

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SPB 7016

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: Florida Historic Capitol Museum DSO Public Records Exemption

DATE: February 20, 2017 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Peacock	Ferrin		Pre-meeting

I. Summary:

SPB 7016 continues the existing public records exemption for the identity of a donor or prospective donor to the Florida Historic Capitol Museum’s direct support organization by removing the October 2, 2017, repeal date.

The bill provides an effective date of October 1, 2017.

II. Present Situation:

Direct-Support Organizations

In General

Direct-support organizations (DSOs) are private entities statutorily created to assist or support governmental entities in carrying out their duties. DSOs are generally established as Florida corporations not for profit, which are incorporated under ch. 617, F.S., and approved by the Department of State.

Direct-Support Organization for the Florida Historic Capitol Museum

The current Florida Historic Capitol (Historic Capitol) was built in 1845, and several additions have been made since that time. In 1981, the Legislature provided for the restoration of the Historic Capitol to its 1902 appearance and made provisions for its use as a museum.¹ The mission of the Florida Historic Capitol Museum (Capitol Museum), as it is known today, is:

to illuminate the past, present, and future connection between the people of Florida and their political institutions through programs of civic education, historic interpretation, and preservation.²

¹ Ch. 81-232, s. 1, Laws of Fla.

² Florida Historic Capitol Museum, <http://www.flhistoriccaptol.gov/about.cfm#mission> (last visited Feb. 13, 2015).

In 2015, legislation created the Florida Historic Capitol Museum Council (Council).³ The Council works with the Capitol Museum's staff to create a strategic plan to guide the Council's mission, ensure that the Capitol Museum preserves legislative history and operates according to best practices, meets with the board of directors of the Capitol Museum's direct support organization, and assists the staff in planning legislative reunions.⁴

Section 272.136, F.S., authorizes the Council and the Director to establish a DSO in order to provide assistance and promotional support through fundraising for the Capitol Museum, including but not limited to, their education programs and initiatives.

The DSO established must be:

- A Florida corporation;
- Not for profit;
- Incorporated under ch. 617, F.S.; and
- Approved by the Department of State.⁵

The DSO is governed by a board of directors dedicated to preserving the Historic Capitol and advancing the mission of the Capitol Museum.⁶ The DSO, Florida Historic Capitol Foundation Corporation, received its not-for-profit status in October 2010 and has been receiving contributions.

Funds from the sale of specialty license plates⁷ are directed to the DSO.⁸ These funds are to be used to reimburse per diem and travel expenses of the DSO's board members.⁹

If the DSO is no longer authorized, fails to comply with the requirements of s. 272.136, F.S., fails to maintain its tax-exempt status, or ceases to exist, then all funds obtained through grants, gifts, and donations in the DSO's account revert to the state and are deposited into an account designated by the Legislature.¹⁰

³ Section 272.131(1), F.S., provides that the Florida Historic Capitol Museum Council is composed of the following 13 members: the Secretary of the Senate, the Clerk of the House of Representatives, the Sergeants at Arms of both chambers, three members appointed by the President of the Senate and three members appointed by the Speaker of the House. Of those appointed by each presiding officer, one member must be a current member of the Legislature, and two members must be former legislators or officers of the Legislature. The board of directors of the Foundation must appoint three of its members to the Council. Council members act as advocates for the Capitol Museum and serve without compensation.

⁴ Section 272.131, F.S.

⁵ Section 272.136(2), F.S.

⁶ Section 272.136(1), F.S., provides that the initial appointments to the 9-member board are made by the President of the Senate and the Speaker of the House at the recommendation of the Council and Director. After July 1, 2015, the board may add up to 12 additional members.

⁷ For retired congressional and state legislative members.

⁸ Section 320.0807(6)(c), F.S.

⁹ Section 272.136(1)(d), F.S.

¹⁰ Section 272.136(6), F.S.

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.¹²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.¹³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.¹⁴ The Public Records Act states that

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.¹⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.¹⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”¹⁷ A violation of the Public Records Act may result in civil or criminal liability.¹⁸

The Legislature may create an exemption to public records requirements.¹⁹ An exemption must pass by a two-thirds vote of the House and the Senate.²⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.²¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.²²

¹¹ FLA. CONST., art. I, s. 24(a).

¹² *Id.*

¹³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also, see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

¹⁴ Public records laws are found throughout the Florida Statutes.

¹⁵ Section 119.01(1), F.S.

¹⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” to mean as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

¹⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

¹⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁹ FLA. CONST., art. I, s. 24(c).

²⁰ *Id.*

²¹ *Id.*

²² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”²³ Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.²⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.²⁶ Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.²⁷

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than necessary.²⁸ An exemption serves an identifiable purpose if it meets one of the following purposes and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁹
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;³⁰ or
- It protects trade or business secrets.³¹

In addition, the Legislature must find that the purpose of the exemption overrides the Florida’s public policy strongly favoring open government.

important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.
²³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

²⁴ *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

²⁵ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

²⁶ Section 119.15(3), F.S.

²⁷ Section 119.15(5)(a), F.S.

²⁸ Section 119.15(6)(b), F.S.

²⁹ Section 119.15(6)(b)1., F.S.

³⁰ Section 119.15(6)(b)2., F.S.

³¹ Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.³² In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.³³ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.³⁴

Current Exemption from Public Records Requirements in s. 272.136, F.S.

Section 272.136(7)(a), F.S., provides that the identity of a donor or prospective donor to the DSO of the Florida Historic Capitol Museum who desires to remain anonymous is confidential and exempt from disclosure. This exemption includes all information identifying a donor or prospective donor. It is subject to the OGSR and stands repealed on October 2, 2017, unless reviewed and saved from repeal by the Legislature.

Review Findings and Recommendations

In June 2016, the Senate Governmental Oversight and Accountability Committee and the House Government Oversight Subcommittee sent an Open Government Sunset Review Questionnaire to the Florida Historic Capitol Museum's DSO regarding the need to keep the information identifying donors or prospective donors who wish to remain anonymous exempt from public disclosure under s. 272.136(7)(a), F.S. The Florida Historic Capitol Museum DSO indicated that it supported continuing the exemption. Additionally, maintaining the confidentiality of the identity of donors and prospective donors aligns with best practices of similar organizations.³⁵

III. Effect of Proposed Changes:

Section 1 of the bill removes the scheduled repeal date of October 2, 2017, in the public records exemption.

³² Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

³³ FLA. CONST., art. I, s. 24(c).

³⁴ Section 119.15(7), F.S.

³⁵ See "Donor Bill of Rights" produced by the Association of Fundraising Professionals located at <http://www.afpnet.org/Ethics/EnforcementDetail.cfm?ItemNumber=3359> (last visited on February 16, 2017) and "General Principles" of the American Alliance of Museums located at <http://www.aam-us.org/resources/ethics-standards-and-best-practices/financial-stability> (last visited on February 16, 2017).

Section 2 of the bill provides an effective date of October 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties or municipalities to spend funds, reduce the counties' or municipalities' ability to raise revenue or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

The bill retains the existing public records exemption for the identity of a donor or prospective donor of the Capitol Museum DSO. The bill complies with the requirements of article I, s. 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 272.136(7) of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
