

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 Education

BILL: SB 774

INTRODUCER: Senator Diaz

SUBJECT: Public Records and Meetings/Applicant for President/State University or Florida College System Institution

DATE: January 24, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bouck</u>	<u>Sikes</u>	<u>ED</u>	<u>Favorable</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 774 creates an exemption from public records and public meetings requirements for any personal identifying information associated with applicants for president of a state university or Florida College System institution.

The bill specifies that the proposed exemption does not apply once a final group of at least three applicants is established.

The bill provides that the exemption is subject to the Open Government Sunshine Review Act, and so is repealed on October 2, 2025, unless saved from repeal by the Legislature.

The bill has no impact on state revenues or expenditures.

The bill takes effect upon becoming a law.

II. Present Situation:

Access to Public Records - Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy 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.²

¹ Art. I, s. 24(a), Fla. Const.

² *Id.*

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” 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.”

⁶ 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ Art. I, s. 24(c), Fla. Const.

¹¹ *Id.* See, e.g., *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

The Act 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 is necessary.²⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and 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.²⁶

State University System and Florida College System Governance

The State University System (SUS) is composed of all public state universities.²⁷ The Board of Governors of the SUS (BOG) is required to operate, regulate, control, and be fully responsible for the management of the whole university system.²⁸ Each state university is governed by a local board of trustees (BOT).²⁹

The Florida College System (FCS) is composed of all public community and state colleges.³⁰ The State Board of Education (SBE) supervises the FCS as provided in law.³¹ A local BOT governs each FCS institution.³²

State University and Florida College System Presidential Searches

Each state university BOT selects its university president, subject to confirmation of the candidate by the BOG and in accordance with BOG Regulation. To locate qualified applicants, a presidential search committee is appointed to make recommendations to the full university BOT.³³

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?

²⁵ *See generally* s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Art. IX, s. 7(b), Fla. Const. The State University System is made up of 12 state universities, specified in s. 1000.21(6), F.S.

²⁸ Art. IX, s. 7(d), Fla. Const. *See also* ss. 20.155(4)(a), 1001.70(3), 1001.705(2), and 1001.706(2)(a), F.S.

²⁹ Art. IX, s. 7(b), Fla. Const. *See also* s. 1001.71(1), F.S.

³⁰ Art. IX, s. 8(b), Fla. Const. The Florida College System is made up of 28 community and state colleges specified in s. 1000.21(3), F.S.

³¹ Art. IX, s. 8(d), Fla. Const. *See also* s. 1001.02(1), F.S.

³² Art. IX, s. 8(b), Fla. Const. *See also* ss. 1001.60(3) and 1001.64(2), F.S.

³³ Board of Governors (BOG) Regulation 1.001(5)(c)

BOG regulation specifies criteria to ensure that the search process is transparent, robust, and designed to attract highly qualified individuals.³⁴ Criteria include the requirements that a search committee be familiar, or demonstrate its ability to become familiar, with Florida's Sunshine laws,³⁵ and that the search committee maintain a webpage that includes search committee notices, agendas, and meetings; applicant lists; and means to provide input; for purposes of transparency.³⁶

Each FCS institution BOT is authorized to appoint the president of the FCS institution. The BOT is authorized to appoint a search committee to assist in the process.³⁷ Each BOT is required to notify the SBE of the appointment of presidents immediately upon such action.³⁸

Each state university and FCS institution, and any entities providing services to assist the search process, must comply with requirements regarding public records and public meetings.³⁹

III. Effect of Proposed Changes:

SB 774 creates s. 1004.098, F.S., to establish an exemption from public records and public meetings requirements for personal identifying information regarding a presidential search at a state university or Florida College System (FCS) institution.

The bill specifies that any personal identifying information of an applicant for president of a state university or FCS institution is confidential and exempt from public records requirements, and does not define any circumstance in which such information may be released.

The bill includes in the exemption any meeting held for the purpose of identifying or vetting applicants for president of a state university or FCS institution. This exemption does not apply to a meeting held for the purpose of establishing qualifications of potential applicants or any compensation framework to be offered to potential applicants. However, the bill specifies that any portion of such a meeting which would disclose personal identifying information of an applicant or potential applicant is exempt from public meeting requirements.

The bill specifies that the exemption from public meetings requirements does not apply to any meeting or interview held after a final group of at least three applicants has been established, which is conducted for the purpose of making a final selection to fill the position of president of a state university or FCS institution. In such cases, the names of three or more applicants who comprise a final group of applicants must be released by the state university or FCS institution no later than 21 days before the date of the meeting at which final action or voting is to occur on the employment of the applicants. There is currently no policy that specifies the timeframe for release of applicants' names prior to a final decision.

³⁴ BOG Regulation 1.002(1).

³⁵ BOG Regulation 1.002(1)(b)ii.

³⁶ BOG Regulation 1.002(1)(c)i.

³⁷ Section 1001.64(19), F.S.

³⁸ Rule 6A-14.026, F.A.C.

³⁹ FCS institutions and state universities are considered state agencies, subject to Sunshine laws. See *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (holding that a University of Florida screening committee was subject to Florida's Sunshine Law); *Rhea v. District Bd. Of Trustees of Santa Fe College*, 2013 WL 950544 at 3, n. 1 (Fla. 1st DCA 20 13) (noting that Santa Fe College, as part of the Florida College System, is a state agency having a duty to provide access to public records).

In addition, the bill specifies that the exemption from public records requirements does not apply to any personal identifying information of the three or more applicants who comprise a final group of applicants that are announced at a public meeting. The bill requires that the identifying information be released when the applicant's names are released.

The exemption from public records and public meetings established in the bill is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

Pursuant to a requirement in the State Constitution, the bill establishes the public necessity justifying the exemption.⁴⁰ The bill asserts that applicants for president who are currently employed could jeopardize their current positions if it were known that they were seeking employment elsewhere. Further, the bill specifies that an exemption is necessary to allow an institution search committee to have the most experienced and desirable pool of qualified applicants from which to fill the position of president.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for personal identifying information about applicants for the position of president at a state university or Florida College System (FCS) institution, thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section two of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect personal identifying information of applicants for the

⁴⁰ Art. I, s. 24(c), Fla. Const.

position of president of a state university or FCS institution. This bill exempts only personal identifying information of such individuals, and portions of meetings where such information is discussed, from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill has no impact on state revenues or expenditures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has opposed the exemption established in the bill as contrary to the public interest.⁴¹

VIII. Statutes Affected:

This bill creates section 1004.098 of the Florida Statutes.

This bill creates an unnumbered section of law.

⁴¹ First Amendment Foundation, *SB 774 Exemption/University President Searches* (Jan. 6, 2020), available at <https://floridafaf.org/wp-content/uploads/2020/01/SB-774-University-Presidents.pdf>.

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.
