

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EPC 09-02 Public Records/Family Educational Rights & Privacy Act

SPONSOR(S): Education Policy Council

TIED BILLS: IDEN./SIM. BILLS:

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Education Policy Council		Brock	Cobb
1)				
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The public's right of access to government records is established by the Constitution of the State of Florida. The Legislature, however, is authorized to create exemptions to preclude the disclosure of specified records when the exemption is found to be a public necessity and is not broader than necessary to meet that public necessity.

This bill enacts the public records component of the revision of Florida's student records laws. It creates s. 1002.221, F.S., and amends s 1006.52, F.S., to authorize exemptions related to student records. The bill addresses both K-12 and postsecondary student records.

The proposed council bill creates a public records exemption for educational records, as defined by the Family Educational Rights & Privacy Act (FERPA) and implementing regulations, for public K-12 students and public postsecondary students and applicants.

This bill provides for future review and repeal of the exemption and a statement of public necessity.

This bill is tied to Proposed Council Bill EPC 09-01 relating to student records.

The bill requires a two-thirds vote of the members present and voting for passage.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Public Records Law

Article I, s. 24(a) of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act² provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

Public Record Exemption for Student Records

Federal Family Educational Rights & Privacy Act

The Family Educational Rights & Privacy Act of 1974³ (FERPA), also known as the "Buckley Amendment," applies to all public and private higher education institutions that receive federal funds,

¹ Article I, s. 24(c) of the *Florida Constitution*.

² Section 119.15, F.S.

³ 20 U.S.C. § 1232g; see also implementing regulations found at 34 C.F.R. Part 99.

including grants, financial aid, and student loan programs. FERPA provides students and their parents or legal guardians' rights to: control disclosure, inspect and review, and seek amendment to their "education records." After significant study and public input, the U.S. Department of Education published substantial revisions to FERPA in December of 2008.⁴ In order to receive federal educational funds, schools and educational institutions must have student records policies that comply with federal law in place.⁵ Changes in federal law have added new exemptions, definitions, and processes, and in recent years have addressed the evolution of information technology, document security concerns, and the need to address campus safety in light of tragedies such as the campus shooting at Virginia Tech.⁶

FERPA defines "record" as directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. Parents have rights concerning their children's education records, which transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level.⁷ Education records may be disclosed by schools and postsecondary institutions without consent in certain instances that include complying with a court order or subpoena and to the following: school officials, including teachers, within the agency or institution who have a legitimate educational interest; officials at other schools to which a student is transferring; appropriate parties in connection with financial aid to a student; and appropriate officials in cases of health and safety emergencies.⁸

Florida Law: K-12 Student Education Records

In Florida, student education records are addressed in statutes that have not been updated to comport with the requirements of the federal law, and in many cases, conflict with certain federal provisions. Florida's K-12 student education records law has not been revised since 2004 and has not been significantly revised in at least a decade.⁹

The specific rights and education records of public K-12 students are listed in Florida law, which contains definitions, responsibility for schools and agencies, and allows access to records without consent in certain limited situations.¹⁰ The statute defines "record" as official records, files, and data directly related to students that are created, maintained, and used by public educational institutions.¹¹ Four rights are provided to parents and students concerning their records: the right of access to a student's records; the right to waive access to confidential letters or statements; the right to challenge the content of any record or report and receive a hearing; and the right of privacy of a student's educational records.¹² Certain exceptions are listed including school officials, specified personnel from other agencies, and subpoenas.¹³ Additionally, public educational institutions may publish and release student directory information to the general public unless the student informs the institution in writing that any or all of the student's information should not be released.¹⁴ Students and their parents must be notified annually of their rights and procedures, and may seek relief in circuit court if necessary.¹⁵

Florida Law: Postsecondary Student Education Records

College and university students' parents have rights concerning student education records of their children, and students have rights relating to their student records including: right of access, right of waiver of access, right to a challenge and hearing, and the right of privacy.¹⁶ Each university is authorized to prescribe the content and custody of records and reports that the university maintains on

⁴ *Id.*; see the regulations at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

⁵ Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 1.

⁶ *Id.*; Over the years FERPA has been amended in both the U.S. Code, and the US Department of Education regulations found in 34 C.F.R. 99.1 *et. seq.*

⁷ 20 U.S.C. § 1232g; see also implementing regulations found at 34 C.F.R. Part 99.

⁸ 20 U.S.C. § 1232g and 34 C.F.R. Part 99.31.

⁹ Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3.

¹⁰ Section 1002.22, F.S.

¹¹ Section 1002.22(2)(c), F.S.

¹² Section 1002.22(3)(a)-(d), F.S.

¹³ Section 1002.22(3)(d)1.-14., F.S.

¹⁴ Section 1002.22(3)(d), F.S.

¹⁵ Section 1002.22(4)&(5), F.S.

¹⁶ Section 1002.21, F.S. In addition, s. 1005.36, F.S., provides protection to students through the Commission for Independent Education when independent postsecondary institutions cease operation. The commission may require an institution to convey student educational records to the commission office or another location so that students may have proper access to the records.

its students. The records are confidential and exempt from the provisions of s. 119.07(1), F.S., and are open to inspection only as provided in s. 1002.22(2), F.S., relating to student records and reports.¹⁷ Rules of the State Board of Education may prescribe the content and custody of records and reports that a community college may maintain on its students. The records are confidential and exempt from s. 119.07(1), F.S., and are open to inspection only as provided in s. 1002.22, F.S., relating to student records and reports.¹⁸

EFFECT OF BILL

The bill enacts the privacy provisions of Florida's student records laws by creating a public records exemption for education records, as defined by the Family Educational Rights and Privacy Act (FERPA) for public K-12 students and public postsecondary students and applicants. These records are confidential and exempt. In addition, the bill provides specifically that records of *applicants* for admission to a public postsecondary institution are included in the public records exemption. These educational records include information that relate to admission to a public postsecondary institution that would become a part of the student's educational record if the student is accepted by the institution. However, under state law and FERPA, an individual who has not been in attendance at a public school or public postsecondary institution is not included in the definition of student.¹⁹

The bill prohibits public schools, centers, institutions or other entities that are part of Florida's education system from releasing information without parental consent, except in certain circumstances permitted by the FERPA. Education records released by agencies, public schools, centers, and public postsecondary institutions to the Office of Program Policy Analysis and Government Accountability (OPPAGA) or the Auditor General to be used to perform their official duties and responsibilities shall be maintained in accordance with FERPA.²⁰

The bill subjects the exemption to the Open Government Sunset Review Act in accordance with s. 119.15, relating to public records and will be repealed on October 2, 2014, unless reenacted.

The bill includes a public necessity statement that cites Florida's long-held protection of student records from public disclosure. It also states that continued receipt of federal funds is dependent upon compliance with federal student records laws. Particular concerns of postsecondary and K-12 parents and students with respect to privacy are addressed. Schools and postsecondary institutions maintain a wide variety of educational records such as diagnostic tests, records of mental or physical disabilities, and academic achievement. In order to comply with federal requirements, these records must be made confidential and exempt from disclosure. The public disclosure of this information could inhibit the educational process and impair parents' ability to oversee their children's education. Applicant records are deemed identical to enrolled student records and need to be kept confidential and exempt from public-records requirements. Student information that does not specifically identify students is released in aggregate form so that the public may know about the performance of schools and other educational matters without disclosing private information.

The bill accompanies a student records bill and allows the state to comply with FERPA privacy requirements, which protects the receipt of federal funds.

B. SECTION DIRECTORY:

Section 1: Creates s. 1002.221, F.S., providing an exemption from public records requirements for K-12 education records held by a public school, center, institution, or other entity that is part of the state's education system; providing exceptions as permitted by the FERPA; and providing for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.

¹⁷ Section 1006.52(1), F.S.

¹⁸ Section 1006.52(2), F.S.

¹⁹ 20 U.S.C. § 1232g(a)(6); 34 C.F.R. Part 99.3; and section 1002.22(2)(d), F.S.

²⁰ The Department of Education indicates that the added reference to disclosure to OPPAGA and the Auditor General is consistent with Florida's current student records law, however, the U.S. Department of Education is examining how states disclose information to auditors, and it is conceivable that future versions of FERPA may specifically address how auditors may access student information. Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3; see also <http://www.ed.gov/policy/gen/req/ferpa/stateauditor.html> for a discussion of this issue.

Section 2: Amends s. 1006.52, F.S., expanding the exemption from public records requirements for records of students in public postsecondary educational institutions to include education records and applicant records; providing requirements for the release, use, and maintenance of education records; and providing for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.

Section 3: Provides a public necessity statement.

Section 4: Provides that the act takes effect on the same date that PCB EPC 09-01 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to affect state government revenues.

2. Expenditures:

The bill does not appear to affect state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to affect local government revenues.

2. Expenditures:

The bill does not appear to affect local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Department of Education indicates that there will be no additional costs to the department to implement the requirements of the proposed council bill.²¹ Failure to comply with FERPA may result in the withholding of funds under any program administered by the U.S. Department of Education.²² This bill may provide a way to demonstrate compliance with federal requirements and provide that federal funds are not jeopardized.

The bill allows a public postsecondary institution to charge a fee for the actual cost of producing a copy of a record; however, a fee may not be charged for searching or retrieving records. Current law allows fees to be charged for providing copies of records and reports to parents and students who wish to access records or reports.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

²¹ Department of Education Analysis on Senate Bill 2426, March 12, 2009, at 3.

²² 20 U.S.C. § 1232g(f) and 34 C.F.R. Part 99.67.

Not applicable. The proposed committee substitute does not appear to require a city or county to expend funds or to take any action requiring expenditures; reduce the authority that municipalities or counties had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities as of February 1, 1989.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public record or public meeting exemption. The bill expands the current exemption under review; thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemption under review; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

N/A.