

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB GVOPS 12-05 OGSR Florida Opportunity Fund and Institute for the Commercialization of Public Research

**SPONSOR(S):** Government Operations Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 798

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Williamson	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides a public record and public meeting exemption for the Florida Opportunity Fund (FOF) and the Institute for the Commercialization of Public Research (institute). The following information is confidential and exempt from public record requirements:

- Materials that relate to methods of manufacture or production, potential trade secrets, or patentable material received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida;
- Information that would identify investors or potential investors in projects reviewed by the FOF or the institute;
- Any information received from a person from another state or nation, or from the federal government, which is otherwise confidential or exempt under the laws governing that entity; and
- Proprietary confidential business information regarding alternative investments for 10 years after the termination of the alternative investments.

In addition, any portion of a meeting wherein confidential and exempt information is discussed is exempt from public meeting requirements.

The bill reenacts the public record and public meeting exemptions, which will repeal on October 2, 2012, if this bill does not become law. It transfers and relocates the public record and public meeting exemptions for the institute to a new section of law. As such, the bill makes conforming changes to the exemptions.

Specific to the FOF, the bill removes the public record exemption for information received from a person from another state or nation or the Federal Government which is otherwise confidential or exempt pursuant to the laws governing that entity. It was determined that this exemption was applicable to the institute only.

In addition, the bill decreases the time period for protecting proprietary confidential business information from 10 years to seven years.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act 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.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>2</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>3</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Florida Opportunity Fund

Created by the Legislature in 2007, the Florida Opportunity Fund (FOF) was intended to attract venture capital investment into targeted Florida industries by providing a state match.<sup>4,5</sup> The FOF is organized as a private, not-for-profit corporation, with a five-member board of directors selected by an Enterprise Florida, Inc., (EFI) appointments committee.<sup>6</sup>

The Legislature appropriated \$29.5 million for investment funds in fiscal year 2007-2008.<sup>7</sup> Originally, the FOF was established as a "fund-of-funds" program, meaning that it could only invest in investment funds, not directly in individual businesses. Additionally, the investment funds had to match each \$1 in state investment with \$2 of their own. The initial emphasis was on "seed" and "early-stage" investments, because proponents of creating the FOF concluded that these types of companies were least likely to have access to venture funding and traditional financing.<sup>8</sup>

Targeted industries for the FOF investments include life sciences, information technology, advanced manufacturing processes, aviation and aerospace, and homeland security and defense. To be eligible

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 24(c), Art. 1 of the State Constitution

<sup>3</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

<sup>4</sup> See s. 288.9624, F.S.

<sup>5</sup> The State Board of Administration (SBA) has invested in "alternative investments" that included Florida-based businesses, and in 2009, pursuant to chapter 2008-31, L.O.F., created the \$250 million Florida Growth Fund for venture-capital private-equity and direct investments within Florida. These SBA programs are separate from the FOF.

<sup>6</sup> Section 288.9624(1)(b), F.S.

<sup>7</sup> This appropriation was included in Section 4 of the substantive legislation, chapter 2007-189, L.O.F., which created the FOF.

<sup>8</sup> See Bill Analysis for CS/SB 2420 (2007).

for state participation, an investment fund must have an experienced and successful investment manager or team, and must focus on investment opportunities in Florida.<sup>9</sup>

The FOF invested in its first fund in fiscal year 2008-2009: \$594,000 in Element Partners II, according to FOF's financial statements. Currently, the FOF has invested \$27 million of the original \$29.5 million appropriation.<sup>10</sup>

In 2009, the Legislature amended s. 288.9624, F.S., to allow the FOF to make loans and other direct investments to individual businesses and infrastructure projects, to form or operate other entities, and to accept funds from other public and private sources for use as investments.<sup>11</sup> These direct investments must be made in Florida infrastructure projects, or in businesses that are Florida-based or have significant business activities in Florida, and operate in technology sectors that are strategic to Florida. The FOF may not use its original appropriation of \$29.5 million to make direct investments or for any purposes not specified in the original legislation.

In May 2010, the FOF launched a direct investment program with the now-defunct Florida Energy and Climate Commission.<sup>12</sup> This new FOF program is expected to increase the availability of investment capital in Florida for businesses engaged in developing or producing energy-efficient or renewable energy (EE/RE) products or services. The FOF initially has access to \$32.4 million in federal funds through the 2009 American Recovery and Reinvestment Act to make loans or investments in qualifying businesses. Under the terms of the federal agreement, these investments are restricted to facility and equipment improvement using EE/RE products; acquisition or demonstration of renewable energy products; and improvement of existing production, manufacturing, assembly, or distribution processes to reduce consumption or increase the efficient use of energy in such processes.<sup>13</sup>

FOF has invested \$12 million of the \$32.4 million in federal funds into three Florida companies, matching \$80 million in private investment.<sup>14</sup>

In mid-2011, EFI entered into an agreement with the Florida Department of Economic Opportunity (DEO) for use of \$43.5 million in federal funds from the United States State Small Business Credit Initiative.<sup>15</sup> These funds will be used by the FOF to make direct investments in eligible businesses.<sup>16</sup> EFI estimates that it can leverage the \$43.5 million into \$652.5 million in private investment. The United States Treasury has approved DEO's application to access Florida's full share of \$97.6 million in federal funds, and in September, the Legislative Budget Commission approved the release of a portion of the federal funds.<sup>17</sup>

#### Institute for the Commercialization of Public Research

Created in the same legislation as the FOF, the Institute for the Commercialization of Public Research (institute) was envisioned as a matchmaker for venture capitalists and young companies trying to turn research ideas, technology, or patents, developed at public institutions, into marketable products and services.<sup>18</sup> The institute's purpose is to assist in the commercialization of products developed by the research and development activities of publicly supported universities and colleges, research institutes, and other publicly supported organizations within the state.<sup>19</sup>

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<sup>9</sup> See The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 798, January 30, 2012.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> Sections 25-26, chapter 2009-51, L.O.F.

<sup>12</sup> The commission's statutes were repealed and its responsibilities transferred to the Florida Department of Agriculture and Consumer Services (DACS) by the Legislature in the 2011 session. See s. 500, chapter 2011-142, L.O.F.

<sup>13</sup> See The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 798, January 30, 2012.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> This initiative is part of the federal Small Business Jobs Act of 2010. See United States Dept. of Treasury, State Small Business Credit Initiative.

<sup>16</sup> Florida's total share of the federal funding is \$97.6 million. The monies not allocated to EFI for the investment program are earmarked for small business loans, export financing, and credit enhancement programs.

<sup>17</sup> See The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 798, January 30, 2012.

<sup>18</sup> See s. 288.9625, F.S.

<sup>19</sup> Section 288.9625(2), F.S.

The institute must support existing commercialization efforts at Florida universities, and may not supplant, replace, or direct existing technology transfer operations or other commercialization programs, including incubators and accelerators.

The institute is a not-for-profit corporation subject to Florida law, but is not an “agency,” as defined in s. 20.03(11), F.S.<sup>20</sup> It is governed by a five-member board of directors comprised of:

- The chair of EFI or designee;
- The president of the state university where the institute is located or designee, or if jointly sponsored by a number of universities, the presidents of those universities must agree on the designated person to serve on the board; and
- Three appointees by the Governor, to serve staggered 3-year terms to which they may be reappointed.<sup>21</sup>

The institute is based in Boca Raton, and is preparing to open a second administrative office in Gainesville.

In 2007, the Legislature appropriated \$900,000 in general revenue to the institute for its operations.<sup>22</sup> In 2009, an additional \$600,000 was appropriated as a transfer from the Florida Small Business Technology Growth Trust Fund administered by EFI.<sup>23</sup> In 2010, the institute was authorized to use up to five percent of the \$3 million appropriated for the Research Commercialization Matching Grant Program to administer the grants.<sup>24</sup> In fiscal year 2011-2012, the institute received a \$10 million general revenue appropriation, which did not specify the uses or amount set aside for the institute’s administration.<sup>25</sup> The institute and DEO have entered into a contract that specifies how the funds may be spent, including a low-interest loan program for eligible companies.

To be eligible for the institute’s assistance, the company or organization attempting to commercialize its product or service must be accepted by the institute into its program. The institute reviews the business plans and technology information of each company recommended by an institute peer-review board, before making its decision whether to accept a recommended company.

For each company that is accepted, the institute provides mentoring, develops marketing information, and uses its resources to attract capital investment into the company. The institute’s other duties are to:

- Maintain a centralized location to showcase companies and their technologies and products;
- Develop an efficient process to inventory and publicize companies and products that have been accepted by the institute for commercialization;
- Routinely communicate with private investors and venture capital organizations regarding the investment opportunities in its showcased companies;
- Facilitate meetings between prospective investors and eligible companies in the institute;
- Develop cooperative relationships with publicly supported organizations all of which work together to provide resources or special knowledge that is likely to be helpful to institute companies; and
- Administer the Florida Research Commercialization Matching Grant Program.<sup>26</sup>

The institute is prohibited from developing or accruing any ownership, royalty, or other such rights over, or interest in, companies or products in the institute and must maintain the confidentiality of proprietary

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<sup>20</sup> See ss. 288.9625(1) and (2), F.S.

<sup>21</sup> Section 288.9625(4), F.S.

<sup>22</sup> Section 4, chapter 2007-189, L.O.F.

<sup>23</sup> Section 72, chapter 2009-81, L.O.F.

<sup>24</sup> Section 56, chapter 2010-147, L.O.F.

<sup>25</sup> Section 39, chapter 2011-76, L.O.F.

<sup>26</sup> Section 288.9625(8), F.S.

information. It also may not charge for services rendered to state universities and affiliated organizations, community colleges, or state agencies.<sup>27</sup>

In 2010, the Legislature created the Research Commercialization Matching Grant Program, to leverage existing federal grant programs for small businesses, and directed the institute to manage it.<sup>28</sup> The grant program is intended to assist small or startup companies that take advantage of federal and private financial support to accelerate their growth and market penetration. Program applicants must meet several criteria, such as having attracted funding from non-government sources and achieved certain milestones required by the federal government.<sup>29</sup>

#### Public Record and Public Meeting Exemptions under Review

In 2007, the Legislature created a joint public record and public meeting exemption for the FOF and the institute.<sup>30</sup>

The following information is confidential and exempt<sup>31</sup> from public record requirements:

- Materials that relate to methods of manufacture or production, potential trade secrets, or patentable material received, generated, ascertained, or discovered by or through research projects conducted by universities and other publicly supported organizations in Florida;
- Information that would identify investors or potential investors in projects reviewed by the FOF or the institute;
- Any information received from a person or another state or nation, or from the federal government, which is otherwise confidential or exempt under the laws of that governmental entity; and
- Proprietary confidential business information regarding alternative investments<sup>32</sup> for 10 years after the termination of the alternative investments.

“Proprietary confidential business information” is defined to mean information that has been designated by the proprietor when provided to the FOF or the institute as owned or controlled by a proprietor; that is intended to be and is treated by the proprietor as private and the disclosure of which would harm the business operations of the proprietor and has not been intentionally disclosed by the proprietor unless pursuant to a private agreement that provides that the information will not be released to the public except as required by law or legal process, or pursuant to law or an order of a court or administrative body; and that concerns:

- Trade secrets;
- Information provided to the FOF or institute regarding a prospective investment in a private equity fund, venture capital fund, angel fund, or portfolio company which is proprietary to the provider of the information;
- Financial statements and auditor reports of an alternative investment vehicle or portfolio company, unless such records have been released by the alternative investment vehicle or portfolio company and are publicly available;
- Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle or portfolio company;

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<sup>27</sup> Sections 288.9625(9) and (10), F.S.

<sup>28</sup> See The Florida Senate Bill Analysis and Fiscal Impact Statement for SB 798, January 30, 2012.

<sup>29</sup> *Id.*

<sup>30</sup> Chapter 2007-190, L.O.F.; codified as s. 288.9626, F.S.

<sup>31</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (See Attorney General Opinion 85-62, August 1, 1985).

<sup>32</sup> Section 288.9626(1)(a), F.S., defines “alternative investment to mean any investment by the FOF in a private equity fund, venture capital fund, or angel fund or a direct investment in a portfolio company or investment through a distribution of securities to its partners or shareholders by an alternative investment vehicle.

- Information regarding the portfolio positions in which an alternative investment vehicle or the FOF invests;
- Capital call and distribution notices to investors of an alternative investment vehicle or the FOF;
- Alternative investment agreements and related records; and
- Information concerning investors, other than the FOF itself, in an alternative investment vehicle or portfolio company.<sup>33</sup>

Proprietary confidential business information does not include:

- The name, address, and vintage year of an alternative investment vehicle or the FOF, and the identity of principals involved in the management of the alternative investment vehicle or the FOF;
- The dollar amount of the commitment made by the FOF to each alternative investment vehicle since inception;
- The dollar amount and date of cash contributions made by the FOF to each alternative investment vehicle since inception;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF from each alternative investment vehicle;
- The dollar amount, on a fiscal-year-end basis, of cash or other fungible distributions received by the FOF, plus the remaining value of alternative-vehicle assets that are attributable to the FOF investment in each alternative investment vehicle;
- The net internal rate of return of each alternative investment vehicle since inception;
- The investment multiple of each alternative investment vehicle since inception; and
- The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the FOF to each alternative investment vehicle on a fiscal-year-end basis.<sup>34</sup>

Current law also provides a public meeting exemption for the FOF and the institute. The boards of directors of those entities may close that portion of their otherwise public meeting when discussing confidential and exempt information.<sup>35</sup> The closed portion of the meeting must be recorded and transcribed;<sup>36</sup> however, the transcript and minutes are confidential and exempt from public record requirements.<sup>37</sup>

The FOF and the institute may release confidential and exempt records to a governmental entity in the performance of its official duties and responsibilities, upon written request.<sup>38</sup> In addition, a request to inspect or copy a public record containing proprietary confidential business information must be granted if the proprietor of the information fails, within a reasonable period of time after the request is received by the FOF or the institute, to verify the following through a written declaration:<sup>39</sup>

- That the requested record contains proprietary confidential business information and the specific location of such information within the record;
- If the proprietary confidential business information is a trade secret, a verification that it is a trade secret;
- That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and
- That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.<sup>40</sup>

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<sup>33</sup> Section 288.9626(1)(g)1., F.S.

<sup>34</sup> Section 299.9626(1)(g)2., F.S.

<sup>35</sup> Section 288.9626(3)(a), F.S.

<sup>36</sup> Section 288.9626(3)(b), F.S.

<sup>37</sup> Section 288.9626(3)(c), F.S.

<sup>38</sup> Section 288.9626(4)(a), F.S.

<sup>39</sup> The written declaration must be verified as provided by s. 92.525, F.S.

<sup>40</sup> Section 288.9626(4)(b), F.S.

Any person may petition a court of competent jurisdiction for an order for the public release of any portion of a confidential and exempt record.<sup>41</sup>

Any person who willfully and knowingly violates the exemptions commits a first-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.<sup>42</sup>

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2012, unless reenacted by the Legislature.

### **Effect of Bill**

The bill removes the repeal date, thereby reenacting the public record and public meeting exemptions for the Florida Opportunity Fund (FOF) and the Institute for the Commercialization of Public Research (institute). It removes from s. 288.9626, F.S., the public record and public meeting exemptions for the institute and recreates the institute's exemptions in a new s. 288.9627, F.S. As such, the bill makes conforming changes to the definition section for both exemptions. In essence, the definition section for the FOF's exemptions is amended to reflect its application to the FOF only, and the definition section for the institute's exemptions is amended to reflect its application to the institute only. The same conforming changes also were made to the exemptions.

Specific to the FOF, the bill removes the public record exemption for information received from a person from another state or nation or the Federal Government which is otherwise confidential or exempt pursuant to the laws governing that entity. It was determined that this exemption was applicable to the institute only.

Finally, the bill decreases the time period for protecting proprietary confidential business information from 10 years to seven years.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 288.9626, F.S., to reenact the public record and public meeting exemptions for the Florida Opportunity Fund.

Section 2 creates s. 288.9627, F.S., to recreate the public record and public meeting exemptions for the Institute for the Commercialization of Public Research in a new section of law.

Section 3 provides an effective date of October 1, 2012.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

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<sup>41</sup> See s. 288.9626(4)(c), F.S.

<sup>42</sup> Section 288.9626(5), F.S.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### **III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.