

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 14-08 OGSR Postsecondary Education Records

SPONSOR(S): Government Operations Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** SB 646

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	13 Y, 0 N	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.

The Family Education Rights and Privacy Act (FERPA) is a federal law that grants parents the right to inspect, review, and challenge the content of their child's education records and, subject to certain exceptions, control the disclosure of education records or personal identifying information contained in the records. When a student turns 18 years of age, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student. Educational agencies and institutions must comply with FERPA as a condition to receiving federal education funds.

Each public postsecondary educational institution may prescribe the content and custody of records it maintains on its students and applicants for admission.

Current law provides a public record exemption for public postsecondary education records and applicant records held by a public postsecondary educational institution. For purposes of the public record exemption, applicant records are records that are directly related to an applicant for admission to a public postsecondary educational institution who has not been in attendance at such institution, and that are maintained by such institution.

A public postsecondary educational institution may not release a student's education records without the written consent of the student, except in accordance with and as permitted by FERPA. Education records may be released to the Auditor General or the Office of Program Policy Analysis and Government Accountability (office) in the furtherance of performing their official duties and responsibilities; however, the Auditor General and the office must maintain the records in accordance with FERPA.

The bill reenacts the public record exemption for education and applicant records held by a public postsecondary educational institution, which will repeal on October 2, 2014, if this bill does not become law.

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 Act¹ 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.² 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 created³ then a public necessity statement and a two-thirds vote for passage are not required.

Federal Family Educational Rights and Privacy Act

The Family Education Rights and Privacy Act⁴ (FERPA) is a federal law that grants parents the right to inspect, review, and challenge the content of their child's education records and, subject to certain exceptions, control the disclosure of education records or personal identifying information⁵ contained in the records.⁶ When a student turns 18 years of age, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student (eligible student).⁷

Educational agencies and institutions⁸ must comply with FERPA as a condition to receiving federal

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁴ 20 U.S.C. s. 1232g and 34 C.F.R. part 99.

⁵ FERPA defines the term "personally identifiable information" to include, without limitation, the names of the student and his or her parents or other family members; the address of the student or student's family; the student's social security number, student number, biometric record, or other personal identifier; indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; and other information that could reasonably identify a student. 34 C.F.R. s. 99.3.

⁶ 20 U.S.C. s. 1232g(a) and (b); 34 C.F.R. part 99. In cases of divorced, separated, or never-married parents, each parent is presumed to have rights under FERPA unless a state statute, court order, or other legally binding document provides to the contrary. 34 C.F.R. s. 99.4.

⁷ 20 U.S.C. s. 1232g(d); 34 C.F.R. ss. 99.3 (definition of "eligible student") and 99.5(a).

⁸ FERPA defines the term "educational agency or institution" to mean any public or private agency or institution that receives federal education funding. 20 U.S.C. s. 1232g(a)(3). This includes educational institutions that provide instructional or educational services and educational agencies that are authorized to control and direct postsecondary institutions or public elementary or secondary schools. 34 C.F.R. s. 99.1.

education funds.⁹ An educational agency or institution that receives federal education funds must annually notify parents and eligible students of their rights under FERPA.¹⁰ In addition, such agency or institution:

- May not deny the parents the right to inspect and review the education records of their children;¹¹
- Must provide parents an opportunity for a hearing to challenge the content of their student's education records;¹² and
- May not release education records or personal identifying information of students without the written consent of their parents, except in certain instances. This does not apply to the release of directory information.¹³

FERPA defines the term "education records" to mean those records, files, documents, and other materials that contain information directly related to a student, and are maintained by an educational agency or institution or by a person acting for such agency or institution.¹⁴ "Directory information" about a student includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended by the student.¹⁵

Each public postsecondary educational institution may prescribe the content and custody of records it maintains on its students and applicants for admission.¹⁶

Public Record Exemption under Review

Current law provides a public record exemption for public postsecondary education records, as defined in FERPA, held by a public postsecondary educational institution. In addition, applicant records are confidential and exempt¹⁷ from public record requirements.¹⁸ For purposes of the public record exemption, applicant records are records that are directly related to an applicant for admission to a public postsecondary educational institution who has not been in attendance at such institution, and that are maintained by such institution.¹⁹

⁹ 20 U.S.C. s. 1232g(a) and (b); 34 C.F.R. s. 99.1.

¹⁰ 20 U.S.C. s. 1232g(e); 34 C.F.R. s. 99.7(a).

¹¹ 20 U.S.C. s. 1232g(a)(1).

¹² 20 U.S.C. s. 1232g(a)(2).

¹³ 20 U.S.C. s. 1232g(b)(1) and (2).

¹⁴ The term "education records" does not include:

Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto that are in the sole possession of the maker thereof and that are not accessible or revealed to any person except a substitute;

- Records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
- In the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business that relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
- Records on a student who is 18 years of age or older, or is attending an institution or postsecondary education, that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, and that are made, maintained, or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatment.

Id. at s. 1232g(a)(4).

¹⁵ *Id.* at s. 1232g(a)(5).

¹⁶ Section 1006.52(1), F.S.

¹⁷ 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).

¹⁸ Section 1006.52(1), F.S.

¹⁹ Section 1006.52(1)(a) and (b), F.S.

A public postsecondary educational institution may not release a student's education records without the written consent of the student, except in accordance with and as permitted by FERPA. Education records may be released to the Auditor General or the Office of Program Policy Analysis and Government Accountability (office) in the furtherance of performing their official duties and responsibilities; however, the Auditor General and the office must maintain the records in accordance with FERPA.²⁰

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2014, unless reenacted by the Legislature.²¹

During the 2013 interim, subcommittee staff met with staff of the Department of Education as part of the Open Government Sunset Review process.²² According to staff of the Department of Education, the public record exemption is necessary in order to maintain compliance with FERPA and to continue receiving federal funding.

Effect of the Bill

The bill removes the repeal date, thereby reenacting the public record exemption for education records and applicant records held by a public postsecondary educational institution. The bill also makes editorial changes.

B. SECTION DIRECTORY:

Section 1 amends s. 1006.52, F.S., to save from repeal the public record exemption for education and applicant records held by a public postsecondary educational institution.

Section 2 provides an effective date of October 1, 2014.

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.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

²⁰ Section 1006.52(2), F.S.

²¹ Section 1006.52(3), F.S.

²² Meeting on December 18, 2013, between House staff of the Government Operations Subcommittee, K-12 Subcommittee, and Choice & Innovation Subcommittee and staff of the Department of Education.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.