



Government Operations Subcommittee

Wednesday, March 12, 2014

9:00 AM

Webster Hall (212 Knott)

Meeting Packet

**Will Weatherford
Speaker**

**Frank Artiles
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Government Operations Subcommittee

Start Date and Time: Wednesday, March 12, 2014 09:00 am
End Date and Time: Wednesday, March 12, 2014 12:00 pm
Location: Webster Hall (212 Knott)
Duration: 3.00 hrs

Consideration of the following bill(s):

HB 201 Flags by Workman
CS/HB 415 Pub. Rec./Investigations and Examinations by the Office of Financial Regulation by Insurance & Banking Subcommittee, Santiago
HB 541 Public-Private Partnerships by Steube
HB 543 Pub. Rec./Public-Private Partnerships/State Universities by Steube
CS/HB 643 Pub. Rec./Trade Secrets/Computers by Criminal Justice Subcommittee, La Rosa
HB 1051 Pub. Rec./Public-Private Partnerships by Roberson, K.

Consideration of the following proposed committee bill(s):

PCB GVOPS 14-06 -- OGSR Investigation of Allegation of Testing Impropriety
PCB GVOPS 14-07 -- OGSR K-12 Education Records
PCB GVOPS 14-08 -- OGSR Postsecondary Education Records

NOTICE FINALIZED on 03/10/2014 16:17 by Love.John

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 201 Flags
SPONSOR(S): Workman and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1334

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		JS Stramski	Williamson <i>raw</i>
2) Criminal Justice Subcommittee			
3) Local & Federal Affairs Committee			
4) State Affairs Committee			

SUMMARY ANALYSIS

State law requires the display of the United States flag and state flag in certain public fora. However, there is no state law or regulation relating to the origin of United States or state flags procured by state or local governments in Florida.

The bill provides that a United States or state flag acquired for public use by the state, a county, or a municipality must be manufactured in the United States from materials grown, produced, and manufactured in the United States. The bill only applies to purchases of such flags made after January 1, 2015.

The bill provides that any person who willfully violates this requirement commits a misdemeanor of the second degree.

The bill may have a fiscal impact on state and local governments. See FISCAL COMMENTS section.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Display of the United States Flag and State Flag

State law requires the display of the United States flag in certain public fora. For example, the United States flag must be displayed at the state capitol and at each county courthouse,¹ at each polling place during all days when an election is held,² at each public auditorium,³ and at each K-20 educational institution provided for or authorized under Florida law, including in each classroom of such institution.⁴

The Governor has the authority to adopt a protocol on the display of the state flag.⁵ The state flag must be displayed, among other locations, at every elementary and secondary school, with such flags to be furnished by the appropriate school board.⁶

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency⁷ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.⁸ The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁹

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods.¹⁰ Purchases with a value of \$35,000 or below may be carried out informally, though may involve receipt of written and telephonic quotations and informal bids.¹¹ For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.¹²

Local governments are not subject to the provisions of chapter 287, F.S., and procure commodities and services pursuant to local procurement ordinances.

*Florida In-state Preference*¹³

State agencies, universities, colleges, school districts, and other political subdivisions are required to grant a preference in the award for contracts for the purchase of personal property, when competitive solicitation is required and when the lowest responsible and responsive bid, proposal, or reply is by a

¹ Section 256.01, F.S.

² Section 256.011(1), F.S.

³ Section 256.11, F.S.

⁴ Section 1000.06, F.S.

⁵ Section 256.015, F.S.

⁶ Section 256.032, F.S.

⁷ Section 287.012(1), F.S., defines agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

⁸ See ss. 287.032 and 287.042, F.S.

⁹ *Id.*

¹⁰ See ss. 287.012(6) and 287.057, F.S.

¹¹ Rule 60A-1.002(2), Fla. Admin. Code.

¹² Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

¹³ Florida's preference law does not apply to transportation projects for which federal aid funds are available, or to counties or cities. It also does not apply in the award of contracts for the purchase of construction services. Section 287.084(1), F.S.

vendor whose principal place of business is in another state, or political subdivision of that state.¹⁴ The preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state.

If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida based vendors.¹⁵

Florida Flag Procurement

Currently, there is no state law specifically relating to the origin of United States or state flags procured by state or local governments in Florida. As such, the procurement would be conducted in accordance with the laws and rules applicable to state or local government procurements.

Flags purchased for public use may be manufactured overseas; however, the quantity of foreign-made United States flags purchased by state and local governments is likely to be relatively small.¹⁶

The Department of Management Services has indicated that of the 772 flags purchased by 13 agencies through the MyFloridaMarketPlace web portal, 682 were produced by RESPECT of Florida¹⁷ from materials fabricated in the United States.¹⁸

Flag Procurement in Other States

Other states have passed legislation in recent years related to the purchase of United States flags. The most restrictive law was passed in Minnesota, and prohibits the sale of any United States flag in the state unless the flag was made in the United States.¹⁹ Most states to consider the issue have not gone so far. Oklahoma, for example, requires flags purchased by the state and its subdivisions to be manufactured in the United States.²⁰ Massachusetts requires all flags on display at public institutions to be manufactured in the United States.²¹ Missouri law provides that all state and American flags flown on state property must be manufactured in the United States.²² Other states also have similar provisions related to the origin of flags displayed at public locations.²³

Federal Flag Procurement

The Buy American Act of 1933 requires federal agencies to procure flags manufactured domestically if the relevant contract exceeds a specific threshold.²⁴ However, the Trade Agreements Act of 1979²⁵

¹⁴ Section 287.084(1)(a), F.S.

¹⁵ *Id.*

¹⁶ Foreign-made United States flags constitute only a few percent of the total number of United States flags purchased in the United States. The Flag Manufacturers Association of America estimates that 95 percent of United States flags are manufactured entirely in the United States. Frequently Asked Questions, available at <http://www.fmaa-usa.com/info/faq.php> (last visited March 10, 2013). The United States Census Bureau estimates that in 2012, the total dollar value of imports of United States flags was \$3.8 million. In 2007, the most recent year for which data is available, the Census estimated the total value of shipments of flags, banners, and similar emblems by the nation's manufacturers to be \$302.7 million. *Profile America Facts for Features*, available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb13-ff14.html (last visited December 6, 2013).

¹⁷ RESPECT of Florida is a state-established non-profit organization designated to administer programs set up to provide employment to handicapped individuals. Sections 413.032-413.037, F.S.

¹⁸ HB 201 Bill Analysis by the Department of Management Services, March 6, 2014 (on file with the Government Operations Subcommittee).

¹⁹ Minn. Stat. Ann. Sec. 325E.65 (2008).

²⁰ 25 Okl. Stat. Ann. Sec. 158 (2008).

²¹ Mass. Gen. Laws Ann. 2 sec. 6.

²² Mo. Rev. Stat. s. 8.922 (2008).

²³ Among those states are Arizona, Connecticut, Kentucky, Michigan, New Hampshire, New Jersey, and North Dakota.

²⁴ 41 U.S.C. s. 8301, *et seq.*

²⁵ 19 U.S.C. s. 2501, *et seq.*

authorizes the President of the United States to waive this purchasing requirement for the purpose of entering into trade agreements with other countries.²⁶ According to the Congressional Research Service, the Buy American Act requirements are significantly limited in application by the waiver provisions of the Trade Agreements Act. As a result, federal agencies must treat offers from many designated foreign countries in the same manner as domestic offers.²⁷

An exception to these general procurement procedures is established by the Berry Amendment,²⁸ which requires the United States Department of Defense to purchase certain supplies, including American flags, that are grown, reprocessed, reused, or produced in the United States.²⁹

International Free Trade Agreements and Government Procurement

The United States is a party to numerous multilateral and bilateral free trade agreements (FTAs). Many of these FTAs address practices for government procurement.

General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) is one FTA that addresses government procurement practices.³⁰ During the negotiations that led to the establishment of the World Trade Organization (WTO), certain parties negotiated a Government Procurement Agreement (GPA) to address access to government procurement markets. The GPA is binding on those WTO member countries that opt into the agreement, among whom is the United States.³¹

Article III of the GPA requires a party undertaking procurement covered by the GPA to treat the products of all other parties equally, and to accord products from other parties the same treatment³² that it accords to its domestic products and producers.³³ Article IV of the GPA prohibits a party to the GPA from applying rules of origin on products supplied for covered government procurement which are different from the rules of origin applied to goods in the normal course of trade.³⁴

The GPA applies to any law, regulation, procedure, or practice regarding any procurement that meets a certain value threshold for those government units of member countries that are included in the

²⁶ 19 U.S.C. s. 2511.

²⁷ Kate Manuel, *et al. Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, p. 7, Congressional Research Service, January 6, 2014. Available at www.hsdl.org/?view&did=749327 (last viewed March 7, 2013).

²⁸ 10 U.S.C. s. 2533a.

²⁹ Valerie Bailey Grasso, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, Congressional Research Service, February 24, 2014. Available at <http://www.fas.org/sgp/crs/natsec/RL31236.pdf> (last visited March 7, 2013).

³⁰ To be precise, the GATT has set forth certain rules governing trade in goods among party countries since 1948. Over the course of its existence, various rounds of negotiations were held to modify the GATT. The Uruguay Round, which concluded in 1994, resulted in the formation of the World Trade Organization (WTO). In addition to trade in goods, WTO agreements set forth general governing principles for trade in services (the General Agreement on Trade in Services, or GATS) and intellectual property (the Agreement on Trade Related Aspects of Intellectual Property Rights, or TRIPS). WTO agreements also have established a more formal and binding trade dispute resolution mechanism than existed under the original version of the GATT. 158 countries are party to the GATT/WTO. *See Understanding the WTO* available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (last visited March 10, 2013). As the GATT continues to provide the foundation for WTO rules related to the trade in goods, the agreement and the organization will be referred to as one entity (GATT/WTO) for the purpose of this bill analysis.

³¹ *Parties and observers to the GPA*, available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited December 30, 2013).

³² This is generally known as most-favored nation status. Most favored nation status (MFN) is a treaty status that means that goods originating from a nation with such status will not be treated any worse by the receiving nation, for example by being subject to higher import duties than goods originating from the nation that has the most favorable trade arrangement with the receiving nation. BLACK'S LAW DICTIONARY 1035 (8th ed. 2004).

³³ Agreement on Government Procurement (GPA), Art. III, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (last visited March 10, 2013); *see also* Amol Mehra, Comment, *Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation*, 4 B.Y.U. INT'L L. & MGMT. REV. 179, 179-181 (Spring 2008).

³⁴ *Id.* at Art. IV.

applicable annex to the agreement.³⁵ For the procurement of goods such as flags, the threshold for the application of GPA requirements to states has been set by the United States Trade Representative at \$558,000 for 2014 and 2015.³⁶

Exceptions to the GPA apply in certain cases.³⁷ State and local entities are not required to abide by the GPA, though they may opt to do so. Florida executive branch agencies have opted to do so and are covered by the GPA.³⁸

A dispute that arises under the GPA is generally subject to the dispute resolution process set up in the GATT/WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.³⁹ A party to the GPA whose rights under the agreement are being impaired by another party may seek remedies under the GPA from that party.⁴⁰

The federal government has provided that no state law can be declared invalid by the courts as violating GATT/WTO agreements except in an action initiated by the United States.⁴¹

Dominican Republic-Central American-United States Free Trade Agreement

The Dominican Republic-Central American-United States Free Trade Agreement (CAFTA-DR) also addresses government procurement.⁴² Florida executive agencies are covered by CAFTA-DR procurement requirements applicable to sub-central governments.⁴³ Parties to CAFTA-DR are required to treat goods originating from other parties no less favorably than domestic goods for procurement purposes. Covered entities also may not treat local suppliers less favorably based on degree of foreign affiliation or because such a supplier offers goods of another party.⁴⁴ The provisions of CAFTA-DR apply to sub-central government procurement of goods where the value of procurement is estimated to be equal to or greater than \$558,000.⁴⁵ A party to CAFTA-DR whose rights under the agreement are being impaired by another party may seek remedies under the CAFTA-DR from that party.⁴⁶

The federal government has provided that no state law can be declared invalid by the courts as violating CAFTA-DR except in an action initiated by the United States.⁴⁷

Other Trade Agreements

Various other bilateral trade agreements between the United States and foreign countries also similarly address government procurement. Florida executive agency procurement is subject to seven such FTAs in addition to the GATT/WTO GPA and CAFTA-DR.⁴⁸ These agreements contain provisions

³⁵ *Id.* at Art. I.

³⁶ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (December 17, 2013).

³⁷ GPA at Art. XXIII. Exceptions apply where procurement is related to national security or defense interests, or if procurement restrictions are necessary to protect, among others, public morals, order, safety, and human, animal, or plant life or health. Exceptions also apply to products and services of handicapped persons, philanthropic organizations, and prison labor.

³⁸ *Id.* Annex 2.

³⁹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts. 6 and 22, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited March 10, 2014).

⁴⁰ *Id.* at Art. 22.

⁴¹ 19 U.S.C. s. 3512(2).

⁴² CAFTA-DR is composed of the United States, El Salvador, the Dominican Republic, Guatemala, Honduras, Nicaragua, and Costa Rica.

⁴³ CAFTA-DR, Annex 9.1.2(b)(i)-25, available at

http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file977_3927.pdf (last visited March 10, 2014).

⁴⁴ CAFTA-DR Art. 9.2, available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file766_3926.pdf (last visited March 10, 2014).

⁴⁵ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (December 17, 2013).

⁴⁶ See CAFTA-DR, Art. 20.16. available at

http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file85_3940.pdf (last visited March 10, 2014).

⁴⁷ 19 U.S.C. s. 4012(b).

⁴⁸ These agreements are the U.S.-Australia FTA, U.S.-Chile FTA, U.S.-Colombia FTA, U.S.-Morocco FTA, U.S.-Panama FTA, U.S.-Peru FTA, and the U.S.-Singapore FTA. Revised Appendix, U.S. States, Other Sub-Federal Entities, and Other Entities Subject to

similar to those discussed above, in that they provide for national treatment and non-discrimination in government procurement for those covered entities engaging in covered transactions, and permit the suspension of trade concessions in the event that an offending party fails to bring its policies into compliance with the respective treaties. The value thresholds for the procurement of goods at which the terms of these agreements apply are essentially uniform at \$558,000.⁴⁹

Effect of Bill

The bill provides that the act may be cited as the "All-American Flag Act."

The bill provides that any United States flag or state flag that is acquired for public use by the state, a county, or municipality must be made in the United States from articles, materials, or supplies that are grown, produced, or manufactured in the United States. It is unclear how the state, a county, or municipality would verify whether a United States or state flag acquired for public use is manufactured in the United States entirely from materials produced in the United States.⁵⁰

A willful violation of this requirement is deemed a misdemeanor of the second degree, punishable by imprisonment of up to 60 days or a fine not to exceed \$500.⁵¹ It is unclear who would be subject to the criminal penalty since the bill provides that the state, a county, or a municipality must acquire such flags manufactured and produced in the United States. It is unclear if the government employee would be penalized or a vendor under contract with the governmental entity.

B. SECTION DIRECTORY:

Section 1 provides that the act may be cited as the "All-American Flag Act."

Section 2 creates s. 256.041, F.S., requiring a United States flag or a state flag that is purchased by the state, a county, or municipality for public use to be made in the United States; providing for applicability to the purchase of a flag made on or after January 1, 2015.

Section 3 amends s. 256.09, F.S., providing a penalty.

Section 4 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may have an indeterminate negative fiscal impact on state government. See FISCAL COMMENTS.

U.S. Obligations under International Agreements, available at <http://www.ustr.gov/sites/default/files/REVISED%20Appendix.pdf> (last visited March 10, 2014).

⁴⁹ Procurement Thresholds for the Implementation of the Trade Agreements Act of 1979, 78 Fed. Reg. 76700 (Dec. 17, 2013)

⁵⁰ The Flag Manufacturers Association of America "Certified Made in the U.S.A." program "certifies that [a] flag has been made in the U.S. of materials that are domestic in origin and that all processes in every step of its manufacture were completed in U.S. facilities with U.S. labor." The FMAA has so far certified five flag manufacturers. About FMAA Certification, available at <http://www.fmaa-usa.com/about/certification.php> (last visited March 10, 2014).

⁵¹ Sections 775.082(4)(b) and 775.083(1)(e), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may have an indeterminate negative fiscal impact on local governments. See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could have a positive impact on those businesses that sell United States and state flags meeting the "born in America" requirements provided in the bill. In addition, it could have a negative impact if the bill is found to violate government procurement provisions in free trade agreements (FTA) to which the United States is a party, because an aggrieved party to that agreement could take proportional retaliatory trade measures against United States businesses. However, it is unlikely that the value threshold in a given FTA would be met to trigger such violation.

D. FISCAL COMMENTS:

This bill may have a negative fiscal impact on state and local governments if United States and state flags that must be purchased pursuant to the bill are more expensive than United States and state flags that would otherwise be available for purchase.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the State Constitution may apply because the bill may require county and municipal governments to spend more funds on the purchase of United States and state flags than they otherwise might spend; however, an exemption may apply as the fiscal impact is likely to be insignificant.

2. Other:

Impairment of Contract

The contract clause of Art. I, s. 10 of the State Constitution prohibits the state from passing laws that impair contract rights. A law impairs contract rights if it changes the substantive rights that parties have under existing contracts.⁵² For a law that impairs contracts to be constitutionally valid, the evil that the law seeks to remedy must outweigh the interests of parties not to have their contracts impaired, and the law must not intrude into the ability of people to contract any more than is necessary to achieve the public purpose behind the law.⁵³ The state's authority to restrict contractual obligations is especially limited in instances where contractual obligations have already been entered into by the state.⁵⁴

While the bill applies to purchases of flags made on or after January 1, 2015, it is possible that existing contracts may provide for the purchase and sale of United States and state flags to state and local governments beyond January 1, 2015.

⁵² *Manning v. Travelers Ins. Co.*, 250 So.2d 872, 874 (Fla. 1971).

⁵³ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979).

⁵⁴ *Chiles v. United Faculty of Fla.*, 615 So.2d 671 (Fla. 1993).

Federal Preemption

While federal and state governments have their respective spheres of sovereignty, the United States Constitution, and laws made pursuant to it, are the supreme law of the United States.⁵⁵ State law may be expressly preempted if federal law explicitly prohibits any state action on a matter. State law also may be preempted by implication if either the federal government has expressed an intent to restrict regulation of a certain field to the federal level, or if a state law conflicts with a federal law.⁵⁶

Treaties and other international agreements entered into by the federal government are a source of federal law. Such agreements are binding on the states through the Supremacy Clause of the United States Constitution.⁵⁷

Pursuant to the federal authority to enter into treaties and executive agreements with foreign powers, the United States has entered into various free trade agreements that address government procurement policies and, in some cases, require the national and sub-national governments of the contracting parties to treat goods from other contracting parties identically to nationally produced goods for the purpose of government procurement.

A reviewing court may find that the bill is preempted under the United States Constitution if it requires procurement practices that violate these trade agreements.

Dormant Foreign Affairs Doctrine

The United States Constitution grants the federal government various powers related to foreign affairs, such as the power to declare war,⁵⁸ maintain a military,⁵⁹ enter into treaties and other international agreements,⁶⁰ regulate foreign commerce,⁶¹ and to hear cases involving foreign states and citizens.⁶² These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.⁶³ The federal government's exclusive authority to act in the area of foreign affairs is known as the dormant foreign affairs doctrine.

When a state law operates in the field of foreign affairs without federal authorization, a reviewing court might find the state law to be invalid as a violation of the dormant foreign affairs doctrine.⁶⁴ If the purpose of the bill is to impact foreign affairs,⁶⁵ or if the effects of the bill have a sufficiently serious impact on foreign policy,⁶⁶ the bill may be found in violation of the dormant foreign affairs doctrine.⁶⁷

⁵⁵ Art. VI, cl. 2, U.S. Const., provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁵⁶ *State v. Harden*, 938 So.2d 480, 485 (Fla. 2006) (stating that “[u]nder the Supremacy Clause, a federal law may expressly or impliedly preempt state law. A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law.”) *citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

⁵⁷ *U.S. v. Pink*, 315 U.S. 203, 230-231 (1941) (noting that “state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.”); *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

⁵⁸ Art. I, sec. 8, U.S. Constitution.

⁵⁹ *Id.*

⁶⁰ Art. II, sec. 2, U.S. Constitution.

⁶¹ Art. I, sec. 8, U.S. Constitution.

⁶² Art. III, sec. 2, U.S. Constitution.

⁶³ *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (stating that the “Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”).

⁶⁴ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

⁶⁵ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (pointing out that a congressional invocation of exclusively national powers with respect to addressing human rights violations in Burma precluded Massachusetts from restricting its agencies from purchasing goods or services from companies that did business with Burma; the case, however, was decided on the basis that a federal law preempted the state law.)

Dormant Foreign Commerce Clause

The United States Constitution grants the United States Congress the power to regulate “Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁶⁸ This provision has long been interpreted as granting Congress the exclusive power to regulate commerce between the states.⁶⁹ This clause is therefore not only a grant of power to Congress, but simultaneously acts to limit the power of states to enact laws that impose burdens on commerce subject to the clause.⁷⁰ For example, a state law that facially discriminates against out of state commerce is invalid under the dormant interstate commerce clause unless the state can demonstrate that the law furthers a legitimate government interest and that there is no way to serve the purpose as well by non-discriminatory means.⁷¹

This dormant interstate commerce clause, which generally prohibits states from enacting laws or policies that burden interstate commerce or favor in-state economic interests over others, has a recognized market participant exception. This exception provides that when a state acts as a market participant, as opposed to a market regulator, the state is not subject to the requirements of the dormant interstate commerce clause.⁷² The market participant exception likely applies to state practices that affect foreign commerce;⁷³ however, the exception has not been applied by the United States Supreme Court to a case implicating foreign commerce. Therefore it is not certain that states as market participants are allowed to discriminate against foreign commerce.⁷⁴

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Purchases Versus Acquisitions

The proposed section title refers to purchases of flags for public use, whereas the body of the section refers to the acquisition of flags. It may be appropriate to revise the proposed section language to clarify that it applies to purchases, as opposed to acquisitions, of United States and state flags.

Drafting Issues: Scope of Application

The bill provides that it “applies to the purchase of a flag made on or after January 1, 2015.” It is unclear if the bill is referring to purchases made on or after January 1, 2015, or to flags manufactured on or after January 1, 2015.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

⁶⁶ *Clark v. Allen*, 331 U.S. 503, 517-518 (1947) (finding a state law that addressed the disposition of personal property of alien decedents valid, in spite of noting that the law would “have some incidental or indirect effect in foreign countries.”); *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁶⁷ Matthew Shaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining, and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 237-239 (2011).

⁶⁸ Art. I., sec. 8, cl. 3, U.S. Const.

⁶⁹ *Gibbons v. Ogden*, 22 U.S. 1 (1822).

⁷⁰ *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).

⁷¹ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

⁷² *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (stating that there was “no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”)

⁷³ *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990).

⁷⁴ *Antilles Cement Corp. v. Futuno*, 670 F.3d 310, 237-328 (2012) (recognizing that “[t]here is some reason to believe that the market participant exception might be inapplicable to state laws that discriminate against foreign commerce” because “the dormant Foreign Commerce Clause places stricter constraints on states than its interstate counterpart.” Nevertheless, the Circuit Court did find the market participant exception applicable.)

1 A bill to be entitled
 2 An act relating to flags; providing a short title;
 3 creating s. 256.041, F.S.; requiring a United States
 4 flag or a state flag that is purchased by the state, a
 5 county, or a municipality for public use to be made in
 6 the United States; providing for applicability;
 7 amending s. 256.09, F.S.; providing a penalty;
 8 providing an effective date.
 9

10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. This act may be cited as the "All-American Flag
 13 Act."

14 Section 2. Section 256.041, Florida Statutes, is created
 15 to read:

16 256.041 Purchase of United States flag or state flag for
 17 public use.—When the state, a county, or a municipality acquires
 18 a United States flag or a state flag for public use, the flag
 19 must be made in the United States from articles, materials, or
 20 supplies, all of which are grown, produced, and manufactured in
 21 the United States. A person who willfully violates this section
 22 is subject to the penalty provided in s. 256.09. This section
 23 applies to the purchase of a flag made on or after January 1,
 24 2015.

25 Section 3. Section 256.09, Florida Statutes, is amended to
 26 read:

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27 256.09 Penalty.—Any person who violates ~~violating the~~
28 ~~provisions of s. 256.05, or s. 256.06, or s. 256.041~~ commits
29 ~~shall be guilty of~~ a misdemeanor of the second degree,
30 punishable as provided in s. 775.082 or s. 775.083.

31 Section 4. This act shall take effect July 1, 2014.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
2 Subcommittee

3 Representative Workman offered the following:

Amendment (with title amendment)

6 Remove lines 17-30 and insert:

7 public use.—When the state, a county, or a municipality
8 purchases a United States flag or a state flag for public use,
9 the flag must be made in the United States from articles,
10 materials, or supplies, all of which are grown, produced, and
11 manufactured in the United States. This section applies to the
12 purchase of a flag on or after January 1, 2015.

13 -----
14
15
16 **T I T L E A M E N D M E N T**

17 Remove line 7

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 415 Pub. Rec./Investigations and Examinations by the Office of Financial Regulation
SPONSOR(S): Insurance & Banking Subcommittee; Santiago
TIED BILLS: CS/HB 413 **IDEN./SIM. BILLS:** CS/SB 1002

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Government Operations Subcommittee		Williamson	Williamson
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

House Bill 413 strengthens the Office of Financial Regulation's (OFR) registration, examination, and investigation authority over consumer collection agencies; however, OFR has no authority to withhold from public disclosure any information relating to consumer complaints, investigations, examinations, and registrations. House Bill 413 also authorizes OFR to conduct joint or concurrent examinations with other state or federal regulatory agencies and to share examination materials.

This bill, which is linked to the passage of House Bill 413, creates a public records exemption for certain information held by OFR relating to investigations and examinations of consumer collection agencies. Information relative to an investigation or examination by OFR is confidential and exempt from public records requirements while the investigation or examination is active. For purposes of the public record exemption, "active" means OFR or a law enforcement or administrative agency is proceeding with reasonable dispatch and has a reasonable good faith belief that the case may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a registration. Once the investigation or examination is no longer active, a consumer complaint and other information relative to an investigation or examination remain confidential and exempt under specified conditions.

The bill also allows OFR to share confidential and exempt information with law enforcement and administrative agencies.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

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 public record or public meeting exemption. The bill creates a new public record exemption; thus, it appears to require a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

The State of Florida has a long history of providing public access to government records and meetings. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24(a) of the State Constitution states:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

[A]ll 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Fla. Const. art. I, s. 24.

³ Chapter 119, F.S.

⁴ The term "agency" is defined in s. 119.011(2), F.S., to mean "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." The State Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the State Constitution. *See supra* fn. 2.

⁵ Section 119.011(12), F.S.

formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁹

Only the Legislature is authorized to create exemptions to open government requirements.¹⁰ Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹¹ A bill enacting an exemption¹² may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act provide that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁵ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- 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 under this provision.
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁶

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.¹⁷ The Legislature is only limited in its review process by constitutional requirements.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

⁸ Florida Attorney General Opinion 85-62.

⁹ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

¹⁰ *Supra* fn. 1.

¹¹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

¹² Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹³ *Supra* fn. 1.

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

¹⁷ *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

Regulation of Consumer Collection Agencies and Debt Collectors

Part VI of ch. 559, F.S., regulates consumer collection agencies and protects consumers from certain debt collection practices that involve fraud, harassment, threats, and other unscrupulous activities. These collection agencies are required to comply with certain registration requirements administered by the Office of Financial Regulation (OFR). Part VI of ch. 559, F.S., provides penalties for noncompliance with certain statutory requirements.

House Bill 413 (2014)

House Bill 413 strengthens OFR's registration, examination, and investigation authority over consumer collection agencies; however, OFR has no authority to withhold from public disclosure any information relating to consumer complaints, investigations, examinations, and registrations, except that which is specifically provided in ch. 119, F.S. (such as social security numbers and bank account numbers).¹⁸

House Bill 413 also authorizes OFR to conduct joint or concurrent examinations with other state or federal regulatory agencies and to share examination materials.

Effect of the Bill

This bill, which is linked to the passage of House Bill 413, creates a public records exemption for certain investigative and examination information relating to consumer collection agencies and held by OFR under part VI of ch. 559, F.S. Such information is confidential and exempt from the public-records requirements of s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution until the investigation or examination is completed or ceases to be active. However, the information remains confidential and exempt after the investigation or examination is completed or ceases to be active if disclosure would:

- Jeopardize the integrity of another active investigation or examination;
- Disclose the identity of a confidential source;
- Disclose investigative or examination techniques or procedures;
- Reveal a trade secret, as defined in the Uniform Trade Secrets Act;¹⁹ or
- Reveal personal identifying information of a consumer unless the consumer is also the complainant. In the case of a complainant, the personal identifying information is subject to disclosure after the investigation is completed or ceases to be active, but the complainant's personal financial and health information remains confidential and exempt.

The confidential and exempt information may be disclosed by OFR at any time to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities.

The bill provides that an investigation or examination is considered active if OFR or a law enforcement or administrative agency is proceeding with reasonable dispatch and has a good faith belief that the investigation or examination might lead to the filing of an administrative, civil, or criminal proceeding or the denial or conditional grant of an application for registration or other approval required under part VI of ch. 559, F.S. The bill also defines the term "personal financial and health information" to mean:

- Information relating to the existence, nature, source, or amount of a consumer's personal income, expenses, and debt;
- Information relating to a consumer's financial transactions of any kind;

¹⁸ The Public Records Act (ch. 119, F.S.) contains an agency-specific exemption for OFR, in which any information that OFR *receives* from other state or federal regulatory, administrative, or criminal justice agencies that confidential or exempt in accordance with the laws of the other agency. Additionally, this exemption provides confidentiality for any information that OFR *receives or develops* as part of a joint or multiagency examination or investigation with these other agencies and that OFR may obtain and use this information in accordance with a joint or multiagency agreement, except to any information that would otherwise be public if OFR independently conducted an investigation or examination under Florida law. Section 119.0712(3), F.S.

¹⁹ The Uniform Trade Secrets Act defines the term "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Section 688.002(4), F.S.

- Information relating to the existence, identification, nature, or value of a consumer's assets, liabilities, or net worth;
- A consumer's personal health condition, disease, or injury; or
- A history of a consumer's personal medical diagnosis or treatment.

The bill provides that the section is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1 creates s. 559.5558, F.S., to create a public record exemption for information held by OFR pursuant to an investigation or examination of consumer collection agencies.

Section 2 provides a statement of public necessity as required by the State Constitution.

Section 3 provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's protection of trade secrets within information relating to an investigation or examination may benefit collection agencies, since disclosure of such information could result in a competitive disadvantage in the marketplace. In addition, the bill's protection of specified personal financial and health information of consumers may reduce the risk of identity theft and protect matters of personal health which are traditionally private and confidential concerns between patients and health care providers.

D. FISCAL COMMENTS:

The bill could create a minimal fiscal impact on OFR, because OFR staff would be responsible for complying with public records requests and may require training related to the creation of the public records exemption. In addition, OFR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of OFR.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Vote Requirement and Public Necessity Statement for Public Records Bills

In order to pass a newly-created or expanded public records or public meetings exemption, Art. I, s. 24(c) of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

Subject Requirement

Article I, s. 24(c) of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill creates a public records exemption for OFR in a separate, stand-alone bill.

Breadth of the Exemption

Article I, s. 24(c) of the State Constitution, requires a newly created public records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public records exemption for information held by OFR during an active investigation or examination of consumer collection agencies. The exemption does not appear to be in conflict with the constitutional requirement that the exemption must be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Public Necessity Statement

On line 72 of the bill, the word "made" is missing. The sentence should read:

The Legislature finds that it is a public necessity that information held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination conducted under part VI of chapter 559, Florida Statutes, be *made* confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution...

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment retained the provisions of the bill and made the following changes to the bill:

- Provided a clearer public necessity statement, and
- Provided a definition and limited exemption for personal health and financial information held by the OFR.

This analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.

1 A bill to be entitled
 2 An act relating to public records; creating s.
 3 559.5558, F.S.; providing an exemption from public
 4 records requirements for information collected in
 5 connection with investigations and examinations by the
 6 Office of Financial Regulation of the Financial
 7 Services Commission; providing a definition; providing
 8 for future legislative review and repeal of the
 9 exemption; providing a statement of public necessity;
 10 providing a contingent effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Section 559.5558, Florida Statutes, is created
 15 to read:

16 559.5558 Public records exemption; investigations and
 17 examinations.-

18 (1) As used in this section, the term "personal financial
 19 and health information" means:

20 (a) Information relating to the existence, nature, source,
 21 or amount of a consumer's personal income, expenses, and debt;

22 (b) Information relating to a consumer's financial
 23 transactions of any kind;

24 (c) Information relating to the existence, identification,
 25 nature, or value of a consumer's assets, liabilities, or net
 26 worth;

27 (d) A consumer's personal health condition, disease, or
 28 injury; or

29 (e) A history of a consumer's personal medical diagnosis
 30 or treatment.

31 (2) (a) Except as otherwise provided by this section,
 32 information held by the office pursuant to an investigation or
 33 examination of a violation of this part is confidential and
 34 exempt from s. 119.07(1) and s. 24(a), Art. I of the State
 35 Constitution. However, information made confidential and exempt
 36 pursuant to this section may be disclosed by the office to a law
 37 enforcement agency or another administrative agency in the
 38 performance of its official duties and responsibilities.

39 (b) Information made confidential and exempt pursuant to
 40 this section is no longer confidential and exempt once the
 41 investigation or examination is completed or ceases to be active
 42 unless disclosure of the information would:

43 1. Jeopardize the integrity of another active
 44 investigation or examination.

45 2. Reveal the personal identifying information of a
 46 consumer, unless the consumer is also the complainant. A
 47 complainant's personal identifying information is subject to
 48 disclosure after the investigation or examination is completed
 49 or ceases to be active. However, a complainant's personal
 50 financial and health information remains confidential and
 51 exempt.

52 3. Reveal the identity of a confidential source.

53 4. Reveal investigative or examination techniques or
 54 procedures.

55 5. Reveal trade secrets, as defined in s. 688.002.

56 (c) For purposes of this subsection, an investigation or
 57 examination is considered active if the investigation or
 58 examination is proceeding with reasonable dispatch and the
 59 office has a reasonable good faith belief that the investigation
 60 or examination may lead to the filing of an administrative,
 61 civil, or criminal proceeding or to the denial or conditional
 62 grant of an application for registration or other approval
 63 required under this part.

64 (3) This section is subject to the Open Government Sunset
 65 Review Act in accordance with s. 119.15 and shall stand repealed
 66 on October 2, 2019, unless reviewed and saved from repeal
 67 through reenactment by the Legislature.

68 Section 2. The Legislature finds that it is a public
 69 necessity that information held by the Office of Financial
 70 Regulation of the Financial Services Commission pursuant to an
 71 investigation or examination conducted under part VI of chapter
 72 559, Florida Statutes, be confidential and exempt from s.
 73 119.07(1), Florida Statutes, and s. 24(a), Article I of the
 74 State Constitution for the following reasons:

75 (1) An investigation or examination conducted by the
 76 Office of Financial Regulation may lead to the filing of an
 77 administrative, civil, or criminal proceeding or to the denial
 78 or conditional granting of a registration. The premature release

79 of such information could frustrate or thwart the investigation
 80 or examination and impair the ability of the office to
 81 effectively and efficiently administer part VI of chapter 559,
 82 Florida Statutes.

83 (2) Information held by the Office of Financial Regulation
 84 that is provided to a law enforcement agency or another
 85 administrative agency for further investigation or examination
 86 should remain confidential and exempt until the investigation or
 87 examination is completed or ceases to be active. The release of
 88 this information before completion of the investigation or
 89 examination could jeopardize the integrity of the investigation
 90 and impair the ability of other agencies to carry out their
 91 statutory duties.

92 (3) Investigations and examinations of consumer collection
 93 agencies frequently involve the gathering of sensitive personal
 94 information, including personal financial information concerning
 95 complainants and consumers. The Office of Financial Regulation
 96 may not otherwise have access to this sensitive personal
 97 information but for the investigation or examination. If the
 98 individuals who are the subject of the information are
 99 identifiable, the disclosure of the information to the public
 100 could cause unwarranted damage to the good name or reputation of
 101 the individuals, especially if the information associated with
 102 the individual is inaccurate. Furthermore, if the individuals
 103 who are the subject of such information are identifiable, public
 104 access to such information could jeopardize the financial safety

105 of such individuals by placing them at risk of becoming victims
 106 of identity theft.

107 (4) Investigations and examinations of consumer collection
 108 agencies frequently involve the gathering of sensitive personal
 109 information, including personal health information concerning
 110 complainants and consumers. Matters of personal health are
 111 traditionally private and confidential concerns between the
 112 patient and the health care provider. The private and
 113 confidential nature of personal health matters pervades both the
 114 public and private health care sectors. Moreover, public
 115 disclosure of personal health information could have a negative
 116 effect upon a person's business and personal relationships and a
 117 person's financial well-being.

118 (5) Releasing information identifying a confidential
 119 source could jeopardize both the integrity of a current and
 120 future investigation or examination and the safety of the
 121 confidential source.

122 (6) Revealing investigative or examination techniques and
 123 procedures could allow a person to hide or conceal violations of
 124 law that otherwise would have been discovered during an
 125 investigation or examination. This exemption is necessary to
 126 enable the Office of Financial Regulation, law enforcement
 127 agencies, and other administrative agencies to effectively and
 128 efficiently carry out their statutory duties, which would be
 129 significantly impaired without this exemption.

130 (7) A trade secret derives independent, economic value,

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131 actual or potential, from being generally unknown to, and not
132 readily ascertainable by, other persons who might obtain
133 economic value from its disclosure or use. Allowing public
134 access to a trade secret through a public records request could
135 destroy the value of the trade secret and cause a financial loss
136 to the person or entity submitting the trade secret. Release of
137 such information could give business competitors an unfair
138 advantage and weaken the position of the person or entity
139 supplying the trade secret in the marketplace.

140 Section 3. This act shall take effect on the same date
141 that HB 413 or similar legislation takes effect, if such
142 legislation is adopted in the same legislative session or an
143 extension thereof and becomes law.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
 2 Subcommittee
 3 Representative Santiago offered the following:

Amendment

Remove line 72 and insert:

559, Florida Statutes, be made confidential and exempt from s.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 541 Public-Private Partnerships
SPONSOR(S): Steube
TIED BILLS: HB 543 **IDEN./SIM. BILLS:** SB 900

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Higher Education & Workforce Subcommittee	9 Y, 0 N	Thomas	Sherry
2) Government Operations Subcommittee		Harrington	Williamson
3) Appropriations Committee			
4) Education Committee			

SUMMARY ANALYSIS

Public-private partnerships are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public buildings and infrastructure projects. Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public.

The bill authorizes public-private partnerships between state universities and private entities. The purpose of the public-private partnership is to provide for the construction or upgrade of state university facilities that are used predominantly for public purposes and that is in the public's interest to provide for the construction or upgrade.

The bill:

- Provides definitions, procurement procedures, project qualifications, and legislative findings and intent relating to the construction or improvement of facilities that will be principally used by a state university in serving the university's core mission.
- Outlines project approval requirements and instructions for interim and comprehensive agreements, including agreement termination.
- Identifies the duties and responsibilities of both the private entities and the state universities relating to public-private partnership agreements.
- Specifies that public-private partnership agreements are subject to the approval of the Board of Governors (BOG).
- Identifies BOG as the entity responsible for developing public-private partnership guidelines for the state universities.

The fiscal impact of the bill is indeterminate at this time. See Fiscal Comments Section.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Education Capital Outlay

The State University System (SUS) currently relies on state Public Education Capital Outlay (PECO) dollars as the primary source of both university construction and building maintenance.¹ The institutions utilize PECO not just for new teaching and research facilities, but to keep existing buildings functional with deferred maintenance spending. PECO also can be utilized to retrofit older buildings into new uses, such as the comprehensive research labs critical to building a more stable, knowledge-based Florida economy.² However, PECO funds cannot be used to construct student life facilities, such as student unions, cafeterias, recreational fields, and wellness centers or fitness centers.

PECO funds have decreased significantly since fiscal year 2010-11 from over \$300 million to less than \$10 million in fiscal year 2012-13.³ The SUS estimates it needs between \$200 million and \$400 million each year to maintain and modernize the existing state investment in university buildings and utility infrastructure, according to national norms that evaluate factors such as square footage and age of assets. For fiscal year 2012-13, total appropriations for this purpose were less than \$9 million to be shared across the system.⁴ The Board of Governors indicated that further PECO reductions will severely limit growth and student access to the SUS, and will translate to reductions in the amount of usable space available by institutions.⁵

Public-Private Partnerships

Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects.⁶ Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.⁷

There are different types of P3s each with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate transaction, where the government contracts with a private vendor, granting the private sector partner the right to develop a new piece of public infrastructure.⁸ The private entity takes on full responsibility and risk for the delivery and operation of the public project in accordance with the terms of the partnership. The private entity is paid through the revenue stream generated by the project, which could take the form of a user charge (such as a highway toll) or, in some cases, an annual government payment for performance (often called a shadow toll or availability charge). Any increases in the user charge or payment for performance typically are set out in advance and are regulated by a binding contract.⁹

¹ Florida Board of Governors, Facilities Task Force, *Report to the Florida Board of Governors*, November 7, 2012, available at <http://www.flbog.edu/about/taskforce/facilities.php> (last visited March 7, 2014).

² State University System, Board of Governors, *FACT SHEET: Public Education Capital Outlay (PECO)*, July 17, 2012, available at http://flbog.edu/pressroom/_doc/7.2012-PECO-Fact-Sheet-Press-Room.pdf (last visited March 7, 2014).

³ *Id.*

⁴ *Supra* at FN 1.

⁵ *Supra* at FN 2.

⁶ See The Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery website, available at: <https://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited March 7, 2014).

⁷ *Id.*

⁸ See The Oregon Department of Transportation, the Power of Public-Private Partnerships, available at <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf> (last visited March 7, 2014).

⁹ *Id.*

Another P3 procurement process is the Unsolicited Proposal Procurement Model. This procurement process allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.¹⁰ Generally, the public entity requires a processing or review fee to cover costs of the technical and legal review.¹¹

While minimal P3s exist between various entities and individual state universities, existing statutory authority does not directly address university P3s. Although the Legislature adopted the Public Facilities and Infrastructure Act in 2013, which established a framework for P3s for specified local governments, the legislation did not authorize state universities to enter into such agreements.¹²

Effect of Proposed Changes

The bill creates a P3 process for state universities for the purpose of raising funds to build, upgrade, operate, own, or finance facilities. The bill provides a process for the receipt of solicited or unsolicited proposals for qualifying projects and establishes definitions.

Definitions

The bill provides for definitions to be used in this section, including the following:

- “Board” means a state university board of trustees.
- “Private entity” means a natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, or other private business entity.
- “Qualifying project” means a facility or project that serves a public educational, research, housing, parking, infrastructure, recreational, or cultural purpose that is used or will be used by a state university or an improvement, including equipment, of a facility that will be principally used by a state university in serving the university’s core mission.

Legislative Intent

The bill provides legislative finds to support the need for P3s in Florida, which includes a need for timely and cost-effective acquisition, design, construction, and maintenance of projects that serve a public purpose and that such need may not be wholly satisfied by existing methods of procurement. The bill provides that it is the intent of the Legislature to encourage investment in the state by private entities and to provide the greatest possible flexibility to public and private entities contracting for the provision of public services.

Procurement Procedures

The bill provides that a board may receive unsolicited proposals or may solicit proposals for qualifying projects and may thereafter enter into an agreement with a private entity, or a consortium of private entities, for the building, upgrading, operation, ownership, or financing of such facilities.

Unsolicited Proposals

The bill provides the following requirements for unsolicited proposals:

- The board may establish a reasonable application fee to accompany the submission of an unsolicited proposal, which must be sufficient to pay the costs of evaluating the proposal. The board may engage the services of a private consultant to assist in the evaluation.
- If an unsolicited proposal is received and the board intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the board must publish notice in a newspaper of general circulation at least once a week for 2 weeks stating the board has received a proposal and will accept other proposals for the same project. The timeframe within which the board may accept other proposals must be determined on a project-by-project basis

¹⁰ See *Innovative Models for Design, Build, Operations and Financing of Public Infrastructure*, John J. Fumero, at 2.

¹¹ *Id.*

¹² Section 287.05712, F.S.

based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time within which other proposals may be received; however, the timeframe for allowing other proposals must be at least 21 days, but no more than 120 days, after the initial date of publication.

Project Approval Requirements

The bill requires the board, before project approval, to determine that the proposed project:

- Is in the public's best interest;
- Is for a facility that is owned by the board or for a facility for which ownership will be conveyed to the board;
- Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the board;
- Has adequate safeguards in place to ensure that the board or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes;
- Will be owned by the board upon completion or termination of the agreement and upon payment of the amount financed; and
- Is supported by a reasonable finance plan; available financing; major assumptions; internal rate of return on private investments, if governmental funds are assumed in order to deliver a cost-feasible project; and a total cash-flow analysis beginning with the implementation of the project and extending for the term of the agreement.

The board may require the private entity to provide a technical study prepared by a nationally recognized expert with experience in preparing analyses for bond rating agencies.

An unsolicited proposal from a private entity for approval of a qualifying project must, unless waived by the board, be accompanied by the following:

- A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project;
- A description of the method by which the private entity proposes to secure the necessary property interests that are required for the qualifying project;
- A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and the identity for a dedicated revenue sources or proposed debt or equity investment on behalf of the private entity;
- The name and address of the person who may be contacted for additional information concerning the proposal;
- The proposed user fees, lease payments, or other services payments over the term of a comprehensive agreement, and the methodology for and circumstances that would allow changes to the user fees, lease payments, and other service payments over time; and
- Any additional material or information that the board reasonably requests.

Project Qualification and Process

The private entity must meet the minimum standards contained in the board's regulation or guidelines for qualifying professional services and contracts for traditional procurement projects.

The bill requires the board to ensure that provisions are made for the private entity's performance and payment of subcontractors, the most efficient pricing of the security package that provides for the performance and payment of subcontractors, and for the transfer of the private entity's obligations if the comprehensive agreement is terminated or a material default occurs. Before the procurement process is initiated or before the contract is awarded, the board must perform an independent analysis of the proposed P3 that demonstrates the cost-effectiveness and overall public benefit.

After the public notification period has expired for unsolicited proposals, the board must rank the proposals received in order of preference. For purposes of ranking, the board may consider factors that include professional qualifications, general business terms, innovative design techniques or cost-reduction terms, and finance plans. The board may then begin negotiation for a comprehensive agreement with the highest-ranked firm. If the board is not satisfied with the results of the negotiations, the board may terminate negotiations with the highest ranked firm and negotiate with the second-ranked or subsequent-ranked firms. The bill does not require the board to choose any of the firms that apply or for more than one firm to respond to the solicitation. The board may reject all proposals at any point in the process until a contract is executed.

The board may charge a reasonable fee to cover the cost of processing, reviewing, and evaluating the request. Such costs include reasonable attorney fees and fees for financial and technical advisors or consultants and for other necessary advisors or consultants.

The bill provides that the board may approve the development or operation of a qualifying project, or the design or equipping of a qualifying project that is developed or operated, if:

- There is a public need for or benefit derived from the project that the private entity proposes as the qualifying project and the project is included in the university's master plan;
- The estimated cost of the qualifying project is reasonable in relation to similar facilities; and
- The private entity's plan will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project.

Approval of a qualifying project by the board is subject to entering into a comprehensive agreement with the private entity. Upon approval of a qualifying project, the board must establish a date for the commencement of activities related to the qualifying project.

Interim Agreement

The bill provides that before, or in connection with the negotiation of a comprehensive agreement, the board may enter into an interim agreement with the private entity, which does not obligate the board to enter into a comprehensive agreement. The interim agreement must be limited to provisions that:

- Authorize the private entity to commence activities for which it may be compensated related to the proposed qualifying project;
- Establish the process and timing of the negotiation of the comprehensive agreement; and
- Contain other provisions related to an aspect of the development or operation of a qualifying project that the board and the private entity deem appropriate.

Comprehensive Agreement

The bill requires the private entity and board to enter into a comprehensive agreement prior to developing or operating the qualifying project. The comprehensive agreement must provide for:

- Delivery of performance and payment bonds, letters of credit, and other security in connection with the development or operation of the qualifying project;
- Review of plans and specifications for the project by the board. This does not require the private entity to complete the design of the project prior to executing the comprehensive agreement;
- Inspection of the qualifying project by the board;
- Maintenance of a policy of public liability insurance;
- Monitoring of the practices of the private entity by the board to ensure the project is properly maintained;
- Filing of financial statements on a periodic basis by the private entity;
- Procedures governing the rights and responsibilities of the board and private entity in the course of the construction and operation of the qualifying project and in the event of a termination of the agreement or a material default;
- Fees, lease payment, or service payments; and
- Duties of the private entity, including terms and conditions that the board determines serve the public purpose.

The comprehensive agreement may include the following:

- An agreement by the board to make grants or loans to the private entity from amounts received from federal, state, or local government or an agency or instrumentality thereof, or private donors.
- A provision under which each entity agrees to provide notice of default and cure rights for the benefit of the other entity, including, but not limited to, a provision regarding unavoidable delays.
- A provision that terminates the authority and duties of the private entity and dedicates the qualifying project to the board.

Fees

The bill provides that the comprehensive agreement may authorize the private entity to impose fees to members of the public for the use of the facility. The following provisions apply to the comprehensive agreement:

- The board may develop new facilities or increase capacity in existing facilities through the agreements with P3s;
- The facility must be properly operated, maintained, or improved in accordance with standards set forth in the agreement;
- The board may lease new facilities or existing fee-for-use facilities through the agreement;
- Any revenue must be regulated by the board pursuant to the comprehensive agreement; and
- A negotiated portion of revenues from fee-generating uses must be returned to the board over the life of the agreement.

Financing

The bill provides financing options for P3s that include the private entity entering into a private-source financial agreement between financing sources and the private entity. A financing agreement and any liens on the property or facility must be paid in full at the applicable closing that transfers ownership or operation of the facility to the board at the conclusion of the term of the comprehensive agreement. The board may use innovative finance techniques associated with a P3 including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources. In addition, the board may provide its own capital or operating budget to support a qualifying project. The budget may be from any legally permissible funding sources of the board, including the proceeds of debt issuances. A financing agreement may not subject the boards' facility to liens in violation of s. 11.066(5).F.S.¹³

Powers and Duties of the Private Entity

The bill requires the private entity to develop, operate, and maintain the qualifying project in accordance with the comprehensive agreement. The private entity must cooperate with the board in making best efforts to establish interconnection between the qualifying project and other facilities and infrastructure. It must maintain, or provide by contract for the maintenance or improvement of, the qualifying project if required by the comprehensive agreement. Finally, the private entity must comply with the terms of the comprehensive agreement and a lease or service contract.

Expiration or Termination of Agreements

The bill provides that, upon the expiration or termination of a comprehensive agreement, the board may use revenues from the qualifying project to pay current operation and maintenance costs of the qualifying project. If the private entity materially defaults under the comprehensive agreement, the compensation that is otherwise due to the private entity is payable to satisfy all financial obligations to investors and lenders on the qualifying project in the same way that is provided in the comprehensive agreement or any other agreement involving the qualifying project, if the cost of operating and maintaining the project are paid in the normal course.

¹³ Section 11.066(5), F.S., provides that the property of the state, the property of any state agency, or any monetary recovery made on behalf of the state or any state agency is not subject to a lien of any kind.

The full faith and credit of the board may not be pledged to secure the financing of the private entity. The bill specifies that the assumption of the development or operation of the qualifying project does not obligate the board to pay any obligation of the private entity from sources other than from revenues from the qualifying project unless stated otherwise in the comprehensive agreement.

Sovereign Immunity

The bill provides that sovereign immunity is not waived by a board, or any officer or employee thereof, with respect to participation in, or approval of, any part of a qualifying project or its operation.

Construction

The bill provides that it must be liberally constructed to effectuate its purpose. In addition, it does not:

- Affect an agreement or existing relationship with a supporting organization involving a board in effect as of January 1, 2014;
- Amend existing laws by granting additional powers to, or further restricting, a board from regulating and entering into cooperative arrangement with the private sector for the planning, construction, or operation of a facility; or
- Waive any requirements of s. 1013.45, F.S., which pertains to educational facility contracting and construction techniques.

B. SECTION DIRECTORY:

Section 1. Creates s. 1013.505, F.S., to create a P3 process for state universities.

Section 2. Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may provide for more opportunities for the private sector to enter into contracts for construction services with state universities.

D. FISCAL COMMENTS:

The bill provides that the comprehensive agreement may authorize the private entity to impose fees to members of the public for the use of the facility. Any fee must be regulated by the board pursuant to the comprehensive agreement, and a negotiated portion of the revenue generated from the fee must be

returned to the board over the life of the agreement. The fee imposed on the public using the facility is not specified in the bill therefore, the revenue generated from the fee is indeterminate.

The BOG also anticipates that there will be an increased workload associated with the development of system-wide guidelines and BOG review and approval of partnership agreements. However, the BOG believes that current staffing resources will be sufficient to address the increased workload.¹⁴

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require municipalities or counties to expend funds or to take any action requiring the expenditure of funds, reduce the authority that municipalities or counties have to raise revenues in the aggregate, or reduce the percentage of state tax shared with municipalities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Board of Governors to adopt guidelines governing P3 transactions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue

On line 163, "analysis" should be "analyses".

Other Comments: Board of Governors (BOG)

According to the BOG, SUS institutions have generally issued tax-exempt bonds to finance the construction of auxiliary facilities such as parking garages, and the state has issued tax-exempt PECO bonds to construct educational facilities. It is not expected that P3s will result in lower interest rates. Rather, potential savings may be realized in that P3 agreements commit both parties to the long-term maintenance of the subject facilities. Making repairs on a scheduled basis can result in long-term cost savings. The ability to defer critical maintenance items due to short-term budget obligations will be significantly reduced if P3 agreements are properly structured and adequately enforced.¹⁵

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

¹⁴ *Id.*

¹⁵ Staff of the Board of Governors, *Legislative Bill Analysis for HB 541* (2014).

1 A bill to be entitled
 2 An act relating to public-private partnerships;
 3 creating s. 1013.505, F.S.; providing for partnerships
 4 between state universities and private entities;
 5 providing definitions; providing legislative findings
 6 and intent relating to the construction or improvement
 7 by private entities of facilities or projects used
 8 predominantly for a public purpose; providing
 9 procurement procedures for a state university board of
 10 trustees, including proposals for a qualifying project
 11 and a comprehensive agreement for partnership
 12 transactions; providing requirements for project
 13 approval; providing project qualifications and
 14 process; providing requirements for interim and
 15 comprehensive agreements between a board of trustees
 16 and a private entity; providing for use fees;
 17 providing for various financing sources for projects;
 18 providing powers and duties of private entities;
 19 providing for expiration or termination of a
 20 comprehensive agreement; providing for the
 21 applicability of sovereign immunity for boards of
 22 trustees with respect to qualified projects; providing
 23 for construction of the act; providing an effective
 24 date.

26 Be It Enacted by the Legislature of the State of Florida:

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Section 1. Section 1013.505, Florida Statutes, is created to read:

1013.505 Public-private partnerships; state universities and private entities.-

(1) DEFINITIONS.-As used in this section, the term:

(a) "Board" means a state university board of trustees.

(b) "Develop" means to plan, design, finance, lease, acquire, install, construct, or expand.

(c) "Fees" means charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to a comprehensive agreement.

(d) "Lease payment" means any form of payment, including a land lease, by a board to the private entity of a qualifying project for the use of the project.

(e) "Material default" means a nonperformance of its duties by the private entity of a qualifying project which jeopardizes adequate service to the public from the project.

(f) "Operate" means to finance, maintain, improve, equip, modify, or repair.

(g) "Private entity" means a natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public-benefit corporation, nonprofit entity, or other private business entity.

(h) "Proposal" means a plan for a qualifying project with detail beyond a conceptual level for which terms such as fixing

53 costs, payment schedules, financing, deliverables, and project
 54 schedule are defined.

55 (i) "Qualifying project" means a facility or project that
 56 serves a public educational, research, housing, parking,
 57 infrastructure, recreational, or cultural purpose that is used
 58 or will be used by a state university or an improvement,
 59 including equipment, of a facility that will be principally used
 60 by a state university in serving the university's core mission.

61 (j) "Revenues" means the income, earnings, user fees,
 62 lease payments, or other service payments relating to the
 63 development or operation of a qualifying project, including, but
 64 not limited to, money received as grants or otherwise from the
 65 Federal Government, a public entity, or an agency or
 66 instrumentality thereof in aid of the qualifying project, and
 67 gifts from private donors.

68 (k) "Service contract" means a contract between a board
 69 and the private entity which defines the terms of the services
 70 to be provided with respect to a qualifying project.

71 (2) LEGISLATIVE FINDINGS AND INTENT.—

72 (a)1. The Legislature finds that there is a public need
 73 for the construction or upgrade of facilities that are used
 74 predominantly for public purposes and that it is in the public's
 75 interest to provide for the construction or upgrade of such
 76 facilities.

77 2. The Legislature also finds that:

78 a. There is a public need for timely and cost-effective

79 acquisition, design, construction, improvement, renovation,
 80 expansion, equipping, maintenance, operation, implementation, or
 81 installation of projects serving a public purpose, including
 82 educational and auxiliary facilities and projects within the
 83 state which serve a public need and purpose, and that such
 84 public need may not be wholly satisfied by existing procurement
 85 methods.

86 b. There are inadequate resources to develop new
 87 educational and auxiliary facilities and projects for the
 88 benefit of residents of this state, and that a public-private
 89 partnership has demonstrated that it can meet the needs by
 90 improving the schedule for delivery, lowering the cost, and
 91 providing other benefits to the public.

92 c. There may be state and federal tax incentives that
 93 promote partnerships between public and private entities to
 94 develop and operate qualifying projects.

95 d. A procurement under this section serves the public
 96 purpose of this section if such procurement facilitates the
 97 timely development or operation of a qualifying project.

98 (b) It is the intent of the Legislature to encourage
 99 investment in the state by private entities; to facilitate
 100 various bond financing mechanisms, private capital, and other
 101 funding sources for the development and operation of qualifying
 102 projects, including expansion and acceleration of such financing
 103 to meet the public need; and to provide the greatest possible
 104 flexibility to public and private entities contracting for the

105 provision of public services.

106 (3) PROCUREMENT PROCEDURES.—A board may receive
107 unsolicited proposals or may solicit proposals for qualifying
108 projects and may thereafter enter into an agreement with a
109 private entity, or a consortium of private entities, to build,
110 upgrade, operate, own, or finance facilities. A copy of all
111 proposals received by a board shall be submitted to the Board of
112 Governors.

113 (a) A board may establish a reasonable application fee for
114 the submission of an unsolicited proposal under this section.
115 The fee must be sufficient to pay the costs of evaluating the
116 proposal. A board may engage the services of a private
117 consultant to assist in the evaluation.

118 (b) A board may request a proposal from private entities
119 for a public-private project or, if the board receives an
120 unsolicited proposal for a public-private project and the board
121 intends to enter into a comprehensive agreement for the project
122 described in such unsolicited proposal, the board shall publish
123 notice in a newspaper of general circulation at least once a
124 week for 2 weeks stating that the board has received a proposal
125 and will accept other proposals for the same project. The
126 timeframe within which the board may accept other proposals
127 shall be determined on a project-by-project basis based upon the
128 complexity of the project and the public benefit to be gained by
129 allowing a longer or shorter period of time within which other
130 proposals may be received; however, the timeframe for allowing

131 other proposals must be at least 21 days, but no more than 120
 132 days, after the initial date of publication.

133 (c) A board may enter into a comprehensive agreement
 134 subject to approval by the Board of Governors and pursuant to
 135 guidelines adopted by the Board of Governors for public-private
 136 partnership transactions.

137 (d) In considering proposals for a public-private
 138 partnership, the board must determine that the proposed project:

139 1. Is in the public's best interest.

140 2. Is for a facility that is owned by the board or for a
 141 facility for which ownership will be conveyed to the board.

142 3. Has adequate safeguards in place to ensure that
 143 additional costs or service disruptions are not imposed on the
 144 public in the event of material default or cancellation of the
 145 agreement by the board.

146 4. Has adequate safeguards in place to ensure that the
 147 board or private entity has the opportunity to add capacity to
 148 the proposed project or other facilities serving similar
 149 predominantly public purposes.

150 5. Will be owned by the board upon completion or
 151 termination of the agreement and upon payment of the amounts
 152 financed.

153 6. Is supported by a reasonable finance plan that is
 154 consistent with subsection (9); the project cost; revenues by
 155 source; available financing; major assumptions; internal rate of
 156 return on private investments, if governmental funds are assumed

157 in order to deliver a cost-feasible project; and a total cash-
 158 flow analysis beginning with the implementation of the project
 159 and extending for the term of the agreement.

160 (e) In considering an unsolicited proposal, the board may
 161 require from the private entity a technical study prepared by a
 162 nationally recognized expert with experience in preparing
 163 analysis for bond rating agencies. In evaluating the technical
 164 study, the board may rely upon internal staff reports prepared
 165 by personnel familiar with the operation of similar facilities
 166 or the advice of external advisors or consultants who have
 167 relevant experience.

168 (4) PROJECT APPROVAL REQUIREMENTS.—An unsolicited proposal
 169 from a private entity for approval of a qualifying project must
 170 be accompanied by the following material and information, unless
 171 waived by the board:

172 (a) A description of the qualifying project, including the
 173 conceptual design of the facilities or a conceptual plan for the
 174 provision of services, and a schedule for the initiation and
 175 completion of the qualifying project.

176 (b) If applicable, a description of the method by which
 177 the private entity proposes to secure the necessary property
 178 interests that are required for the qualifying project.

179 (c) A description of the private entity's general plans
 180 for financing the qualifying project, including the sources of
 181 the private entity's funds and the identity of a dedicated
 182 revenue source or proposed debt or equity investment on behalf

183 of the private entity.

184 (d) The name and address of a person who may be contacted
 185 for additional information concerning the proposal.

186 (e) The proposed user fees, lease payments, or other
 187 service payments over the term of a comprehensive agreement, and
 188 the methodology for and circumstances that would allow changes
 189 to the user fees, lease payments, and other service payments
 190 over time.

191 (f) Additional material or information that the board
 192 reasonably requests.

193 (5) PROJECT QUALIFICATION AND PROCESS.—

194 (a) The private entity must meet the minimum standards
 195 contained in the board's regulations or guidelines for
 196 qualifying professional services and contracts for traditional
 197 procurement projects.

198 (b) The board must:

199 1. Ensure that provision is made for the private entity's
 200 performance and payment of subcontractors, including, but not
 201 limited to, surety bonds, letters of credit, parent company
 202 guarantees, and lender and equity partner guarantees. For the
 203 components of the qualifying project which involve construction
 204 performance and payment, bonds are required and are subject to
 205 the recordation, notice, suit limitation, and other requirements
 206 of s. 255.05.

207 2. Ensure the most efficient pricing of the security
 208 package that provides for the performance and payment of

209 subcontractors.

210 3. Ensure that provision is made for the transfer of the
 211 private entity's obligations if the comprehensive agreement is
 212 terminated or a material default occurs.

213 (c) After the public notification period has expired in
 214 the case of an unsolicited proposal, the board shall rank the
 215 proposals received in order of preference. In ranking the
 216 proposals, the board may consider factors that include, but are
 217 not limited to, professional qualifications, general business
 218 terms, innovative design techniques or cost-reduction terms, and
 219 finance plans. The board may then begin negotiations for a
 220 comprehensive agreement with the highest-ranked firm. If the
 221 board is not satisfied with the results of the negotiations, the
 222 board may terminate negotiations with the proposer and negotiate
 223 with the second-ranked or subsequent-ranked firms, in the order
 224 consistent with this procedure. If only one proposal is
 225 received, the board may negotiate in good faith, and if the
 226 board is not satisfied with the results of the negotiations, the
 227 board may terminate negotiations with the proposer.

228 Notwithstanding this paragraph, the board may reject all
 229 proposals at any point in the process until a contract with the
 230 proposer is executed.

231 (d) The board shall perform an independent analysis of the
 232 proposed public-private partnership which demonstrates the cost-
 233 effectiveness and overall public benefit before the procurement
 234 process is initiated or before the contract is awarded.

235 (e) The board may approve the development or operation of
 236 a qualifying project, or the design or equipping of a qualifying
 237 project that is developed or operated, if:

238 1. There is a public need for or benefit derived from a
 239 project of the type that the private entity proposes as the
 240 qualifying project, and the project is included in the
 241 university's master plan.

242 2. The estimated cost of the qualifying project is
 243 reasonable in relation to similar facilities.

244 3. The private entity's plans will result in the timely
 245 acquisition, design, construction, improvement, renovation,
 246 expansion, equipping, maintenance, or operation of the
 247 qualifying project.

248 (f) The board may charge a reasonable fee to cover the
 249 costs of processing, reviewing, and evaluating the request,
 250 including, but not limited to, reasonable attorney fees and fees
 251 for financial and technical advisors or consultants and for
 252 other necessary advisors or consultants.

253 (g) Upon approval of a qualifying project, the board shall
 254 establish a date for the commencement of activities related to
 255 the qualifying project. The board may extend the commencement
 256 date.

257 (h) Approval of a qualifying project by the board is
 258 subject to entering into a comprehensive agreement with the
 259 private entity.

260 (6) INTERIM AGREEMENT.—Before or in connection with the

261 negotiation of a comprehensive agreement, the board may enter
 262 into an interim agreement with the private entity proposing the
 263 development or operation of the qualifying project. An interim
 264 agreement does not obligate the board to enter into a
 265 comprehensive agreement. The interim agreement is discretionary
 266 with the parties and is not required on a qualifying project for
 267 which the parties may proceed directly to a comprehensive
 268 agreement without the need for an interim agreement. An interim
 269 agreement must be limited to provisions that:

270 (a) Authorize the private entity to commence activities
 271 for which it may be compensated related to the proposed
 272 qualifying project, including, but not limited to, project
 273 planning and development, design, environmental analysis and
 274 mitigation, survey, other activities concerning any part of the
 275 proposed qualifying project, and ascertaining the availability
 276 of financing for the proposed facility or facilities.

277 (b) Establish the process and timing of the negotiation of
 278 the comprehensive agreement.

279 (c) Contain such other provisions related to an aspect of
 280 the development or operation of a qualifying project that the
 281 board and the private entity deem appropriate.

282 (7) COMPREHENSIVE AGREEMENT.—

283 (a) Before developing or operating the qualifying project,
 284 the private entity must enter into a comprehensive agreement
 285 with the board. The comprehensive agreement must provide for:

286 1. Delivery of performance and payment bonds, letters of

287 credit, or other security acceptable to the board in connection
 288 with the development or operation of the qualifying project in
 289 the form and amount satisfactory to the board. For the
 290 components of the qualifying project which involve construction,
 291 the form and amount of the bonds must comply with s. 255.05.

292 2. Review of the design for the qualifying project by the
 293 board and, if the design conforms to standards acceptable to the
 294 board, the approval of the board. This subparagraph does not
 295 require the private entity to complete the design of the
 296 qualifying project before the execution of the comprehensive
 297 agreement.

298 3. Inspection of the qualifying project by the board to
 299 ensure that the private entity's activities are acceptable to
 300 the board in accordance with the comprehensive agreement.

301 4. Maintenance of a policy of public liability insurance,
 302 a copy of which must be filed with the board and accompanied by
 303 proofs of coverage, or self-insurance, each in the form and
 304 amount satisfactory to the board and reasonably sufficient to
 305 ensure coverage of tort liability to the public and employees
 306 and to enable the continued operation of the qualifying project.

307 5. Monitoring by the board of the maintenance practices to
 308 be performed by the private entity to ensure that the qualifying
 309 project is properly maintained.

310 6. Periodic filing by the private entity of the
 311 appropriate financial statements that pertain to the qualifying
 312 project.

313 7. Procedures that govern the rights and responsibilities
 314 of the board and the private entity in the course of the
 315 construction and operation of the qualifying project and in the
 316 event of the termination of the comprehensive agreement or a
 317 material default by the private entity. The procedures must
 318 include conditions that govern the assumption of the duties and
 319 responsibilities of the private entity by an entity that funded,
 320 in whole or part, the qualifying project or by the board, and
 321 must provide for the transfer or purchase of property or other
 322 interests of the private entity by the board.

323 8. Fees, lease payments, or service payments. In
 324 negotiating user fees, the fees must be the same for persons
 325 using the facility under like conditions and must not materially
 326 discourage use of the qualifying project. The execution of the
 327 comprehensive agreement or a subsequent amendment is conclusive
 328 evidence that the fees, lease payments, or service payments
 329 provided for in the comprehensive agreement comply with this
 330 section. Fees or lease payments established in the comprehensive
 331 agreement as a source of revenue may be in addition to, or in
 332 lieu of, service payments.

333 9. Duties of the private entity, including the terms and
 334 conditions that the board determines serve the public purpose of
 335 this section.

336 (b) The comprehensive agreement may include:

337 1. An agreement by the board to make grants or loans to
 338 the private entity from amounts received from federal, state, or

339 local government or an agency or instrumentality thereof, or
 340 private donors.

341 2. A provision under which each entity agrees to provide
 342 notice of default and cure rights for the benefit of the other
 343 entity, including, but not limited to, a provision regarding
 344 unavoidable delays.

345 3. A provision that terminates the authority and duties of
 346 the private entity under this section and dedicates the
 347 qualifying project to the board.

348 (8) FEES.—An agreement entered into pursuant to this
 349 section may authorize the private entity to impose fees to
 350 members of the public for the use of the facility. The following
 351 provisions apply to the agreement:

352 (a) The board may develop new facilities or increase
 353 capacity in existing facilities through agreements with public-
 354 private partnerships.

355 (b) The public-private partnership agreement must ensure
 356 that the facility is properly operated, maintained, or improved
 357 in accordance with standards set forth in the comprehensive
 358 agreement.

359 (c) The board may lease new facilities or existing fee-
 360 for-use facilities through a public-private partnership
 361 agreement.

362 (d) All revenues must be regulated by the board pursuant
 363 to the comprehensive agreement.

364 (e) A negotiated portion of revenues from fee-generating

365 | uses must be returned to the board over the life of the
 366 | agreement.

367 | (9) FINANCING.—

368 | (a) A private entity may enter into a private-source
 369 | financing agreement between financing sources and the private
 370 | entity. A financing agreement and any liens on the property or
 371 | facility must be paid in full at the applicable closing that
 372 | transfers ownership or operation of the facility to the board at
 373 | the conclusion of the term of the comprehensive agreement.

374 | (b) The board may use innovative finance techniques
 375 | associated with a public-private partnership under this section,
 376 | including, but not limited to, federal loans as provided in
 377 | Titles 23 and 49 C.F.R., commercial bank loans, and hedges
 378 | against inflation from commercial banks or other private
 379 | sources. In addition, the board may provide its own capital or
 380 | operating budget to support a qualifying project. The budget may
 381 | be from any legally permissible funding sources of the board,
 382 | including the proceeds of debt issuances. A financing agreement
 383 | may not subject the board's facility to liens in violation of s.
 384 | 11.066(5).

385 | (10) POWERS AND DUTIES OF THE PRIVATE ENTITY.—

386 | (a) The private entity shall:

387 | 1. Develop or operate the qualifying project in a manner
 388 | that is acceptable to the board in accordance with the
 389 | provisions of the comprehensive agreement.

390 | 2. Maintain, or provide by contract for the maintenance or

391 improvement of, the qualifying project if required by the
 392 comprehensive agreement.

393 3. Cooperate with the board in making best efforts to
 394 establish interconnection between the qualifying project and any
 395 other facility or infrastructure as requested by the board in
 396 accordance with the provisions of the comprehensive agreement.

397 4. Comply with the comprehensive agreement and a lease or
 398 service contract.

399 (b) Each private facility that is constructed pursuant to
 400 this section must comply with the requirements of federal,
 401 state, and local laws; state, regional, and local comprehensive
 402 plans; the board's rules, regulations, procedures, and standards
 403 for facilities; and such other conditions that the board
 404 determines to be in the public's best interest and that are
 405 included in the comprehensive agreement.

406 (c) The board may provide services to the private entity.
 407 An agreement for maintenance and other services entered into
 408 pursuant to this section must provide for full reimbursement for
 409 services rendered for qualifying projects.

410 (d) A private entity of a qualifying project may provide
 411 additional services for the qualifying project to the public or
 412 to other private entities if the provision of additional
 413 services does not impair the private entity's ability to meet
 414 its commitments to the board pursuant to the comprehensive
 415 agreement.

416 (11) EXPIRATION OR TERMINATION OF AGREEMENTS.—Upon the

417 expiration or termination of a comprehensive agreement, the
418 board may use revenues from the qualifying project to pay
419 current operation and maintenance costs of the qualifying
420 project. If the private entity materially defaults under the
421 comprehensive agreement, the compensation that is otherwise due
422 to the private entity is payable to satisfy all financial
423 obligations to investors and lenders on the qualifying project
424 in the same way that is provided in the comprehensive agreement
425 or any other agreement involving the qualifying project, if the
426 costs of operating and maintaining the qualifying project are
427 paid in the normal course. Revenues in excess of the costs for
428 operation and maintenance costs may be paid to the investors and
429 lenders to satisfy payment obligations under their respective
430 agreements. A board may terminate with cause and without
431 prejudice a comprehensive agreement and may exercise other
432 rights or remedies that may be available to it in accordance
433 with the provisions of the comprehensive agreement. The full
434 faith and credit of the board may not be pledged to secure the
435 financing of the private entity. The assumption of the
436 development or operation of the qualifying project does not
437 obligate the board to pay an obligation of the private entity
438 from sources other than revenues from the qualifying project
439 unless stated otherwise in the comprehensive agreement.

440 (12) SOVEREIGN IMMUNITY.—This section does not waive the
441 sovereign immunity of a board, or an officer or employee
442 thereof, with respect to participation in, or approval of, any

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443 part of a qualifying project or its operation, including, but
444 not limited to, interconnection of the qualifying project with
445 any other infrastructure or project.

446 (13) CONSTRUCTION.—This section shall be liberally
447 construed to effectuate the purposes of this section. This
448 section shall be construed as cumulative and supplemental to any
449 other authority or power vested in or exercised by a board. This
450 section does not affect an agreement or existing relationship
451 with a supporting organization involving a board in effect as of
452 January 1, 2014.

453 (a) Except as otherwise provided in this section, this
454 section does not amend existing laws by granting additional
455 powers to, or further restricting, a board from regulating and
456 entering into cooperative arrangements with the private sector
457 for the planning, construction, or operation of a facility.

458 (b) This section does not waive any requirement of s.
459 1013.45.

460 Section 2. This act shall take effect July 1, 2014.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
2 Subcommittee

3 Representative Steube offered the following:

4

5 **Amendment**

6 Remove line 163 and insert:

7 analyses for bond rating agencies. In evaluating the technical

8

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 543 Pub. Rec./Public-Private Partnerships/State Universities

SPONSOR(S): Steube

TIED BILLS: HB 541 **IDEN./SIM. BILLS:** SB 1396

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Higher Education & Workforce Subcommittee	10 Y, 0 N	Thomas	Sherry
2) Government Operations Subcommittee		Harrington	Williamson
3) Education Committee			

SUMMARY ANALYSIS

House Bill 541 creates a public-private partnership process for state universities. It authorizes state university boards of trustees (board) to enter into P3s for specified qualifying projects if the board determines the project is in the public's best interest.

This bill, which is tied to the passage of House Bill 541, creates an exemption from public record requirements for unsolicited proposals for public-private projects for the upgrade of state university facilities and infrastructure.

The bill provides that unsolicited proposals are exempt from public record requirements until such time that the board receives and ranks the proposals and provides notice of its intended decision. It provides that an unsolicited proposal is not exempt for more than 12 months after the state university board of trustees rejects all proposals received for the project described in the unsolicited proposals. If the board of trustees does not intend to enter into an agreement for the project, the unsolicited proposal is no longer exempt from the date the proposal was received.

The public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

The bill may create a minimal fiscal impact on state universities.

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 public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This 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 State 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., 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.

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

House Bill 541 (2014)

House Bill 541 creates a public-private partnership process for state universities. House Bill 541 authorizes state university boards of trustees (board) to enter into P3s for specified qualifying projects³ if the board determines the project is in the public's best interest.

The board may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into an agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities.

If the board receives an unsolicited proposal and intends to enter into a P3 agreement for the project, the board must publish a notice in a newspaper of general circulation at least once a week for two weeks stating that the board has received a proposal and will accept other proposals. The board must establish a timeframe in which to accept other proposals.

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ House bill 541 defines "qualifying project" as a facility or project that serves a public educational, research, housing, parking, infrastructure, recreational, or cultural purpose that is used or will be used by a state university or an improvement, including equipment, of a facility that will be principally used by a state university in serving the university's core mission.

After the notification period has expired, the board must rank the proposals received in order of preference. If negotiations with the first ranked firm are unsuccessful, the board may begin negotiations with the second ranked firm. The board may reject all proposals at any point in the process.

Public Record Exemption

Current law does not provide a public record exemption for unsolicited proposals. However, sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt⁴ from public record requirements until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.⁵ If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt until the agency provides notice of its intended decision or withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.⁶

Effect of Proposed Changes

The bill, which is tied to the passage of House Bill 541, creates an exemption from public record requirements for unsolicited proposals for P3 projects for the upgrade of state university facilities and infrastructure.

The bill provides that an unsolicited proposal is exempt from public record requirements until such time that the board receives and ranks the proposals and provides notice of its intended decision. It also provides that an unsolicited proposal is not exempt for more than 12 months after the board rejects all proposals received for the project described in the unsolicited proposal.

If the board does not intend to enter into the agreement for the project, the unsolicited proposal is no longer exempt; however, it is unclear if the unsolicited proposal is no longer exempt on the date the unsolicited proposal was received or 12 months from the date the unsolicited proposal was received.

The public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1. Amends s. 1013.505, F.S., relating to P3 projects for the upgrade of state university facilities and infrastructure; provides an exemption for public records requirements for unsolicited proposals held by a state university board of trustees for a specified period; provides for future legislative review and repeal of the exemption.

Section 2. Provides a statement of public necessity.

Section 3. Provides a contingent effective date.

⁴ 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).

⁵ Section 119.071(1)(b), F.S.

⁶ *Id.*

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.

D. FISCAL COMMENTS:

The bill may create a minimal fiscal impact on boards that receive unsolicited P3 proposals because staff responsible for complying with the public records request could require training related to the public record exemption. In addition, boards could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the board.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require municipalities or counties to expend funds or to take any action requiring the expenditure of funds, reduce the authority that municipalities or counties have to raise revenues in the aggregate, or reduce the percentage of state tax shared with municipalities or counties.

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 final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final 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 creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the state purpose of the law. The bill creates a public record exemption for unsolicited proposals for P3 projects that expire after a certain time. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Expiration of Public Record Exemption

The bill provides that unsolicited proposals may not remain exempt for more than 12 months after the board rejects all proposals, or if the board does not intend to enter into an agreement for the project, the date the unsolicited proposal was received. This provision could create uncertainty regarding whether an unsolicited proposal is immediately made public upon the date received if the board does not intend to enter into an agreement for the project, exempt indefinitely from date of receipt, or made public 12 months after the date received. It also is not clear how the board must indicate whether they intend to enter into an agreement.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to public records; amending s.
 3 1013.505, F.S., relating to public-private projects
 4 for the upgrade of state university facilities and
 5 infrastructure; providing an exemption from public
 6 records requirements for unsolicited proposals held by
 7 a state university board of trustees for a specified
 8 period; providing for future legislative review and
 9 repeal of the exemption; providing a statement of
 10 public necessity; providing a contingent effective
 11 date.

12
 13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. Subsection (14) is added to section 1013.505,
 16 Florida Statutes, as created by HB 541, 2014 Regular Session, to
 17 read:

18 1013.505 Public-private partnerships; state universities
 19 and private entities.—

20 (14) PUBLIC RECORDS EXEMPTION.—

21 (a) If a board receives an unsolicited proposal under this
 22 section, the proposal is exempt from s. 119.07(1) and s. 24(a),
 23 Art. I of the State Constitution until such time that the board
 24 receives and ranks the proposals as described in subsection (5)
 25 and provides notice of its intended decision.

26 (b) An unsolicited proposal is not exempt for more than 12

27 months after the board rejects all proposals received for the
 28 project described in the unsolicited proposal or, if the board
 29 does not intend to enter into an agreement for the project, the
 30 date that the unsolicited proposal was received.

31 (c) This subsection is subject to the Open Government
 32 Sunset Review Act in accordance with s. 119.15 and shall stand
 33 repealed on October 2, 2019, unless reviewed and saved from
 34 repeal through reenactment by the Legislature.

35 Section 2. The Legislature finds that it is a public
 36 necessity that an unsolicited proposal held by a state
 37 university board of trustees pursuant to s. 1013.505, Florida
 38 Statutes, which may identify proprietary business information,
 39 be made exempt from s. 119.07(1), Florida Statutes, and s.
 40 24(a), Article I of the State Constitution until the board
 41 provides notification of its decision or its intent to make a
 42 decision after ranking proposals under s. 1013.505(5)(c),
 43 Florida Statutes. An unsolicited proposal is not exempt for more
 44 than 12 months after the board rejects all proposals received
 45 for the project described in the unsolicited proposal or, if the
 46 board does not intend to enter into an agreement for the
 47 project, the date that the unsolicited proposal was received.
 48 The protection of information contained in unsolicited
 49 proposals, as set forth in s. 1013.505, Florida Statutes,
 50 submitted to a state university board of trustees that serve the
 51 public purpose of procuring the timely development or operation
 52 of a qualifying project as defined in s. 1013.505(1)(i), Florida

53 Statutes, and serve a public need for timely and cost-effective
 54 acquisition, design, construction, improvement, renovation,
 55 expansion, equipping, maintenance, operation, implementation, or
 56 installation of projects that will be principally used by a
 57 state university in serving the university's core mission may
 58 not be wholly satisfied by existing procurement methods. These
 59 unsolicited proposals may contain proprietary information and
 60 trade secrets, such as patent-pending designs and financing
 61 terms. If such information is publicly available before the
 62 state university board of trustees makes a decision, competitors
 63 could determine the creative financing used to fund these
 64 projects. Therefore, the Legislature finds that the harm that
 65 may result from the release of such information outweighs any
 66 public benefit that may be derived from disclosure of the
 67 information.

68 Section 3. This act shall take effect on the same date
 69 that HB 541 or similar legislation takes effect, if such
 70 legislation is adopted in the same legislative session or an
 71 extension thereof and becomes law.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
 2 Subcommittee

3 Representative Steube offered the following:

4
 5 **Amendment (with title amendment)**

6 Remove everything after the enacting clause and insert:

7 Section 1. Subsection (14) is added to section 1013.505,
 8 Florida Statutes, as created by HB 541, 2014 Regular Session, to
 9 read:

10 1013.505 Public-private partnerships; state universities
 11 and private entities; public record and public meeting
 12 exemptions.--

13 (14) PUBLIC RECORD AND PUBLIC MEETING EXEMPTIONS.-

14 (a) For purposes of this subsection, "competitive
 15 solicitation" has the same meaning as in s. 119.071(1).

16 (b)1. An unsolicited proposal received by a board is
 17 exempt from s. 119.07(1) and s. 24(a), Art. I of the State



Amendment No.

18 Constitution until such time as the board provides notice of an
19 intended decision for a qualifying project.

20 2. If the board rejects all proposals submitted pursuant
21 to a competitive solicitation for a qualifying project and the
22 board concurrently provides notice of its intent to seek
23 additional proposals for such project, then the unsolicited
24 proposal remains exempt until such time that the board provides
25 notice of an intended decision concerning the reissued
26 competitive solicitation for the qualifying project or until the
27 board withdraws the reissued competitive solicitation for such
28 project.

29 3. An unsolicited proposal is not exempt for longer than
30 90 days after the initial notice by the board rejecting all
31 proposals.

32 (c) If the board does not issue a competitive solicitation
33 for a qualifying project, then the unsolicited proposal is no
34 longer exempt 180 days after receipt of the unsolicited proposal
35 by the board.

36 (d)1. Any portion of a board meeting at which an
37 unsolicited proposal that is exempt is discussed is exempt from
38 s. 286.011 and s. 24(b), Art. I of the State Constitution.

39 2.a. A complete recording must be made of any portion of
40 an exempt meeting. No portion of the exempt meeting may be held
41 off the record.

42 b. The recording of, and any records generated during, the
43 exempt meeting are exempt from s. 119.07(1) and s. 24(a), Art. I



Amendment No.

44 of the State Constitution until such time as the board provides
45 notice of an intended decision for a qualifying project or 180
46 days after receipt of the unsolicited proposal by the board if
47 the board does not issue a competitive solicitation for the
48 project.

49 c. If the board rejects all proposals and concurrently
50 provides notice of its intent to reissue a competitive
51 solicitation, the recording and any records generated at the
52 exempt meeting remain exempt from s. 119.07(1) and s. 24(a),
53 Art. I of the State Constitution until such time as the board
54 provides notice of an intended decision concerning the reissued
55 competitive solicitation or until the board withdraws the
56 reissued competitive solicitation for such project.

57 d. A recording and any records generated during an exempt
58 meeting are not exempt for longer than 90 days after the initial
59 notice by the board rejecting all proposals.

60 (e) This subsection is subject to the Open Government
61 Sunset Review Act in accordance with s. 119.15 and shall stand
62 repealed on October 2, 2019, unless reviewed and saved from
63 repeal through reenactment by the Legislature.

64 Section 2. (1) The Legislature finds that it is a public
65 necessity that an unsolicited proposal received by a state
66 university board of trustees pursuant to s. 1013.505, Florida
67 Statutes, be made exempt from s. 119.07(1), Florida Statutes,
68 and s. 24(a), Article I of the State Constitution until a time
69 certain. Prohibiting the public release of unsolicited proposals



Amendment No.

70 until a time certain ensures the effective and efficient
71 administration of the public-private partnership process
72 established in s. 1013.505, Florida Statutes. Temporarily
73 protecting unsolicited proposals protects the public-private
74 partnership process by encouraging private entities to submit
75 such proposals, which will facilitate the timely development and
76 operation of a qualifying project. Protecting such information
77 ensures that other private entities do not gain an unfair
78 competitive advantage. The public record exemption preserves
79 public oversight of the public-private partnership process by
80 providing for disclosure of the unsolicited proposal when the
81 board provides notice of an intended decision; no longer than 90
82 days after the board rejects all proposals received in a
83 competitive solicitation for a qualifying project; or 180 days
84 after receipt of an unsolicited proposal if the board does not
85 issue a competitive solicitation for a qualifying project
86 related to the proposal.

87 (2) The Legislature further finds that it is a public
88 necessity that any portion of a meeting of the state university
89 board of trustees at which an unsolicited proposal that is
90 exempt from public record requirements is discussed be made
91 exempt from s. 286.011, Florida Statutes, and s. 24(b), Art. I
92 of the State Constitution. The Legislature also finds that it is
93 a public necessity that the recording of, and any records
94 generated during, a closed meeting be made temporarily exempt
95 from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I of the



Amendment No.

96 State Constitution. Failure to close any portion of a meeting
97 wherein such unsolicited proposal is discussed, and failure to
98 protect the release of the recording and records generated
99 during that closed meeting, would defeat the purpose of the
100 public record exemption. In addition, the Legislature finds that
101 public oversight is maintained because the public record
102 exemption for the recording and records generated during any
103 closed portion of a meeting are subject to public disclosure
104 when the board provides notice of an intended decision; no
105 longer than 90 days after the board rejects all proposals
106 received in a competitive solicitation for a qualifying project;
107 or 180 days after receipt of an unsolicited proposal if the
108 board does not issue a competitive solicitation for a qualifying
109 project related to the proposal.

110 Section 3. This act shall take effect on the same date
111 that HB 541 or similar legislation takes effect, if such
112 legislation is adopted in the same legislative session or an
113 extension thereof and becomes law.

114

115

116

T I T L E A M E N D M E N T

117
118 Remove everything before the enacting clause and insert:
119 An act relating to public records and public meetings; amending
120 s. 1013.505, F.S., relating to public-private projects for the
121 upgrade of state university facilities and infrastructure;

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Amendment No.

122 providing a definition; providing an exemption from public
123 record requirements for unsolicited proposals received by a
124 state university board of trustees for a specified period;
125 providing an exemption from public meeting requirements for any
126 portion of a meeting of a state university board of trustees
127 wherein exempt proposals are discussed; requiring a recording to
128 be made of the closed meeting; providing an exemption from
129 public record requirements for the recording of, and any records
130 generated during, a closed meeting for a specified period;
131 providing for future legislative review and repeal of the
132 exemption; providing a statement of public necessity; providing
133 a contingent effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 643 Pub. Rec./Trade Secrets/Computers
SPONSOR(S): Criminal Justice Subcommittee; La Rosa
TIED BILLS: HB 641 **IDEN./SIM. BILLS:** SB 366

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Jones	Cunningham
2) Government Operations Subcommittee		Williamson	Williamson
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law provides a public record exemption for data, programs, or supporting documentation that is a trade secret and that resides or exists internal or external to a computer, computer system, or computer network. Such trade secrets are confidential and exempt from public record requirements when held by an agency.

This bill, which is linked to the passage of House Bill 641, expands the public record exemption for data, programs, or supporting documentation that is a trade secret, to include such information when it resides or exists internal or external to an electronic device.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill could create a minimal fiscal impact on state and local governments. See FISCAL COMMENTS section.

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 record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This 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 State 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., 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.

House Bill 641 (2014)

Chapter 815, F.S., entitled the "Florida Computer Crimes Act," was created in 1978 in recognition of growing computer-related crime. The chapter establishes legislative intent, and a variety of computer-related offenses and definitions.

House Bill 641 adds legislative intent language that recognizes that the proliferation of new technologies impact computer-related crimes. To this end, the bill amends the definition of computer network and creates a definition of the term "electronic device," which means a device that is capable of communicating across a computer network with other computers or devices for the purpose of transmitting, receiving, or storing data.

Public Record Exemption for Trade Secrets

Section 815.04(3)(a), F.S., provides a public record exemption for data, programs, or supporting documentation that is a trade secret³ and that resides or exists internal or external to a computer,

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ Section 812.081, F.S., defines a "trade secret" as the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be: a Secret; of value; for use or in use by the business; and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

computer system, or computer network. Such trade secrets are confidential and exempt⁴ from public record requirements when held by an agency.⁵

For purposes of the public record exemption, agency is defined to mean:

[A]ny 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

Effect of the Bill

This bill, which is linked to the passage of House Bill 641, expands the current public record exemption for trade secrets to include such information when it resides or exists internal or external to an electronic device.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1. Amends s. 815.04, F.S., relating to offenses against intellectual property; public records exemptions.

Section 2. Provides a public necessity statement.

Section 3. Provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

See FISCAL COMMENTS.

⁴ 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).

⁵ Section 119.011, F.S., defines a "agency" to mean 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(2), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could create a minimal fiscal impact on state and local agencies. Staff responsible for complying with public record requests could require training related to the expansion of the current public record exemption. In addition, such agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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:

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 newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final 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 a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands the current public record exemption for certain trade secret information to include such information as it relates to an electronic device.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Public Necessity Statement

The public necessity statement provides justification for the public record exemption found in current law in addition to the changes proposed by the bill. However, the public necessity statement only needs to provide reasons for the expansion of the public record exemption. In addition, the word "made" is missing from line 54 of the public necessity statement.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 12, 2014, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorable as a committee substitute. The amendment removed the changes to the offense against intellectual property because they are included in CS/HB 641.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

27 Constitution.

28 (b) Whoever willfully, knowingly, and without
29 authorization discloses or takes data, programs, or supporting
30 documentation which is a trade secret as defined in s. 812.081
31 or is confidential as provided by law residing or existing
32 internal or external to a computer, computer system, or computer
33 network commits an offense against intellectual property.

34 (c) This subsection is subject to the Open Government
35 Sunset Review Act in accordance with s. 119.15, and shall stand
36 repealed on October 2, 2019, unless reviewed and saved from
37 repeal through reenactment by the Legislature.

38 Section 2. The Legislature finds that it is a public
39 necessity that trade secrets and intellectual property be
40 protected from disclosure by persons gaining unauthorized access
41 into computer networks and electronic devices. Trade secrets and
42 intellectual property are already afforded public records
43 exemptions because of the immense importance of this type of
44 proprietary information to the economic competition between this
45 state and other states and nations. As technology continues to
46 evolve, it is important that the existing public records
47 exemption for trade secrets and intellectual property expand
48 accordingly to encompass new technology used in association with
49 sensitive trade secrets and intellectual property. Thus the
50 Legislature declares that it is a public necessity that data,
51 programs, and supporting documentation that are trade secrets
52 which are held by an agency and which reside or exist internal

53 | or external to a computer, computer system, computer network, or
 54 | electronic device be confidential and exempt from the
 55 | requirements of s. 119.07(1), Florida Statutes, and s. 24(a),
 56 | Article I of the State Constitution.

57 | Section 3. This act shall take effect on the same date
 58 | that HB 641 or similar legislation takes effect, if such
 59 | legislation is adopted in the same legislative session or an
 60 | extension thereof and becomes a law.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
 2 Subcommittee
 3 Representative La Rosa offered the following:

Amendment

Remove lines 38-56 and insert:

4
 5
 6
 7 Section 2. The Legislature finds that it is a public
 8 necessity that data, programs, or supporting documentation that
 9 is a trade secret as defined in s. 812.081, Florida Statutes,
 10 that is held by an agency as defined in chapter 119, Florida
 11 Statutes, and that resides or exists internal or external to an
 12 electronic device be made confidential and exempt from s.
 13 119.07(1), Florida Statute, and s. 24(a), Art. I of the State
 14 Constitution. The public release of such data, programs, and
 15 supporting documentation would negatively impact the business
 16 interests of those providing an agency such trade secrets by
 17 damaging the business in the marketplace. Without the public




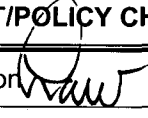
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18 record exemption, those entities and individuals disclosing such
19 trade secrets would hesitate to cooperate with that agency,
20 which would impair the effective and efficient administration of
21 governmental functions. Thus, the public and private harm in
22 disclosing data, programs, or supporting documentation that is a
23 trade secret, and that resides or exists internal or external to
24 an electronic device, significantly outweighs any public benefit
25 derived from disclosure, and the public's ability to scrutinize
26 and monitor agency action is not diminished by the nondisclosure
27 of such trade secrets.

28

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1051 Pub. Rec./Public-Private Partnerships
SPONSOR(S): Roberson
TIED BILLS: IDEN./SIM. BILLS: SB 1318

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington 	Williamsor 
2) Local & Federal Affairs Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Current law authorizes public-private partnerships for specified public purpose projects. If a public entity solicits proposals for qualifying projects, the responses are protected from public disclosure for a specified period of time. However, if a public entity receives an unsolicited proposal for a qualifying project from the private sector, that unsolicited proposal is considered a public record.

The bill creates a public record exemption for an unsolicited proposal held by a responsible public entity until such time that the responsible public entity receives, opens, and ranks the proposals. If the responsible public entity rejects all proposals submitted and concurrently provides notice of its intent to seek additional proposals, the unsolicited proposal remains exempt until such time that the responsible public entity solicits bids and provides notice of a decision or intended decision. An unsolicited proposal is not exempt for more than 12 months after the responsible public entity rejects all proposals.

The public record exemption is subject to the Open Government Sunset Review Act and must stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

The bill does not appear to have a fiscal impact on state government; however, it may create a minimal fiscal impact on local governments.

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 public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This 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 State 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., 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.

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

Public-Private Partnerships

Chapter 287, F.S., governs the procurement process for public-private partnerships (P3s) for public purpose projects. Section 287.05712, F.S., authorizes responsible public entities³ to enter into P3s for specified qualifying projects⁴ if the public entity determines the project is in the public's best interest.⁵

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ Section 287.05712(1)(j), F.S., defines "responsible public entity" as a county, municipality, school board, or any other political subdivision of the state; a public body politic and corporate; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

⁴ Section 287.05712(1)(i), F.S., defines "qualifying project" as a facility or project that serves a public purpose, including, but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity; an improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector; a water, wastewater, or surface water management facility or other related infrastructure; or for projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects.

⁵ Section 287.05712(4)(d), F.S.

Responsible public entities may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into an agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities. Unsolicited proposals from private entities must be accompanied by the following material and information, unless waived by the responsible public entity:⁶

- A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project.
- A description of the method by which the private entity proposes to secure any necessary property interests that are required for the qualifying project.
- A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity.
- The name and address of the person who may be contacted for further information concerning the proposal.
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology and circumstances for changes to the user fees, lease payments, and other service payments over time.
- Any additional material or information the responsible public entity reasonably requests.

If the responsible public entity receives an unsolicited proposal and intends to enter into a P3 agreement for the project, the responsible public entity must publish a notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks stating that the entity has received a proposal and will accept other proposals.⁷ The responsible public entity must establish a timeframe in which to accept other proposals.⁸

After the notification period has expired, the responsible public entity must rank the proposals received in order of preference.⁹ If negotiations with the first ranked firm are unsuccessful, the responsible public entity may begin negotiations with the second ranked firm.¹⁰ The responsible public entity may reject all proposals at any point in the process.¹¹

Public Record Exemption

Current law does not provide a public record exemption for unsolicited proposals submitted to responsible public entities. However, sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt¹² from public record requirements until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.¹³ If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt until the agency provides notice of its intended decision or withdraws the reissued competitive solicitation. A bid, proposal, or

⁶ Section 287.05712(5), F.S.

⁷ Section 287.05712(4)(b), F.S.

⁸ *Id.*

⁹ Section 287.05712(6)(c), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² 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).

¹³ Section 119.071(1)(b), F.S.

reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.¹⁴

Effect of Proposed Changes

The bill creates a public record exemption for an unsolicited proposal held by a responsible public entity until such time that the responsible public entity receives, opens, and ranks the proposals. If the responsible public entity rejects all proposals submitted and concurrently provides notice of its intent to seek additional proposals, the unsolicited proposal remains exempt until such time that the responsible public entity solicits bids and provides notice of a decision or intended decision. An unsolicited proposal is not exempt for more than 12 months after the responsible public entity rejects all proposals.

The public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1. amends s. 287.05712, F.S., relating to public-private projects for the upgrade of public facilities and infrastructure; providing an exemption from public record requirements for unsolicited proposals held by a responsible public entity for a specified period; providing for future legislative review and repeal of the exemption.

Section 2. provides a public necessity statement.

Section 3. provides an effective date of July 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:

The bill may create a minimal fiscal impact on local governments that receive unsolicited P3 proposals because staff responsible for complying with the public records request could require training related to the public record exemption. In addition, local governments could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

¹⁴ *Id.*

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require municipalities or counties to expend funds or take any action requiring the expenditure of funds, reduce the authority that municipalities or counties have to raise revenues in the aggregate, or reduce the percentage of state tax shared with municipalities or counties.

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 final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final 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 creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the state purpose of the law. The bill creates a public record exemption for unsolicited proposals for P3 projects that expires after a certain time. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

The bill provides that unsolicited proposals are exempt until the responsible public entity receives, opens, and ranks the proposals, but also provides that solicitations may remain exempt for a specified period of time if the public entity rejects all proposals and concurrently provides notice of its intent to seek additional proposals. This could create confusion because current law allows the responsible public entity to reject all proposals at any time in the process, which could occur after the public entity has received, opened, and ranked the proposals.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

27 rejected unsolicited proposal remains exempt from s. 119.07(1)
 28 and s. 24(a), Art. I of the State Constitution until such time
 29 that the responsible public entity solicits bids and provides
 30 notice of a decision or intended decision. An unsolicited
 31 proposal is not exempt for more than 12 months after the
 32 responsible public entity rejects all proposals submitted as
 33 provided in paragraph (6)(c).

34 (c) This subsection is subject to the Open Government
 35 Sunset Review Act in accordance with s. 119.15 and shall stand
 36 repealed on October 2, 2019, unless reviewed and saved from
 37 repeal through reenactment by the Legislature.

38 Section 2. The Legislature finds that it is a public
 39 necessity that an unsolicited proposal held by a responsible
 40 public entity pursuant to s. 287.05712, Florida Statutes, be
 41 made exempt from s. 119.07(1), Florida Statutes, and s. 24(a),
 42 Article I of the State Constitution until such time that the
 43 responsible public entity receives, opens, and ranks the
 44 proposals as set forth in s. 287.05712(6)(c), Florida Statutes,
 45 or, if the responsible public entity rejects all proposals,
 46 until the responsible public entity solicits bids for the
 47 qualifying project and notices its decision or intended
 48 decision. An unsolicited proposal is not exempt for more than 12
 49 months after all proposals are rejected. The disclosure of
 50 information in an unsolicited proposal, such as financing
 51 mechanisms and terms, formulas, and designs, could give
 52 competitors a business advantage by knowing the proposal's

53 financial strategy and innovative plans, thereby injuring the
54 entity that submitted the unsolicited proposal and placing the
55 entity at a competitive disadvantage in the marketplace. Without
56 the exemption, entities might not submit unsolicited proposals
57 that could provide timely and cost-effective solutions for
58 qualifying projects that serve a public need. Therefore, the
59 Legislature finds that the harm that may result from the release
60 of such information outweighs any public benefit that may be
61 derived from disclosure of the information.

62 Section 3. This act shall take effect July 1, 2014.



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COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Government Operations
 2 Subcommittee

3 Representative Roberson, K. offered the following:

4
 5 **Amendment (with title amendment)**

6 Remove everything after the enacting clause and insert:

7 Section 1. Subsection (16) is added to section 287.05712,
 8 Florida Statutes, to read:

9 Section 287.05712 Public-private partnerships; public
 10 record and public meeting exemptions.--

11 (16) PUBLIC RECORD AND PUBLIC MEETING EXEMPTIONS.--

12 (a) For purposes of this subsection, "competitive
 13 solicitation" has the same meaning as in s. 119.071(1).

14 (b)1. An unsolicited proposal received by a responsible
 15 public entity is exempt from s. 119.07(1) and s. 24(a), Art. I
 16 of the State Constitution until such time as the responsible



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17 public entity provides notice of an intended decision for a
18 qualifying project.

19 2. If the responsible public entity rejects all proposals
20 submitted pursuant to a competitive solicitation for a
21 qualifying project and such entity concurrently provides notice
22 of its intent to seek additional proposals for such project,
23 then the unsolicited proposal remains exempt until such time
24 that the responsible public entity provides notice of an
25 intended decision concerning the reissued competitive
26 solicitation for the qualifying project or until the responsible
27 public entity withdraws the reissued competitive solicitation
28 for such project.

29 3. An unsolicited proposal is not exempt for longer than
30 90 days after the initial notice by the responsible public
31 entity rejecting all proposals.

32 (c) If the responsible public entity does not issue a
33 competitive solicitation for a qualifying project, then the
34 unsolicited proposal is no longer exempt 180 days after receipt
35 of the unsolicited proposal by such entity.

36 (d)1. Any portion of a board meeting at which an
37 unsolicited proposal that is exempt is discussed is exempt from
38 s. 286.011 and s. 24(b), Art. I of the State Constitution.

39 2.a. A complete recording must be made of any portion of
40 an exempt meeting. No portion of the exempt meeting may be held
41 off the record.



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42 b. The recording of, and any records generated during, the
43 exempt meeting are exempt from s. 119.07(1) and s. 24(a), Art. I
44 of the State Constitution until such time as the responsible
45 public entity provides notice of an intended decision for a
46 qualifying project or 180 days after receipt of the unsolicited
47 proposal by the responsible public entity if such entity does
48 not issue a competitive solicitation for the project.

49 c. If the responsible public entity rejects all proposals
50 and concurrently provides notice of its intent to reissue a
51 competitive solicitation, the recording and any records
52 generated at the exempt meeting remain exempt from s. 119.07(1)
53 and s. 24(a), Art. I of the State Constitution until such time
54 as the responsible public entity provides notice of an intended
55 decision concerning the reissued competitive solicitation or
56 until the responsible public entity withdraws the reissued
57 competitive solicitation for such project.

58 d. A recording and any records generated during an exempt
59 meeting are not exempt for longer than 90 days after the initial
60 notice by the responsible public entity rejecting all proposals.

61 (e) This subsection is subject to the Open Government
62 Sunset Review Act in accordance with s. 119.15 and shall stand
63 repealed on October 2, 2019, unless reviewed and saved from
64 repeal through reenactment by the Legislature.

65 Section 2. (1) The Legislature finds that it is a public
66 necessity that an unsolicited proposal received by a responsible
67 public entity pursuant to s. 287.05712, Florida Statutes, be



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68 made exempt from s. 119.07(1), Florida Statutes, and s. 24(a),
69 Article I of the State Constitution until a time certain.
70 Prohibiting the public release of unsolicited proposals until a
71 time certain ensures the effective and efficient administration
72 of the public-private partnership process established in s.
73 287.05712, Florida Statutes. Temporarily protecting unsolicited
74 proposals protects the public-private partnership process by
75 encouraging private entities to submit such proposals, which
76 will facilitate the timely development and operation of a
77 qualifying project. Protecting such information ensures that
78 other private entities do not gain an unfair competitive
79 advantage. The public record exemption preserves public
80 oversight of the public-private partnership process by providing
81 for disclosure of the unsolicited proposal when the responsible
82 public entity provides notice of an intended decision; no longer
83 than 90 days after the responsible public entity rejects all
84 proposals received in a competitive solicitation for a
85 qualifying project; or 180 days after receipt of an unsolicited
86 proposal if such entity does not issue a competitive
87 solicitation for a qualifying project related to the proposal.

88 (2) The Legislature further finds that it is a public
89 necessity that any portion of a meeting of the responsible
90 public entity at which an unsolicited proposal that is exempt
91 from public record requirements is discussed be made exempt from
92 s. 286.011, Florida Statutes, and s. 24(b), Art. I of the State
93 Constitution. The Legislature also finds that it is a public



Amendment No.

94 necessity that the recording of, and any records generated
95 during, a closed meeting be made temporarily exempt from s.
96 119.07(1), Florida Statutes, and s. 24(a), Art. I of the State
97 Constitution. Failure to close any portion of a meeting wherein
98 such unsolicited proposal is discussed, and failure to protect
99 the release of the recording and records generated during that
100 closed meeting would defeat the purpose of the public record
101 exemption. In addition, the Legislature finds that public
102 oversight is maintained because the public record exemption for
103 the recording and records generated during any closed portion of
104 a meeting of the responsible public entity are subject to public
105 disclosure when such entity provides notice of an intended
106 decision; no longer than 90 days after the responsible public
107 entity rejects all proposals received in a competitive
108 solicitation for a qualifying project; or 180 days after receipt
109 of an unsolicited proposal if the responsible public entity does
110 not issue a competitive solicitation for a qualifying project
111 related to the proposal.

112 Section 3. This act shall take effect July 1, 2014.

113
114
115 -----
116 **T I T L E A M E N D M E N T**

117 Remove everything before the enacting clause and insert:
118 An act relating to public records and public meetings; amending
119 s. 287.05712, F.S., relating to public-private projects for the

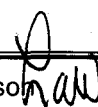
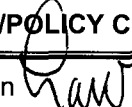


Amendment No.

120 upgrade of public facilities and infrastructure; providing a
121 definition; providing an exemption from public record
122 requirements for unsolicited proposals received by a responsible
123 public entity for a specified period; providing an exemption
124 from public meeting requirements for any portion of a meeting of
125 a responsible public entity wherein exempt proposals are
126 discussed; requiring a recording to be made of the closed
127 meeting; providing an exemption from public record requirements
128 for the recording of, and any records generated during, a closed
129 meeting for a specified period; providing for future legislative
130 review and repeal of the exemption; providing a statement of
131 public necessity; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 14-06 OGSR Investigation of Allegation of Testing Impropriety
SPONSOR(S): Government Operations Subcommittee
TIED BILLS: IDEN./SIM. BILLS: SB 656

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.

It is unlawful for anyone to knowingly and willfully violate test security rules set by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification, or administered by school districts. A district school superintendent or president of a public or nonpublic postsecondary educational institution must cooperate with the Commissioner of Education in any investigation concerning the administration of a test administered pursuant to state statute or rule.

Current law provides a public record exemption for certain information obtained or reported to the Department of Education pursuant to an investigation regarding an allegation of testing impropriety. Specifically, the identity of a school or postsecondary educational institution, personal identifying information of any personnel of any school district or postsecondary educational institution, or any specific allegations of misconduct are confidential and exempt from public record requirements. The information remains confidential and exempt until the conclusion of the investigation or until such time as the investigation ceases to be active.

The bill reenacts the public record exemption, 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.

Test Security

It is unlawful for anyone to knowingly and willfully violate test security rules set by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification, or administered by school districts.⁴ Violations include, in part, giving examinees access to test questions prior to testing; copying reproducing, or using in any manner inconsistent with test security rules all or any portion of any secure test booklet; coaching examinees during testing; or making answer keys available to examinees.⁵ A district school superintendent or president of a public or nonpublic postsecondary educational institution must cooperate with the Commissioner of Education in any investigation concerning the administration of a test administered pursuant to state statute or rule.⁶

Public Record Exemption under Review

In 2009, the Legislature created a public record exemption for certain information obtained or reported to the Department of Education pursuant to an investigation regarding an allegation of testing impropriety.⁷ Specifically, the identity of a school or postsecondary educational institution, personal

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 Section 1008.24(1), F.S.

⁵ See s. 1008.24(1)(a)-(g), F.S.

⁶ Section 1008.24(4)(a), F.S.

⁷ Chapter 2009-143, L.O.F.; codified as s. 1008.21(3)(b), F.S., however, the section has since been amended and the public record exemption can now be found at paragraph (4)(b).

identifying information of any personnel of any school district or postsecondary educational institution, or any specific allegations of misconduct are confidential and exempt⁸ from public record requirements.

The information remains confidential and exempt until the conclusion of the investigation or until such time as the investigation ceases to be active. An investigation is deemed concluded upon:

- A finding that no impropriety has occurred;
- The conclusion of any resulting preliminary investigation;
- The completion of any resulting investigation by a law enforcement agency; or
- Referral of the matter to an employer who has the authority to take disciplinary action against an individual who is suspected of a testing impropriety.⁹

An investigation is considered active so long as it is ongoing and there is a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future.¹⁰

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2014, unless reenacted by the Legislature.¹¹

During the 2013 interim, subcommittee staff met with staff of the Department of Education as part of the Open Government Sunset Review process.¹² Staff of the Department of Education recommended reenactment of the public record exemption.

Effect of the Bill

The bill removes the repeal date, thereby reenacting the public record exemption for certain information obtained or reported to the Department of Education pursuant to an investigation regarding an allegation of testing impropriety. The bill also makes editorial changes.

B. SECTION DIRECTORY:

Section 1 amends s. 1008.24, F.S., to save from repeal the public record exemption for certain information obtained or reported to the Department of Education pursuant to an investigation regarding an allegation of testing impropriety.

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.

⁸ 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).

⁹ Section 1008.24(4)(b), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² 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.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

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.

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2014

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 1008.24, F.S., relating
 4 to an exemption from public record requirements for
 5 certain information held by the Department of
 6 Education during active investigations of allegations
 7 of testing impropriety; making editorial changes;
 8 removing the scheduled repeal of the exemption;
 9 providing an effective date.

10
 11 Be It Enacted by the Legislature of the State of Florida:

12
 13 Section 1. Paragraph (b) of subsection (4) of section
 14 1008.24, Florida Statutes, is amended to read:

15 1008.24 Test administration and security; public record
 16 exemption.--

17 (4)

18 (b) The identity of a school or postsecondary educational
 19 institution, personal identifying ~~the personally identifiable~~
 20 information of any personnel of any school district or
 21 postsecondary educational institution, or any specific
 22 allegations of misconduct obtained or reported pursuant to an
 23 investigation conducted by the Department of Education of a
 24 testing impropriety are confidential and exempt from s.
 25 119.07(1) and s. 24(a), Art. I of the State Constitution until
 26 the conclusion of the investigation or until such time as the

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ORIGINAL

2014

27 investigation ceases to be active. For the purpose of this
 28 paragraph, an investigation is ~~shall be~~ deemed concluded upon a
 29 finding that no impropriety has occurred, upon the conclusion of
 30 any resulting preliminary investigation pursuant to s. 1012.796,
 31 upon the completion of any resulting investigation by a law
 32 enforcement agency, or upon the referral of the matter to an
 33 employer who has the authority to take disciplinary action
 34 against an individual who is suspected of a testing impropriety.
 35 For the purpose of this paragraph, an investigation is ~~shall be~~
 36 considered active so long as it is ongoing and there is a
 37 reasonable, good faith anticipation that an administrative
 38 finding will be made in the foreseeable future. ~~This paragraph~~
 39 ~~is subject to the Open Government Sunset Review Act in~~
 40 ~~accordance with s. 119.15 and shall stand repealed on October 2,~~
 41 ~~2014, unless reviewed and saved from repeal through reenactment~~
 42 ~~by the Legislature.~~

43 Section 2. This act shall take effect October 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 14-07 OGSR K-12 Education Records
SPONSOR(S): Government Operations Subcommittee
TIED BILLS: IDEN./SIM. BILLS: SB 648

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

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.

Current law provides a public record exemption for K-12 education records held by educational agencies and institutions and requires that such records be protected in accordance with FERPA. Specifically, education records as defined in FERPA are confidential and exempt from public record requirements. An agency or institution may not release a student's education records without the written consent of the student or parent to any individual, agency, or organization, 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. In addition, and in accordance with FERPA, an agency or institution may release a student's education records without written consent of the student or parent to parties to an interagency agreement among the Department of Juvenile Justice, the school, law enforcement authorities, and other signatory agencies.

The bill reenacts the public record exemption for K-12 education records held by an educational agency or 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

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

Public Record Exemption under Review

Current law provides a public record exemption for K-12 education records held by educational agencies and institutions¹⁶ and requires that such records be protected in accordance with FERPA. Specifically, education records as defined in FERPA are confidential and exempt¹⁷ from public record requirements.

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.

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 1002.22(1)(a), F.S., defines the term "agency" to mean any board, agency, or other entity that provides administrative control or direction of or performs services for public elementary or secondary schools, centers, or other institutions as defined in chapter 1002, F.S. Section 1002.22(1)(b), F.S., defines the term "institution" to mean any public school, center, institution, or other entity that is part of Florida's education system under s. 1000.04(1), (3), and (4), 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).

An agency or institution may not release a student's education records without the written consent of the student or parent to any individual, agency, or organization, except in accordance with and as permitted by FERPA.¹⁸ 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.¹⁹

In accordance with FERPA, an agency or institution may release a student's education records without written consent of the student or parent to parties to an interagency agreement among the Department of Juvenile Justice, the school, law enforcement authorities, and other signatory agencies. Such information is intended solely for use in determining the appropriate programs and services for each juvenile or the juvenile's family, or for coordinating the delivery of the programs and services. As such it is inadmissible in any court proceeding before a dispositional hearing unless written consent is provided by a parent or other responsible adult on behalf of the juvenile.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 K-12 education records held by an educational agency or institution. The bill also removes superfluous language.

B. SECTION DIRECTORY:

Section 1 amends s. 1002.221, F.S., to save from repeal the public record exemption for K-12 education records held by an educational agency or 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:

¹⁸ Section 1002.221(2)(a), F.S.

¹⁹ *Id.*

²⁰ Section 1002.221(2)(b), F.S.

²¹ Section 1002.221(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.

1. Revenues:

None.

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. 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

Not applicable.

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 1002.221, F.S.,
 4 relating to an exemption from public record
 5 requirements for K-12 education records; removing the
 6 scheduled repeal of the exemption under the Open
 7 Government Sunset Review Act; removing superfluous
 8 language; providing an effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Section 1002.221, Florida Statutes, is amended
 13 to read:

14 1002.221 K-12 education records; public record exemption.—

15 (1) Education records, as defined in the Family
 16 Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g,
 17 and the federal regulations issued pursuant thereto, are
 18 confidential and exempt from s. 119.07(1) and s. 24(a), Art. I
 19 of the State Constitution.

20 (2) (a) An agency or institution, as defined in s.
 21 1002.22(1)(a), ~~or a public school, center, institution, or other~~
 22 ~~entity that is part of Florida's education system under s.~~
 23 ~~1000.04(1), (3), or (4)~~, may not release a student's education
 24 records without the written consent of the student or parent to
 25 any individual, agency, or organization, except in accordance
 26 with and as permitted by the FERPA.

27 **(b)** Education records released by an agency or
 28 institution, as defined in s. 1002.22(1)(a), ~~or by a public~~
 29 ~~school, center, institution, or other entity that is part of~~
 30 ~~Florida's education system under s. 1000.04(1), (3), or (4), to~~
 31 the Auditor General or the Office of Program Policy Analysis and
 32 Government Accountability, which are necessary for such agencies
 33 to perform their official duties and responsibilities, must
 34 ~~shall~~ be used and maintained by the Auditor General and the
 35 Office of Program Policy Analysis and Government Accountability
 36 in accordance with the FERPA.

37 **(c)** ~~(b)~~ In accordance with FERPA and the federal
 38 regulations issued pursuant to FERPA, an agency or institution,
 39 as defined in s. 1002.22, ~~or a public school, center,~~
 40 ~~institution, or other entity that is part of Florida's education~~
 41 ~~system under s. 1000.04(1), (3), or (4)~~ may release a student's
 42 education records without written consent of the student or
 43 parent to parties to an interagency agreement among the
 44 Department of Juvenile Justice, the school, law enforcement
 45 authorities, and other signatory agencies. ~~The purpose of such~~
 46 ~~an agreement and information sharing is to reduce juvenile~~
 47 ~~crime, especially motor vehicle theft, by promoting cooperation~~
 48 ~~and collaboration and the sharing of appropriate information in~~
 49 ~~a joint effort to improve school safety, to reduce truancy and~~
 50 ~~in school and out of school suspensions, and to support~~
 51 ~~alternatives to in school and out of school suspensions and~~
 52 ~~expulsions, which provide structured and well-supervised~~

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ORIGINAL

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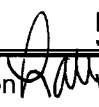

53 ~~educational programs supplemented by a coordinated overlay of~~
 54 ~~other appropriate services designed to correct behaviors that~~
 55 ~~lead to truancy, suspensions, and expulsions and that support~~
 56 ~~students in successfully completing their education.~~ Information
 57 provided in furtherance of an interagency agreement is intended
 58 solely for use in determining the appropriate programs and
 59 services for each juvenile or the juvenile's family, or for
 60 coordinating the delivery of the programs and services, and as
 61 such is inadmissible in any court proceeding before a
 62 dispositional hearing unless written consent is provided by a
 63 parent or other responsible adult on behalf of the juvenile.

64 ~~(3) This section is subject to the Open Government Sunset~~
 65 ~~Review Act in accordance with s. 119.15 and shall stand repealed~~
 66 ~~on October 2, 2014, unless reviewed and saved from repeal~~
 67 ~~through reenactment by the Legislature.~~

68 Section 2. This act shall take effect October 1, 2014.

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		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

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

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.

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.

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

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.

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

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.

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. 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

Not applicable.

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 1006.52, F.S., relating
 4 to an exemption from public record requirements for
 5 postsecondary education records and applicant records;
 6 removing the scheduled repeal of the exemption under
 7 the Open Government Sunset Review Act; providing an
 8 effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Section 1006.52, Florida Statutes, is amended
 13 to read:

14 1006.52 Education records and applicant records; public
 15 record exemption.—

16 (1) Each public postsecondary educational institution may
 17 prescribe the content and custody of records that the
 18 institution may maintain on its students and applicants for
 19 admission. A student's education records, as defined in the
 20 Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s.
 21 1232g, and the federal regulations issued pursuant thereto, and
 22 applicant records are confidential and exempt from s. 119.07(1)
 23 and s. 24(a), Art. I of the State Constitution. For the purpose
 24 of this subsection, applicant records are ~~shall be considered to~~
 25 be records that are:

26 (a) Directly related to an applicant for admission to a

27 public postsecondary educational institution who has not been in
 28 attendance at the institution; and

29 (b) Maintained by a public postsecondary educational
 30 institution or by a party acting on behalf of the public
 31 postsecondary educational institution.

32 (2) (a) A public postsecondary educational institution may
 33 not release a student's education records without the written
 34 consent of the student to any individual, agency, or
 35 organization, except in accordance with and as permitted by the
 36 FERPA.

37 (b) Education records released by public postsecondary
 38 educational institutions to the Auditor General or the Office of
 39 Program Policy Analysis and Government Accountability, which are
 40 necessary for such agencies to perform their official duties and
 41 responsibilities, must ~~shall~~ be used and maintained by the
 42 Auditor General and the Office of Program Policy Analysis and
 43 Government Accountability in accordance with the FERPA.

44 ~~(3) This section is subject to the Open Government Sunset~~
 45 ~~Review Act in accordance with s. 119.15 and shall stand repealed~~
 46 ~~on October 2, 2014, unless reviewed and saved from repeal~~
 47 ~~through reenactment by the Legislature.~~

48 Section 2. This act shall take effect October 1, 2014.