



Government Operations Subcommittee

Tuesday, March 18, 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: Tuesday, March 18, 2014 09:00 am
End Date and Time: Tuesday, March 18, 2014 12:00 pm
Location: Webster Hall (212 Knott)
Duration: 3.00 hrs

Consideration of the following bill(s):

CS/HB 69 Pub. Rec./Names of Spouses and Children of Public Defenders and Criminal Conflict and Civil Regional Counsel by Criminal Justice Subcommittee, Pritchett
CS/HB 111 Pub. Rec./Forensic Behavioral Health Evaluations by Criminal Justice Subcommittee, Gibbons
HB 135 Public Records & Public Meetings/Postsecondary Education Executive Search by Kerner
HB 295 Employment after Retirement of School District Personnel by Porter
CS/HB 711 Public Meetings and Public Records/Alzheimer's Disease Research Grant Advisory Board by Health Quality Subcommittee, Hudson
HB 801 Preference in Award of State Contracts by Fitzenhagen
HB 811 Foreign Investments by Hager
HB 849 Service Animals by Smith
HB 953 State Contracting by Peters

Consideration of the following proposed committee bill(s):

PCB GVOPS 14-09 -- OGSR Social Security Numbers

NOTICE FINALIZED on 03/14/2014 16:17 by Love.John

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 69 Pub. Rec./Names of Spouses and Children of Public Defenders and Criminal Conflict and Civil Regional Counsel
SPONSOR(S): Criminal Justice Subcommittee; Pritchett and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/SB 238

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

SUMMARY ANALYSIS

Current law provides a public records exemption for certain identification and location information of current and former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel ("public defenders"), and for certain identification and location information of the spouses and children of public defenders. Notably, the *names* of spouses and children of public defenders are not exempted.

The bill amends the current public record exemption to add the names of the spouses and children of current and former public defenders. 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, Section 24(c) of the Florida 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 the current 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 Record Exemption for Certain Identification and Location Information

Currently, s. 119.071(4)(d)2.j., F.S., provides a public records exemption for certain identification and location information of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel ("public defenders"), and their spouses and children. The following information is exempt³ from public records requirements:

- Home addresses, telephone numbers, social security numbers, dates of birth, and photographs of public defenders;
- Home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of public defenders; and
- Names and locations of schools and day care facilities attended by the children of public defenders.

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

² See s. 119.15, F.S.

³ 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); *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 85-62 Fla. Op. Att'y Gen. (1985).

If exempt information is held by an agency⁴ that is not the employer of the public defender, the public defender must submit a written request to that agency to maintain the public records exemption.⁵

Notably, the *names* of spouses and children of public defenders are not exempt from public records requirements. In contrast, the names of spouses and children of the following are exempt from public disclosure: former or current sworn or civilian law enforcement personnel, state attorneys, human resource or labor relations agency personnel, code enforcement officers, guardians ad litem, juvenile justice officers, investigators or inspectors of the Department of Business and Professional Regulation, and county tax collectors.⁶

Effect of the Bill

The bill amends s. 119.071(4)(d)2.j., F.S., to expand the current public record exemption for the identification and location information of current and former public defenders. It adds the names of spouses and children of current or former public defenders to the list of exempt information.

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.⁷

B. SECTION DIRECTORY:

Section 1. Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

Section 2. Provides a public necessity statement.

Section 3. Provides an effective date of October 1, 2014.

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 government revenues.

2. Expenditures:

See FISCAL COMMENTS.

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.

⁴ Section 119.011(2), F.S., defines "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.

⁵ Section 119.071(4)(d)3., F.S.

⁶ Section 119.071(4)(d)2., F.S.

⁷ Article I, Sec. 24(c), FLA. CONST.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could create a minimal fiscal impact on agencies, because agency staff would be responsible for complying with public records requests and may require training related to the expansion of the public record exemption. In addition, agencies 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 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 public record or public meeting exemption. The bill expands the public records 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 the public records 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 stated purpose of the law. The bill expands the public record exemption for location and identification information of current and former public defenders and their spouses and children. It affords the spouses and children with similar protections provided to others. As such, 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:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 5, 2014, the Criminal Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments provide technical clarifications and do not make any substantive changes to the bill.

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

1 A bill to be entitled
 2 An act relating to public records; amending s.
 3 119.071, F.S.; creating an exemption from public
 4 records requirements for the names of the spouses and
 5 children of current or former public defenders,
 6 assistant public defenders, criminal conflict and
 7 civil regional counsel, and assistant criminal
 8 conflict and civil regional counsel; providing for
 9 future review and repeal of the exemption; providing a
 10 statement of necessity; providing an effective date.

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

13
 14 Section 1. Paragraph (d) of subsection (4) of section
 15 119.071, Florida Statutes, is amended to read:

16 119.071 General exemptions from inspection or copying of
 17 public records.—

18 (4) AGENCY PERSONNEL INFORMATION.—

19 (d)1. For purposes of this paragraph, the term "telephone
 20 numbers" includes home telephone numbers, personal cellular
 21 telephone numbers, personal pager telephone numbers, and
 22 telephone numbers associated with personal communications
 23 devices.

24 2.a.(I) The home addresses, telephone numbers, social
 25 security numbers, dates of birth, and photographs of active or
 26 former sworn or civilian law enforcement personnel, including

27 | correctional and correctional probation officers, personnel of
 28 | the Department of Children and Families whose duties include the
 29 | investigation of abuse, neglect, exploitation, fraud, theft, or
 30 | other criminal activities, personnel of the Department of Health
 31 | whose duties are to support the investigation of child abuse or
 32 | neglect, and personnel of the Department of Revenue or local
 33 | governments whose responsibilities include revenue collection
 34 | and enforcement or child support enforcement; the home
 35 | addresses, telephone numbers, social security numbers,
 36 | photographs, dates of birth, and places of employment of the
 37 | spouses and children of such personnel; and the names and
 38 | locations of schools and day care facilities attended by the
 39 | children of such personnel are exempt from s. 119.07(1).

40 | (II) The names of the spouses and children of active or
 41 | former sworn or civilian law enforcement personnel and the other
 42 | specified agency personnel identified in sub-sub-subparagraph
 43 | (I) are exempt from s. 119.07(1) and s. 24(a), Art. I of the
 44 | State Constitution.

45 | (III) Sub-sub-subparagraph (II) is subject to the Open
 46 | Government Sunset Review Act in accordance with s. 119.15, and
 47 | shall stand repealed on October 2, 2018, unless reviewed and
 48 | saved from repeal through reenactment by the Legislature.

49 | b. The home addresses, telephone numbers, dates of birth,
 50 | and photographs of firefighters certified in compliance with s.
 51 | 633.408; the home addresses, telephone numbers, photographs,
 52 | dates of birth, and places of employment of the spouses and

53 children of such firefighters; and the names and locations of
 54 schools and day care facilities attended by the children of such
 55 firefighters are exempt from s. 119.07(1).

56 c. The home addresses, dates of birth, and telephone
 57 numbers of current or former justices of the Supreme Court,
 58 district court of appeal judges, circuit court judges, and
 59 county court judges; the home addresses, telephone numbers,
 60 dates of birth, and places of employment of the spouses and
 61 children of current or former justices and judges; and the names
 62 and locations of schools and day care facilities attended by the
 63 children of current or former justices and judges are exempt
 64 from s. 119.07(1).

65 d.(I) The home addresses, telephone numbers, social
 66 security numbers, dates of birth, and photographs of current or
 67 former state attorneys, assistant state attorneys, statewide
 68 prosecutors, or assistant statewide prosecutors; the home
 69 addresses, telephone numbers, social security numbers,
 70 photographs, dates of birth, and places of employment of the
 71 spouses and children of current or former state attorneys,
 72 assistant state attorneys, statewide prosecutors, or assistant
 73 statewide prosecutors; and the names and locations of schools
 74 and day care facilities attended by the children of current or
 75 former state attorneys, assistant state attorneys, statewide
 76 prosecutors, or assistant statewide prosecutors are exempt from
 77 s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

78 (II) The names of the spouses and children of current or

79 former state attorneys, assistant state attorneys, statewide
 80 prosecutors, or assistant statewide prosecutors are exempt from
 81 s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

82 (III) Sub-sub-subparagraph (II) is subject to the Open
 83 Government Sunset Review Act in accordance with s. 119.15, and
 84 shall stand repealed on October 2, 2018, unless reviewed and
 85 saved from repeal through reenactment by the Legislature.

86 e. The home addresses, dates of birth, and telephone
 87 numbers of general magistrates, special magistrates, judges of
 88 compensation claims, administrative law judges of the Division
 89 of Administrative Hearings, and child support enforcement
 90 hearing officers; the home addresses, telephone numbers, dates
 91 of birth, and places of employment of the spouses and children
 92 of general magistrates, special magistrates, judges of
 93 compensation claims, administrative law judges of the Division
 94 of Administrative Hearings, and child support enforcement
 95 hearing officers; and the names and locations of schools and day
 96 care facilities attended by the children of general magistrates,
 97 special magistrates, judges of compensation claims,
 98 administrative law judges of the Division of Administrative
 99 Hearings, and child support enforcement hearing officers are
 100 exempt from s. 119.07(1) and s. 24(a), Art. I of the State
 101 Constitution if the general magistrate, special magistrate,
 102 judge of compensation claims, administrative law judge of the
 103 Division of Administrative Hearings, or child support hearing
 104 officer provides a written statement that the general

105 magistrate, special magistrate, judge of compensation claims,
 106 administrative law judge of the Division of Administrative
 107 Hearings, or child support hearing officer has made reasonable
 108 efforts to protect such information from being accessible
 109 through other means available to the public.

110 f. The home addresses, telephone numbers, dates of birth,
 111 and photographs of current or former human resource, labor
 112 relations, or employee relations directors, assistant directors,
 113 managers, or assistant managers of any local government agency
 114 or water management district whose duties include hiring and
 115 firing employees, labor contract negotiation, administration, or
 116 other personnel-related duties; the names, home addresses,
 117 telephone numbers, dates of birth, and places of employment of
 118 the spouses and children of such personnel; and the names and
 119 locations of schools and day care facilities attended by the
 120 children of such personnel are exempt from s. 119.07(1) and s.
 121 24(a), Art. I of the State Constitution.

122 g. The home addresses, telephone numbers, dates of birth,
 123 and photographs of current or former code enforcement officers;
 124 the names, home addresses, telephone numbers, dates of birth,
 125 and places of employment of the spouses and children of such
 126 personnel; and the names and locations of schools and day care
 127 facilities attended by the children of such personnel are exempt
 128 from s. 119.07(1) and s. 24(a), Art. I of the State
 129 Constitution.

130 h. The home addresses, telephone numbers, places of

131 employment, dates of birth, and photographs of current or former
 132 guardians ad litem, as defined in s. 39.820; the names, home
 133 addresses, telephone numbers, dates of birth, and places of
 134 employment of the spouses and children of such persons; and the
 135 names and locations of schools and day care facilities attended
 136 by the children of such persons are exempt from s. 119.07(1) and
 137 s. 24(a), Art. I of the State Constitution, if the guardian ad
 138 litem provides a written statement that the guardian ad litem
 139 has made reasonable efforts to protect such information from
 140 being accessible through other means available to the public.

141 i. The home addresses, telephone numbers, dates of birth,
 142 and photographs of current or former juvenile probation
 143 officers, juvenile probation supervisors, detention
 144 superintendents, assistant detention superintendents, juvenile
 145 justice detention officers I and II, juvenile justice detention
 146 officer supervisors, juvenile justice residential officers,
 147 juvenile justice residential officer supervisors I and II,
 148 juvenile justice counselors, juvenile justice counselor
 149 supervisors, human services counselor administrators, senior
 150 human services counselor administrators, rehabilitation
 151 therapists, and social services counselors of the Department of
 152 Juvenile Justice; the names, home addresses, telephone numbers,
 153 dates of birth, and places of employment of spouses and children
 154 of such personnel; and the names and locations of schools and
 155 day care facilities attended by the children of such personnel
 156 are exempt from s. 119.07(1) and s. 24(a), Art. I of the State

157 Constitution.

158 j.(I) The home addresses, telephone numbers, dates of
 159 birth, and photographs of current or former public defenders,
 160 assistant public defenders, criminal conflict and civil regional
 161 counsel, and assistant criminal conflict and civil regional
 162 counsel; the home addresses, telephone numbers, dates of birth,
 163 and places of employment of the spouses and children of such
 164 defenders or counsel; and the names and locations of schools and
 165 day care facilities attended by the children of such defenders
 166 or counsel are exempt from s. 119.07(1) and s. 24(a), Art. I of
 167 the State Constitution.

168 (II) The names of the spouses and children of the
 169 specified agency personnel identified in sub-sub-subparagraph
 170 (I) are exempt from s. 119.07(1) and s. 24(a), Art. I of the
 171 State Constitution. This sub-sub-subparagraph is subject to the
 172 Open Government Sunset Review Act in accordance with s. 119.15
 173 and shall stand repealed on October 2, 2019, unless reviewed and
 174 saved from repeal through reenactment by the Legislature.

175 k. The home addresses, telephone numbers, and photographs
 176 of current or former investigators or inspectors of the
 177 Department of Business and Professional Regulation; the names,
 178 home addresses, telephone numbers, and places of employment of
 179 the spouses and children of such current or former investigators
 180 and inspectors; and the names and locations of schools and day
 181 care facilities attended by the children of such current or
 182 former investigators and inspectors are exempt from s. 119.07(1)

183 and s. 24(a), Art. I of the State Constitution if the
 184 investigator or inspector has made reasonable efforts to protect
 185 such information from being accessible through other means
 186 available to the public. This sub-subparagraph is subject to the
 187 Open Government Sunset Review Act in accordance with s. 119.15
 188 and shall stand repealed on October 2, 2017, unless reviewed and
 189 saved from repeal through reenactment by the Legislature.

190 1. The home addresses and telephone numbers of county tax
 191 collectors; the names, home addresses, telephone numbers, and
 192 places of employment of the spouses and children of such tax
 193 collectors; and the names and locations of schools and day care
 194 facilities attended by the children of such tax collectors are
 195 exempt from s. 119.07(1) and s. 24(a), Art. I of the State
 196 Constitution if the county tax collector has made reasonable
 197 efforts to protect such information from being accessible
 198 through other means available to the public. This sub-
 199 subparagraph is subject to the Open Government Sunset Review Act
 200 in accordance with s. 119.15 and shall stand repealed on October
 201 2, 2017, unless reviewed and saved from repeal through
 202 reenactment by the Legislature.

203 3. An agency that is the custodian of the information
 204 specified in subparagraph 2. and that is not the employer of the
 205 officer, employee, justice, judge, or other person specified in
 206 subparagraph 2. shall maintain the exempt status of that
 207 information only if the officer, employee, justice, judge, other
 208 person, or employing agency of the designated employee submits a

209 written request for maintenance of the exemption to the
 210 custodial agency.

211 4. The exemptions in this paragraph apply to information
 212 held by an agency before, on, or after the effective date of the
 213 exemption.

214 5. Except as otherwise expressly provided in this
 215 paragraph, this paragraph is subject to the Open Government
 216 Sunset Review Act in accordance with s. 119.15, and shall stand
 217 repealed on October 2, 2017, unless reviewed and saved from
 218 repeal through reenactment by the Legislature.

219 Section 2. The Legislature finds that it is a public
 220 necessity that the names of the spouses and children of current
 221 or former public defenders, assistant public defenders, criminal
 222 conflict and civil regional counsel, and assistant criminal
 223 conflict and civil regional counsel be made exempt from s.
 224 119.07(1), Florida Statutes, and s. 24(a), Article I of the
 225 State Constitution. Public defenders, assistant public
 226 defenders, criminal conflict and civil regional counsel, and
 227 assistant criminal conflict and civil regional counsel personnel
 228 in this state perform a variety of important duties that ensure
 229 public safety and welfare and encourage safe and civil
 230 communities. These persons work with felons, many of whom have
 231 committed violent crimes. As a result of their duties, such
 232 personnel often come in close contact with individuals who not
 233 only may be a threat to these personnel, but who might seek to
 234 take revenge against them by harming their spouses and children.

235 These attorneys also interact with the victims of crime.
 236 Allowing access to the names of the spouses and children of
 237 current or former public defenders, assistant public defenders,
 238 criminal conflict and civil regional counsel, and assistant
 239 criminal conflict and civil regional counsel provides a means by
 240 which individuals who have been investigated, arrested,
 241 interrogated, or incarcerated can identify and cause physical or
 242 emotional harm to these spouses and children. In addition,
 243 criminal conflict and civil regional counsel and their
 244 assistants provide representation in sensitive civil matters,
 245 such as those in which a person's parental rights may be
 246 terminated based on allegations of perpetrating abuse and
 247 neglect against a child. By providing legal representation in
 248 criminal and civil matters, these attorneys provide a valuable
 249 service. The Legislature therefore finds that the harm that may
 250 result from the release of the names of spouses and children of
 251 current or former public defenders, assistant public defenders,
 252 criminal conflict and civil regional counsel, and assistant
 253 criminal conflict and civil regional counsel outweighs any
 254 public benefit that may be derived from the disclosure of the
 255 information.

256 Section 3. This act shall take effect October 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 111 Pub. Rec./Forensic Behavioral Health Evaluations
SPONSOR(S): Criminal Justice Subcommittee; Gibbons
TIED BILLS: IDEN./SIM. BILLS: CS/SB 256

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Cox	Cunningham
2) Government Operations Subcommittee		Williamson	Williamson
3) Judiciary Committee			

SUMMARY ANALYSIS

Rule 2.420 of the Florida Rules of Judicial Administration states the public must have access to the records of the judicial branch. Rule 2.420 also establishes 20 categories of court record information which the clerk of the court must automatically designate and maintain as confidential (Type I information). Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing. Forensic behavioral health records filed with the courts in ch. 916, F.S., proceedings are not automatically exempt from public records as Type I information.

In 2011, it was suggested that Rule 2.420 be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports (which would include behavioral health records) as Type I information. However, the Florida Supreme Court held that "the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list."

The bill creates a public record exemption for forensic behavioral health evaluations filed with the courts in ch. 916, F.S., proceedings. It defines the term "forensic behavioral health evaluation" to mean any record, including supporting documentation, derived from a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation of an individual. The bill also provides a public necessity statement as required by the State Constitution.

The bill eliminates the need to file motions and conduct hearings to make forensic behavioral health evaluations confidential. As such, the Office of State Courts Administrator determined the bill will result in a reduction in judicial and court system workload, but that the precise impact cannot be accurately determined.

Article I, Section 24(c) of the Florida 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 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.

The Open Government Sunset Review Act does not apply to an exemption that applies solely to the State Court System.³

Public Access to Judicial Records

Rule 2.420 of the Florida Rules of Judicial Administration (Rule), states the public must have access to the records of the judicial branch.^{4,5} The Rule identifies 20 categories of court record information which

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

² See s. 119.15, F.S.

³ Section 119.15(2)(b), F.S.

⁴ Fla. R. Jud. Admin 2.420(b)(1) defines "records of the judicial branch" as all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

- "Court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and
- "Administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

⁵ Fla. R. Jud. Admin 2.420(b)(2) defines "judicial branch" as the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all entities established by or operating under the authority of the supreme court or the chief justice.

the clerk of the court must automatically designate and maintain as confidential (Type I information).⁶ Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing.⁷

In 2011, it was suggested that the Rule be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports as Type I information. However, the Florida Supreme Court held that because such information was not expressly exempt from public access by the laws in effect on July 1, 1993, or court rules in effect on September 1992, such information was not appropriate for inclusion as Type I information.⁸ The opinion further stated “the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list.”⁹

Forensic Clients

The Department of Children and Families (DCF) and the Agency for Persons with Disabilities (APD) establish, locate, and maintain separate and secure forensic facilities and programs for the treatment and training of defendants who have been charged with a felony and found to be incompetent to proceed due to their mental illness, mental retardation, or autism.¹⁰ These agencies also provide services for individuals who have been acquitted of a felony by reason of insanity. In fiscal year 2012-2013, DCF provided services to a total of 2,885 individuals in accordance with ch. 916, F.S.^{11,12}

Competency restoration training and mental health services are provided by DCF in four state forensic mental health treatment facilities with a total secure capacity of 1108 beds. There are also 435 non-secure, forensic step-down beds in civil hospitals. Evaluators employed at state mental health treatment facilities, as well as court-appointed evaluators, are tasked with evaluating defendants to determine if they meet criteria for involuntary commitment. Those reports are received by the circuit clerks of courts, presiding judges, defense counsel, and opposing counsel.¹³

Clinical Records of Forensic Clients

Clinical records¹⁴ for individuals adjudicated as incompetent to proceed due to mental illness, mental retardation, or autism, or who have been acquitted of a felony by reason of insanity are confidential and exempt from public records requirements.¹⁵ These records may be released to specified individuals, including persons authorized by order of the court, and to the client’s counsel when the records are needed by counsel for adequate representation.¹⁶

Individuals evaluated pursuant to ch. 916, F.S., who are not adjudicated incompetent to proceed or acquitted by reason of insanity also have their records filed with the courts.¹⁷ However, these individuals’ records have not been deemed exempt from public records requirements by the Legislature and thus, are not automatically exempt under Rule 2.420 as Type I information. Such records include

⁶ *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011); Fla. R. Jud Admin 2.420(d)(3).

⁷ *Id.*

⁸ *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

⁹ *Id.*

¹⁰ Section 916.105, F.S., further provides that forensic facilities must be designed and administered so that entry and exit may be strictly controlled by staff responsible for security in order to protect the defendant, facility personnel, other clients, and citizens in adjacent communities.

¹¹ Chapter 916, F.S., governs mentally deficient and mentally ill defendants.

¹² Electronic mail from Gina Sisk with DCF, dated February 24, 2014 (on file with the Criminal Justice Subcommittee).

¹³ Department of Children and Families, Analysis of HB 1183 (2013), which is similar to this bill (on file with the Criminal Justice Subcommittee).

¹⁴ Section 916.107(8), F.S., states a clinical record must include data pertaining to admission and such other information as may be required under rules of DCF or APD.

¹⁵ Section 916.107(8), F.S.

¹⁶ Section 916.107(8)(a)2., F.S.

¹⁷ *See* s. 916.107, F.S.

those created as a result of a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation.

Since forensic behavioral health evaluations contained in court files are not currently listed as Type I information, a motion must be filed and the trial court must hold a hearing in each case in order to make these records confidential. The Office of State Courts Administrator (OSCA) reports that in every applicable case, in essentially every circuit, these motions are being filed and granted after being unopposed by the State.¹⁸

Effect of the Bill

The bill creates s. 916.1065, F.S., to provide that forensic behavioral health evaluations *filed with the court* under ch. 916, F.S., are confidential and exempt¹⁹ from the public records requirements. Since this exemption is limited to records filed with the court, the requirements of the Open Government Sunset Review Act do not apply.

The bill defines the term “forensic behavioral health evaluation” to mean any record, including supporting documentation, derived from a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation of an individual.

The bill provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1. Creates s. 916.1065, F.S., relating to confidentiality of forensic behavioral health evaluations.

Section 2. Provides a public necessity statement.

Section 3. Provides an effective date of upon becoming a law.

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:

The bill eliminates the need to file motions and conduct hearings to make forensic behavioral health evaluations confidential. OSCA determined the bill will result in a reduction in judicial and court system workload.²⁰ However, the precise impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the reduction in workload.²¹

¹⁸ Electronic mail from Sarah Naf, dated February 27, 2014 (on file with the Criminal Justice Subcommittee).

¹⁹ 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 85-62 Fla. Op. Att’y Gen. (1985).

²⁰ Office of the State Courts Administrator, Analysis of HB 111 (on file with the Criminal Justice Subcommittee).

²¹ *Id.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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 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 stated purpose of the law. The bill creates a public record exemption for forensic behavioral health evaluations filed with the court; thus, providing similar protections afforded other behavioral health evaluations. As such, 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:

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

On line 26 of the bill, the word "made" is missing. The sentence should read:

The Legislature finds that it is a public necessity that forensic health evaluations filed with the court pursuant to chapter 916, Florida Statutes, be made

confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution.

Other Comments: Retroactive Application

The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such.²² The bill does not contain a provision requiring retroactive application. As such, the public record exemption would apply prospectively.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 5, 2014, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment adds the necessary reference to s. 119.07(1), F.S., which was omitted from the original bill.

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

²² *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001)

1 A bill to be entitled
 2 An act relating to public records; creating s.
 3 916.1065, F.S.; providing a definition; providing an
 4 exemption from public records requirements for a
 5 forensic behavioral health evaluation filed with a
 6 court; providing a statement of public necessity;
 7 providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Section 916.1065, Florida Statutes, is created
 12 to read:

13 916.1065 Confidentiality of forensic behavioral health
 14 evaluations.-

15 (1) As used in this section, the term "forensic behavioral
 16 health evaluation" means any record, including supporting
 17 documentation, derived from a competency, substance abuse,
 18 psychosexual, psychological, psychiatric, psychosocial,
 19 cognitive impairment, sanity, or other mental health evaluation
 20 of an individual.

21 (2) A forensic behavioral health evaluation filed with the
 22 court under this chapter is confidential and exempt from s.
 23 119.07(1) and s. 24(a), Art. I of the State Constitution.

24 Section 2. The Legislature finds that it is a public
 25 necessity that forensic behavioral health evaluations filed with
 26 the court pursuant to chapter 916, Florida Statutes, be

27 confidential and exempt from disclosure under s. 119.07(1),
28 Florida Statutes, and s. 24(a), Article I of the State
29 Constitution. The personal health of an individual and the
30 treatment he or she receives are intensely private matters. An
31 individual's forensic behavioral health evaluation should not be
32 made public merely because it is filed with the court.
33 Protecting forensic behavioral health evaluations is necessary
34 to consistently protect the health care privacy rights of all
35 persons. Making these evaluations confidential and exempt will
36 protect information of a sensitive personal nature, the release
37 of which would cause unwarranted damage to the reputation of an
38 individual. Further, the knowledge that sensitive personal
39 information is subject to disclosure could have a chilling
40 effect on mental health experts who conduct the evaluations for
41 use by the court. Therefore, making these evaluations
42 confidential and exempt allows courts to effectively and
43 efficiently make decisions relating to the competency of
44 individuals who interact with the state courts system.

45 Section 3. This act shall take effect upon becoming 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 Gibbons offered the following:

Amendment (with title amendment)

Remove lines 24-26 and insert:

7 (3) The public records exemption applies to forensic
8 behavioral health evaluations filed with a court before, on, or
9 after the effective date of this exemption.

10 Section 2. The Legislature finds that it is a public
11 necessity that forensic behavioral health evaluations filed with
12 the court pursuant to chapter 916, Florida Statutes, be made

17 -----



Amendment No.

18
19
20
21
22

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

Remove line 6 and insert:
court; providing for retroactive application of the public
record exemption; providing a statement of public necessity;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 135 Public Records & Public Meetings/Postsecondary Education Executive Search
SPONSOR(S): Kerner and others
TIED BILLS: IDEN./SIM. BILLS: SB 728

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

SUMMARY ANALYSIS

The bill creates an exemption from public record and public meeting requirements for information associated with the applicant recruitment process and discussions associated with the applicant search for certain state university and Florida College System (FCS) institution employees. Specifically, the bill provides that any personal identifying information of an applicant for president, provost, or dean of any state university or FSC institution is confidential and exempt from public record requirements. It also creates a public meeting exemption for any meeting held for the purpose of identifying or vetting applicants for president, provost, or dean of any state university or FCS institution.

The bill provides instances when the public meeting exemption does not apply. In addition, it provides that the names of any applicants who comprise a final group of applicants must be released by the state university or FCS institution no later than 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the applicants. All documents containing personal identifying information of any applicants who comprise a final group of applicants become subject to public record requirements when the applicants' names are released.

The bill provides for repeal of the section 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 does not appear to have a fiscal impact on state or local governments.

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

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 public record and public meeting exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

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.

Public Meetings Law

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.¹ The board or commission must provide reasonable notice of all public meetings.² Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.³ Minutes of a public meeting must be promptly recorded and open to public inspection.⁴

Public Record and Public Meeting Exemptions

The Legislature, however, may provide by general law for the exemption of records and meetings from the requirements of Article I, s. 24(a) and (b) 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.⁵

Furthermore, the Open Government Sunset Review Act⁶ 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; or

¹ Section 286.011(1), F.S.

² *Ibid.*

³ Section 286.011(6), F.S.

⁴ Section 286.011(2), F.S.

⁵ Art. I, s. 24(c), Fla. Const.

⁶ Section 119.15, F.S.

- Protects trade or business secrets.

Search Committees

Often, when looking to fill a vacant president, provost, or dean position, state universities and Florida College System (FCS) institutions⁷ establish a search committee, which may be comprised of members from an institution's board of trustees, faculty or student representatives, members of the community, a member from the Board of Governors or State Board of Education, and other potentially interested persons. The purpose of the committee is to locate qualified applicants who are interested in filling the vacant position at the university or institution, vetting applicants, and selecting a candidate to fill the position.⁸

The search committee often retains the services of a consulting firm for the purpose of conducting the search for a president or provost. It is typical for the consultant to make the initial contact with a potential applicant to determine if the person is interested in applying to fill the vacancy at the state university or FCS institution.

Information obtained by a search committee or consultant, including applications and other information gathered by a committee or consultant regarding applicants, must be made available for copying and inspection upon request. In addition, any meetings associated with the search process, including vetting of applicants, are open to the public.⁹

Effect of Proposed Changes

The bill creates an exemption from public record requirements for information associated with the applicant recruitment process and an exemption from public meeting requirements for discussions associated with the applicant search.

Specifically, the bill provides that any personal identifying information of an applicant for president, provost, or dean of any state university or FCS institution is confidential and exempt¹⁰ from public record requirements.

The bill also creates a public meeting exemption for any meeting held for the purpose of identifying or vetting applicants for president, provost, or dean of any state university or FCS institution. It provides that the public meeting exemption does not apply to a meeting held for the purpose of establishing qualifications of potential applicants or any compensation framework to be offered to potential applicants; however, any portion of such meeting that would disclose personal identifying information of an applicant or potential applicant is exempt from public meeting requirements.

Any meeting or interview held after a final group of applicants has been established and held for the purpose of making a final selection to fill the position of president, provost, or dean is subject to public meeting requirements. In addition, the names of any applicants who comprise a final group of

⁷ The Board of trustees for a FCS institution is charged with appointing an institution president and may appoint a search committee for this purpose. Section 1001.64(19), F.S.

⁸ The Board of Governors must confirm the selected candidate for president of a state university Section 1001.706(6)(a), F.S.

⁹ FCS institutions and state universities are considered state agencies, subject to public records and public meetings laws. *See Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (holding that a University of Florida screening committee was subject to Florida's Sunshine Law); *Rhea v. District Bd. Of Trustees of Santa Fe College*, 2013 WL 950544 at 3, n. 1 (Fla. 1st DCA 2013) (noting that Santa Fe College, as part of the Florida College System, is a state agency having a duty to provide access to public records).

¹⁰ 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).

applicants must be released by the state university or FCS institution no later than 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the applicants. All documents containing personal identifying information of any applicants who comprise a final group of applicants become subject to public record requirements when the applicants' names are released.

The bill provides that the section is subject to the Open Government Sunset Review Act and will be repealed 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.

B. SECTION DIRECTORY:

Section 1 creates s. 1004.097, F.S., to provide public record and public meeting exemptions associated with a search conducted by a state university or FCS institution for the purpose of identifying or vetting applicants for president, provost, or dean.

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

Section 3 provides an effective date of October 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on state universities and FCS institutions, because staff responsible for complying with public record requests could require training related to creation of the public record exemption. In addition, state universities and FCS institutions 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 universities and institutions.

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:

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 public record and public meeting exemptions; 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 public record and public meeting exemptions; 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 stated purpose of the law. The bill creates a public record exemption for any personal identifying information of an applicant for president, provost, or dean of any state university or FCS institution, in addition to a public meeting exemption for any meetings wherein such information is discussed or such applicants are vetted. The exemptions do not appear to be in conflict with the constitutional requirement that the exemptions be no broader than necessary to accomplish the stated purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to public records and public meetings;
 3 creating s. 1004.097, F.S.; providing an exemption
 4 from public records requirements for any personal
 5 identifying information of an applicant for president,
 6 provost, or dean of a state university or Florida
 7 College System institution; providing an exemption
 8 from public meeting requirements for any meeting held
 9 for the purpose of identifying or vetting applicants
 10 for president, provost, or dean of a state university
 11 or Florida College System institution and for any
 12 portion of a meeting held for the purpose of
 13 establishing qualifications of, or any compensation
 14 framework to be offered to, such potential applicants
 15 that would disclose personal identifying information
 16 of an applicant or potential applicant; providing for
 17 applicability; requiring release of the names of
 18 specified applicants within a certain timeframe;
 19 providing for future legislative review and repeal of
 20 the exemptions; providing a statement of public
 21 necessity; providing an effective date.

22
 23 Be It Enacted by the Legislature of the State of Florida:

24
 25 Section 1. Section 1004.097, Florida Statutes, is created
 26 to read:

27 1004.097 Information identifying applicants for president,
 28 provost, or dean at state universities and Florida College

29 System institutions; public records exemption; public meeting
 30 exemption.

31 (1) Any personal identifying information of an applicant
 32 for president, provost, or dean of a state university or Florida
 33 College System institution is confidential and exempt from s.
 34 119.07(1) and s. 24(a), Art. I of the State Constitution.

35 (2) Any meeting held for the purpose of identifying or
 36 vetting applicants for president, provost, or dean of a state
 37 university or Florida College System institution is exempt from
 38 s. 286.011 and s. 24(b), Art. I of the State Constitution. This
 39 exemption does not apply to a meeting held for the purpose of
 40 establishing qualifications of potential applicants or any
 41 compensation framework to be offered to potential applicants.
 42 However, any portion of such a meeting that would disclose
 43 personal identifying information of an applicant or potential
 44 applicant is exempt from s. 286.011 and s. 24(b), Art. I of the
 45 State Constitution.

46 (3) Any meeting or interview held after a final group of
 47 applicants has been established and held for the purpose of
 48 making a final selection to fill the position of president,
 49 provost, or dean of a state university or Florida College System
 50 institution is subject to the provisions of s. 286.011 and s.
 51 24(b), Art. I of the State Constitution.

52 (4) The names of applicants who comprise a final group of
 53 applicants pursuant to subsection (3) must be released by the
 54 state university or Florida College System institution no later
 55 than 21 days before the date of the meeting at which final

56 action or vote is to be taken on the employment of the
 57 applicants.

58 (5) Any personal identifying information of applicants who
 59 comprise a final group of applicants pursuant to subsection (3)
 60 become subject to the provisions of s. 119.07(1) and s. 24(a),
 61 Art. I of the State Constitution at the time the names of such
 62 applicants are released pursuant to subsection (4).

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

67 Section 2. The Legislature finds that it is a public
 68 necessity that any personal identifying information of an
 69 applicant for president, provost, or dean of a state university
 70 or Florida College System institution be made confidential and
 71 exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I
 72 of the State Constitution. It is also the finding of the
 73 Legislature that any meeting held for the purpose of identifying
 74 or vetting applicants for president, provost, or dean of a state
 75 university or Florida College System institution and any portion
 76 of a meeting held for the purpose of establishing qualifications
 77 of, or any compensation framework to be offered to, such
 78 potential applicants that would disclose personal identifying
 79 information of an applicant or potential applicant be made
 80 exempt from s. 286.011, Florida Statutes, and s. 24(b), Art. I
 81 of the State Constitution. The task of filling the position of
 82 president, provost, or dean within a state university or Florida
 83 College System institution is often conducted by an executive

84 search committee. Many, if not most, applicants for such a
 85 position are currently employed at another job at the time they
 86 apply and could jeopardize their current positions if it were to
 87 become known that they were seeking employment elsewhere. These
 88 exemptions from public records and public meeting requirements
 89 are needed to ensure that such a search committee can avail
 90 itself of the most experienced and desirable pool of qualified
 91 applicants from which to fill the position of president,
 92 provost, or dean of a state university or Florida College System
 93 institution. If potential applicants fear the possibility of
 94 losing their current jobs as a consequence of attempting to
 95 progress along their chosen career path or simply seeking
 96 different and more rewarding employment, failure to have these
 97 safeguards in place could have a chilling effect on the number
 98 and quality of applicants available to fill the position of
 99 president, provost, or dean of a state university or Florida
 100 College System institution.

101 Section 3. This act shall take effect October 1, 2014.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 135 (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 Ingram offered the following:

4
5 **Amendment**
6 Remove line 101 and insert:
7 Section 3. This act shall take effect upon becoming a law.
8

125427 - HB 135.amendment line 101 by Ingram.docx

Published On: 3/17/2014 3:11:02 PM

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 295 Employment after Retirement of School District Personnel
SPONSOR(S): Porter
TIED BILLS: IDEN./SIM. BILLS: SB 560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington	Williamson
2) Appropriations Committee			
3) Education Committee			

SUMMARY ANALYSIS

Current law provides that instructional personnel may be awarded probationary contracts upon initial employment and may be awarded annual contracts thereafter; professional service contracts may not be issued to any instructional personnel hired on or after July 1, 2011. Additionally, the Florida Retirement System Act and the Teachers' Retirement System Act provide that retired instructional personnel who retired before July 1, 2010, may be rehired on an annual contractual basis. Although the law provides for the issuance of annual contracts after retirement, in 2012, the Fifth District Court of Appeals held that retired instructional personnel rehired prior to July 1, 2011, may be awarded professional service contracts.

The bill clarifies that instructional personnel may be reemployed after retirement but only under a 1-year probationary contract. If the instructional personnel successfully completes the probationary contract, such employee may receive an annual contract; reemployed retired instructional personnel may not receive professional service contracts. The bill further provides legislative intent and clarification for purposes of pending civil and administrative actions.

The bill does not appear to have a fiscal impact on state government; however, it could have a positive fiscal impact on local school districts.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Student Success Act

In 2011, the Legislature passed the Student Success Act (act),¹ which requires, among other things, the use of performance evaluations to assess performance. The evaluation system for administrative and instructional personnel differentiates among four levels of performance: highly effective, effective, needs improvement,² or unsatisfactory.³ The Commissioner of Education was required to consult with experts, instructional personnel, school administrators, and education stakeholders in developing the criteria for the performance levels.

Prior to 2011, instructional personnel with as little as three years of service could be granted a professional service contract, which provided for automatic renewal of the contract unless the superintendent charged the employee with unsatisfactory performance.⁴ For instructional personnel hired on or after July 1, 2011, the act, in effect, provides that professional service contracts and tenure may no longer be given to any instructional personnel who do not currently have a professional service contract.

Specifically, the act provides that employees hired on or after July 1, 2011, must be awarded probationary contracts for a period of one year upon initial employment in a school district.⁵ Probationary contract employees may be dismissed without cause or may resign without breach of contract.⁶ The district may not award a probationary contract more than once to the same employee;⁷ after the initial year, the school district may award an annual contract upon the successful completion of a probationary contract.⁸ An annual contract is an employment contract for a period of no longer than one school year, which the district school board may choose to award or not award at the end of the contract term without cause.⁹ Instructional personnel with an annual contract may be suspended or dismissed at any time during the term of the contract for just cause.¹⁰

In addition, the act ties the renewal of a professional service contract, for those employees who have a professional service contract, to the employee's performance evaluation; the professional service contract is no longer automatically renewed.¹¹ If an employee who holds a professional service contract is not performing his or her duties in a satisfactory manner, the act requires such an employee to receive notice and be placed on probation.¹² If the employee receives two consecutive annual performance evaluations of unsatisfactory, two annual performance evaluations of unsatisfactory within a three-year period, or three consecutive annual performance evaluations of needs improvement or a combination of needs improvement and unsatisfactory, the district may terminate or not renew the employee's contract.¹³

¹ Chapter 2011-1, L.O.F.

² For instructional personnel in the first three years of employment, the evaluation may designate the performance as developing.

³ Section 1012.34, F.S.

⁴ See s. 1012.33(3)(e), F.S. (2010).

⁵ Section 1012.335(2)(a), F.S.

⁶ Section 1012.335(1)(c), F.S.

⁷ *Id.*

⁸ Section 1012.335(2)(a), F.S.

⁹ Section 1012.335(1)(a), F.S.

¹⁰ Section 1012.335(4), F.S.

¹¹ Section 1012.33(3)(b), F.S.

¹² Section 1012.34(4)(b), F.S.

¹³ See ss. 1012.33 and 1012.34, F.S.

Florida Retirement System

The Florida Retirement System (FRS) was established in 1970 when the Legislature consolidated the Teachers' Retirement System, the State and County Officers and Employees' Retirement System, and the Highway Patrol Pension Fund. In 1972, the Judicial Retirement System was consolidated into the pension plan and, in 2007, the Institute of Food and Agricultural Sciences Supplemental Retirement Program was consolidated under the Regular Class of the FRS as a closed group.¹⁴ The FRS is a contributory system, with all members contributing 3 percent of their salaries.¹⁵

The FRS is governed by the Florida Retirement System Act.¹⁶ The FRS, which is a multi-employer, contributory plan, provides retirement income benefits to 621,774 active members,¹⁷ 334,682 retired members and beneficiaries, and 38,724 members of the Deferred Retirement Option Program (DROP).¹⁸ It is the primary retirement plan for employees of state and county government agencies, district school boards, community colleges, and universities. The FRS also serves as the retirement plan for participating employees of the 186 cities and 267 independent hospitals and special districts that have elected to join the system.¹⁹

Members of the FRS have two primary plan options available for participation:

- The defined benefit plan, also known as the pension plan; and
- The defined contribution plan, also known as the investment plan.

The pension plan is administered by the secretary of the Department of Management Services through the Division of Retirement.²⁰ Investment management is handled by the State Board of Administration (SBA). The SBA is primarily responsible for administering the investment plan.²¹ The SBA is comprised of the Governor as chair, the Chief Financial Officer, and the Attorney General.²²

Employment after Retirement

Section 121.091, F.S., governs the payment of benefits under the FRS. It requires a member of the FRS to terminate employment to begin receiving benefits, or begin participation in DROP to defer and accrue those benefits until termination from DROP. Termination occurs when a member ceases all employment relationships with his or her FRS employer.²³ Termination is void if any FRS-participating employer reemploys a member a specified period of time.²⁴

Subsection 121.091(9), F.S., governs employment after retirement. It allows reemployment of FRS retirees by a non-FRS employer and authorizes those retirees to continue receiving retirement benefits.²⁵

¹⁴ *The Florida Retirement System Annual Report*, July 1, 2011 – June 30, 2012, at 10. A copy of the report can be found online at: http://www.dms.myflorida.com/workforce_operations/retirement/publications/annual_reports (last visited February 21, 2014).

¹⁵ Prior to 1975, members of the FRS were required to make employee contributions of either 4 percent for Regular Class employees or 6 percent for Special Risk Class members. Employees were again required to contribute to the system after July 1, 2011.

¹⁶ Chapter 121, F.S.

¹⁷ As of June 30, 2013, the FRS defined benefit plan, also known as the pension plan, had 514,436 members, and the defined contribution plan, also known as the investment plan, had 107,338 members. Email from staff of the Division of Retirement, Department of Management Services, February 4, 2014 (on file with the Government Operations Subcommittee).

¹⁸ *Id.*

¹⁹ Florida Retirement System Participating Employers for Plan Year 2013-14, prepared by the Department of Management Services, Division of Retirement, Revised January 2014, at 8. A copy of the document can be found online at: http://www.dms.myflorida.com/workforce_operations/retirement/publications (last visited March 14, 2014).

²⁰ Section 121.025, F.S.

²¹ Section 121.4501(8), F.S.

²² Section 4, Art. IV, Fla. Const.

²³ Section 121.021(39)(a), F.S.

²⁴ *Id.*

²⁵ Section 121.091(9)(a), F.S.

An FRS retiree may be reemployed by an FRS employer provided certain requirements are met. A member who retired before July 1, 2010, may be reemployed by an FRS employer one calendar month after retiring or after the member's DROP termination date. If the retiree is reemployed during months two through 12 after retiring or terminating DROP, then the retiree may not receive her or his pension benefit until month 13. However, a retiree who retired before July 1, 2010, may be reemployed as instructional personnel on an annual contractual basis after one calendar month without having her or his retirement benefits disrupted.²⁶

A member who retires on or after July 1, 2010, may not be reemployed by an FRS employer until month seven after retiring or after the member's DROP termination date. If the retiree is reemployed during months seven through 12 after retiring or terminating DROP, then the retiree may not receive her or his pension benefit until month 13.²⁷ The reemployment exception for retirees reemployed as instructional personnel no longer applies to members who retire on or after July 1, 2010.

Teachers' Retirement System

The Teachers' Retirement System (TRS), which is closed to new members effective December 1, 1970, is governed by chapter 238, F.S. As of June 2013, there were 18 active members and eight DROP participants.²⁸ Similar reemployment provisions apply for instructional personnel who retire under the TRS.

Legal Ambiguity for Reemployment of Instructional Personnel

In 2011, two retired reemployed instructional personnel brought suit in Orange County, Florida to determine whether the county was required to issue professional service contracts after the employees' successfully completed three years of employment.²⁹ The Orange County Public Schools argued that s. 121.091, F.S., required the instructional personnel to be rehired on an annual contractual basis. The issue in the case centered on whether the FRS act required instructional personnel to be reemployed with an annual contract for the rest of the member's career, or whether the FRS act only pertained to the initial year of reemployment and such member may ultimately be given a professional service contract under s. 1012.33, F.S., which provided for such a contract after three years of service.

The circuit court, applying the rules of statutory construction, found that the legislature intended for retired, rehired teachers to be rehired on the same terms as newly hired teachers; at that time, newly hired teachers were placed on an initial annual contract and after serving three years in the district, received a professional service contract. At the time of this lawsuit, professional service contracts were still provided for in law.

The Orange County School Board appealed the final judgment to the Fifth District Court of Appeal arguing that the trial court erred and that s. 121.091, F.S., precludes the school board from ever issuing a contract longer than an annual contract when employing retired instructional personnel.³⁰ The court, however, agreed with the lower court and found that the limitations in s. 121.091, F.S., only apply at the time of the initial rehire.

According to information supplied by the Orange County Public Schools, approximately 779 instructional personnel were rehired in Florida prior to July 1, 2011; 324 of the reemployed retired instructional personnel have been awarded professional service contracts.³¹

²⁶ Section 121.091(9)(b), F.S.

²⁷ Section 121.091(9)(c), F.S.

²⁸ Telephone conversation with staff of the Division of Retirement, Department of Management Services, on March 14, 2014.

²⁹ A copy of the circuit court decision is on file with the Government Operations Subcommittee.

³⁰ *Orange County School Board v. Rachman and Schuman*, 87 So.3d 48 (Fla. 5th DCA 2012).

³¹ Although 455 instructional personnel were rehired prior to 2011 and have not been issued professional service contracts, it is unclear if such employees qualified for professional service contracts prior to the 2011 changes to the act. Once such changes were made, a teacher not previously provided a professional service contract was ineligible to receive one. A class action lawsuit was filed in 2013 in Orange County; the plaintiffs allege that they were rehired retirees and qualified for professional service contracts prior to the 2011 legislation. A copy of the amended complaint is on file with the Government Operations Subcommittee.

Effect of the Bill

The bill provides that instructional personnel rehired after retirement from the FRS Pension Plan or the TRS may only be initially hired under a 1-year probationary contract, rather than an annual contract. If the retiree successfully completes the probationary contract, the district school board may reemploy the retiree on an annual contract basis. The bill clarifies that reemployed retired instructional personnel may not receive professional service contracts.

The bill provides that the holding in *Orange County School Board v. Rachman and Shuman*³² was contrary to legislative intent at the time the statutes were enacted and that retirees were never entitled to professional service contracts. The bill directs the judge in a civil action or administrative proceeding to rule against a classroom teacher on any claim or cause of action against the district school board, district superintendent, or district school board employee for not awarding such a teacher a professional service contract.

B. SECTION DIRECTORY:

Section 1. and 2. amend ss. 121.091 and 238.181, F.S., revising provisions relating to reemployment of retirees as instructional personnel on a contract basis; clarifying applicability and legislative intent.

Section 3. amends s. 1012.33, F.S., revising provisions relating to reemployment of retirees as instructional personnel on a contract basis; providing legislative intent and findings to clarify authorization to award contracts; providing requirements for a judge in certain civil actions or administrative proceedings.

Section 4. providing an effective date of upon becoming a law.

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:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

As a result of the bill, local school districts could experience a positive fiscal impact associated with any pending litigation.

³² *Supra* at n. 30.

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 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 state tax shared with counties or municipalities.

2. Other:

It is unclear if the intent of the bill is to retroactively impair professional service contracts that have already been issued to retired instructional personnel. Retroactive legislation may violate the Contract Clause of Art. 1, s. 10 of the United States Constitution;³³ the prohibition against ex post facto laws in Art. I, s. 10 of the State Constitution;³⁴ and the Due Process Clauses of the Fifth and 14th Amendments.³⁵ Even where these constitutional clauses do not apply, the common law provides that the government, through rule or legislation, cannot adversely affect substantive rights once such rights have vested.³⁶

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Amendments to the FRS Act and TRS Act

The changes proposed to s. 1012.33, F.S., address employment contractual issues that arose under *Rachman v. Orange County School Board*.³⁷ However, the bill also amends ss. 121.091 and 238.181, F.S., which are retirement provisions and not contractual provisions. It is unclear why contractual provisions are being placed in the FRS Act and the TRS Act, which govern retirement and payment of retirement benefits to FRS and TRS retirees.

The Department of Management Services also raised concerns regarding the proposed changes to the FRS Act and TRS Act. According to the department's bill analysis for HB 295:³⁸

Because this bill and the underlying court decision deal with a contractual issue and not a retirement issue, the proposed changes to sections 121.091 and 238.181, Florida Statutes, are not necessary and could result in the Department being subject to a lawsuit. Since the proposed amendments to section 1012.33, Florida Statutes, achieves the goal sought, and is achieved without amending sections 121.091 or 238.181, Florida Statutes, the recommendation of the Department would be to proceed without the proposed changes to sections 121.091 and 238.181, Florida Statutes, and to remove the conforming references to these sections in section 1012.33, Florida Statutes, as amended.

³³ The Contract Clause prohibits states from passing laws which impair contract rights. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). It only prevents substantial impairments of contracts. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

³⁴ Article I, s. 10 of the State Constitution prohibits ex post facto laws impairing the obligation of contracts.

³⁵ The Due Process Clauses require a state to provide due process of law before depriving any person of life, liberty, or property. Under a due process analysis, "property" includes items such as personal belongings, real property, intellectual property, or money. It may also include any benefit or entitlement to which a legitimate claim attaches. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁶ *Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

³⁷ *Supra* at n. 30.

³⁸ Department of Management Services, 2014 Legislative Bill Analysis for HB 295 (on file with the Government Operations Subcommittee).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to employment after retirement of
 3 school district personnel; amending ss. 121.091 and
 4 238.181, F.S.; revising provisions relating to
 5 reemployment of retirees as instructional personnel on
 6 a contract basis; clarifying applicability and
 7 legislative intent; amending s. 1012.33, F.S.;
 8 revising provisions relating to reemployment of
 9 retirees as instructional personnel on a contract
 10 basis; providing legislative intent and findings to
 11 clarify authorization to award contracts; providing
 12 requirements for a judgment in certain civil actions
 13 or administrative proceedings; providing an effective
 14 date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Paragraph (b) of subsection (9) of section
 19 121.091, Florida Statutes, is amended to read:

20 121.091 Benefits payable under the system.—Benefits may
 21 not be paid under this section unless the member has terminated
 22 employment as provided in s. 121.021(39)(a) or begun
 23 participation in the Deferred Retirement Option Program as
 24 provided in subsection (13), and a proper application has been
 25 filed in the manner prescribed by the department. The department
 26 may cancel an application for retirement benefits when the

27 member or beneficiary fails to timely provide the information
28 and documents required by this chapter and the department's
29 rules. The department shall adopt rules establishing procedures
30 for application for retirement benefits and for the cancellation
31 of such application when the required information or documents
32 are not received.

33 (9) EMPLOYMENT AFTER RETIREMENT; LIMITATION.—

34 (b) Any person whose retirement is effective before July
35 1, 2010, or whose participation in the Deferred Retirement
36 Option Program terminates before July 1, 2010, except under the
37 disability retirement provisions of subsection (4) or as
38 provided in s. 121.053, may be reemployed by an employer that
39 participates in a state-administered retirement system and
40 receive retirement benefits and compensation from that employer,
41 except that the person may not be reemployed by an employer
42 participating in the Florida Retirement System before meeting
43 the definition of termination in s. 121.021 and may not receive
44 both a salary from the employer and retirement benefits for 12
45 calendar months immediately subsequent to the date of
46 retirement. However, a DROP participant shall continue
47 employment and receive a salary during the period of
48 participation in the Deferred Retirement Option Program, as
49 provided in subsection (13).

50 1. A retiree who violates such reemployment limitation
51 before completion of the 12-month limitation period must give
52 timely notice of this fact in writing to the employer and to the

53 | Division of Retirement or the state board and shall have his or
 54 | her retirement benefits suspended for the months employed or the
 55 | balance of the 12-month limitation period as required in sub-
 56 | subparagraphs b. and c. A retiree employed in violation of this
 57 | paragraph and an employer who employs or appoints such person
 58 | are jointly and severally liable for reimbursement to the
 59 | retirement trust fund, including the Florida Retirement System
 60 | Trust Fund and the Public Employee Optional Retirement Program
 61 | Trust Fund, from which the benefits were paid. The employer must
 62 | have a written statement from the retiree that he or she is not
 63 | retired from a state-administered retirement system. Retirement
 64 | benefits shall remain suspended until repayment has been made.
 65 | Benefits suspended beyond the reemployment limitation shall
 66 | apply toward repayment of benefits received in violation of the
 67 | reemployment limitation.

68 | a. A district school board may reemploy a retiree as a
 69 | substitute or hourly teacher, education paraprofessional,
 70 | transportation assistant, bus driver, or food service worker on
 71 | a noncontractual basis after he or she has been retired for 1
 72 | calendar month. After a retiree has been retired for 1 calendar
 73 | month, a district school board may reemploy the ~~a~~ retiree as
 74 | instructional personnel, as defined in s. 1012.01(2)(a), under a
 75 | 1-year probationary contract as defined in s. 1012.335(1)(c). If
 76 | the retiree successfully completes the probationary contract,
 77 | the district school board may reemploy the retiree on an annual
 78 | contract basis as defined in s. 1012.335(1)(a) ~~on an annual~~

79 ~~contractual basis after he or she has been retired for 1~~
 80 ~~calendar month.~~ Any member who is reemployed within 1 calendar
 81 month after retirement shall void his or her application for
 82 retirement benefits. District school boards reemploying such
 83 teachers, education paraprofessionals, transportation
 84 assistants, bus drivers, or food service workers are subject to
 85 the retirement contribution required by subparagraph 2. This
 86 sub-subparagraph does not allow, and has never allowed, a
 87 retiree to be awarded a professional service contract under s.
 88 1012.33.

89 b. A Florida College System institution board of trustees
 90 may reemploy a retiree as an adjunct instructor or as a
 91 participant in a phased retirement program within the Florida
 92 College System, after he or she has been retired for 1 calendar
 93 month. A member who is reemployed within 1 calendar month after
 94 retirement shall void his or her application for retirement
 95 benefits. Boards of trustees reemploying such instructors are
 96 subject to the retirement contribution required in subparagraph
 97 2. A retiree may be reemployed as an adjunct instructor for no
 98 more than 780 hours during the first 12 months of retirement. A
 99 retiree reemployed for more than 780 hours during the first 12
 100 months of retirement must give timely notice in writing to the
 101 employer and to the Division of Retirement or the state board of
 102 the date he or she will exceed the limitation. The division
 103 shall suspend his or her retirement benefits for the remainder
 104 of the 12 months of retirement. Any retiree employed in

105 violation of this sub-subparagraph and any employer who employs
 106 or appoints such person without notifying the division to
 107 suspend retirement benefits are jointly and severally liable for
 108 any benefits paid during the reemployment limitation period. The
 109 employer must have a written statement from the retiree that he
 110 or she is not retired from a state-administered retirement
 111 system. Any retirement benefits received by the retiree while
 112 reemployed in excess of 780 hours during the first 12 months of
 113 retirement must be repaid to the Florida Retirement System Trust
 114 Fund, and retirement benefits shall remain suspended until
 115 repayment is made. Benefits suspended beyond the end of the
 116 retiree's first 12 months of retirement shall apply toward
 117 repayment of benefits received in violation of the 780-hour
 118 reemployment limitation.

119 c. The State University System may reemploy a retiree as
 120 an adjunct faculty member or as a participant in a phased
 121 retirement program within the State University System after the
 122 retiree has been retired for 1 calendar month. A member who is
 123 reemployed within 1 calendar month after retirement shall void
 124 his or her application for retirement benefits. The State
 125 University System is subject to the retired contribution
 126 required in subparagraph 2., as appropriate. A retiree may be
 127 reemployed as an adjunct faculty member or a participant in a
 128 phased retirement program for no more than 780 hours during the
 129 first 12 months of his or her retirement. A retiree reemployed
 130 for more than 780 hours during the first 12 months of retirement

131 must give timely notice in writing to the employer and to the
 132 Division of Retirement or the state board of the date he or she
 133 will exceed the limitation. The division shall suspend his or
 134 her retirement benefits for the remainder of the 12 months. Any
 135 retiree employed in violation of this sub-subparagraph and any
 136 employer who employs or appoints such person without notifying
 137 the division to suspend retirement benefits are jointly and
 138 severally liable for any benefits paid during the reemployment
 139 limitation period. The employer must have a written statement
 140 from the retiree that he or she is not retired from a state-
 141 administered retirement system. Any retirement benefits received
 142 by the retiree while reemployed in excess of 780 hours during
 143 the first 12 months of retirement must be repaid to the Florida
 144 Retirement System Trust Fund, and retirement benefits shall
 145 remain suspended until repayment is made. Benefits suspended
 146 beyond the end of the retiree's first 12 months of retirement
 147 shall apply toward repayment of benefits received in violation
 148 of the 780-hour reemployment limitation.

149 d. The Board of Trustees of the Florida School for the
 150 Deaf and the Blind may reemploy a retiree as a substitute
 151 teacher, substitute residential instructor, or substitute nurse
 152 on a noncontractual basis after he or she has been retired for 1
 153 calendar month. Any member who is reemployed within 1 calendar
 154 month after retirement shall void his or her application for
 155 retirement benefits. The Board of Trustees of the Florida School
 156 for the Deaf and the Blind reemploying such teachers,

157 residential instructors, or nurses is subject to the retirement
 158 contribution required by subparagraph 2.

159 e. A developmental research school may reemploy a retiree
 160 as a substitute or hourly teacher or an education
 161 paraprofessional as defined in s. 1012.01(2) on a noncontractual
 162 basis after he or she has been retired for 1 calendar month.
 163 After a retiree has been retired for 1 calendar month, a
 164 developmental research school may reemploy the a retiree as
 165 instructional personnel, as defined in s. 1012.01(2)(a), under a
 166 1-year probationary contract as defined in s. 1012.335(1)(c). If
 167 the retiree successfully completes the probationary contract,
 168 the developmental research school may reemploy the retiree on an
 169 annual contract basis as defined in s. 1012.335(1)(a) ~~on an~~
 170 annual contractual basis after he or she has been retired for 1
 171 calendar month after retirement. Any member who is reemployed
 172 within 1 calendar month voids his or her application for
 173 retirement benefits. A developmental research school that
 174 reemploys retired teachers and education paraprofessionals is
 175 subject to the retirement contribution required by subparagraph
 176 2. This sub-subparagraph does not allow, and has never allowed,
 177 a retiree to be awarded a professional service contract under s.
 178 1012.33.

179 f. A charter school may reemploy a retiree as a substitute
 180 or hourly teacher on a noncontractual basis after he or she has
 181 been retired for 1 calendar month. After a retiree has been
 182 retired for 1 calendar month, a charter school may reemploy the

183 retiree ~~a retired member~~ as instructional personnel, as defined
 184 in s. 1012.01(2)(a), under a 1-year probationary contract as
 185 defined in s. 1012.335(1)(c). If the retiree successfully
 186 completes the probationary contract, the charter school may
 187 reemploy the retiree on an annual contract basis as defined in
 188 s. 1012.335(1)(a) ~~on an annual contractual basis after he or she~~
 189 ~~has been retired for 1 calendar month after retirement.~~ Any
 190 member who is reemployed within 1 calendar month voids his or
 191 her application for retirement benefits. A charter school that
 192 reemploys such teachers is subject to the retirement
 193 contribution required by subparagraph 2. This sub-subparagraph
 194 does not allow, and has never allowed, a retiree to be awarded a
 195 professional service contract under s. 1012.33.

196 2. The employment of a retiree or DROP participant of a
 197 state-administered retirement system does not affect the average
 198 final compensation or years of creditable service of the retiree
 199 or DROP participant. Before July 1, 1991, upon employment of any
 200 person, other than an elected officer as provided in s. 121.053,
 201 who is retired under a state-administered retirement program,
 202 the employer shall pay retirement contributions in an amount
 203 equal to the unfunded actuarial liability portion of the
 204 employer contribution which would be required for regular
 205 members of the Florida Retirement System. Effective July 1,
 206 1991, contributions shall be made as provided in s. 121.122 for
 207 retirees who have renewed membership or, as provided in
 208 subsection (13), for DROP participants.

209 3. Any person who is holding an elective public office
 210 which is covered by the Florida Retirement System and who is
 211 concurrently employed in nonelected covered employment may elect
 212 to retire while continuing employment in the elective public
 213 office if he or she terminates his or her nonelected covered
 214 employment. Such person shall receive his or her retirement
 215 benefits in addition to the compensation of the elective office
 216 without regard to the time limitations otherwise provided in
 217 this subsection. A person who seeks to exercise the provisions
 218 of this subparagraph as they existed before May 3, 1984, may not
 219 be deemed to be retired under those provisions, unless such
 220 person is eligible to retire under this subparagraph, as amended
 221 by chapter 84-11, Laws of Florida.

222 Section 2. Paragraph (c) of subsection (2) of section
 223 238.181, Florida Statutes, is amended to read:

224 238.181 Reemployment after retirement; conditions and
 225 limitations.—

226 (2)

227 (c) Effective July 1, 2003, after a retired member has
 228 been retired for 1 calendar month in accordance with s.
 229 121.021(39), a district school board may reemploy such retired
 230 member as a substitute or hourly teacher on a noncontractual
 231 basis, or reemploy such retired member as instructional
 232 personnel, as defined in s. 1012.01(2)(a), under a 1-year
 233 probationary contract as defined in s. 1012.335(1)(c). If the
 234 retiree successfully completes the probationary contract, the

235 district school board may reemploy the retiree on an annual
 236 contract basis as defined in s. 1012.335(1)(a) ~~on an annual~~
 237 ~~contractual~~ basis. Any other retired member who is reemployed
 238 within 1 calendar month after retirement shall void his or her
 239 application for retirement benefits. All retirees reemployed
 240 under this paragraph shall become renewed members of the Florida
 241 Retirement System under s. 121.122, and district school boards
 242 reemploying such retired members as described herein are subject
 243 to the contributions as provided for renewed membership. This
 244 paragraph does not allow, and has never allowed, a retiree to be
 245 awarded a professional service contract under s. 1012.33.

246 Section 3. Subsection (8) of section 1012.33, Florida
 247 Statutes, is amended to read:

248 1012.33 Contracts with instructional staff, supervisors,
 249 and school principals.—

250 (8) (a) In conformance with ss. 121.091 and 238.181, after
 251 a retiree has been retired for 1 calendar month, a district
 252 school board may reemploy the retiree as instructional
 253 personnel, as defined in s. 1012.01(2)(a), under a 1-year
 254 probationary contract as defined in s. 1012.335(1)(c). If the
 255 retiree successfully completes the probationary contract, the
 256 district school board may reemploy the retiree on an annual
 257 contract basis as defined in s. 1012.335(1)(a).

258 (b) Neither this subsection, nor any other law, was
 259 intended or may be construed to allow a retiree to be awarded a
 260 professional service contract. The Legislature finds that the

261 holding in Orange County School Board v. Rachman and Schuman, 87
 262 So. 3d 48 (Fla. 5th DCA 2012), that retirees under s.
 263 121.091(9)(b)1.a. and this subsection are entitled to
 264 professional service contracts, was contrary to legislative
 265 intent at the time the statutes were enacted. The Legislature
 266 finds that retirees under s. 121.091(9)(b)1.a. and this
 267 subsection are not eligible, and were never eligible, to receive
 268 a professional service contract under this section or any other
 269 law. In a civil action or administrative proceeding, if a
 270 classroom teacher was formerly retired and then reemployed by
 271 the district school board pursuant to s. 121.091(9)(b)1.a. and
 272 this section, a judgment shall be entered against that classroom
 273 teacher on any claim or cause of action against the district
 274 school board, the district school superintendent, or a district
 275 school board employee for not awarding that teacher a
 276 professional service contract. Notwithstanding any other
 277 provision of law, a retired member may interrupt retirement and
 278 be reemployed in any public school. A member reemployed by the
 279 same district from which he or she retired may be employed on a
 280 probationary contractual basis as provided in subsection (1).

281 Section 4. This act shall take effect upon becoming 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 Porter offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

7 Section 1. Subsection (8) of section 1012.33, Florida
 8 Statutes, is amended to read:

9 1012.33 Contracts with instructional staff, supervisors,
 10 and school principals.-

11 (8) Notwithstanding any other law, a district school board
 12 may reemploy a retiree as instructional personnel, as defined in
 13 s. 1012.01(2)(a), under a 1-year probationary contract as
 14 defined in s. 1012.335(1). If the retiree successfully completes
 15 the probationary contract, the district school board may
 16 reemploy the retiree under an annual contract as defined in s.
 17 1012.335(1).



Amendment No.

18 (a) Neither this subsection nor any other law enacted
19 before the effective date of this act allows, or was intended to
20 allow, a retiree to be awarded a professional service contract.
21 The Legislature finds that the holding in Orange County School
22 Board v. Rachman and Schuman, 87 So. 3d 48 (Fla. 5th DCA 2012),
23 which found that retirees under s. 121.091(9)(b)1.a. and this
24 subsection as enacted before the effective date of this act were
25 entitled to a professional service contract, was contrary to
26 legislative intent at the time the statutes were enacted. The
27 Legislature finds that retirees under s. 121.091(9), regardless
28 of the retiree's date of retirement, and this subsection are not
29 eligible, and were never eligible, to receive a professional
30 service contract under this section or any other law. In a civil
31 action or administrative proceeding, if a classroom teacher was
32 formerly retired and then reemployed by the district school
33 board pursuant to s. 121.091(9) and this section as enacted
34 before the effective date of this act, the Legislature intends,
35 in accordance with the findings expressed in this subsection,
36 that a judgment be entered against that classroom teacher on any
37 claim or cause of action against the district school board, the
38 district school superintendent, or a district school board
39 employee for not awarding that teacher a professional service
40 contract.

41 (b) This subsection does not void and is not intended to
42 void or in any way impair any professional service contract
43 inadvertently awarded by a district school board to a retiree



Amendment No.

44 before the effective date of this act ~~Notwithstanding any other~~
45 ~~provision of law, a retired member may interrupt retirement and~~
46 ~~be reemployed in any public school. A member reemployed by the~~
47 ~~same district from which he or she retired may be employed on a~~
48 ~~probationary contractual basis as provided in subsection (1).~~

49 Section 2. The Division of Law Revision and Information is
50 directed to replace the phrase "the effective date of this act"
51 wherever it occurs in this act with such date.

52 Section 3. This act shall take effect upon becoming a law.
53
54
55

56 -----
57 **T I T L E A M E N D M E N T**

58 Remove everything before the enacting clause and insert:
59 An act relating to employment after retirement of school
60 district personnel; amending s. 1012.33, F.S.; revising
61 provisions relating to reemployment of retirees as instructional
62 personnel on a contract basis; providing legislative intent and
63 findings to clarify authorization to award contracts; providing
64 requirements for a judgment in certain civil actions or
65 administrative proceedings; providing a directive to the
66 Division of Law Revision and Information; providing an effective
67 date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 711 Public Meetings and Public Records/Alzheimer's Disease Research Grant Advisory Board
SPONSOR(S): Health Quality Subcommittee; Hudson and others
TIED BILLS: CS/HB 709 **IDEN./SIM. BILLS:** SB 840

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	12 Y, 0 N, As CS	Guzzo	O'Callaghan
2) Government Operations Subcommittee		Williamson	Williamson
3) Health & Human Services Committee			

SUMMARY ANALYSIS

House Bill 709 (2014) creates the Ed and Ethel Moore Alzheimer's Disease Research Program and the Alzheimer's Disease Research Grant Advisory Board (board) in order to make recommendations to the State Surgeon General regarding funding for certain research proposals.

This bill, which is linked to the passage of House Bill 709, creates public record and public meeting exemptions for the board.

The bill provides that applications provided to the board for Alzheimer's disease research grants are confidential and exempt from public record requirements. In addition any records generated by the board relating to the review of research grant applications, except final recommendations, are confidential and exempt.

The bill also creates a public meeting exemption for those portions of a board meeting during which such applications are discussed. The closed portion of the meeting must be recorded, and the recording must be maintained by the board.

The bill provides that the confidential and exempt records, including the recording of the meeting, may be disclosed with the written consent of the individual to whom the information pertains, or the individual's legally authorized representative, or by a court order upon a showing of good cause.

The bill provides that the public record and public meeting exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October, 2, 2019, unless saved from repeal by reenactment by the Legislature. It also provides a public necessity statement 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 public record and public meeting exemptions; 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 Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

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.

Public Meetings Law

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.¹ The board or commission must provide reasonable notice of all public meetings.² Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.³ Minutes of a public meeting must be promptly recorded and open to public inspection.⁴

Public Record and Public Meeting Exemptions

The Legislature, however, may provide by general law for the exemption of records and meetings from the requirements of Article I, s. 24(a) and (b) 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.⁵

Furthermore, the Open Government Sunset Review Act⁶ 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; or

¹ Section 286.011(1), F.S.

² *Ibid.*

³ Section 286.011(6), F.S.

⁴ Section 286.011(2), F.S.

⁵ Art. I, s. 24(c), Fla. Const.

⁶ Section 119.15, F.S.

- 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 709 (2014), Ed and Ethel Moore Alzheimer's Disease Research Program

House Bill 709 creates the Ed and Ethel Moore Alzheimer's Disease Research Program (program), and authorizes the program to be administered by the Department of Health (DOH). The purpose of the program is to fund research leading to prevention of or a cure for Alzheimer's disease.

The bill authorizes applications for research funding under the program to be submitted by any university or established research institute in the state, and requires that all qualified investigators in the state have equal access and opportunity to compete for research funding. The bill authorizes certain types of applications to be considered for funding, including:

- Investigatory-initiated research grants;
- Institutional research grants;
- Pre-doctoral and post-doctoral research fellowships; and
- Collaborative research grants, including those that advance the finding of cures through basic or applied research.

House Bill 709 also creates the Alzheimer's Disease Research Grant Advisory Board (board). The board must consist of 11 members appointed by the State Surgeon General, and must include two gerontologists, two geriatric psychiatrists, two geriatricians, two neuroscientists, and three neurologists. The bill provides requirements for the board, including requiring the board to advise the State Surgeon General as to the scope of the research program.

Effect of Proposed Changes

The bill creates a public record and public meeting exemption for the board.

The bill provides that applications provided to the board for Alzheimer's disease research grants are confidential and exempt⁷ from public record requirements. In addition any records generated by the board relating to the review of research grant applications, except final recommendations, are confidential and exempt.

The bill also creates a public meeting exemption for those portions of a board meeting during which such applications are discussed. The closed portion of the meeting must be recorded, and the recording must be maintained by the board.

The bill provides that the confidential and exempt records, including the recording of the meeting, may be disclosed with the written consent of the individual to whom the information pertains, or the individual's legally authorized representative, or by a court order upon a showing of good cause.

The bill provides that the public record and public meeting exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October, 2, 2019, unless saved from repeal by reenactment by the Legislature.

⁷ 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).

The bill provides a public necessity statement as required by the State Constitution, which states the exemptions are a public necessity because the research grant applications and the records generated by the board related to review of the applications contain information of a confidential nature, including ideas and processes, the disclosure of which could injure the affected researchers. Further, closing the access to those portions of meetings of the board during which research grant applications are discussed serves a public good by ensuring that decisions are based upon merit without bias or undue influence.

B. SECTION DIRECTORY:

Section 1: Amends s. 381.82, F.S., as created by House Bill 709, 2014 Regular Session, relating to the Ed and Ethel Moore Alzheimer's Disease Research Program.

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:

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 the board because staff responsible for complying with public records requests could require training related to the public record exemption. In addition, the board 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 board.

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:

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 new exemptions; 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 new exemptions; thus, it includes a public necessity statement.

Exemption Bills

Article I, s. 24(c) of the State Constitution provides that an exemption must be created by general law and the law must contain only exemptions from public record or public meeting requirements. The exemption does not appear to be in conflict with the constitutional requirement.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

Lines 38 through 40 of the bill provide that the recording of the closed meeting must be maintained by the board and is subject to disclosure in accordance with subparagraphs 3. and 4. However, subparagraph 4. does not provide disclosure requirements. It provides for repeal of the public record exemption pursuant to the Open Government Sunset Review Act.

Lines 41 through 45 authorize the board to release the confidential and exempt information "by court order upon showing good cause." Such provision usually is phrased as "by court order upon a showing of good cause."

Lines 56 through 59 discuss the need to make certain portions of meetings of the board confidential and exempt from public meeting requirements; however, meetings are only made exempt from those requirements.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 5, 2014, the Health Quality Subcommittee adopted an amendment to HB 711 and reported the bill favorably as a committee substitute. The amendment made the following changes to the bill:

- Required the closed portion of a meeting to be recorded;
- Required the recording to be maintained by the board; and
- Authorized the recording to be disclosed with the written consent of either the individual affected or the individual's legally authorized representative, by a court order, or in the event of the exemption being repealed as a result of the Open Government Sunset Review Act.

This analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.

1 A bill to be entitled
2 An act relating to public meetings and public records;
3 amending s. 381.82, F.S.; providing an exemption from
4 public records requirements for research grant
5 applications provided to the Alzheimer's Disease
6 Research Grant Advisory Board under the Ed and Ethel
7 Moore Alzheimer's Disease Research Program and records
8 generated by the board relating to review of the
9 applications; providing an exemption from public
10 meetings requirements for those portions of meetings
11 of the board during which the research grant
12 applications are discussed; requiring the recording of
13 closed portions of meetings; authorizing disclosure of
14 such confidential information under certain
15 circumstances; providing for legislative review and
16 repeal of the exemptions; providing a statement of
17 public necessity; providing a contingent effective
18 date.

19
20 Be It Enacted by the Legislature of the State of Florida:

21
22 Section 1. Paragraph (d) is added to subsection (3) of
23 section 381.82, Florida Statutes, as created by HB 709, 2014
24 Regular Session, to read:

25 381.82 Ed and Ethel Moore Alzheimer's Disease Research
26 Program.—

27 (3) There is created within the Department of Health the
 28 Alzheimer's Disease Research Grant Advisory Board.

29 (d)1. Applications provided to the board for Alzheimer's
 30 disease research grants under this section, and any records
 31 generated by the board relating to review of such applications,
 32 except final recommendations, are confidential and exempt from
 33 s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

34 2. Those portions of a meeting of the board during which
 35 applications for Alzheimer's disease research grants under this
 36 section are discussed are exempt from s. 286.011 and s. 24(b),
 37 Art. I of the State Constitution. The closed portion of a
 38 meeting must be recorded. The recording shall be maintained by
 39 the board and shall be subject to disclosure in accordance with
 40 subparagraphs 3. and 4.

41 3. Information that is held confidential and exempt under
 42 this paragraph may be disclosed with the express written consent
 43 of the individual to whom the information pertains or the
 44 individual's legally authorized representative, or by court
 45 order upon showing good cause.

46 4. This paragraph is subject to the Open Government Sunset
 47 Review Act in accordance with s. 119.15 and shall stand repealed
 48 on October 2, 2019, unless reviewed and saved from repeal
 49 through reenactment by the Legislature.

50 Section 2. The Legislature finds that it is a public
 51 necessity that applications for Alzheimer's disease research
 52 grants provided to the Alzheimer's Disease Research Grant

53 Advisory Board and records generated by the board related to
 54 review of the applications be held confidential and exempt from
 55 s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the
 56 State Constitution and that those portions of meetings of the
 57 board during which the applications are discussed be held
 58 confidential and exempt from s. 286.011, Florida Statutes, and
 59 s. 24(b), Article I of the State Constitution. The research
 60 grant applications, and the records generated by the board
 61 related to review of the applications, contain information of a
 62 confidential nature, including ideas and processes, the
 63 disclosure of which could injure the affected researchers.
 64 Maintaining confidentiality is a hallmark of scientific peer
 65 review when awarding grants, is practiced by the National
 66 Science Foundation and the National Institutes of Health, and
 67 allows for candid exchanges among reviewers critiquing
 68 proposals. The Legislature further finds that closing access to
 69 those portions of meetings of the board during which the
 70 Alzheimer's disease research grant applications are discussed
 71 serves a public good by ensuring that decisions are based upon
 72 merit without bias or undue influence.

73 Section 3. This act shall take effect on the same date
 74 that HB 709 or similar legislation takes effect, if such
 75 legislation is adopted in the same legislative session or an
 76 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 Hudson offered the following:

Amendment

6 Remove lines 40-58 and insert:
7 subparagraph 3.

8 3. Information that is held confidential and exempt under
9 this paragraph may be disclosed with the express written consent
10 of the individual to whom the information pertains or the
11 individual's legally authorized representative, or by court
12 order upon a showing of good cause.

13 4. This paragraph is subject to the Open Government Sunset
14 Review Act in accordance with s. 119.15 and shall stand repealed
15 on October 2, 2019, unless reviewed and saved from repeal
16 through reenactment by the Legislature.


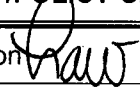


Amendment No.

17 Section 2. The Legislature finds that it is a public
18 necessity that applications for Alzheimer's disease research
19 grants provided to the Alzheimer's Disease Research Grant
20 Advisory Board and records generated by the board related to
21 review of the applications be held confidential and exempt from
22 s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the
23 State Constitution and that those portions of meetings of the
24 board during which the applications are discussed be held exempt
25 from s. 286.011, Florida Statutes, and
26

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 801 Preference in Award of State Contracts
SPONSOR(S): Fitzenhagen
TIED BILLS: IDEN./SIM. BILLS: CS/SB 612

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

SUMMARY ANALYSIS

Current law requires each state agency, university, college, school district, or other political subdivision of this state to award a preference to Florida based businesses for the purchase of personal property, through competitive solicitation, when 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. If the out-of-state bidder's home state offers an in-state preference, then the preference given to Florida based vendors is limited to the preference provided by the out-of-state bidder's home state. In a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state and the out of state bidder's home state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, a 5 percent preference is given to the lowest responsible and responsive vendor having a principal place of business in Florida.

The bill expands the preference provided in current law to include counties and municipalities, as well as construction services. It provides that for a competitive solicitation in which payment is to be made, in whole or in part, from funds appropriated by the state, Florida's preference preempts and supersedes any local ordinance or regulation based upon specified criteria. The bill also provides that other than the requirements imposed for solicitations involving state funds, a university, college, county, municipality, school district, or other political subdivision of the state is not prevented from awarding a contract to any vendor in accordance with the applicable state laws or local ordinances or regulations.

The bill may have an indeterminate fiscal impact on state and local governments. See Fiscal Comments section for further discussion.

This bill may be a county or municipal mandate. See Section III.A.1 of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹ 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.² The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁴

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposal, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.⁵ Section 287.012(6), F.S., provides that competitive solicitation means "the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement."

Local governmental units are not subject to the provisions of chapter 287, F.S.

Florida In-state Preference

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 vendor whose principal place of business is in another state, or political subdivision of that state.⁶ 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.

¹ 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."

² See ss. 287.032 and 287.042, F.S.

³ *Id.*

⁴ See ss. 287.012(6) and 287.057, F.S.

⁵ 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 procured.

⁶ Section 287.084(1)(a), F.S.

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.⁷

A vendor whose principal place of business is outside of this state must submit with the bid, proposal, or reply documents a written opinion of an attorney at law licensed to practice law in that foreign state as to the preferences, if any, granted by the law of that state to a business entity whose principal place of business is in that foreign state.⁸

Florida's preference law does not apply to transportation projects for which federal aid funds are available,⁹ or to counties or cities.¹⁰ It also does not apply in the award of contracts for the purchase of construction services.

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. The department is responsible for establishing by rule the following:¹¹

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when those contracts are determined to be in the best interest of the state.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.¹² Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.¹³

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Register at least 21 days prior to the established bid opening. If the construction project is projected to exceed \$500,000, the advertisement must be published at least 30 days prior to the bid opening in the Florida Administrative Register, and at least once 30 days prior to the bid opening in a newspaper of general circulation in the county where the project is located.¹⁴

Florida Preference to State Residents

Florida law provides a preference for the employment of state residents in construction contracts funded by money appropriated with state funds. Such contracts must contain a provision requiring the contractor to give preference to the employment of state residents in the performance of the work if state residents have substantially equal qualifications¹⁵ to those of non-residents.¹⁶ If a construction

⁷ *Id.*

⁸ Section 287.084(2), F.S.

⁹ Section 287.084(1)(b), F.S.

¹⁰ Section 287.084(1)(c), F.S.

¹¹ Section 255.29, F.S.

¹² See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

¹³ See s. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

¹⁴ For counties, municipalities, and political subdivisions, similar publishing provisions apply. Section 255.0525(2), F.S.

¹⁵ Section 255.099(1)(a), F.S., defines substantially equal qualifications as the "qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons."

contract is funded by local funds, the contract may contain such a provision.¹⁷ In addition, the contractor required to employ state residents must contact the Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.¹⁸

Effect of the Bill

The bill expands the preference provided in chapter 287, F.S., to include counties and municipalities, as well as construction services. Currently, the preference is required only when personal property is required to be purchased through competitive solicitation by an agency, university, college, school district, or other political subdivision of the state.

When payment for the purchase of personal property or construction services is to be in whole or in part from state appropriated funds, the bill provides a preemption of any local ordinance or regulation that restricts a contractor certified under s. 489.105(8), F.S.,¹⁹ from competing for an award based upon:

- The vendor maintaining an office or place of business within a particular local jurisdiction;
- The vendor hiring employees or subcontractors from within a particular local jurisdiction; or
- The vendor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

When payment for the purchase of personal property or construction services is to be in whole or in part from state appropriated funds, a university, college, county, municipality, school district, or other political subdivision must disclose in the solicitation document the funding source as well as the amount of such funds or the percentage of such funds as compared to the anticipated total cost of the purchase.

The bill provides that except for when state appropriated funds are used for the purchase of personal property or construction services, a university, college, county, municipality, school district, or other political subdivision is not prevented from awarding a contract to any vendor in accordance with applicable state laws or local ordinances or regulations.

B. SECTION DIRECTORY:

Section 1. amends s. 287.084, F.S., expanding provisions that require an agency, university, college, school district, or other political subdivision of the state to provide preferential consideration to a Florida business in awarding competitively bid contracts to purchase personal property to include the purchase of construction services; requiring counties and municipalities to provide such preferential consideration; providing that for specified competitive solicitations the authority to grant a preference supersedes any local ordinance or regulation that restricts specified contractors from competing for an award based upon certain conditions; requiring a university, college, county, municipality, school district, or other political subdivision to make specified disclosures in competitive solicitation documents.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

¹⁶ Section 255.099(1), F.S.

¹⁷ *Id.*

¹⁸ Section 255.099(1)(b), F.S.

¹⁹ Section 489.105(8), F.S., defines certified contractor as a contractor who possesses a certificate of competency issued by the Department of Business and Professional Regulation, and who is authorized to contract statewide.

1. Revenues:
See Fiscal Comments.

2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
See Fiscal Comments.

2. Expenditures:
See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill could result in more business being awarded to in-state vendors as a result of the state preference being given for construction services.

D. FISCAL COMMENTS:

The bill may have an unknown negative fiscal impact on both the state and local governments. The bill may have a negative effect as the state and local governments may experience increased expenditures with the possibility of higher contract prices for construction services as a result of the preference. Local governments may experience a negative impact because they will be required to utilize an in-state preference for the procurement of goods and services. The bill also may have an operational impact as the statute would preempt local ordinances or regulations in certain circumstances.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill requires cities and counties to spend money or take an action that requires the expenditure of money; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18 of the State Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

Equal Protection Clause

The United States Constitution provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.”²⁰ The expansion of the in-state preference provision in this bill may constitute an equal protection violation. If such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.²¹ Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.²²

²⁰ U.S. Const. amend. XIV, s. 1; *see also* FLA. Const. art. I, s. 2.

²¹ *Nordlinger v. Hahn*, 505 U.S. 1, 33-34 (1992) (stating that a “classification rationally furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.”)

²² *Id.*

Commerce Clause

The United States Constitution provides that Congress has the power to “regulate commerce...among the states.”²³ The Commerce Clause acts not only as a positive grant of powers to Congress, but also as a negative constraint upon the states.²⁴ When a state or local government is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause.²⁵ A state is considered to be a “market participant” when it is acting as an economic actor such as a purchaser of goods and services.²⁶ Since the state is acting as a “market participant” under this bill, the in-state preference provisions herein are likely to be upheld as an exception to the Commerce Clause.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority for the Department of Management Services; however, the department may need to adopt rules for purposes of implementing the bill. The department does not appear to have a general grant of rulemaking authority in chapter 287, F.S., which may be needed if the department determines that rulemaking is necessary.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Relating to Clause

The relating to clause for the bill provides that it is “[a]n act relating to preference in award of state contracts”; however, the bill creates provisions applicable to state and local contracts. As such, the sponsor may want to consider an amendment to correct the drafting error in the relating to clause to provide that the bill is an act relating to “preference in award of governmental entity contracts.”

Drafting Issues: Construction Services

The bill amends s. 287.084, F.S., to expand the in-state preference in current law to include the purchase of construction services; however, chapter 287, F.S., regulates state agency procurement of personal property and services. Chapter 255, F.S., relates to public property and publicly owned buildings and regulates contracts pertaining to construction services. As such, the sponsor may want to consider an amendment to remove the reference to “construction services” in s. 287.084, F.S., and instead create the same preference for construction services in chapter 255, F.S.

Drafting Issues: Title

On lines 7 through 13, the bill provides that counties and municipalities must grant such state preferences if state appropriations are used to fund the contract; however, the state preference must be used regardless of whether state funds are used. The title may create confusion as drafted.

Other Comments: Principal Place of Business

Current law does not provide for a definition of “principal place of business.” There are two competing tests to determine where a company’s principal place of business is located.

The first is the “substantial predominance” test, which analyzes the following criteria: the location of its employees, where sales took place, its production activities, its tangible property, its sources of income, the value of land owned and leased, and the replacement cost of assets located in a certain state.²⁷

The second test is the “nerve center test.” Under this test, a company’s principal place of business refers to the place where the corporation’s high level officers direct, control, and coordinate the

²³ U.S. Const. art. I, s. 8, cl. 3.

²⁴ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁵ *National Collegiate Athletic Ass’n v. Associated Press*, 18 So.3d 1201, 1211-1212 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579).

²⁶ *Id.*

²⁷ *Ghaderi v. United Airlines, Inc.*, 136 F.Supp.2d 1041, 1044-46 (N.D. Cal 2001).

corporation's activities.²⁸ The Department of Management Services has previously utilized the "nerve center" test to determine the company's principal place of business.²⁹

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

²⁸ *Hertz Corp v. Friend et al.*, 130 S.Ct. 1181 (2010).

²⁹ In a 2010 memorandum to purchasing directors, the department indicated it intended to use the nerve center test when applying the Florida based business preference found in s. 49 of ch. 2010-151, L.O.F., to both state term contracts and other department issued solicitations. Memorandum to Purchasing Directors, Department of Management Services, September 2, 2010 at 3 (on file with the Government Operations Subcommittee).

1 A bill to be entitled
 2 An act relating to preference in award of state
 3 contracts; amending s. 287.084, F.S.; expanding
 4 provisions to require specified political subdivisions
 5 to provide preferential consideration to Florida
 6 businesses when awarding competitively bid contracts
 7 for construction services; requiring counties and
 8 municipalities to provide such preferential
 9 consideration if state appropriations are used to fund
 10 the contract; specifying that the grant preference
 11 supersedes any local ordinance that restricts
 12 contractors from competing for an award based upon
 13 certain criteria; requiring certain political
 14 subdivisions to disclose whether payment for a
 15 competitively awarded contract will come from state
 16 appropriations; providing for construction; providing
 17 an effective date.

18
 19 Be It Enacted by the Legislature of the State of Florida:

20
 21 Section 1. Subsection (1) of section 287.084, Florida
 22 Statutes, is amended to read:

23 287.084 Preference to Florida businesses.—

24 (1)(a) When an agency, university, college, county,
 25 municipality, school district, or other political subdivision of
 26 the state is required to make purchases of personal property or

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27 construction services through competitive solicitation and the
 28 lowest responsible and responsive bid, proposal, or reply is by
 29 a vendor whose principal place of business is in a state or
 30 political subdivision thereof which grants a preference for the
 31 purchase of such personal property or construction services to a
 32 person whose principal place of business is in such state, then
 33 the agency, university, college, county, municipality, school
 34 district, or other political subdivision of this state shall
 35 award a preference to the lowest responsible and responsive
 36 vendor having a principal place of business within this state,
 37 which preference is equal to the preference granted by the state
 38 or political subdivision thereof in which the lowest responsible
 39 and responsive vendor has its principal place of business. In a
 40 competitive solicitation in which the lowest bid is submitted by
 41 a vendor whose principal place of business is located outside
 42 the state and that state does not grant a preference in
 43 competitive solicitation to vendors having a principal place of
 44 business in that state, the preference to the lowest responsible
 45 and responsive vendor having a principal place of business in
 46 this state shall be 5 percent.

47 (b) Paragraph (a) does not apply to transportation
 48 projects for which federal aid funds are available.

49 (c)1. For a competitive solicitation in which payment for
 50 the personal property or construction services is to be made in
 51 whole or in part from state appropriations, this section
 52 preempts and supersedes any local ordinance or regulation that

53 restricts a contractor certified under s. 489.105(8) from
 54 competing for an award based upon:

55 a. The vendor maintaining an office or place of business
 56 within a particular local jurisdiction;

57 b. The vendor hiring employees or subcontractors from
 58 within a particular local jurisdiction; or

59 c. The vendor's prior payment of local taxes, assessments,
 60 or duties within a particular local jurisdiction.

61 2. In a competitive solicitation subject to this section,
 62 a university, college, county, municipality, school district, or
 63 other political subdivision shall disclose in the solicitation
 64 document whether payment will come from state appropriations
 65 and, if known, the amount of such funds or the percentage of
 66 such funds as compared to the anticipated total cost of the
 67 personal property or construction services.

68 3. Except as provided in subparagraph 1., this section
 69 does not prevent a university, college, county, municipality,
 70 school district, or other political subdivision of this state
 71 from awarding a contract to any vendor in accordance with
 72 applicable state laws or local ordinances or regulations.

73 ~~(c) As used in this section, the term "other political~~
 74 ~~subdivision of this state" does not include counties or~~
 75 ~~municipalities.~~

76 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 Fitzenhagen offered the following:

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

6 Remove everything after the enacting clause and insert:

7 Section 1. Section 255.0991, Florida Statutes, is created
8 to read:

9 255.0991 Contracts for construction services; prohibiting
10 local government preferences.-

11 (1) For a competitive solicitation for construction
12 services in which 20 percent or more of the cost is to be paid
13 from state-appropriated funds, this section prohibits the use of
14 any local ordinance or regulation that restricts a contractor
15 certified under s. 489.105(8) from competing for an award based
16 upon:



Amendment No.

17 (a) The vendor maintaining an office or place of business
18 within a particular local jurisdiction;

19 (b) The vendor hiring employees or subcontractors from
20 within a particular local jurisdiction; or

21 (c) The vendor's prior payment of local taxes,
22 assessments, or duties within a particular local jurisdiction.

23 (2) In any competitive solicitation subject to this
24 section, a state college, county, municipality, school district,
25 or other political subdivision shall disclose in the
26 solicitation document whether payment will come from funds
27 appropriated by the state and, if known, the amount of such
28 funds or the percentage of such funds as compared to the
29 anticipated total cost of the construction services.

30 (3) Except as provided in subsection (1), this section
31 does not prevent a state college, county, municipality, school
32 district, or other political subdivision of this state from
33 awarding a contract to any vendor in accordance with applicable
34 state laws or local ordinances or regulations.

35 Section 2. This act shall take effect July 1, 2014
36
37

38 -----
39 **T I T L E A M E N D M E N T**

40 Remove everything before the enacting clause and insert:
41 An act relating to local government construction
42 preferences; creating s. 255.0991, F.S.; prohibiting



Amendment No.

43 | local ordinances and regulations in certain
44 | circumstances; requiring a state college, school
45 | district, or other political subdivision to make
46 | specified disclosures in competitive solicitation
47 | documents; providing an effective date.

48

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 811 Foreign Investments
SPONSOR(S): Hager
TIED BILLS: IDEN./SIM. BILLS: SB 948

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington	Williamson
2) Appropriations Committee			

SUMMARY ANALYSIS

The State Board of Administration (SBA) has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan and FRS Investment Plan, which represents approximately \$152 billion, or 85 percent, of the \$177 billion in assets which are managed by the SBA. The SBA's ability to invest the FRS assets is governed by a "legal list" of the types of investments and the total percentage that may be invested in each type. Currently, the SBA may invest up to 35 percent of any of its funds in foreign corporate securities and obligations. The bill increases that amount to 50 percent.

The Protecting Florida's Investment Act (PFIA) requires the SBA to identify and divest from assets in foreign companies doing business in Iran and Sudan. The PFIA requires the SBA to assemble and publish a list of "Scrutinized Companies" that have prohibited business operations in Sudan and Iran. Once placed on the list, the SBA and its investment managers are prohibited from acquiring those companies' securities and are required to divest those securities if the companies on the list do not cease the prohibited activities or take certain compensating actions involving petroleum or energy, oil or mineral extraction, power production, or military support activities.

The bill modifies the PFIA to amend the definition of companies subject to the PFIA to exclude subsidiaries and affiliates. It provides that SBA investments in exchange-traded funds will not be subject to the divestiture requirements. It also makes terminology changes to reflect that South Sudan is now an independent nation.

The bill also provides that investments by a domestic insurer in a company included on the SBA's Scrutinized Companies list must be treated as nonadmitted assets under the Florida Insurance Code. Such investments must be reported to the Office of Insurance Regulation and must be divested within a specified period of time.

The bill may have an indeterminate fiscal impact on state government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida State Pension Funds and Annuities

State Board of Administration

The State Board of Administration (SBA or board) is created in s. 4(e), Art. IV of the State Constitution. The Governor, the Chief Financial Officer, and the Attorney General are the trustees. The SBA derives its powers to oversee state funds from s. 9, Art. XII of the State Constitution.

The SBA has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan and FRS Investment Plan,¹ which represents approximately \$152 billion, or 85 percent, of the \$177 billion in assets which are managed by the SBA.² The SBA also manages over 30 other investment portfolios, with combined assets of \$25 billion, including the Florida Hurricane Catastrophe Fund, the Florida Lottery Fund, the Florida Pre-Paid College Plan, and various debt-service accounts for state bond issues.³

Investments

Investment decisions for the pension plan are made by fiduciaries hired by the state. Under Florida law, an SBA fiduciary charged with an investment decision must act as a prudent expert would under similar circumstances, taking into account all relevant substantive factors. A nine-member Investment Advisory Council provides recommendations on investment policy, strategy, and procedures.⁴

The SBA's ability to invest the FRS assets is governed by s. 215.47, F.S., which provides a "legal list" of the types of investments and the total percentage that may be invested in each type. Some "legal list" guidelines specific to the pension plan provide:

- No more than 80 percent of assets should be invested in domestic common stocks.
- No more than 75 percent of assets should be invested in internally managed common stocks.
- No more than 3 percent of equity assets should be invested in the equity securities of any one corporation, except to the extent a higher percentage of the same issue is included in a nationally recognized market index, based on market values, or except upon a specific finding by the board that such higher percentage is in the best interest of the fund.
- No more than 25 percent of assets should be invested in notes issued by FHA-insured or VA-guaranteed first mortgages on real property, or foreign government general obligations.
- No more than 35 percent of assets should be invested in foreign corporate or commercial securities or obligations.
- No more than 20 percent of assets should be invested in alternative investments.

Exchange-Traded Funds

Exchange-traded funds (ETFs) are a type of investment product. ETFs offer investors a way to pool their money in a fund that makes investments in stocks, bonds, or other assets and, in return, to receive an interest in that investment pool. Unlike mutual funds, ETF shares are traded on a national

¹ Members in the FRS may elect to participate in the pension plan, which is a defined benefit plan, or the investment plan, which is a defined contribution plan.

² *Quarterly Performance Report to the Trustees*, December 31, 2013, State Board of Administration. A copy of the report can be found online at: <http://www.sbafla.com/fsb/PerformanceReports/2013QuarterlyReporttoTrustees/tabid/1481/Default.aspx> (last visited March 15, 2014).

³ *Monthly Performance Report to the Trustees, Performance through November 30, 2013*, State Board of Administration, issued January 13, 2014. A copy of the report can be found online at: <http://www.sbafla.com/fsb/PerformanceReports/2013MonthlyReporttoTrustees/tabid/1480/Default.aspx> (last visited March 15, 2014).

⁴ Section 215.444, F.S.

stock exchange and at market prices that may or may not be the same as the net asset value of the shares.⁵

State Sponsors of Terrorism

Countries which are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as “State Sponsors of Terrorism” and are subject to sanctions under the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act.⁶ The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.

The four countries currently designated by the U.S. Secretary of State as “State Sponsors of Terrorism” are Cuba, Iran, Sudan, and Syria.⁷

Divestment of Securities

Divestment of securities is one method of applying economic pressures to companies, groups, or countries whose practices are not condoned by shareholders. Divestment may be used in conjunction with or in lieu of other sanctioning methods, such as economic embargoes and diplomatic and military activities. Alternatively, divestment may be used as a protective device if a particular investment carries a high level of risk to the performance of the fund.

Federal Divestment Laws

The Sudan Accountability and Divestment Act of 2007 (SADA) authorizes states to divest – within specified boundaries – from companies that do business in Sudan. SADA provides in pertinent part:

Authority to Divest—Notwithstanding any other provision of law, a State or local government may adopt and enforce measures that meet the requirements of subsection (e) to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines, using credible information available to the public, are conducting or have direct investments in business operations described in subsection (d).

The authority of states to divest is limited to companies with business operations in Sudan and to companies with operations in four specified industries: power production activities, mineral extraction activities, oil-related activities, or the production of military equipment. SADA contains other limitations on the divestment of state funds.⁸ Additionally, the authority to divest ends 30 days after the President certifies that Sudan has met certain conditions assuring peace and safety for civilian populations.

Similar divestment policy is found in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). Title II of CISADA pertains to the divestment from certain companies that invest in Iran. Identical authority for states to divest state funds, as found in SADA, is found in s. 202(b). CISADA prohibits investments in Iran relating to specified amounts invested in the energy sector, including oil and natural gas production. CISADA requires the state or local government to provide notice and opportunity for a hearing.

State Divestment Laws

The state has practiced divestment three times in modern history. From 1986 to 1993, the Legislature directed the SBA to divest of companies doing business with South Africa. From 1997 until 2001, the

⁵ More information about ETFs can be found online at: <http://www.nasdaq.com/investing/etfs/what-are-ETFs.aspx> (last visited March 15, 2014).

⁶ U.S. Department of State, Diplomacy in Action can be found online at: <http://www.state.gov/j/ct/list/c14151.htm> (last visited March 15, 2014).

⁷ *Id.*

⁸ See SADA s. 3(d)(2), (e), and (f).

SBA made a decision to divest of 16 tobacco stocks due to pending litigation involving the state and those companies. In 2007, the Legislature unanimously passed the Protecting Florida's Investment Act (PFIA), which required the SBA to divest of companies with certain business operations in the countries of Sudan or Iran. The PFIA requires the SBA to assemble and publish a list of "Scrutinized Companies"⁹ that have prohibited business operations in Sudan and Iran. Once placed on the list, the SBA and its investment managers are prohibited from acquiring those companies' securities and are required to divest those securities if the companies on the list do not cease the prohibited activities or take certain compensating actions involving petroleum or energy, oil or mineral extraction, power production, or military support activities.

Sudan and South Sudan

Sudan was engaged in a civil war between north and south Sudan until 2005 when a Comprehensive Peace Agreement was signed. Southern Sudan was granted a six-year period of autonomy to be followed by a referendum on independence. That referendum was held in January 2011, and resulted in a vote in favor of succession from Sudan. The southern region attained independence on July 9, 2011.¹⁰ As a result, the PFIA contains references to Sudan that are now inaccurate.

Office of Insurance Regulation

The Financial Services Commission (commission) is created within the Department of Financial Services, and is comprised of the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture. The Office of Insurance Regulation, within the commission, is responsible for all activities concerning insurers and other risk bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision.¹¹ Chapter 625, F.S., governs accounting, investments, and deposits by insurers and specifies the assets that are allowed and not allowed for purposes of determining the financial condition of an insurer. Insurer is defined as "every person

⁹ Section 215.473(1)(t), F.S., defines "Scrutinized Company" as any company that meets any of the following criteria:

1. The company has business operations that involve contracts with or provision of supplies or services to the government of Sudan, companies in which the government of Sudan has any direct or indirect equity share, consortiums or projects commissioned by the government of Sudan, or companies involved in consortiums or projects commissioned by the government of Sudan, and:

a. More than 10 percent of the company's revenues or assets linked to Sudan involve oil-related activities or mineral-extraction activities; less than 75 percent of the company's revenues or assets linked to Sudan involve contracts with or provision of oil-related or mineral-extracting products or services to the regional government of southern Sudan or a project or consortium created exclusively by that regional government; and the company has failed to take substantial action; or

b. More than 10 percent of the company's revenues or assets linked to Sudan involve power-production activities; less than 75 percent of the company's power-production activities include projects whose intent is to provide power or electricity to the marginalized populations of Sudan; and the company has failed to take substantial action.

2. The company is complicit in the Darfur genocide.

3. The company supplies military equipment within Sudan, unless it clearly shows that the military equipment cannot be used to facilitate offensive military actions in Sudan or the company implements rigorous and verifiable safeguards to prevent use of that equipment by forces actively participating in armed conflict. Examples of safeguards include post-sale tracking of such equipment by the company, certification from a reputable and objective third party that such equipment is not being used by a party participating in armed conflict in Sudan, or sale of such equipment solely to the regional government of southern Sudan or any internationally recognized peacekeeping force or humanitarian organization.

4. The company has business operations that involve contracts with or provision of supplies or services to the government of Iran, companies in which the government of Iran has any direct or indirect equity share, consortiums, or projects commissioned by the government of Iran, or companies involved in consortiums or projects commissioned by the government of Iran and:

a. More than 10 percent of the company's total revenues or assets are linked to Iran and involve oil-related activities or mineral-extraction activities; and the company has failed to take substantial action; or

b. The company has, with actual knowledge, on or after August 5, 1996, made an investment of \$20 million or more, or any combination of investments of at least \$10 million each, which in the aggregate equals or exceeds \$20 million in any 12-month period, and which directly or significantly contributes to the enhancement of Iran's ability to develop the petroleum resources of Iran.

¹⁰ More information can be found on the CIA World Factbook, located online at: <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> (last visited March 13, 2014).

¹¹ Section 20.121(3)(a), F.S.

engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity.”¹²

Chapter 625, F.S., provides for the calculation of assets to determine the financial condition of an insurer. Section 625.012, F.S., provides for certain allowable assets, which include cash, investments, interest, and premiums due. Section 625.031, F.S., provides a list of assets that are not allowed, including trade names, patents, advances to officers or employees, and furniture and fixtures.

Effect of Proposed Changes

The bill amends current law to allow the SBA to invest up to 50 percent of any of its funds in foreign corporate securities and obligations, which is an increase from the current maximum of 35 percent.

The bill amends the definition of “company” in s. 215.473, F.S., for purposes of the PFIA, by deleting from the definition “all wholly owned subsidiaries, majorly owned subsidiaries, parent companies, or affiliates of such entities or business associations.” As a result, a parent company will not be placed on the Scrutinized Company list because an affiliate or wholly owned subsidiary is doing business with Sudan or Iran.

The bill changes references to Sudan to reflect Sudan and South Sudan.

The bill provides that SBA investments in exchange-traded funds are not subject to the divestiture requirements.

The bill creates s. 624.449, F.S., relating to insurers invested in companies doing business in Sudan and Iran. The bill makes legislative findings with respect to companies doing business in Sudan and Iran. The findings state such companies may be held in the portfolio of insurance companies in Florida.

The bill provides that investments by a domestic insurer that are included on the “Scrutinized Companies with Activities in Sudan List” or “Scrutinized Companies with Activities in Iran Petroleum Energy Sector List” must be treated as nonadmitted assets. By June 30, 2014, and quarterly thereafter, the insurer must determine what investments it has in companies included on those lists. The insurer also must provide the Office of Insurance Regulation with a quarterly list of all investments that the insurer has on the Scrutinized Company lists. Within 36 months after a company appears on one of the scrutinized lists, the insurer must sell, redeem, divest, or withdraw all of its investments in the company.

The bill further provides a series of conditions for when the law would not apply to assets in Iran or Sudan.

The bill provides that the invalidation of any one provision of the act does not affect other provisions that could still be given legal effect.

B. SECTION DIRECTORY:

Section 1. amends s. 215.47, F.S., revising the percentage of investments that the SBA may invest in foreign securities.

Section 2. amends s. 215.473, F.S., revising and providing definitions with respect to requirements that the board divest securities in which public moneys are invested in certain companies doing specified types of businesses in or with Sudan or Iran; revising exclusions from the divestment requirements; conforming cross-references.

¹² Section 624.03, F.S.

Section 3. creates s. 624.449, F.S., providing legislative intent and definitions; providing that certain assets are treated as nonadmitted assets; requiring insurers to identify, report, and divest certain assets within a specified period.

Section 4. provides applicability and severability.

Section 5. 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 requires private insurers with specified investments to divest of those holdings within three years. The office estimates that the divestment requirement will impact less than 10 insurance companies, with a total of \$1 million in assets.¹³

D. FISCAL COMMENTS:

The bill may have an indeterminate fiscal impact on the SBA because it will increase the investment opportunities available to the SBA by providing more flexibility to invest and manage global assets by increasing the permitted holdings of foreign investments from 35 to 50 percent.

The bill may have an indeterminate fiscal impact on the Office of Insurance Regulation; certain insurance companies will be required to submit quarterly reports and this may increase the workload for staff.

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.

¹³ Telephone conversation with staff of the Office of Insurance Regulation on March 14, 2014.

2. Other:

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.¹⁴ 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 intent to restrict regulation of a certain field to the federal level, or if a state law conflicts with a federal law.¹⁵

In *American Insurance Ass'n v. Garamendi*, the Supreme Court invalidated a Holocaust Victim Insurance Relief Act in California, which required insurers to disclose information about all policies sold in Europe between certain years as a violation of Presidential preemption.¹⁶ The court reasoned that executive power includes the power to conduct foreign affairs on behalf of the nation and applied a two-prong test to justify preemption: whether an express federal law was in place at the time state law was enacted, and whether the conflict between the two was sufficient to permit preemption of the state law.

The federal government has expressed foreign policy concerning Iran and Sudan through CISADA and SADA, which authorizes states to divest in certain circumstances. A reviewing court may find that the bill is preempted under the United States Constitution if it finds the requirement that insurers report and divest of specified assets is in conflict with the federal policy, or if the court determines the federal policies are intended to regulate the field of sanctions against Iran and Sudan.

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,¹⁷ maintain a military,¹⁸ enter into treaties and other international agreements,¹⁹ regulate foreign commerce,²⁰ and to hear cases involving foreign states and citizens.²¹ These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.²² 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.²³ If the purpose of the bill is to impact foreign affairs,²⁴ or if the effects of the bill have a sufficiently serious impact on foreign policy,²⁵ the bill may be found in violation of the dormant foreign affairs doctrine.²⁶

¹⁴ Article VI, cl. 2, U.S. Constitution.

¹⁵ *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).

¹⁶ 539 U.S. 396 (2003).

¹⁷ Section 8, Art. I, U.S. Constitution.

¹⁸ *Id.*

¹⁹ Section 2, Art. II, U.S. Constitution.

²⁰ Section 8, Art. I, U.S. Constitution.

²¹ Section 2, Art. III, U.S. Constitution.

²² *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.”).

²³ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

²⁴ *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.).

Case law indicates that in the absence of federal authority authorizing a restriction on foreign commerce, state laws may be preempted by the dormant federal foreign affairs powers. In 2000, the United States Supreme Court unanimously held in *Crosby v. National Foreign Trade Council* that a Massachusetts law restricting state transactions with firms doing business in Burma was preempted by a federal Burma statute.²⁷ The Court noted that the state law penalized private action differently than the federal law, which results in an “unyielding application” that compromises the President’s authority over foreign affairs. Without control, the “President has less to offer and less economic and diplomatic leverage” when utilizing the coercive powers of the national economy.²⁸

The federal government has expressly given state and local governments authority to divest from companies directly invested in certain Sudanese and Iranian sectors. A reviewing court may determine that requiring domestic insurers to report and divest of specified foreign assets may be preempted foreign affairs policy. “Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs.”²⁹

Dormant Foreign Commerce Clause

The Commerce Clause authorizes Congress to regulate foreign and interstate commerce. Under judicial construction, it also has dormant or negative aspects that limit state interference with foreign and interstate commerce even in the absence of Congressional action.

The U.S. District of the Northern District of Illinois, Eastern Division, ruled that Illinois legislation that required broad divestment in the banking sector, as well as prohibitions in state and local pension funds, was unconstitutional in violation of the foreign commerce clause of the United States Constitution.³⁰ The court denied the defendant’s assertion that the state was merely acting as a market participant because the divestment policy impacted more than just the state.

Single Subject

Article III, s. 6 of the State Constitution provides that “[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” The single subject clause contains three requirements: that each law embrace only one subject, that the law may include any matter that is properly connected with the subject, and that the subject be briefly expressed in the title.³¹ The single subject must be derived from the short title. “A connection between a provision [in the act] and the subject is proper (1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject.”³²

²⁵ *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).

²⁶ 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).

²⁷ 530 U.S. 363 (2003). *But see Faculty Senate of Fla. Int’l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010) (upholding a Florida law that prohibited state and nonstate university funding to be used on activities related to travel to a “terrorist state” as designated by the United States Department of State. The 11th Circuit distinguished the case from *Crosby* by stating that the travel act did not name a specific country and did not penalize or prohibit anyone from traveling to any place. Instead, the Florida law established how funds would be used to facilitate university travel.).

²⁸ *Crosby*, at 377.

²⁹ *Movsesian v. Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012); quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010); see also *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. National Foreign Affairs Trade Council*, 530 U.S. 363, 373 (2000); *Zschernig v. Miller*, 389 U.S. 429, 437-38 (1968).

³⁰ *National Foreign Trade Council, Inc. v. Giannoulas*, 523 F.Supp.2d 731 (N.D. Ill 2007). The court noted that even though the state law appeared to have good motives, the law violated federal constitutional provisions, which preclude states from taking action that may interfere with the President’s authority over foreign affairs and commerce with foreign countries.

³¹ *Franklin v. State*, 887 So.2d 1063, 1072 (Fla. 2004).

³² *Id.* at 1078.

The short title of this bill is “[a]n act relating to foreign investments,” and the bill contains provisions relating to the proportion of funds that the SBA may invest in foreign securities, provisions pertaining to the divestment of SBA funds in ETFs, and regulatory and divestment requirements for insurers with investments in scrutinized companies. If the bill was challenged as a violation of the single subject provision of the State Constitution, a court would apply a highly deferential standard of review.³³

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

³³ *Id.* at 1073.

A bill to be entitled

An act relating to foreign investments; amending s. 215.47, F.S.; revising the percentage of investments that the State Board of Administration may invest in foreign securities; amending s. 215.473, F.S.; revising and providing definitions with respect to requirements that the board divest securities in which public moneys are invested in certain companies doing specified types of business in or with Sudan or Iran; revising exclusions from the divestment requirements; conforming cross-references; creating s. 624.449, F.S.; providing legislative intent and definitions; providing that certain assets shall be treated as nonadmitted assets; requiring insurers to identify, report, and divest certain assets within a specified period; providing applicability; providing for severability; providing an effective date.

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

Section 1. Subsection (20) of section 215.47, Florida Statutes, is amended to read:

215.47 Investments; authorized securities; loan of securities.—Subject to the limitations and conditions of the State Constitution or of the trust agreement relating to a trust fund, moneys available for investments under ss. 215.44-215.53

27 | may be invested as follows:

28 | (20) Notwithstanding the provisions in subsection (5)
 29 | limiting such investments to 25 percent of any fund, the board
 30 | may invest no more than 50 ~~35~~ percent of any fund in corporate
 31 | obligations and securities of any kind of a foreign corporation
 32 | or a foreign commercial entity having its principal office
 33 | located in any country other than the United States or its
 34 | possessions or territories, not including United States dollar-
 35 | denominated securities listed and traded on a United States
 36 | exchange that are a part of the ordinary investment strategy of
 37 | the board.

38 | Section 2. Subsections (1) and (2), paragraph (e) of
 39 | subsection (3), and subsection (5) of section 215.473, Florida
 40 | Statutes, are amended to read:

41 | 215.473 Divestiture by the State Board of Administration;
 42 | Sudan; Iran.—

43 | (1) DEFINITIONS.—As used in this act, the term:

44 | (a) "Active business operations" means all business
 45 | operations that are not inactive business operations.

46 | (b) "Business operations" means engaging in commerce in
 47 | any form in Sudan or Iran, including, but not limited to,
 48 | acquiring, developing, maintaining, owning, selling, possessing,
 49 | leasing, or operating equipment, facilities, personnel,
 50 | products, services, personal property, real property, or any
 51 | other apparatus of business or commerce.

52 | (c) "Company" means any sole proprietorship, organization,

53 association, corporation, partnership, joint venture, limited
 54 partnership, limited liability partnership, limited liability
 55 company, or other entity or business association, ~~including all~~
 56 ~~wholly owned subsidiaries, majority owned subsidiaries, parent~~
 57 ~~companies, or affiliates of such entities or business~~
 58 ~~associations,~~ that exists for the purpose of making profit.

59 (d) "Complicit" means taking actions during any preceding
 60 20-month period which have directly supported or promoted the
 61 genocidal campaign in Darfur, including, but not limited to,
 62 preventing Darfur's victimized population from communicating
 63 with each other; encouraging Sudanese citizens to speak out
 64 against an internationally approved security force for Darfur;
 65 actively working to deny, cover up, or alter the record on human
 66 rights abuses in Darfur; or other similar actions.

67 (e) "Direct holdings" in a company means all securities of
 68 that company that are held directly by the public fund or in an
 69 account or fund in which the public fund owns all shares or
 70 interests.

71 (f) "Government of Iran" means the government of Iran, its
 72 instrumentalities, and companies owned or controlled by the
 73 government of Iran.

74 (g) "Government of South Sudan" means the Republic of
 75 South Sudan, with its capital in Juba, South Sudan.

76 (h)-(g) "Government of Sudan" means the Republic of the
 77 Sudan with its capital ~~government~~ in Khartoum, Sudan, ~~that is~~
 78 ~~led by the National Congress Party, formerly known as the~~

79 ~~National Islamic Front, or any successor government formed on or~~
 80 ~~after October 13, 2006, including the coalition National Unity~~
 81 ~~Government agreed upon in the Comprehensive Peace Agreement for~~
 82 ~~Sudan, and does not include the regional government of southern~~
 83 ~~Sudan.~~

84 (i)~~(h)~~ "Inactive business operations" means the mere
 85 continued holding or renewal of rights to property previously
 86 operated for the purpose of generating revenues but not
 87 presently deployed for such purpose.

88 (j)~~(i)~~ "Indirect holdings" in a company means all
 89 securities of that company that are held in a commingled an
 90 ~~account or fund or other collective investment~~, such as a mutual
 91 fund, ~~managed by one or more persons not employed by the public~~
 92 ~~fund~~, in which the public fund owns shares or interests together
 93 with other investors not subject to the provisions of this act.

94 (k)~~(j)~~ "Iran" means the Islamic Republic of Iran.

95 (l)~~(k)~~ "Marginalized populations of Sudan" include, but
 96 are not limited to, the portion of the population in the Darfur
 97 region that has been genocidally victimized; the portion of the
 98 population of South ~~southern~~ Sudan victimized by Sudan's north-
 99 south civil war; the Beja, Rashidiya, and other similarly
 100 underserved groups of eastern Sudan; the Nubian and other
 101 similarly underserved groups in Sudan's Abyei, Southern Blue
 102 Nile, and Nuba Mountain regions; and the Amri, Hamadab, Manasir,
 103 and other similarly underserved groups of northern Sudan.

104 (m)~~(l)~~ "Military equipment" means weapons, arms, military

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105 supplies, and equipment that may readily be used for military
106 purposes, including, but not limited to, radar systems,
107 military-grade transport vehicles, or supplies or services sold
108 or provided directly or indirectly to any force actively
109 participating in armed conflict in Sudan.

110 (n)~~(m)~~ "Mineral-extraction activities" include the
111 exploring, extracting, processing, transporting, or wholesale
112 selling or trading of elemental minerals or associated metal
113 alloys or oxides (ore), including gold, copper, chromium,
114 chromite, diamonds, iron, iron ore, silver, tungsten, uranium,
115 and zinc, as well as facilitating such activities, including
116 providing supplies or services in support of such activities.

117 (o)~~(n)~~ "Oil-related activities" include, but are not
118 limited to, owning rights to oil blocks; exporting, extracting,
119 producing, refining, processing, exploring for, transporting,
120 selling, or trading of oil; constructing, maintaining, or
121 operating a pipeline, refinery, or other oil-field
122 infrastructure; and facilitating such activities, including
123 providing supplies or services in support of such activities,
124 except that the mere retail sale of gasoline and related
125 consumer products is not considered an oil-related activity.

126 (p)~~(e)~~ "Petroleum resources" means petroleum, petroleum
127 byproducts, or natural gas.

128 (q)~~(p)~~ "Power-production activities" means any business
129 operation that involves a project commissioned by the National
130 Electricity Corporation (NEC) of Sudan or other similar entity

131 of the government of Sudan whose purpose is to facilitate power
 132 generation and delivery, including, but not limited to,
 133 establishing power-generating plants or hydroelectric dams,
 134 selling or installing components for the project, providing
 135 service contracts related to the installation or maintenance of
 136 the project, as well as facilitating such activities, including
 137 providing supplies or services in support of such activities.

138 (r)~~(q)~~ "Public fund" means all funds, assets, trustee, and
 139 other designates under the State Board of Administration
 140 pursuant to chapter 121.

141 (s)~~(r)~~ "Scrutinized active business operations" means
 142 active business operations that have resulted in a company
 143 becoming a scrutinized company.

144 (t)~~(s)~~ "Scrutinized business operations" means business
 145 operations that have resulted in a company becoming a
 146 scrutinized company.

147 (u)~~(t)~~ "Scrutinized company" means any company that meets
 148 any of the following criteria:

149 1. The company has business operations that involve
 150 contracts with or provision of supplies or services to the
 151 government of Sudan, companies in which the government of Sudan
 152 has any direct or indirect equity share, consortiums or projects
 153 commissioned by the government of Sudan, or companies involved
 154 in consortiums or projects commissioned by the government of
 155 Sudan, and:

156 a. More than 10 percent of the company's revenues or

157 assets linked to Sudan involve oil-related activities or
 158 mineral-extraction activities; less than 75 percent of the
 159 company's revenues or assets linked to Sudan involve contracts
 160 with or provision of oil-related or mineral-extracting products
 161 or services to the ~~regional~~ government of South ~~southern~~ Sudan
 162 ~~or a project or consortium created exclusively by that regional~~
 163 ~~government~~; and the company has failed to take substantial
 164 action; or

165 b. More than 10 percent of the company's revenues or
 166 assets linked to Sudan involve power-production activities; less
 167 than 75 percent of the company's power-production activities
 168 include projects whose intent is to provide power or electricity
 169 to the marginalized populations of Sudan; and the company has
 170 failed to take substantial action.

171 2. The company is complicit in the Darfur genocide.

172 3. The company supplies military equipment within Sudan,
 173 unless it clearly shows that the military equipment cannot be
 174 used to facilitate offensive military actions in Sudan or the
 175 company implements rigorous and verifiable safeguards to prevent
 176 use of that equipment by forces actively participating in armed
 177 conflict. Examples of safeguards include post-sale tracking of
 178 such equipment by the company, certification from a reputable
 179 and objective third party that such equipment is not being used
 180 by a party participating in armed conflict in Sudan, or sale of
 181 such equipment solely to the ~~regional~~ government of South
 182 ~~southern~~ Sudan or any internationally recognized peacekeeping

183 force or humanitarian organization.

184 4. The company has business operations that involve
 185 contracts with or provision of supplies or services to the
 186 government of Iran, companies in which the government of Iran
 187 has any direct or indirect equity share, consortiums, or
 188 projects commissioned by the government of Iran, or companies
 189 involved in consortiums or projects commissioned by the
 190 government of Iran and:

191 a. More than 10 percent of the company's total revenues or
 192 assets are linked to Iran and involve oil-related activities or
 193 mineral-extraction activities; and the company has failed to
 194 take substantial action; or

195 b. The company has, with actual knowledge, on or after
 196 August 5, 1996, made an investment of \$20 million or more, or
 197 any combination of investments of at least \$10 million each,
 198 which in the aggregate equals or exceeds \$20 million in any 12-
 199 month period, and which directly or significantly contributes to
 200 the enhancement of Iran's ability to develop the petroleum
 201 resources of Iran.

202 (v)~~(u)~~ "Social-development company" means a company whose
 203 primary purpose in Sudan is to provide humanitarian goods or
 204 services, including medicine or medical equipment; agricultural
 205 supplies or infrastructure; educational opportunities;
 206 journalism-related activities; information or information
 207 materials; spiritual-related activities; services of a purely
 208 clerical or reporting nature; food, clothing, or general

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209 consumer goods that are unrelated to oil-related activities;
 210 mineral-extraction activities; or power-production activities.

211 (w)~~(v)~~ "Substantial action specific to Iran" means
 212 adopting, publicizing, and implementing a formal plan to cease
 213 scrutinized business operations within 1 year and to refrain
 214 from any such new business operations.

215 (x)~~(w)~~ "Substantial action specific to Sudan" means
 216 adopting, publicizing, and implementing a formal plan to cease
 217 scrutinized business operations within 1 year and to refrain
 218 from any such new business operations; undertaking humanitarian
 219 efforts in conjunction with an international organization, the
 220 government of Sudan, the ~~regional~~ government of South ~~southern~~
 221 Sudan, or a nonprofit entity evaluated and certified by an
 222 independent third party to be substantially in a relationship to
 223 the company's Sudan business operations and of benefit to one or
 224 more marginalized populations of Sudan; or, through engagement
 225 with the government of Sudan, materially improving conditions
 226 for the genocidally victimized population in Darfur.

227 (2) IDENTIFICATION OF COMPANIES.—

228 (a) Within 90 days after the effective date of this act,
 229 the public fund shall make its best efforts to identify all
 230 scrutinized companies in which the public fund has direct or
 231 indirect holdings or could possibly have such holdings in the
 232 future. Such efforts include:

233 1. Reviewing and relying, as appropriate in the public
 234 fund's judgment, on publicly available information regarding

235 companies having business operations in Sudan, including
 236 information provided by nonprofit organizations, research firms,
 237 international organizations, and government entities;

238 2. Contacting asset managers contracted by the public fund
 239 that invest in companies having business operations in Sudan; or

240 3. Contacting other institutional investors that have
 241 divested from or engaged with companies that have business
 242 operations in Sudan.

243 4. Reviewing the laws of the United States regarding the
 244 levels of business activity that would cause application of
 245 sanctions for companies conducting business or investing in
 246 countries that are designated state sponsors of terror.

247 (b) By the first meeting of the public fund following the
 248 90-day period described in paragraph (a), the public fund shall
 249 assemble all scrutinized companies that fit criteria specified
 250 in subparagraphs (1) (u)1., 2., and 3. ~~(1) (t)1., 2., and 3.~~ into
 251 a "Scrutinized Companies with Activities in Sudan List" and
 252 shall assemble all scrutinized companies that fit criteria
 253 specified in subparagraph (1) (u)4. ~~(1) (t)4.~~ into a "Scrutinized
 254 Companies with Activities in the Iran Petroleum Energy Sector
 255 List."

256 (c) The public fund shall update and make publicly
 257 available quarterly the Scrutinized Companies with Activities in
 258 Sudan List and the Scrutinized Companies with Activities in the
 259 Iran Petroleum Energy Sector List based on evolving information
 260 from, among other sources, those listed in paragraph (a).

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261 (d) Notwithstanding the provisions of this act, a social-
 262 development company that is not complicit in the Darfur genocide
 263 is not considered a scrutinized company under subparagraph
 264 (1)(u)1. ~~(1)(t)1.~~, subparagraph (1)(u)2. ~~(1)(t)2.~~, or
 265 subparagraph (1)(u)3. ~~(1)(t)3.~~

266 (3) REQUIRED ACTIONS.—The public fund shall adhere to the
 267 following procedure for assembling companies on the Scrutinized
 268 Companies with Activities in Sudan List and the Scrutinized
 269 Companies with Activities in the Iran Petroleum Energy Sector
 270 List:

271 (e) Excluded securities.—

272 1. Notwithstanding the provisions of this act, paragraphs
 273 (b) and (c) do not apply to indirect holdings in actively
 274 managed investment funds. However, the public fund shall submit
 275 letters to the managers of such investment funds containing
 276 companies that have scrutinized active business operations
 277 requesting that they consider removing such companies from the
 278 fund or create a similar actively managed fund having indirect
 279 holdings devoid of such companies. If the manager creates a
 280 similar fund, the public fund shall replace all applicable
 281 investments with investments in the similar fund in an expedited
 282 timeframe consistent with prudent investing standards. For the
 283 purposes of this section, a private equity fund is deemed to be
 284 an actively managed investment fund.

285 2. Notwithstanding the provisions of this act, paragraphs
 286 (b) and (c) do not apply to exchange-traded funds.

287 (5) EXPIRATION.—This act expires upon the occurrence of
 288 all of the following:

289 (a) If any of the following occur, the public fund shall
 290 no longer scrutinize companies according to subparagraphs
 291 (1) (u) 1., 2., and 3. ~~(1) (t) 1., 2., and 3.~~ and shall no longer
 292 assemble the Scrutinized Companies with Activities in Sudan
 293 List, shall cease engagement and divestment of such companies,
 294 and may reinvest in such companies as long as such companies do
 295 not satisfy the criteria for inclusion in the Scrutinized
 296 Companies with Activities in the Iran Petroleum Energy Sector
 297 List:

298 1. The Congress or President of the United States,
 299 affirmatively and unambiguously states, by means including, but
 300 not limited to, legislation, executive order, or written
 301 certification from the President to Congress, that the Darfur
 302 genocide has been halted for at least 12 months;

303 2. The United States revokes all sanctions imposed against
 304 the government of Sudan;

305 3. The Congress or President of the United States
 306 affirmatively and unambiguously states, by means including, but
 307 not limited to, legislation, executive order, or written
 308 certification from the President to Congress, that the
 309 government of Sudan has honored its commitments to cease attacks
 310 on civilians, demobilize and demilitarize the Janjaweed and
 311 associated militias, grant free and unfettered access for
 312 deliveries of humanitarian assistance, and allow for the safe

313 and voluntary return of refugees and internally displaced
 314 persons; or

315 4. The Congress or President of the United States
 316 affirmatively and unambiguously states, by means including, but
 317 not limited to, legislation, executive order, or written
 318 certification from the President to Congress, that mandatory
 319 divestment of the type provided for in this act interferes with
 320 the conduct of United States foreign policy.

321 (b) If any of the following occur, the public fund shall
 322 no longer scrutinize companies according to subparagraph
 323 (1)(u)4. ~~(1)(t)4.~~ and shall no longer assemble the Scrutinized
 324 Companies with Activities in the Iran Petroleum Energy Sector
 325 List and shall cease engagement, investment prohibitions, and
 326 divestment. The public fund may reinvest in such companies as
 327 long as such companies do not satisfy the criteria for inclusion
 328 in the Scrutinized Companies with Activities in Sudan List:

329 1. The Congress or President of the United States
 330 affirmatively and unambiguously states, by means including, but
 331 not limited to, legislation, executive order, or written
 332 certification from the President to Congress, that the
 333 government of Iran has ceased to acquire weapons of mass
 334 destruction and support international terrorism;

335 2. The United States revokes all sanctions imposed against
 336 the government of Iran; or

337 3. The Congress or President of the United States
 338 affirmatively and unambiguously declares, by means including,

339 but not limited to, legislation, executive order, or written
 340 certification from the President to Congress, that mandatory
 341 divestment of the type provided for in this act interferes with
 342 the conduct of United States foreign policy.

343 Section 3. Section 624.449, Florida Statutes, is created
 344 to read:

345 624.449 Assets of insurers; foreign states sponsoring
 346 terrorism.-

347 (1) The Legislature finds that:

348 (a) The federal Securities and Exchange Commission has
 349 determined that business activities in foreign nations
 350 sponsoring terrorism, such as Iran and Sudan, that are subject
 351 to sanctions by the United States may materially harm the share
 352 value of foreign companies. Shares in these foreign companies
 353 may be held in the portfolio of insurance companies issuing
 354 policies to consumers in this state.

355 (b) Publicly traded companies in the United States are
 356 substantially restricted from doing business in or with foreign
 357 nations that the United States Department of State has
 358 identified as sponsoring terrorism.

359 (c) Identifying companies with business activities in
 360 foreign nations that sponsor terrorism and ensuring that those
 361 investments are financially sound is an important public policy
 362 priority.

363 (d) It is the governments of Iran and Sudan, and not the
 364 people of Iran or Sudan, that support terrorism and commit

365 egregious violations of human rights under which their own
 366 citizens are required to live.

367 (2) As used in this section, the term:

368 (a) "Business operations" means maintaining, selling, or
 369 leasing equipment, facilities, personnel, or any other apparatus
 370 of business or commerce in Iran or Sudan, including the
 371 ownership or possession of real or personal property located in
 372 Iran or Sudan.

373 (b) "Company" means a sole proprietorship, organization,
 374 association, corporation, partnership, venture, or other entity,
 375 including its subsidiary or affiliate, that exists for
 376 profitmaking purposes or to otherwise secure economic advantage.
 377 The term includes a company owned or controlled, either directly
 378 or indirectly, by the government of Iran or Sudan that is
 379 established or organized under the laws of or has its principal
 380 place of business in the Islamic Republic of Iran or the
 381 Republic of the Sudan.

382 (c) "Government of Iran" has the same meaning as provided
 383 in s. 215.473. The term includes an individual, company, or
 384 public agency located in Iran that provides material or
 385 financial support to the Islamic Republic of Iran.

386 (d) "Government of South Sudan" has the same meaning as
 387 provided in s. 215.473.

388 (e) "Government of Sudan" has the same meaning as provided
 389 in s. 215.473.

390 (f) "Invest" or "investment" means the purchase,

391 ownership, or control of stock of a company, association, or
 392 corporation; the capital stock of a mutual water company or
 393 corporation; bonds issued by the government or a political
 394 subdivision of Iran or Sudan; corporate bonds or other debt
 395 instruments issued by a company; or the commitment of funds or
 396 other assets to a company, including a loan or extension of
 397 credit to that company.

398 (g) "Iran" means the Islamic Republic of Iran or a
 399 territory under the administration or control of Iran.

400 (h) "South Sudan" means the Republic of South Sudan, with
 401 its capital in Juba, South Sudan.

402 (i) "Sudan" means the Republic of the Sudan with its
 403 capital in Khartoum, Sudan.

404 (3)(a) Investments by a domestic insurer included on the
 405 lists of companies compiled by the State Board of Administration
 406 pursuant to s. 215.473 shall be treated as nonadmitted assets.

407 (b) On or before June 30, 2014, and quarterly thereafter,
 408 the insurer shall determine what investments it has in companies
 409 included on the list.

410 (4) The insurer shall provide to the Office of Insurance
 411 Regulation, on a quarterly basis, a list of investments that the
 412 insurer has in companies included on the list described in
 413 subsection (3), including, but not limited to, the issuer, by
 414 name, of the stock, bond, security, and other evidence of
 415 indebtedness.

416 (5) Within 36 months after a company's appearance on a

417 list compiled pursuant to subsection (4), the insurer shall
 418 sell, redeem, divest, or withdraw all of its investments in the
 419 company.

420 (6) (a) This section ceases to apply with respect to
 421 Iranian assets upon the occurrence of both of the following:

422 1. Iran is removed from the United States Department of
 423 State's list of countries that have been determined to
 424 repeatedly provide support for acts of international terrorism.

425 2. Pursuant to federal law, the President of the United
 426 States determines and certifies to the United States Congress
 427 that Iran has ceased its efforts to design, develop,
 428 manufacture, or acquire a nuclear explosive device or related
 429 materials and technology.

430 (b) This section ceases to apply with respect to Sudanese
 431 assets if the government of Sudan is removed from the United
 432 States Department of State's list of countries that have been
 433 determined to repeatedly provide support for acts of
 434 international terrorism.

435 Section 4. If any provision of this act or the application
 436 thereof to any person or circumstance is held invalid, the
 437 invalidity does not affect other provisions or applications of
 438 the act which can be given effect without the invalid provision
 439 or application, and to this end the provisions of this act are
 440 declared severable.

441 Section 5. 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 Hager offered the following:

Amendment (with title amendment)

6 Remove everything after the enacting clause and insert:
 7 Section 1. Subsection (20) of section 215.47, Florida
 8 Statutes, is amended to read:

9 215.47 Investments; authorized securities; loan of
 10 securities.—Subject to the limitations and conditions of the
 11 State Constitution or of the trust agreement relating to a trust
 12 fund, moneys available for investments under ss. 215.44-215.53
 13 may be invested as follows:

14 (20) Notwithstanding the provisions in subsection (5)
 15 limiting such investments to 25 percent of any fund, the board
 16 may invest up to 50 ~~no more than 35~~ percent of any fund in
 17 corporate obligations and securities of any kind of a foreign



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18 corporation or a foreign commercial entity having its principal
19 office located in any country other than the United States or
20 its possessions or territories, not including United States
21 dollar-denominated securities listed and traded on a United
22 States exchange that are a part of the ordinary investment
23 strategy of the board.

24 Section 2. Subsections (1) and (2), paragraph (e) of
25 subsection (3), and subsection (5) of section 215.473, Florida
26 Statutes, are amended to read:

27 215.473 Divestiture by the State Board of Administration;
28 Sudan; Iran.—

29 (1) DEFINITIONS.—As used in this act, the term:

30 (a) "Active business operations" means all business
31 operations that are not inactive business operations.

32 (b) "Business operations" means engaging in commerce in
33 any form in Sudan or Iran, including, but not limited to,
34 acquiring, developing, maintaining, owning, selling, possessing,
35 leasing, or operating equipment, facilities, personnel,
36 products, services, personal property, real property, or any
37 other apparatus of business or commerce.

38 (c) "Company" means a ~~any~~ sole proprietorship,
39 organization, association, corporation, partnership, joint
40 venture, limited partnership, limited liability partnership,
41 limited liability company, or other entity or business
42 association, including all wholly owned subsidiaries, majority-
43 owned subsidiaries, parent companies, or affiliates of such



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44 entities or business associations, that exists for the purpose
45 of making profit.

46 (d) "Complicit" means taking actions during any preceding
47 20-month period which have directly supported or promoted the
48 genocidal campaign in Darfur, including, ~~but not limited to,~~
49 preventing Darfur's victimized population from communicating
50 with each other; encouraging Sudanese citizens to speak out
51 against an internationally approved security force for Darfur;
52 actively working to deny, cover up, or alter the record on human
53 rights abuses in Darfur; or other similar actions.

54 (e) "Direct holdings" in a company means all securities of
55 that company that are held directly by the public fund or in an
56 account or fund in which the public fund owns all shares or
57 interests.

58 (f) "Government of Iran" means the government of Iran, its
59 instrumentalities, and companies owned or controlled by the
60 government of Iran.

61 (g) "Government of South Sudan" means the Republic of
62 South Sudan, that has its capital in Juba, South Sudan.

63 (h) ~~(g)~~ "Government of Sudan" means the Republic of the
64 Sudan that has its capital ~~government~~ in Khartoum, Sudan, ~~that~~
65 is led by the National Congress Party, formerly known as the
66 National Islamic Front, or any successor government formed on or
67 after October 13, 2006, including the coalition National Unity
68 Government agreed upon in the Comprehensive Peace Agreement for



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69 | ~~Sudan, and does not include the regional government of southern~~
70 | ~~Sudan.~~

71 | (i) ~~(h)~~ "Inactive business operations" means the mere
72 | continued holding or renewal of rights to property previously
73 | operated for the purpose of generating revenues but not
74 | presently deployed for such purpose.

75 | (j) ~~(i)~~ "Indirect holdings" in a company means all
76 | securities of that company that are held in a commingled an
77 | ~~account or fund or other collective investment~~, such as a mutual
78 | fund, ~~managed by one or more persons not employed by the public~~
79 | ~~fund~~, in which the public fund owns shares or interests together
80 | with other investors not subject to ~~the provisions of this~~
81 | section act.

82 | (k) ~~(j)~~ "Iran" means the Islamic Republic of Iran.

83 | (l) ~~(k)~~ "Marginalized populations of Sudan" include, but
84 | are not limited to, the portion of the population in the Darfur
85 | region that has been genocidally victimized; the portion of the
86 | population of South ~~southern~~ Sudan victimized by Sudan's north-
87 | south civil war; the Beja, Rashidiya, and other similarly
88 | underserved groups of eastern Sudan; the Nubian and other
89 | similarly underserved groups in Sudan's Abyei, Southern Blue
90 | Nile, and Nuba Mountain regions; and the Amri, Hamadab, Manasir,
91 | and other similarly underserved groups of northern Sudan.

92 | (m) ~~(l)~~ "Military equipment" means weapons, arms, military
93 | supplies, and equipment that may readily be used for military
94 | purposes, including, but not limited to, radar systems,



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95 military-grade transport vehicles, or supplies or services sold
96 or provided directly or indirectly to any force actively
97 participating in armed conflict in Sudan.

98 ~~(n)~~ ~~(m)~~ "Mineral-extraction activities" include the
99 exploring, extracting, processing, transporting, or wholesale
100 selling or trading of elemental minerals or associated metal
101 alloys or oxides (ore), including gold, copper, chromium,
102 chromite, diamonds, iron, iron ore, silver, tungsten, uranium,
103 and zinc, as well as facilitating such activities, including
104 providing supplies or services in support of such activities.

105 ~~(o)~~ ~~(n)~~ "Oil-related activities" include, but are not
106 limited to, owning rights to oil blocks; exporting, extracting,
107 producing, refining, processing, exploring for, transporting,
108 selling, or trading of oil; constructing, maintaining, or
109 operating a pipeline, refinery, or other oil-field
110 infrastructure; and facilitating such activities, including
111 providing supplies or services in support of such activities,
112 except that the mere retail sale of gasoline and related
113 consumer products is not considered an oil-related activity.

114 ~~(p)~~ ~~(o)~~ "Petroleum resources" means petroleum, petroleum
115 byproducts, or natural gas.

116 ~~(q)~~ ~~(p)~~ "Power-production activities" means a ~~any~~ business
117 operation that involves a project commissioned by the National
118 Electricity Corporation (NEC) of Sudan or other similar entity
119 of the government of Sudan whose purpose is to facilitate power
120 generation and delivery, including, but not limited to,

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121 establishing power-generating plants or hydroelectric dams,
122 selling or installing components for the project, providing
123 service contracts related to the installation or maintenance of
124 the project, as well as facilitating such activities, including
125 providing supplies or services in support of such activities.

126 ~~(r)~~~~(q)~~ "Public fund" means all funds, assets, trustee, and
127 other designates under the State Board of Administration
128 pursuant to chapter 121.

129 ~~(s)~~~~(r)~~ "Scrutinized active business operations" means
130 active business operations that result ~~have resulted~~ in a
131 company becoming a scrutinized company.

132 ~~(t)~~~~(s)~~ "Scrutinized business operations" means business
133 operations that result ~~have resulted~~ in a company becoming a
134 scrutinized company.

135 ~~(u)~~~~(t)~~ "Scrutinized company" means a ~~any~~ company that
136 meets any of the following criteria:

137 1. The company has business operations that involve
138 contracts with or provision of supplies or services to the
139 government of Sudan, companies in which the government of Sudan
140 has a ~~any~~ direct or indirect equity share, consortiums or
141 projects commissioned by the government of Sudan, or companies
142 involved in consortiums or projects commissioned by the
143 government of Sudan, and:

144 a. More than 10 percent of the company's revenues or
145 assets linked to Sudan involve oil-related activities or
146 mineral-extraction activities; less than 75 percent of the



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147 company's revenues or assets linked to Sudan involve contracts
148 with or provision of oil-related or mineral-extracting products
149 or services to the ~~regional~~ government of South ~~southern~~ Sudan
150 ~~or a project or consortium created exclusively by that regional~~
151 ~~government~~; and the company has failed to take substantial
152 action; or

153 b. More than 10 percent of the company's revenues or
154 assets linked to Sudan involve power-production activities; less
155 than 75 percent of the company's power-production activities
156 include projects whose intent is to provide power or electricity
157 to the marginalized populations of Sudan; and the company has
158 failed to take substantial action.

159 2. The company is complicit in the Darfur genocide.

160 3. The company supplies military equipment within Sudan,
161 unless it clearly shows that the military equipment cannot be
162 used to facilitate offensive military actions in Sudan or the
163 company implements rigorous and verifiable safeguards to prevent
164 use of that equipment by forces actively participating in armed
165 conflict. Examples of safeguards include post-sale tracking of
166 such equipment by the company, certification from a reputable
167 and objective third party that such equipment is not being used
168 by a party participating in armed conflict in Sudan, or sale of
169 such equipment solely to the ~~regional~~ government of South
170 ~~southern~~ Sudan or any internationally recognized peacekeeping
171 force or humanitarian organization.



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172 4. The company has business operations that involve
173 contracts with or provision of supplies or services to the
174 government of Iran, companies in which the government of Iran
175 has any direct or indirect equity share, consortiums, or
176 projects commissioned by the government of Iran, or companies
177 involved in consortiums or projects commissioned by the
178 government of Iran and:

179 a. More than 10 percent of the company's total revenues or
180 assets are linked to Iran and involve oil-related activities or
181 mineral-extraction activities, ~~+~~ and the company has failed to
182 take substantial action; or

183 b. The company has, with actual knowledge, on or after
184 August 5, 1996, made an investment of \$20 million or more, or
185 any combination of investments of at least \$10 million each,
186 which in the aggregate equals or exceeds \$20 million in any 12-
187 month period, and which directly or significantly contributes to
188 the enhancement of Iran's ability to develop the petroleum
189 resources of Iran.

190 ~~(v)(u)~~ "Social-development company" means a company whose
191 primary purpose in Sudan is to provide humanitarian goods or
192 services, including medicine or medical equipment; agricultural
193 supplies or infrastructure; educational opportunities;
194 journalism-related activities; information or information
195 materials; spiritual-related activities; services of a purely
196 clerical or reporting nature; food, clothing, or general



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197 consumer goods that are unrelated to oil-related activities;
198 mineral-extraction activities; or power-production activities.

199 ~~(v)~~ (w) "Substantial action specific to Iran" means
200 adopting, publicizing, and implementing a formal plan to cease
201 scrutinized business operations within 1 year and to refrain
202 from ~~any~~ such new business operations.

203 ~~(w)~~ (x) "Substantial action specific to Sudan" means
204 adopting, publicizing, and implementing a formal plan to cease
205 scrutinized business operations within 1 year and to refrain
206 from ~~any~~ such new business operations; undertaking humanitarian
207 efforts in conjunction with an international organization, the
208 government of Sudan, the ~~regional~~ government of South ~~southern~~
209 Sudan, or a nonprofit entity evaluated and certified by an
210 independent third party to be substantially in a relationship to
211 the company's Sudan business operations and of benefit to one or
212 more marginalized populations of Sudan; or, through engagement
213 with the government of Sudan, materially improving conditions
214 for the genocidally victimized population in Darfur.

215 (2) IDENTIFICATION OF COMPANIES.-

216 (a) Within 90 days after June 8, 2007 ~~the effective date~~
217 ~~of this act~~, the public fund shall make its best efforts to
218 identify all scrutinized companies in which the public fund has
219 direct or indirect holdings or could possibly have such holdings
220 in the future. Such efforts include:

221 1. Reviewing and relying, as appropriate in the public
222 fund's judgment, on publicly available information regarding



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223 companies having business operations in Sudan, including
224 information provided by nonprofit organizations, research firms,
225 international organizations, and government entities;

226 2. Contacting asset managers contracted by the public fund
227 which ~~that~~ invest in companies having business operations in
228 Sudan; or

229 3. Contacting other institutional investors that have
230 divested from or engaged with companies that have business
231 operations in Sudan.

232 4. Reviewing the laws of the United States regarding the
233 levels of business activity that would cause application of
234 sanctions for companies conducting business or investing in
235 countries that are designated state sponsors of terror.

236 (b) By the first meeting of the public fund following the
237 90-day period described in paragraph (a), the public fund shall
238 assemble all scrutinized companies that fit criteria specified
239 in subparagraphs (1)(u)1., 2., and 3. ~~(1)(t)1., 2., and 3.~~ into
240 a "Scrutinized Companies with Activities in Sudan List" and
241 ~~shall assemble~~ all scrutinized companies that fit criteria
242 specified in subparagraph (1)(u)4. ~~(1)(t)4.~~ into a "Scrutinized
243 Companies with Activities in the Iran Petroleum Energy Sector
244 List."

245 (c) The public fund shall update and make publicly
246 available quarterly the Scrutinized Companies with Activities in
247 Sudan List and the Scrutinized Companies with Activities in the



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248 Iran Petroleum Energy Sector List based on evolving information
249 from, among other sources, those listed in paragraph (a).

250 (d) Notwithstanding the provisions of this section ~~act~~, a
251 social-development company that is not complicit in the Darfur
252 genocide is not considered a scrutinized company under
253 subparagraph (1)(u)1. ~~(1)(t)1.~~, subparagraph (1)(u)2. ~~(1)(t)2.~~,
254 or subparagraph (1)(u)3 ~~(1)(t)3.~~

255 (3) REQUIRED ACTIONS.—The public fund shall adhere to the
256 following procedure for assembling companies on the Scrutinized
257 Companies with Activities in Sudan List and the Scrutinized
258 Companies with Activities in the Iran Petroleum Energy Sector
259 List:

260 (e) *Excluded securities.*—

261 1. Notwithstanding the provisions of this act, paragraphs
262 (b) and (c) do not apply to indirect holdings in actively
263 managed investment funds. However, the public fund shall submit
264 letters to the managers of such investment funds containing
265 companies that have scrutinized active business operations
266 requesting that they consider removing such companies from the
267 fund or create a similar actively managed fund having indirect
268 holdings devoid of such companies. If the manager creates a
269 similar fund, the public fund shall replace all applicable
270 investments with investments in the similar fund in an expedited
271 timeframe consistent with prudent investing standards. For the
272 purposes of this section, a private equity fund is deemed to be
273 an actively managed investment fund.



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274 2. Notwithstanding the provisions of this section,
275 paragraphs (b) and (c) do not apply to exchange-traded funds.

276 (5) EXPIRATION.—This act expires upon the occurrence of
277 all of the following:

278 (a) If any of the following occur, the public fund shall
279 no longer scrutinize companies according to subparagraphs
280 (1)(u)1., 2., and 3. ~~(1)(t)1., 2., and 3.~~ and shall no longer
281 assemble the Scrutinized Companies with Activities in Sudan
282 List, shall cease engagement and divestment of such companies,
283 and may reinvest in such companies if as long as such companies
284 do not satisfy the criteria for inclusion in the Scrutinized
285 Companies with Activities in the Iran Petroleum Energy Sector
286 List:

287 1. The Congress or President of the United States,
288 affirmatively and unambiguously states, by means including, but
289 not limited to, legislation, executive order, or written
290 certification from the President to Congress, that the Darfur
291 genocide has been halted for at least 12 months;

292 2. The United States revokes all sanctions imposed against
293 the government of Sudan;

294 3. The Congress or President of the United States
295 affirmatively and unambiguously states, by means including, but
296 not limited to, legislation, executive order, or written
297 certification from the President to Congress, that the
298 government of Sudan has honored its commitments to cease attacks
299 on civilians, demobilize and demilitarize the Janjaweed and



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300 associated militias, grant free and unfettered access for
301 deliveries of humanitarian assistance, and allow for the safe
302 and voluntary return of refugees and internally displaced
303 persons; or

304 4. The Congress or President of the United States
305 affirmatively and unambiguously states, by means including, but
306 not limited to, legislation, executive order, or written
307 certification from the President to Congress, that mandatory
308 divestment of the type provided for in this section ~~act~~
309 interferes with the conduct of United States foreign policy.

310 (b) If any of the following occur, the public fund shall
311 no longer scrutinize companies according to subparagraph
312 (1)(u)4. ~~(1)(t)4.~~ and shall no longer assemble the Scrutinized
313 Companies with Activities in the Iran Petroleum Energy Sector
314 List and shall cease engagement, investment prohibitions, and
315 divestment. The public fund may reinvest in such companies if ~~as~~
316 ~~long as~~ such companies do not satisfy the criteria for inclusion
317 in the Scrutinized Companies with Activities in Sudan List:

318 1. The Congress or President of the United States
319 affirmatively and unambiguously states, by means including, but
320 not limited to, legislation, executive order, or written
321 certification from the President to Congress, that the
322 government of Iran has ceased to acquire weapons of mass
323 destruction and support international terrorism;

324 2. The United States revokes all sanctions imposed against
325 the government of Iran; or

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326 3. The Congress or President of the United States
327 affirmatively and unambiguously declares, by means including,
328 but not limited to, legislation, executive order, or written
329 certification from the President to Congress, that mandatory
330 divestment of the type provided for in this section ~~act~~
331 interferes with the conduct of United States foreign policy.

332 Section 3. Section 624.449, Florida Statutes, is created
333 to read:

334 624.449 Insurer investment in foreign companies.- A
335 domestic insurer must provide to the office on a quarterly
336 basis, a list of investments that the domestic insurer has in
337 companies included on the "Scrutinized Companies with Activities
338 in Sudan List" and "Scrutinized Companies with Activities in the
339 Iran Petroleum Energy Sector List," compiled by the State Board
340 of Administration pursuant to s. 215.473(2). This list must
341 include the name of the issuer and the stock, bond, security,
342 and other evidence of indebtedness.

343 Section 4. If any provision of this act or the application
344 thereof to any person or circumstance is held invalid, the
345 invalidity does not affect other provisions or applications of
346 the act which can be given effect without the invalid provision
347 or application, and to this end the provisions of this act are
348 declared severable.

349 Section 5. This act shall take effect July 1, 2014.
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T I T L E A M E N D M E N T

Remove everything before the enacting clause and insert:
An act relating to foreign investments; amending s. 215.47,
F.S.; revising the percentage of investments that the State
Board of Administration may invest in foreign securities;
amending s. 215.473, F.S.; revising and providing definitions
with respect to requirements that the board divest securities in
which public moneys are invested in certain companies doing
specified types of business in or with Sudan or Iran; revising
exclusions from the divestment requirements; conforming cross-
references; creating s. 624.449, F.S.; requiring insurers to
identify and report on specified investments; providing for
severability; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 849 Service Animals
SPONSOR(S): Smith and others
TIED BILLS: IDEN./SIM. BILLS: SB 1146

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		SS Stramski	Williamson <i>AW</i>
2) Criminal Justice Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Under Florida law, an individual with a disability, defined as a person who is deaf, hard of hearing, blind, visually impaired, or otherwise physically disabled, is entitled to equal access to public accommodations, public employment, and housing. Such an individual may be accompanied by a trained service animal in all areas of public accommodations that the public is normally allowed to occupy. Documentation that a service animal is trained is not a precondition for providing service to a person accompanied by a service animal. However, a public accommodation may remove a service animal if the animal poses a direct threat to the health and safety of others. Any person who denies or interferes with the right of a disabled individual or animal trainer to use a place of public accommodation commits a second degree misdemeanor.

This bill defines an "emotional support animal" as an animal that provides emotional support to individuals with disabilities who have a disability-related need for such support. Training is not required for an animal to be classified as an "emotional support animal." The bill revises the definition of "individual with a disability" to add a person with a physical or mental impairment that substantially limits one or more major life activities. A "major life activity" is defined as a function such as caring for oneself, performing manual tasks, walking, hearing, and speaking, among others. A "physical or mental impairment" is defined, in part, as a physiological disorder that affects one or more bodily functions, or a mental or psychological disorder as specified by the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

The bill requires a public accommodation to modify its policies to permit use of a service animal by a person with a disability. The bill requires a service animal to be kept under the control of its handler. It authorizes a public accommodation to remove the animal if it is not under the handler's control, the animal is not housebroken, or the animal's behavior poses a serious threat to others. The criminal penalty for interference with the right of a disabled individual or animal trainer to use a place of public accommodation is modified to require a person to also perform 30 hours of community service for an organization that serves individuals with disabilities or for another entity at the discretion of the court.

The bill provides that an individual with a disability who has an emotional support animal has equal access to housing accommodations, and such a person may not be required to pay extra compensation for housing because of any emotional support animal kept by the individual. Unless the need for an emotional support or service animal is apparent, a landlord may request medical documentation from an individual to verify the disability and need for a service or emotional support animal.

Finally, the bill provides that knowingly and fraudulently representing oneself to be qualified to use a service animal or to be a trainer of a service animal is a second degree misdemeanor. It also requires such person to perform 30 hours of community service.

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

Americans with Disabilities Act¹

The federal Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities² in employment,³ the provision of public services,⁴ and in public accommodations.⁵ This prohibition requires entities covered by the law to provide reasonable accommodations to disabled persons. One such accommodation provides that a disabled person is entitled to be accompanied by a service animal⁶ in all areas of a public accommodation or a public entity that is otherwise open to the public.⁷ A public accommodation or a public entity may not ask about the nature of a person's disability, but may ask if an animal is required because of a disability, and may ask what tasks the animal has been trained to perform. A public accommodation or a public entity may remove a service animal if it is out of control and the animal's handler does not take immediate action to remove it, or if the animal is not housebroken.⁸

Federal Fair Housing Act⁹

The federal Fair Housing Act (FHA) prohibits any person from discriminating in the sale or rental of a dwelling based on handicap.^{10, 11} Failure to provide a reasonable accommodation, including permitting use of service animals, to a disabled person may constitute a violation of the prohibition on discrimination based on a handicap.¹² Accommodation of untrained emotional support animals may also be required under the FHA if such an accommodation is reasonably necessary to allow a person with a handicap an equal opportunity to enjoy and use housing.¹³

Florida Service Animal Law

Florida law provides that an individual with a disability¹⁴ is entitled to equal privileges of access in public accommodations,¹⁵ public employment,¹⁶ and housing accommodations.¹⁷

¹ 42 U.S.C. s. 12101, *et seq.*

² Under the ADA, a disability means a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. s. 12102(1).

³ 42 U.S.C. s. 12112.

⁴ 42 U.S.C. s. 12132.

⁵ 42 U.S.C. s. 12182.

⁶ A "service animal" is defined in part as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability[...]. The work or tasks performed by a service animal must be directly related to the individual's disability... [T]he provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

⁷ 28 C.F.R. ss. 36.302(c)(7) and 35.136(g).

⁸ *Id.*

⁹ 42 U.S.C. s. 3601.

¹⁰ The definition of "handicap" under the Fair Housing Act mirrors the definition of "disability" under the ADA. 42 U.S.C. s. 3602(h). *See supra*, fn 2.

¹¹ 42 U.S.C. s. 3604(f).

¹² *See* 28 C.F.R. ss. 35.136 and 36.302.

¹³ *Janush v. Charities Housing Development Corp.*, 169 F.Supp.2d 1133, 1136 (N.D. Cal. 2000) (denying a motion to dismiss a claim to permit keeping birds and cats as emotional support animals because "plaintiff has adequately plead that she is handicapped, that defendants knew of her handicap, that accommodation of the handicap may be necessary and that defendants refused to make such accommodation...")

¹⁴ An "individual with a disability" means a person who is deaf, hard of hearing, blind, visually impaired, or otherwise has a physical impairment that substantially limits one or more major life activities. Section 413.08(1)(b), F.S.

¹⁵ Section 413.08(2), F.S. "Public accommodation" means a common carrier, airplane, motor vehicle, railroad train, motor bus, streetcar, boat, or other public conveyance or mode of transportation; hotel; lodging place; place of public accommodation, amusement, or resort; and other places to which the general public is invited. Section 413.08(1)(c), F.S.

An individual with a disability has the right to be accompanied by a trained service animal¹⁸ in all areas of public accommodations that the public is normally allowed to occupy.¹⁹ A trainer of a service animal, while engaged in the training of the animal, has the same rights of access and obligations of liability for damage as an individual with a disability who is accompanied by a service animal.²⁰

Documentation that a service animal is trained is not a precondition for providing service to a person accompanied by a service animal, though a public accommodation may ask if an animal is a service animal and what tasks it is trained to perform in order to determine if an animal is a service animal or a pet.²¹ A public accommodation may remove a service animal if the animal poses a direct threat to the health and safety of others. Allergies and fear of animals are not sufficient for removal.²² While no deposit may be required of a disabled individual as a precondition of allowing that person to be accompanied by a service animal, the individual is responsible for the care of the animal and for damage caused by the animal. If a service animal is removed by the public accommodation, it must provide the disabled individual the option of continuing access to the public accommodation without having the service animal on the premises.²³

Any person who denies or interferes with the rights of access to public accommodations, or otherwise interferes with the rights, of a person with a disability or a trainer of a service animal while engaged in the training of such an animal, commits a misdemeanor of the second degree, punishable by imprisonment of up to 60 days or a fine not to exceed \$500.²⁴

It is the policy of the state that individuals with a disability be employed by the state or its subdivisions, or in other employment funded in whole or in part by public funds. An individual with a disability may not be refused employment on the basis of disability alone, unless it is shown that the particular disability prevents the performance of the work involved.²⁵ A covered employer who discriminates in employment against a person with a disability commits a misdemeanor of the second degree, unless it is shown that the particular disability prevents the satisfactory performance of the work involved.²⁶

An individual with a disability is entitled to rent, lease, or purchase any housing accommodations subject to the same conditions that are applicable to all persons.²⁷ An individual with a disability who has a service animal is entitled to full and equal access to all housing accommodations, and may not be required to pay extra compensation for such animal. Such a person is liable for any harm to the premises or another person on the premises caused by the animal.²⁸

¹⁶ Section 413.08(5), F.S.

¹⁷ Section 413.08(6), F.S. "Housing accommodation" means any real property or portion thereof which is used or occupied, or intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more persons, but does not include any single-family residence, the occupants of which rent, lease, or furnish for compensation not more than one room therein. Section 413.08(1)(a), F.S.

¹⁸ "Service animal" means an animal that is trained to perform tasks for an individual with a disability. The tasks may include, but are not limited to, guiding a person who is visually impaired or blind, alerting a person who is deaf or hard of hearing, pulling a wheelchair, assisting with mobility or balance, alerting and protecting a person who is having a seizure, retrieving objects, or performing other special tasks. A service animal is not a pet. Section 413.08(1)(d), F.S.

¹⁹ Section 413.08(3), F.S.

²⁰ Section 413.08(8), F.S.

²¹ Section 413.08(3)(a), F.S.

²² Section 413.08(3)(e), F.S.

²³ Sections 413.08(3)(c) and (d), F.S.

²⁴ Sections 775.082(4)(b) and 775.083(1)(e), F.S.

²⁵ Section 413.08(5), F.S.

²⁶ Section 413.08(7), F.S.

²⁷ Section 413.08(6), F.S.

²⁸ Section 413.08(6)(b), F.S.

Effect of the Bill

The bill defines an “emotional support animal” as an animal that provides emotional support to an individual with a disability who has a disability-related need for such support. Training is not required for an animal to be classified as an “emotional support animal.”

The bill revises the definition of “individual with a disability” to add a person with a physical or mental impairment that substantially limits one or more major life activities. A “physical or mental impairment” is defined in part as a physiological disorder that affects one or more bodily functions, or a mental or psychological disorder as specified by the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. A “major life activity” is defined as a function such as caring for oneself, performing manual tasks, walking, hearing, and speaking, among others.

The bill expands the definition of “service animal” to add animals trained to work or perform tasks to assist with psychiatric, intellectual, or other mental disabilities. The work or tasks performed for the purpose of the definition must be directly related to the disability, and do not include any crime-deterrent effect due to an animal’s presence or the provision of emotional support, well-being, comfort, or companionship.

The bill requires a public accommodation to modify its policies, practices, and procedures to permit use of a service animal by a person with a disability. The bill also provides that a service animal must be kept under the control of its handler. A public accommodation may remove the animal if it is not under the handler’s control and the handler does not take effective measures to control it, the animal is not housebroken, or the animal’s behavior poses a serious threat to others. A public accommodation may not ask about the nature or extent of an individual’s disability in order to determine whether an animal is a service animal or pet, but it may ask whether an animal is a service animal required because of a disability and what work the animal has been trained to perform.

The bill modifies current criminal penalty provisions applicable to any person who interferes with the right of an individual with a disability or animal trainer engaged in the training of an animal to access a place of public accommodation, or who otherwise interferes with the rights of an individual with a disability or the trainer of a service animal while engaged in the training of an animal. It requires the person to also perform 30 hours of community service for an organization that serves individuals with disabilities or for another entity, at the discretion of the court, to be completed in not more than one year.

The bill provides that an individual with a disability who has an emotional support animal has equal access to housing accommodations and such a person may not be required to pay extra compensation for housing because of any emotional support animal kept by the individual. Unless the need for an emotional support or service animal is apparent, a landlord may request medical documentation from an individual to verify the disability and need for a service or emotional support animal.

Finally, the bill provides that it is a misdemeanor of the second degree to knowingly and fraudulently represent oneself as using a service animal and being qualified to use a service animal, or as a trainer of a service animal, punishable by imprisonment of up to 60 days or a fine not to exceed \$500.²⁹ In addition, such a person must perform 30 hours of community service for an organization that serves individuals with disabilities or another entity, at the discretion of the court, to be performed in not more than one year.

B. SECTION DIRECTORY:

Section 1 amends s. 413.08, F.S., providing and revising definitions, requiring a public accommodation to permit use of a service animal by an individual with a disability under certain conditions, providing conditions for a public accommodation to exclude or remove a service animal, revising penalties to

²⁹ Sections 775.082(4)(b) and 775.083(1)(e), F.S.

include community service for certain persons or entities who interfere with use of a service animal in specified circumstances, providing equal access to housing accommodations for an individual with a disability accompanied by an emotional support animal, providing conditions under which a landlord may request documentation of a qualifying disability, providing a penalty for fraud with respect to use or training of a service animal

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government.

2. Expenditures:

This bill does not appear to have a fiscal impact on state government.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local government.

2. Expenditures:

This bill does not appear to have a fiscal impact on local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Knowing and Fraudulent Representation

The bill provides that a person who knowingly and fraudulently represents herself or himself, through conduct or verbal or written notice, as using a service animal and being qualified to use such animal, or as being a trainer of a service animal, is subject to criminal penalties as set forth in the bill.

The fraudulent representation element of such crime would require that the false representation was intended to cause a detriment or harm to another, and was in fact relied on by another to that person's detriment.³⁰ It does not appear likely that a person would misrepresent herself or himself as using a service animal and being qualified to use such animal, or as being a trainer of a service animal, with the intent to cause detriment to another. As a result, it appears that most cases would involve a knowing, but not fraudulent, misrepresentation by a person and as such, would not be prohibited under the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

³⁰ See *First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536, 539 (Fla. 1987) (stating that "to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff.")

1 A bill to be entitled
 2 An act relating to service animals; amending s.
 3 413.08, F.S.; providing and revising definitions;
 4 requiring a public accommodation to permit use of a
 5 service animal by an individual with a disability
 6 under certain conditions; providing conditions for a
 7 public accommodation to exclude or remove a service
 8 animal; revising penalties to include community
 9 service for certain persons or entities who interfere
 10 with use of a service animal in specified
 11 circumstances; providing equal access to housing
 12 accommodations for an individual with a disability
 13 accompanied by an emotional support animal; providing
 14 conditions under which a landlord may request
 15 documentation of a qualifying disability; providing a
 16 penalty for fraud with respect to use or training of a
 17 service animal; providing an effective date.

18
 19 Be It Enacted by the Legislature of the State of Florida:

20
 21 Section 1. Section 413.08, Florida Statutes, is amended to
 22 read:

23 413.08 Rights and responsibilities of an individual with a
 24 disability; use of a service or emotional support animal;
 25 prohibited discrimination in public employment, public
 26 accommodations, and ~~or~~ housing accommodations; penalties.-

27 (1) As used in this section and s. 413.081, the term:

28 (a) "Emotional support animal" means an animal that
 29 provides emotional support to individuals with disabilities who
 30 have a disability-related need for such support or that
 31 alleviates one or more identified symptoms or effects of an
 32 individual's disability. Training is not required for an
 33 emotional support animal.

34 (b)(a) "Housing accommodation" means any real property or
 35 portion thereof which is used or occupied, or intended,
 36 arranged, or designed to be used or occupied, as the home,
 37 residence, or sleeping place of one or more persons, but does
 38 not include any single-family residence, the occupants of which
 39 rent, lease, or furnish for compensation not more than one room
 40 therein.

41 (c)(b) "Individual with a disability" means a person who
 42 has a physical or mental impairment that substantially limits
 43 one or more major life activities of the individual ~~is deaf,~~
 44 ~~hard of hearing, blind, visually impaired, or otherwise~~
 45 ~~physically disabled.~~ As used in this paragraph, the term:

46 1. "Major life activity" means a function such as caring
 47 for one's self, performing manual tasks, walking, seeing,
 48 hearing, speaking, breathing, learning, and working ~~"Hard of~~
 49 ~~hearing" means an individual who has suffered a permanent~~
 50 ~~hearing impairment that is severe enough to necessitate the use~~
 51 ~~of amplification devices to discriminate speech sounds in verbal~~
 52 ~~communication.~~

53 2. "Physical or mental impairment" means:
 54 a. A physiological disorder or condition, disfigurement,
 55 or anatomical loss that affects one or more bodily functions; or
 56 b. A mental or psychological disorder that meets one of
 57 the diagnostic categories specified in the most recent edition
 58 of the Diagnostic and Statistical Manual of Mental Disorders
 59 published by the American Psychiatric Association, such as an
 60 intellectual or developmental disability, organic brain
 61 syndrome, traumatic brain injury, posttraumatic stress disorder,
 62 or an emotional or mental illness ~~"Physically disabled" means~~
 63 ~~any person who has a physical impairment that substantially~~
 64 ~~limits one or more major life activities.~~
 65 ~~(d)~~(e) "Public accommodation" means a common carrier,
 66 airplane, motor vehicle, railroad train, motor bus, streetcar,
 67 boat, or other public conveyance or mode of transportation;
 68 hotel; lodging place; place of public accommodation, amusement,
 69 or resort; and other places to which the general public is
 70 invited, subject only to the conditions and limitations
 71 established by law and applicable alike to all persons.
 72 ~~(e)~~(d) "Service animal" means an animal that is trained to
 73 do work or perform tasks for an individual with a disability,
 74 including a physical, sensory, psychiatric, intellectual, or
 75 other mental disability. The work done or tasks performed must
 76 be directly related to the individual's disability and may
 77 include, but are not limited to, guiding an individual ~~a person~~
 78 who is visually impaired or blind, alerting an individual a

79 ~~person~~ who is deaf or hard of hearing, pulling a wheelchair,
 80 assisting with mobility or balance, alerting and protecting an
 81 individual ~~a person~~ who is having a seizure, retrieving objects,
 82 alerting an individual to the presence of allergens, providing
 83 physical support and assistance with balance and stability to an
 84 individual with a mobility disability, helping an individual
 85 with a psychiatric or neurological disability by preventing or
 86 interrupting impulsive or destructive behaviors, reminding an
 87 individual with mental illness to take prescribed medications,
 88 calming an individual with posttraumatic stress disorder during
 89 an anxiety attack, or doing other specific work or performing
 90 other special tasks. A service animal is not a pet. The crime-
 91 deterrent effect of an animal's presence and the provision of
 92 emotional support, well-being, comfort, or companionship do not
 93 constitute work or tasks for purposes of this definition.

94 (2) An individual with a disability is entitled to full
 95 and equal accommodations, advantages, facilities, and privileges
 96 in all public accommodations. A public accommodation must modify
 97 its policies, practices, and procedures to permit use of a
 98 service animal by an individual with a disability. This section
 99 does not require any person, firm, business, or corporation, or
 100 any agent thereof, to modify or provide any vehicle, premises,
 101 facility, or service to a higher degree of accommodation than is
 102 required for a person not so disabled.

103 (3) An individual with a disability has the right to be
 104 accompanied by a service animal in all areas of a public

105 accommodation that the public or customers are normally
 106 permitted to occupy.

107 (a) The service animal must be under the control of its
 108 handler and must have a harness, leash, or other tether, unless
 109 either the handler is unable because of a disability to use a
 110 harness, leash, or other tether, or the use of a harness, leash,
 111 or other tether would interfere with the service animal's safe,
 112 effective performance of work or tasks, in which case the
 113 service animal must be otherwise under the handler's control by
 114 means of voice control, signals, or other effective means.

115 ~~(b)(a)~~ Documentation that the service animal is trained is
 116 not a precondition for providing service to an individual
 117 accompanied by a service animal. A public accommodation may not
 118 ask about the nature or extent of an individual's disability. To
 119 determine the difference between a service animal and a pet, a
 120 public accommodation may ask if an animal is a service animal
 121 required because of a disability and what work or what tasks the
 122 animal has been trained to perform ~~in order to determine the~~
 123 ~~difference between a service animal and a pet.~~

124 ~~(c)(b)~~ A public accommodation may not impose a deposit or
 125 surcharge on an individual with a disability as a precondition
 126 to permitting a service animal to accompany the individual with
 127 a disability, even if a deposit is routinely required for pets.

128 ~~(d)(e)~~ An individual with a disability is liable for
 129 damage caused by a service animal if it is the regular policy
 130 and practice of the public accommodation to charge nondisabled

131 persons for damages caused by their pets.

132 ~~(e)(d)~~ The care or supervision of a service animal is the
 133 responsibility of the individual owner. A public accommodation
 134 is not required to provide care or food or a special location
 135 for the service animal or assistance with removing animal
 136 excrement.

137 ~~(f)(e)~~ A public accommodation may exclude or remove any
 138 animal from the premises, including a service animal, if the
 139 animal is out of control and the animal's handler does not take
 140 effective action to control it, the animal is not housebroken,
 141 or the animal's behavior poses a direct threat to the health and
 142 safety of others. Allergies and fear of animals are not valid
 143 reasons for denying access or refusing service to an individual
 144 with a service animal. If a service animal is excluded or
 145 removed for being a direct threat to others, the public
 146 accommodation must provide the individual with a disability the
 147 option of continuing access to the public accommodation without
 148 having the service animal on the premises.

149 (4) Any person, firm, or corporation, or the agent of any
 150 person, firm, or corporation, who denies or interferes with
 151 admittance to, or enjoyment of, a public accommodation or
 152 otherwise interferes with the rights of an individual with a
 153 disability or the trainer of a service animal while engaged in
 154 the training of such an animal pursuant to subsection (8),
 155 commits a misdemeanor of the second degree, punishable as
 156 provided in s. 775.082 or s. 775.083 and must perform 30 hours

157 of community service for an organization that serves individuals
 158 with disabilities, or for another entity or organization at the
 159 discretion of the court, to be completed in not more than 1
 160 year.

161 (5) It is the policy of this state that an individual with
 162 a disability be employed in the service of the state or
 163 political subdivisions of the state, in the public schools, and
 164 in all other employment supported in whole or in part by public
 165 funds, and an employer may not refuse employment to such a
 166 person on the basis of the disability alone, unless it is shown
 167 that the particular disability prevents the satisfactory
 168 performance of the work involved.

169 (6) An individual with a disability is entitled to rent,
 170 lease, or purchase, as other members of the general public, any
 171 housing accommodations offered for rent, lease, or other
 172 compensation in this state, subject to the conditions and
 173 limitations established by law and applicable alike to all
 174 persons.

175 (a) This section does not require any person renting,
 176 leasing, or otherwise providing real property for compensation
 177 to modify her or his property in any way or provide a higher
 178 degree of care for an individual with a disability than for a
 179 person who is not disabled.

180 (b) An individual with a disability who has a service
 181 animal or an emotional support animal or who obtains a service
 182 animal or an emotional support animal is entitled to full and

183 equal access to all housing accommodations provided for in this
 184 section, and such a person may not be required to pay extra
 185 compensation for such ~~the service~~ animal. However, such a person
 186 is liable for any damage done to the premises or to another
 187 person on the premises by the ~~such an~~ animal. A housing
 188 accommodation may request proof of compliance with vaccination
 189 requirements.

190 (c) Except when the disability and the need for the
 191 service or emotional support animal is readily apparent, such as
 192 when it is observed guiding, pulling, or providing physical
 193 assistance to an individual who is blind, has low vision, uses a
 194 wheelchair, or needs the animal for stability, a landlord may
 195 request medical documentation that a tenant has a qualifying
 196 disability and how the service or emotional support animal
 197 benefits the individual with a disability.

198 (7) An employer covered under subsection (5) who
 199 discriminates against an individual with a disability in
 200 employment, unless it is shown that the particular disability
 201 prevents the satisfactory performance of the work involved, or
 202 any person, firm, or corporation, or the agent of any person,
 203 firm, or corporation, providing housing accommodations as
 204 provided in subsection (6) who discriminates against an
 205 individual with a disability, commits a misdemeanor of the
 206 second degree, punishable as provided in s. 775.082 or s.
 207 775.083.

208 (8) Any trainer of a service animal, while engaged in the

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209 training of such an animal, has the same rights and privileges
210 with respect to access to public facilities and the same
211 liability for damage as is provided for those persons described
212 in subsection (3) accompanied by service animals.

213 (9) A person who knowingly and fraudulently represents
214 herself or himself, through conduct or verbal or written notice,
215 as using a service animal and being qualified to use a service
216 animal or as a trainer of a service animal commits a misdemeanor
217 of the second degree, punishable as provided in s. 775.082 or s.
218 775.083 and must perform 30 hours of community service for an
219 organization that serves individuals with disabilities, or for
220 another entity or organization at the discretion of the court,
221 to be completed in not more than 1 year.

222 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 Smith offered the following:

Amendment (with title amendment)

Remove line 213 and insert:

(9) A person who knowingly and willfully misrepresents

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

Remove line 16 and insert:

penalty for knowing and willful misrepresentation with respect
to use or training of a

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 953 State Contracting
SPONSOR(S): Peters
TIED BILLS: IDEN./SIM. BILLS: SB 914

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Harrington	Williamson
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Current law requires agencies to utilize a competitive solicitation process for contracts for commodities or services in excess of \$35,000. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which may include a request for proposal or invitation to negotiate. The agency must consider certain criteria when evaluating the proposal or reply before selecting a vendor.

The bill requires state agencies to consider the prior relevant experience of a vendor when evaluating the responses to a request for proposal or invitation to negotiate. Currently, agencies may consider such prior relevant experience, but agencies are not required to do so.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹ 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.² The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁴

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposal, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process;⁵ however, certain contractual services and commodities are exempt from this requirement.⁶ Section 287.012(6), F.S., provides that competitive solicitation means "the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement."

Evaluation Criteria

Prior to contracting, an agency must determine the integrity, reliability, and qualifications it will require in a vendor with regard to the capability of the vendor to fully perform the contract requirements.⁷

Depending on the type of competitive solicitation utilized, an agency must consider certain criteria; however, agencies are not limited in what they may consider prior to contract.

If an agency utilizes a request for proposal, the agency must award the contract to the responsible and responsive vendor whose proposal is determined to be the most advantageous to the state after evaluating:

- Price;

¹ 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."

² See ss. 287.032 and 287.042, F.S.

³ *Id.*

⁴ See ss. 287.012(6) and 287.057, F.S.

⁵ 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.

⁶ See s. 287.057(3), F.S.

⁷ Chapter 60A-1.006, F.A.C.

- Renewal price, if renewal is contemplated; and
- Consideration of the total cost for each year of the contract, including renewal years, as submitted by the vendor.⁸

For purposes of an invitation to negotiate, the criteria used to determine the acceptability of the reply, and for purposes of guiding the selection of the vendors with which the agency will negotiate, must be specified in the invitation to negotiate. The agency must evaluate the replies received against the evaluation criteria established in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to negotiate. After negotiations, the agency must award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

Effect of Proposed Changes

The bill requires agencies to consider the prior relevant experience of a vendor when evaluating responses to a request for proposal or invitation to negotiate. Currently, agencies may consider prior relevant experience, but agencies are not required to do so.

B. SECTION DIRECTORY:

Section 1. amends s. 287.057, F.S., revising the criteria for evaluating a proposal to include consideration of prior relevant experience of the vendor; revising the criteria for evaluating a response to an agency's invitation to negotiate to include consideration of prior relevant experience of the vendor.

Section 2. 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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

⁸ Section 287.057(1)(b)3., F.S.

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.

1 A bill to be entitled

2 An act relating to state contracting; amending s.
 3 287.057, F.S.; revising the criteria for evaluating a
 4 proposal to include consideration of prior relevant
 5 experience of the vendor; revising the criteria for
 6 evaluating a response to an agency's invitation to
 7 negotiate to include consideration of prior relevant
 8 experience of the vendor; providing an effective date.

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

11
 12 Section 1. Subsection (1) of section 287.057, Florida
 13 Statutes, is amended to read:

14 287.057 Procurement of commodities or contractual
 15 services.—

16 (1) The competitive solicitation processes authorized in
 17 this section shall be used for procurement of commodities or
 18 contractual services in excess of the threshold amount provided
 19 for CATEGORY TWO in s. 287.017. Any competitive solicitation
 20 shall be made available simultaneously to all vendors, must
 21 include the time and date for the receipt of bids, proposals, or
 22 replies and of the public opening, and must include all
 23 contractual terms and conditions applicable to the procurement,
 24 including the criteria to be used in determining acceptability
 25 and relative merit of the bid, proposal, or reply.

26 (a) *Invitation to bid.*—The invitation to bid shall be used

27 when the agency is capable of specifically defining the scope of
 28 work for which a contractual service is required or when the
 29 agency is capable of establishing precise specifications
 30 defining the actual commodity or group of commodities required.

31 1. All invitations to bid must include:

32 a. A detailed description of the commodities or
 33 contractual services sought; and

34 b. If the agency contemplates renewal of the contract, a
 35 statement to that effect.

36 2. Bids submitted in response to an invitation to bid in
 37 which the agency contemplates renewal of the contract must
 38 include the price for each year for which the contract may be
 39 renewed.

40 3. Evaluation of bids must include consideration of the
 41 total cost for each year of the contract, including renewal
 42 years, as submitted by the vendor.

43 4. The contract shall be awarded to the responsible and
 44 responsive vendor who submits the lowest responsive bid.

45 (b) *Request for proposals.*-An agency shall use a request
 46 for proposals when the purposes and uses for which the
 47 commodity, group of commodities, or contractual service being
 48 sought can be specifically defined and the agency is capable of
 49 identifying necessary deliverables. Various combinations or
 50 versions of commodities or contractual services may be proposed
 51 by a responsive vendor to meet the specifications of the
 52 solicitation document.

53 1. Before issuing a request for proposals, the agency must
 54 determine and specify in writing the reasons that procurement by
 55 invitation to bid is not practicable.

56 2. All requests for proposals must include:

57 a. A statement describing the commodities or contractual
 58 services sought;

59 b. The relative importance of price and other evaluation
 60 criteria; and

61 c. If the agency contemplates renewal of the contract, a
 62 statement to that effect.

63 3. Criteria that will be used for evaluation of proposals
 64 must ~~shall~~ include, but are not limited to:

65 a. Price, which must be specified in the proposal;

66 b. If the agency contemplates renewal of the contract, the
 67 price for each year for which the contract may be renewed; ~~and~~

68 c. Consideration of the total cost for each year of the
 69 contract, including renewal years, as submitted by the vendor;
 70 and-

71 d. Consideration of prior relevant experience of the
 72 vendor.

73 4. The contract shall be awarded by written notice to the
 74 responsible and responsive vendor whose proposal is determined
 75 in writing to be the most advantageous to the state, taking into
 76 consideration the price and other criteria set forth in the
 77 request for proposals. The contract file shall contain
 78 documentation supporting the basis on which the award is made.

79 (c) *Invitation to negotiate.*—The invitation to negotiate
 80 is a solicitation used by an agency which is intended to
 81 determine the best method for achieving a specific goal or
 82 solving a particular problem and identifies one or more
 83 responsive vendors with which the agency may negotiate in order
 84 to receive the best value.

85 1. Before issuing an invitation to negotiate, the head of
 86 an agency must determine and specify in writing the reasons that
 87 procurement by an invitation to bid or a request for proposal is
 88 not practicable.

89 2. The invitation to negotiate must describe the questions
 90 being explored, the facts being sought, and the specific goals
 91 or problems that are the subject of the solicitation.

92 3. The criteria that will be used for determining the
 93 acceptability of the reply and guiding the selection of the
 94 vendors with which the agency will negotiate must be specified.
 95 The evaluation criteria must include consideration of prior
 96 relevant experience of the vendor.

97 4. The agency shall evaluate replies against all
 98 evaluation criteria set forth in the invitation to negotiate in
 99 order to establish a competitive range of replies reasonably
 100 susceptible of award. The agency may select one or more vendors
 101 within the competitive range with which to commence
 102 negotiations. After negotiations are conducted, the agency shall
 103 award the contract to the responsible and responsive vendor that
 104 the agency determines will provide the best value to the state,

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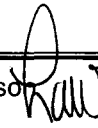

105 based on the selection criteria.

106 5. The contract file for a vendor selected through an
107 invitation to negotiate must contain a short plain statement
108 that explains the basis for the selection of the vendor and that
109 sets forth the vendor's deliverables and price, pursuant to the
110 contract, along with an explanation of how these deliverables
111 and price provide the best value to the state.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 14-09 OGSR Social Security Numbers
SPONSOR(S): Government Operations Subcommittee
TIED BILLS: IDEN./SIM. BILLS: SPB 7080

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

SUMMARY ANALYSIS

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

Current law provides a public record exemption for social security numbers of current and former agency employees held by the employing agency.

The bill reenacts this public record exemption, which will repeal on October 2, 2014, if this bill does not become law. It also authorizes release of such numbers by the employing agency:

- If disclosure of such number is required by federal or state law or a court order.
- To another agency or governmental entity if disclosure of such number is necessary for the receiving agency or entity to perform its duties and responsibilities.
- If the current or former agency employee consents in writing to the disclosure of his or her social security number.

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.

Public Record Exemption under Review

Section 119.071(4)(a), F.S., provides a public record exemption for social security numbers of current and former agency⁴ employees.⁵ The numbers are confidential and exempt⁶ from public record requirements when held by the employing agency. Current law does not authorize release of such numbers by the employing agency.

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 119.011(2), F.S., defines "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 chapter 119, F.S., 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.

⁵ Section 119.071(5)(a), F.S., provides a general public record exemption for social security numbers. The general exemption was created in order to provide a general protection for such numbers when a specific exemption for social security numbers does not exist. It does not supersede any other applicable public record exemption for social security numbers.

⁶ 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).

Pursuant to the Open Government Sunset Review Act, the public record exemption will repeal on October 2, 2014, unless reenacted by the Legislature.⁷

During the 2013 interim, the House Government Operations Subcommittee and the Senate Governmental Oversight and Accountability Committee sent a joint questionnaire to state agencies as part of the Open Government Sunset Review process.⁸ Of the 26 agencies that responded, 24 recommended reenactment of the public record exemption for social security numbers of current and former agency employees.⁹ Many cited the potential for identity theft and criminal activity as the rationale for keeping employees' social security numbers confidential and exempt from public disclosure.

Effect of the Bill

The bill removes the repeal date, thereby reenacting the public record exemption for social security numbers of current and former agency employees. It also authorizes release of such numbers in certain circumstances. Social security numbers of current and former agency employees may be disclosed by the employing agency:

- If disclosure of such number is required by federal or state law or a court order.
- To another agency or governmental entity if disclosure of such number is necessary for the receiving agency or entity to perform its duties and responsibilities.
- If the current or former agency employee consents in writing to the disclosure of his or her social security number.

B. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to save from repeal the public record exemption for social security numbers of current or former agency employees.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

⁷ Section 119.071(4)(a) F.S.

⁸ Agency responses to the joint questionnaire are on file with the House Government Operations Subcommittee.

⁹ The Department of the Lottery indicated that it utilizes a public record exemption specific to the department. As such, it provided no recommendation regarding the public record exemption under review. The Department of Legal Affairs indicated social security numbers should be confidential and released only as authorized by statute; however, the department did not make an official recommendation regarding reenactment or repeal of the exemption under review.

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.

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1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 119.071, F.S., relating
 4 to an exemption from public record requirements for
 5 social security numbers of current and former agency
 6 employees; providing exceptions to the public record
 7 exemption; removing the scheduled repeal of the
 8 exemption; providing an effective date.

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

11
 12 Section 1. Paragraph (a) of subsection (4) of section
 13 119.071, Florida Statutes, is amended to read:

14 119.071 General exemptions from inspection or copying of
 15 public records.—

16 (4) AGENCY PERSONNEL INFORMATION.—

17 (a)1. The social security numbers of all current and
 18 former agency employees which numbers are held by the employing
 19 agency are confidential and exempt from s. 119.07(1) and s.
 20 24(a), Art. I of the State Constitution.

21 2. Social security numbers of current and former agency
 22 employees may be disclosed by the employing agency:

23 a. If the disclosure of the social security number is
 24 expressly required by federal or state law or a court order.

25 b. To another agency or governmental entity if disclosure
 26 of the social security number is necessary for the receiving

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27 agency or entity to perform its duties and responsibilities.

28 c. If the current or former agency employee expressly
 29 consents in writing to the disclosure of his or her social
 30 security number. This paragraph is subject to the Open
 31 Government Sunset Review Act in accordance with s. 119.15 and
 32 shall stand repealed on October 2, 2014, unless reviewed and
 33 saved from repeal through reenactment by the Legislature.

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