



Oversight, Transparency & Administration Subcommittee

November 16, 2017
9:00 AM – 11:00 AM
Morris Hall (17 HOB)

Meeting Packet

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Oversight, Transparency & Administration Subcommittee

Start Date and Time: Thursday, November 16, 2017 09:00 am

End Date and Time: Thursday, November 16, 2017 11:00 am

Location: Morris Hall (17 HOB)

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 359 State Investments by Nuñez, Diaz, M.

Consideration of the following proposed committee bill(s):

PCB OTA 18-01 -- OGSR/School Food Program

PCB OTA 18-02 -- OGSR/False Claims

NOTICE FINALIZED on 11/09/2017 4:08PM by Larson.Lisa

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 359 State Investments
SPONSOR(S): Nuñez, Diaz, and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 70, SB 538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee		Moore <i>AM</i>	Harrington <i>PH</i>
2) Ways & Means Committee			
3) Government Accountability Committee			

SUMMARY ANALYSIS

The State Board of Administration (SBA) is established by Art. IV, s. 4(e) of the State Constitution and is composed of the Governor, the Chief Financial Officer (CFO), and the Attorney General. The SBA has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan investments and the FRS Investment Plan, which represent approximately \$168.8 billion, or 86.3 percent, of the \$195.7 billion in assets managed by the SBA as of October 26, 2017.

The CFO is the head of the Department of Financial Services and is the constitutional officer with fiduciary responsibility over the State Treasury. The CFO is required to fully invest or deposit all general revenue, trust funds, and funds of each state agency and the judicial branch in a manner that allows the state to realize maximum earnings and benefits. Such funds are managed by the Division of Treasury and are invested as the Treasury Investment Pool. As of September 2017, the Treasury Investment Pool contained \$23.4 billion in assets.

In recent years, the federal government has imposed various sanctions on the government of Venezuela. On August 24, 2017, President Trump signed Executive Order 13808 to prohibit United States persons and entities from engaging in certain financial transactions with the government of Venezuela.

The bill requires the SBA to divest any investment in stocks, securities, or other obligations of any institution or company domiciled in the U.S., or foreign subsidiary of a company domiciled in the U.S., doing business in or with the government of Venezuela, or with any agency or instrumentality thereof, in violation of federal law. The bill also prohibits the SBA from investing in such stocks, securities, or other obligations.

The bill prohibits a state agency from investing in any financial institution or company domiciled in the U.S., or foreign subsidiary of a company domiciled in the U.S. which, directly or through the U.S. foreign subsidiary, extends credit of any kind or character, advances funds in any manner, or purchases or trades any goods or services with the government of Venezuela, or any company doing business in or with the government of Venezuela, in violation of federal law.

The bill defines the term "government of Venezuela" to mean the government of Venezuela, its agencies or instrumentalities, or any company that is majority-owned or controlled by the government of Venezuela.

The bill may have an insignificant negative fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments or the private sector.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Board of Administration

The State Board of Administration (SBA) is established by Art. IV, s. 4(e) of the State Constitution and is composed of the Governor, the Chief Financial Officer (CFO), and the Attorney General. The board members are commonly referred to as "Trustees." The SBA derives its powers to oversee state funds from Art. XII, s. 9 of the Constitution.

The SBA has responsibility for oversight of the Florida Retirement System (FRS) Pension Plan investments and the FRS Investment Plan,¹ which represent approximately \$168.8 billion, or 86.3 percent, of the \$195.7 billion in assets managed by the SBA as of October 26, 2017.² The SBA also manages more than 30 other investment portfolios with combined assets of \$26.9 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

The Trustees, at the August 16, 2017, Cabinet meeting, passed a resolution to add the following language to the SBA's Investment Policy Statement for the FRS:

1. Prohibited Investments. Until such as time as the SBA determines it is otherwise prudent to do so, the SBA is prohibited from investing in:
 - a. any financial institution or company domiciled in the United States, or foreign subsidiary of a company domiciled in the United States, which directly or through a United States or foreign subsidiary and in violation of federal law, makes any loan, extends credit of any kind or character, advances funds in any manner, or purchases or trades any goods or services in or with the government of Venezuela; and
 - b. any securities issued by the government of Venezuela or any company that is majority-owned by the government of Venezuela.
2. Proxy Voting. The SBA will not vote in favor of any proxy resolution advocating the support of the Maduro Regime in Venezuela.⁴

The SBA's Investment Advisory Council formally recommended that the language be added to the FRS Investment Policy Statement at its meeting on September 25, 2017. The Trustees accepted the updated Investment Policy Statement at their October 17, 2017, meeting.

State Treasury

The CFO is the head of the Department of Financial Services (DFS) and is the constitutional officer with fiduciary responsibility over the State Treasury. Florida law requires all moneys collected by state agencies, boards, bureaus, commissions, institutions, and departments to be deposited in the State Treasury.⁵ The CFO is required to fully invest or deposit all general revenue, trust funds, and funds of each state agency and the judicial branch in a manner that allows the state to realize maximum

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 State Board of Administration, Agency Analysis of 2018 Senate Bill 538, p. 1 (Nov. 2, 2017). The provisions in Senate Bill 538 are substantively the same as the provisions in House Bill 359.

³ *Id.*

⁴ *Id.*

⁵ Section 17.58(1), F.S.

earnings and benefits.⁶ Such funds are managed by the Division of Treasury and are invested as the Treasury Investment Pool. As of September 2017, the Treasury Investment Pool contained \$23.4 billion in assets.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 a fund.

State Divestment Laws

The state has practiced divestment several times in modern history. From 1986 to 1993, the Legislature directed the SBA to divest of companies doing business with South Africa. From 1988 to 2015, the Legislature placed restrictions on investments in any institution or company doing business in or with Northern Ireland. From 1997 until 2001, the SBA made a decision to divest of 16 tobacco stocks due to pending litigation involving the state and those companies. From 2007 to the present, the Legislature has directed the SBA to divest funds from companies that are actively seeking and providing certain business opportunities with Iran and Sudan.⁸

Federal Venezuela Sanctions

In recent years, the federal government has imposed various sanctions on the government of Venezuela. On August 24, 2017, President Trump signed Executive Order 13808 to prohibit U.S. persons and entities from engaging in transactions involving the following:

- New debt with a maturity of greater than 90 days of Petroleos de Venezuela, S.A. (PdVSA), Venezuela's state-owned oil company;
- New debt with a maturity of greater than 30 days, or new equity, of the government of Venezuela, other than debt of PdVSA as defined above;
- Bonds issued by the government of Venezuela prior to August 25, 2017;
- Dividend payments or other distributions of profits to the government of Venezuela from any entity owned or controlled, directly or indirectly, by the government of Venezuela; and
- The purchase, directly or indirectly, of securities from the government of Venezuela, other than security qualifying as new debt with a maturity of less than or equal to 90 days (for PdVSA) or 30 days (for the government of Venezuela).⁹

The executive order defined the term "government of Venezuela" to mean the government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and PdVSA, and any person or entity owned or controlled by, or acting for or on behalf of, the government of Venezuela.¹⁰

Effect of Proposed Changes

The bill requires the SBA to divest any investment in stocks, securities, or other obligations of any institution or company domiciled in the U.S., or foreign subsidiary of a company domiciled in the U.S., doing business in or with the government of Venezuela, or with any agency or instrumentality thereof, in violation of federal law. The bill also prohibits the SBA from investing in such stocks, securities, or other obligations. In addition, the bill provides that the SBA may not be a fiduciary with respect to voting

⁶ Sections 17.61(1) and 17.57(1), F.S.

⁷ Division of Treasury, *Florida Treasury Investment Pool Holdings as of September 2017*, <https://www.myfloridacfo.com/Division/Treasury/InvestmentPool/documents/FLTreasuryInvHoldingsSeptember2017.pdf> (last visited Nov. 9, 2017).

⁸ See s. 215.473, F.S.

⁹ Exec. Order No. 13808, 3 C.F.R. 41155 (2017).

¹⁰ *Id.* at 41156.

on, and may not have the right to vote in favor of, any proxy resolution advocating expanded U.S. trade with Venezuela.

The bill also prohibits a state agency from investing in any financial institution or company domiciled in the U.S., or foreign subsidiary of a company domiciled in the U.S. which, directly or through the U.S. foreign subsidiary, extends credit of any kind or character, advances funds in any manner, or purchases or trades any goods or services with the government of Venezuela, or any company doing business in or with the government of Venezuela, in violation of federal law.

The bill defines the term “government of Venezuela” to mean the government of Venezuela, its agencies or instrumentalities, or any company that is majority-owned or controlled by the government of Venezuela.

The bill authorizes the Governor to waive the bill’s requirements if the existing regime in Venezuela collapses and there is a need for immediate aid to Venezuela before the convening of the Legislature or for other humanitarian reasons as determined by the Governor.

According to the SBA and DFS, the agencies do not currently invest in any companies that are in violation of federal law as specified in the bill.¹¹

B. SECTION DIRECTORY:

Section 1. amends s. 215.471, F.S., relating to divestiture by the SBA; reporting requirements.

Section 2. amends s. 215.472, F.S., relating to prohibited investments.

Section 3. provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state government revenues.

2. Expenditures:

The bill may have an insignificant negative fiscal impact on the SBA related to conducting research. These costs, however, will be absorbed by the SBA.¹²

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

¹¹ Telephone conversation with SBA staff (Nov. 6, 2017); Telephone conversation with DFS staff (Nov. 9, 2017).

¹² State Board of Administration, Agency Analysis of 2018 Senate Bill 538, p. 3 (Nov. 2, 2017). The provisions in Senate Bill 538 are substantively the same as the provisions in House Bill 359.

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 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:

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,¹³ maintain a military,¹⁴ enter into treaties and other international agreements,¹⁵ regulate foreign commerce,¹⁶ and to hear cases involving foreign states and citizens.¹⁷ These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.¹⁸ 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.¹⁹ If the purpose of the bill is to impact foreign affairs,²⁰ or if the effects of the bill have a sufficiently serious impact on foreign policy,²¹ the bill may be found in violation of the dormant foreign affairs doctrine.²²

B. RULE-MAKING AUTHORITY:

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

¹³ Section 8, Art. I, U.S. Constitution.

¹⁴ *Id.*

¹⁵ Section 2, Art. II, U.S. Constitution.

¹⁶ Section 8, Art. I, U.S. Constitution.

¹⁷ Section 2, Art. III, U.S. Constitution.

¹⁸ *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.").

¹⁹ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

²⁰ *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.).

²¹ *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).

²² 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).

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 investments; amending s.
3 215.471, F.S.; requiring the State Board of
4 Administration to divest specified investments and
5 prohibiting it from investing in specified investments
6 of institutions or companies doing business in or with
7 the government of Venezuela or any of its agencies or
8 instrumentalities in violation of federal law;
9 defining the term "government of Venezuela";
10 authorizing the Governor to waive the investment
11 prohibitions if certain conditions exist; prohibiting
12 the State Board of Administration from voting in favor
13 of any proxy resolution advocating expanded United
14 States trade with the government of Venezuela;
15 amending s. 215.472, F.S.; prohibiting state agencies
16 from investing in specified financial entities that
17 extend credit, trade or buy goods or services with the
18 government of Venezuela or investing in any company
19 doing business with Venezuela in violation of federal
20 law; defining the term "government of Venezuela";
21 authorizing the Governor to waive the investment
22 prohibitions under specific circumstances; providing
23 an effective date.
24

25 WHEREAS, the people of Venezuela believe the current
 26 government of Venezuela is intolerable because it has used and
 27 continues to use extreme violence and political persecution in
 28 the orchestrated suppression of human rights, and

29 WHEREAS, the Maduro regime continues to unjustly detain and
 30 prosecute political prisoners in spite of international calls
 31 for their freedom, and

32 WHEREAS, the State of Florida stands in unity with the
 33 people of Venezuela in their fight for democracy and freedom
 34 from the oppressive Maduro regime, and

35 WHEREAS, the United States deems the situation in Venezuela
 36 as an extraordinary threat to national security and foreign
 37 policy, and

38 WHEREAS, the United States Department of the Treasury's
 39 Office of Foreign Assets Control has issued sanctions against
 40 Venezuelan officials, including Nicolás Maduro who has been
 41 identified as a "Specially Designated National" and labeled a
 42 dictator, NOW, THEREFORE,

43

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

45

46 Section 1. Section 215.471, Florida Statutes, is amended
 47 to read:

48 215.471 Divestiture by the State Board of Administration;
 49 reporting requirements.—

50 (1) The State Board of Administration shall divest any
51 investment under s. 121.151 and ss. 215.44-215.53, and is
52 prohibited from investment in stocks, securities, or other
53 obligations of:

54 (a) Any institution or company domiciled in the United
55 States, or foreign subsidiary of a company domiciled in the
56 United States, doing business in or with Cuba, or with agencies
57 or instrumentalities thereof in violation of federal law.

58 (b) Any institution or company domiciled outside of the
59 United States if the President of the United States has applied
60 sanctions against the foreign country in which the institution
61 or company is domiciled pursuant to s. 4 of the Cuban Democracy
62 Act of 1992.

63 (c)1. Any institution or company domiciled in the United
64 States, or foreign subsidiary of a company domiciled in the
65 United States, doing business in or with the government of
66 Venezuela, or with any agency or instrumentality thereof, in
67 violation of federal law. The term "government of Venezuela"
68 means the government of Venezuela, its agencies or
69 instrumentalities, or any company that is majority-owned or
70 controlled by the government of Venezuela.

71 2. The Governor may waive the requirements of this
72 paragraph if the existing regime in Venezuela collapses and
73 there is a need for immediate aid to Venezuela before the
74 convening of the Legislature or for other humanitarian reasons

75 as determined by the Governor.

76 (2) The State Board of Administration may not be a
 77 fiduciary under this section with respect to voting on, and may
 78 not have the right to vote in favor of, any proxy resolution
 79 advocating expanded United States trade with Cuba, ~~or~~ Syria, or
 80 Venezuela. The board's staff shall report on its activities in
 81 its annual proxy voting report.

82 Section 2. Subsection (3) is added to section 215.472,
 83 Florida Statutes, to read:

84 215.472 Prohibited investments.—Notwithstanding any other
 85 provision of law, each state agency, as defined in s. 216.011,
 86 is prohibited from investing in:

87 (3)(a) Any financial institution or company domiciled in
 88 the United States, or foreign subsidiary of a company domiciled
 89 in the United States which, directly or through the United
 90 States or foreign subsidiary, extends credit of any kind or
 91 character, advances funds in any manner, or purchases or trades
 92 any goods or services with the government of Venezuela, or any
 93 company doing business in or with the government of Venezuela,
 94 in violation of federal law. The term "government of Venezuela"
 95 means the government of Venezuela, its agencies or
 96 instrumentalities, or any company that is majority-owned or
 97 controlled by the government of Venezuela.

98 (b) The Governor may waive the requirements of this
 99 subsection if the existing regime in Venezuela collapses and

HB 359



2018

100 | there is a need for immediate aid to Venezuela before the
101 | convening of the Legislature or for other humanitarian reasons
102 | as determined by the Governor.

103 | Section 3. This act shall take effect July 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTA 18-01 OGSR/School Food Program
SPONSOR(S): Oversight, Transparency & Administration Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Administration Subcommittee		Harrington 	Harrington 

SUMMARY ANALYSIS

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

The Department of Agriculture and Consumer Services (DACS) is the state administrator of school food and nutrition service programs. Such programs include the National School Lunch Program, the Special Milk Program, the School Breakfast Program, the Summer Food Service Program, the Fresh Fruit and Vegetable Program, and any other program that relates to school nutrition under the purview of DACS. Applicants for school food and nutrition service programs must provide certain personal information to DACS and the Department of Education (DOE). Some of the information provided for purposes of determining eligibility for participation in the school food and nutrition service programs is considered to be of a sensitive, personal nature.

Current law provides that personal identifying information of an applicant for or a participant in a school food and nutrition service program held by DACS, DOE, or the Department of Children and Families is exempt from public record requirements. Such information must be disclosed to another governmental entity in the performance of its official duties and responsibilities or to any person who has the written consent of the applicant for or participant in such program.

The bill reenacts and narrows the application of the public record exemption, which will repeal on October 2, 2018, if this bill does not become law.

The bill does not appear to have a fiscal impact on the 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.²

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:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.³

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.⁴ 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 created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

School Food and Nutrition Service Program

Federal law authorizes federal financial assistance to states for the operation of school food and nutrition service programs.⁶ The United States Department of Agriculture annually prescribes income guidelines for determining eligibility for free and reduced price meals.⁷ The Department of Agriculture and Consumer Services (DACCS) is the state administrator of school food and nutrition service programs. Such programs include the National School Lunch Program, the Special Milk Program, the School Breakfast Program, the Summer Food Service Program, the Fresh Fruit and Vegetable Program, and any other program that relates to school nutrition under the purview of DACCS.⁸

Current law requires applicants for or participants in school food and nutrition service programs to provide certain personal information to DACCS and the Department of Education (DOE). In addition, the Department of Children and Families (DCF) receives information from the United States Social Security Administration and determines Medicaid eligibility for Florida and forwards that information to DACCS

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I of the State Constitution.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ See Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq) and the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq).

⁷ 42 U.S.C. 1758(b)(1)(A) and 42 U.S.C. 1773(e)(1)(A); see also USDA Income Eligibility Guidelines found online at: <https://www.fns.usda.gov/school-meals/income-eligibility-guidelines> (last visited November 6, 2017).

⁸ Section 595.402, F.S.

and local education agencies for a determination of whether a student is eligible for participation in a school food and nutrition service program. Although DCF shares certain information with DACS, DCF does not receive information related to applicants for or participants in school food and nutrition service programs.

Public Record Exemption under Review

In 2013, the Legislature created a public record exemption for personal identifying information of an applicant for or participant in a school food and nutrition program held by DACS, DOE, and DCF. The personal identifying information is exempt⁹ from public record requirements.¹⁰

The 2013 public necessity statement for the exemption provided that:

A public records exemption for personal identifying information of an applicant for or participant in a school food and nutrition service program, as defined in s. 595.402, Florida Statutes, held by [DACS, DCF, or DOE] protects information of a sensitive, personal nature concerning an individual, the release of which could be defamatory to the individual, could cause unwarranted damage to his or her good name or reputation, and could possibly jeopardize the safety of the individual. Additionally, the public records exemption allows the state to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.¹¹

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2018, unless reenacted by the Legislature.¹²

During the 2017 interim, subcommittee staff sent DACS, DOE, and DCF questionnaires and consulted with staff from the departments as part of its review under the Open Government Sunset Review Act. DOE and DACS recommended that the exemption be reenacted noting that the exemption has allowed the departments to properly operate the program while preventing the disclosure of a student's or parent's personal identifying information. DCF indicated that it does not hold personal identifying information of an applicant for or participant in a school food and nutrition service program. As such, DCF did not oppose narrowing the application of the exemption to remove DCF from the exemption.

Effect of the Bill

The bill removes the repeal date thereby reenacting the public record exemption for personal identifying information of an applicant for or participant in a school food and nutrition service program held by DACS and DOE. The bill also narrows the exemption removing reference to information held by DCF as that department does not hold information relating to applicants for or participants in a school food and nutrition service program.

B. SECTION DIRECTORY:

Section 1 amends s. 595.409, F.S., to save from repeal the public record exemption for personal identifying information of an applicant for or participant in a school food and nutrition service program.

⁹ 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 statute. See Attorney General Opinion 85-62 (August 1, 1985).

¹⁰ Chapter 2013-217, L.O.F.; codified as s. 595.409(1), F.S.

¹¹ Section 2, ch. 2013-217, L.O.F.

¹² Section 595.409(4), F.S.

Section 2 provides an effective date of October 1, 2018.

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.

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 a review under the Open Government
3 Sunset Review Act; amending s. 595.409, F.S., relating
4 to an exemption from public record requirements for
5 personal identifying information of an applicant for
6 or participant in a school food and nutrition service
7 program; narrowing the application of the exemption;
8 removing the scheduled repeal of the exemption;
9 providing an effective date.

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

12
13 Section 1. Section 595.409, Florida Statutes, is amended
14 to read:

15 595.409 Public records exemption.—

16 (1) Personal identifying information of an applicant for
17 or participant in a school food and nutrition service program,
18 as defined in s. 595.402, held by the department, ~~the Department~~
19 ~~of Children and Families,~~ or the Department of Education is
20 exempt from s. 119.07(1) and s. 24(a), Art. I of the State
21 Constitution.

22 (2) (a) Such information shall be disclosed to:

- 23 1. Another governmental entity in the performance of its
24 official duties and responsibilities; or
25 2. Any person who has the written consent of the applicant

26 for or participant in such program.

27 (b) This section does not prohibit a participant's legal
 28 guardian from obtaining confirmation of acceptance and approval,
 29 dates of applicability, or other information the legal guardian
 30 may request.



31 (3) This exemption applies to any information identifying
 32 a program applicant or participant held by the department, ~~the~~
 33 ~~Department of Children and Families,~~ or the Department of
 34 Education before, on, or after the effective date of this
 35 exemption.

36 ~~(4) This section is subject to the Open Government Sunset~~
 37 ~~Review Act in accordance with s. 119.15 and shall stand repealed~~
 38 ~~on October 2, 2018, unless reviewed and saved from repeal~~
 39 ~~through reenactment by the Legislature.~~

40 Section 2. This act shall take effect October 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTA 18-02 OGSR/False Claims
SPONSOR(S): Oversight, Transparency & Administration Subcommittee
TIED BILLS: IDEN./SIM. **BILLS:** SB 7006

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Administration Subcommittee		Harrington 	Harrington 

SUMMARY ANALYSIS

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

The Florida False Claims Act (FFCA) authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. These types of actions were recognized at common law and have historically been called “qui tam” actions. The Department of Financial Services or the Department of Legal Affairs (DLA) may bring an action for a false claim, or may join a private action.

Current law provides that the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA are confidential and exempt from public record requirements. Such information may be disclosed by DLA to a law enforcement agency or other administrative agency in the performance of its official duties and responsibilities. The exemption expires once the investigation is completed.

The bill reenacts the public record exemption, which will repeal on October 2, 2018, if this bill does not become law.

The bill does not appear to have a fiscal impact on the 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.²

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:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.³

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.⁴ 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 created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Florida False Claims Act

The Florida False Claims Act (FFCA) authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency.⁶ These types of actions were recognized at common law and have historically been called "qui tam" actions. The Florida Legislature enacted the FFCA in 1994 and modeled the FFCA after the Federal Civil False Claims Act. Actions that violate the FFCA include:

- Knowingly presenting or causing to be presented a false claim for payment or approval;
- Knowingly making, using, or causing to be used a false record to get a false or fraudulent claim paid or approved;
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid;
- Possessing or controlling property or money used or to be used by the state and knowingly delivering or causing to be delivered less than all of that money or property;
- Intending to defraud the state, making or delivering a document certifying receipt of property used or to be used by the state and making or delivering the receipt without knowing that the information on the receipt is true;

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I of the State Constitution.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 68.081, F.S. The FFCA is found in ss. 68.081-68.092, F.S.

- Knowingly buying or receiving, as a pledge of obligation or a debt, public property from an officer or employee of the state who may not sell or pledge the property; or
- Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly concealing or knowingly and improperly avoiding or decreasing payments owed to the state.⁷

An action for a false claim may be brought by the Department of Legal Affairs (DLA), the Department of Financial Services (DFS), or by any person.⁸ Generally, such actions are brought by individuals rather than the departments. When an individual files an action, the complaint must be identified as a qui tam action and filed in the circuit court of the Second Judicial Circuit, in and for Leon County. Immediately upon filing the complaint, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses must be served on the Attorney General, as head of DLA, and on the Chief Financial Officer, as head of DFS. DLA, or DFS if the action is based on facts underlying a pending investigation by DFS, may elect to intervene and proceed on behalf of the state within 60 days.⁹ DFS may bring an action only if the action arises from an investigation by DFS and DLA has not filed an action.¹⁰

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state for the FFCA violation.¹¹ The person who brought the action, if not initiated by DLA or DFS, is entitled to a percent of the proceeds of the action or settlement of the claim. The amount varies depending on whether DLA proceeds with the action or elects not to intervene.¹²

Public Record Exemption under Review

In 2013, the Legislature created a public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA. The complaint and information are confidential and exempt¹³ from public record requirements.¹⁴ Such information may be disclosed by DLA to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities. In addition, such information is no longer confidential and exempt once the investigation is completed.

The 2013 public necessity statement for the exemption provided that:

Because a false claims investigation conducted by [DLA] may lead to the filing of an administrative or civil proceeding, the premature release of the complaint and information held by the department could frustrate or thwart the investigation and impair the ability of the department to effectively and efficiently administer its duties under the [FFCA]. This exemption also protects the reputation of the named defendant in the event the allegations of the qui tam complaint ultimately prove to be unfounded. Without this exemption, a plaintiff can subject a

⁷ Section 68.082(2), F.S.

⁸ Sections 68.083 and 68.084, F.S.

⁹ Section 68.083(3) and (4), F.S.

¹⁰ *Id.*

¹¹ Section 68.082(2), F.S.

¹² Section 68.085, F.S.

¹³ 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 statute. See Attorney General Opinion 85-62 (August 1, 1985).

¹⁴ Chapter 2013-105, L.O.F.; codified as s. 68.083(8), F.S.

defendant to serious fraud allegations in the name of the State of Florida merely by filing a qui tam complaint.¹⁵

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2018, unless reenacted by the Legislature.¹⁶

During the 2017 interim, subcommittee staff consulted with staff from DLA as part of its review under the Open Government Sunset Review Act. According to DLA, the exemption allows DLA to complete the investigation without compromising the integrity of the investigation, which is necessary to implement the FFCA to prevent fraud, waste, and abuse of state funds. As such, DLA supports reenactment of the public record exemption.

Effect of the Bill

The bill removes the repeal date thereby reenacting the public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA.

B. SECTION DIRECTORY:

Section 1 amends s. 68.083, F.S., to save from repeal the public record exemption for the complaint and information held by DLA pursuant to an investigation of a violation of the FFCA.

Section 2 provides an effective date of October 1, 2018.

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.

¹⁵ Section 2, ch. 2013-105, L.O.F.

¹⁶ Section 68.083(8)(a), 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 a review under the Open Government
 3 Sunset Review Act; amending s. 68.083, F.S., which
 4 provides an exemption from public record requirements
 5 for the complaint and information held by the
 6 Department of Legal Affairs pursuant to an
 7 investigation of a violation of the Florida False
 8 Claims Act; removing the scheduled repeal of the
 9 exemption; providing an effective date.

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

12
 13 Section 1. Paragraph (a) of subsection (8) of section
 14 68.083, Florida Statutes, is amended to read:

15 68.083 Civil actions for false claims.—

16 (8)(a) Except as otherwise provided in this subsection,
 17 the complaint and information held by the department pursuant to
 18 an investigation of a violation of s. 68.082 is confidential and
 19 exempt from s. 119.07(1) and s. 24(a), Art. I of the State
 20 Constitution. ~~This paragraph is subject to the Open Government~~
 21 ~~Sunset Review Act in accordance with s. 119.15 and shall stand~~
 22 ~~repealed on October 2, 2018, unless reviewed and saved from~~
 23 ~~repeal through reenactment by the Legislature.~~

24 Section 2. This act shall take effect October 1, 2018.