

House Bill No. 7161

An act relating to a public records exemption for alternative investments; amending s. 215.44, F.S.; providing definitions; defining “proprietary confidential business information” and specifying information which does not constitute proprietary confidential business information; creating an exemption from public records requirements for proprietary confidential business information held by the State Board of Administration regarding alternative investments; providing for limited duration of the exemption; providing for retroactive application of the exemption; authorizing the inspection and copying of confidential and exempt records if the proprietor of the information fails to verify that a record contains certain information within a specified period of time; authorizing a court to order the release of confidential and exempt records upon making certain findings; providing for future review and repeal; providing a statement of public necessity; providing an effective date.

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

Section 1. Paragraph (c) is added to subsection (8) of section 215.44, Florida Statutes, to read:

215.44 Board of Administration; powers and duties in relation to investment of trust funds.—

(8)

(c)1. As used in this paragraph, the term:

a. “Alternative investment” means an investment by the State Board of Administration in a private equity fund, venture fund, hedge fund, or distress fund or a direct investment in a portfolio company through an investment manager.

b. “Alternative investment vehicle” means the limited partnership, limited liability company, or similar legal structure or investment manager through which the State Board of Administration invests in a portfolio company.

c. “Portfolio company” means a corporation or other issuer, any of whose securities are owned by an alternative investment vehicle or the State Board of Administration and any subsidiary of such corporation or other issuer.

d. “Portfolio positions” means individual investments in portfolio companies which are made by the alternative investment vehicles, including information or specific investment terms associated with any portfolio company investment.

e. “Proprietor” means an alternative investment vehicle, a portfolio company in which the alternative investment vehicle is invested, or an outside

consultant, including the respective authorized officers, employees, agents, or successors in interest, which controls or owns information provided to the State Board of Administration.

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

(I) Trade secrets as defined in s. 688.002.

(II) Information provided to the State Board of Administration regarding a prospective investment in a private equity fund, venture fund, hedge fund, distress fund, or portfolio company which is proprietary to the provider of the information.

(III) Financial statements and auditor reports of an alternative investment vehicle.

(IV) Meeting materials of an alternative investment vehicle relating to financial, operating, or marketing information of the alternative investment vehicle.

(V) Information regarding the portfolio positions in which the alternative investment vehicles invest.

(VI) Capital call and distribution notices to investors of an alternative investment vehicle.

(VII) Alternative investment agreements and related records.

(VIII) Information concerning investors, other than the State Board of Administration, in an alternative investment vehicle.

g. "Proprietary confidential business information" does not include:

(I) The name, address, and vintage year of an alternative investment vehicle and the identity of the principals involved in the management of the alternative investment vehicle.

(II) The dollar amount of the commitment made by the State Board of Administration to each alternative investment vehicle since inception.

(III) The dollar amount and date of cash contributions made by the State Board of Administration to each alternative investment vehicle since inception.

(IV) The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration from each alternative investment vehicle.

(V) The dollar amount, on a fiscal-year-end basis, of cash distributions received by the State Board of Administration plus the remaining value of alternative-vehicle assets that are attributable to the State Board of Administration's investment in each alternative investment vehicle.

(VI) The net internal rate of return of each alternative investment vehicle since inception.

(VII) The investment multiple of each alternative investment vehicle since inception.

(VIII) The dollar amount of the total management fees and costs paid on an annual fiscal-year-end basis by the State Board of Administration to each alternative investment vehicle.

(IX) The dollar amount of cash profit received by the State Board of Administration from each alternative investment vehicle on a fiscal-year-end basis.

2. Proprietary confidential business information held by the State Board of Administration regarding alternative investments is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 10 years after the termination of the alternative investment. This exemption applies to proprietary confidential business information held by the State Board of Administration before, on, or after October 1, 2006.

3. Notwithstanding the provisions of subparagraph 2., a request to inspect or copy a record under s. 119.07(1) which contains proprietary confidential business information shall be granted if the proprietor of the information fails, within a reasonable period of time after the request is received by the State Board of Administration, to verify the following to the State Board of Administration through a written declaration in the manner provided by s. 92.525:

a. That the requested record contains proprietary confidential business information and the specific location of such information within the record;

b. If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002;

c. That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and

d. That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

4. Any person may petition a court of competent jurisdiction for an order for the public release of those portions of any record made confidential and exempt by subparagraph 2. Any action under this subparagraph must be brought in Leon County, Florida, and the petition or other initial pleading shall be served on the State Board of Administration and, if determinable

upon diligent inquiry, on the proprietor of the information sought to be released. In any order for the public release of a record under this subparagraph, the court shall make a finding that the record or portion thereof is not a trade secret as defined in s. 688.002, that a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record, and that the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the State Board of Administration, or any trust fund, the assets of which are invested by the State Board of Administration.

5. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that proprietary confidential business information held by the State Board of Administration regarding alternative investments be held confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Art. I of the State Constitution for 10 years after the termination of the alternative investment. Disclosing proprietary confidential business information, including trade secrets as defined in s. 688.002, Florida Statutes, used in determining how private equity investments are made or managed by private partnerships investing assets on behalf of the State Board of Administration would negatively affect the business interests of private partnerships that rely heavily on their information advantage to generate investment returns, and competitor partnerships could gain an unfair competitive advantage if provided access to such information. Maintaining the information advantage of highly skilled private equity investment managers is necessary in order for the State Board of Administration to generate an adequate return from its assets committed to this high-risk segment of the market, since only those managers having a strong information advantage have generated adequate risk-adjusted returns. Research shows that 60 percent of all private equity partnerships have delivered a return less than that of the lower-risk public markets. Only 30 percent of all private equity partnerships have been able to produce the State Board of Administration's required premium over public-market returns to justify incurring the risks associated with these investments. The ninth and tenth deciles of private equity managers are those having a substantial information advantage and they have generated sizable premiums over the public markets, with net returns of 19.4 percent and 29.7 percent, respectively. The Legislature finds that the exemption of proprietary confidential business information used in or implying how private equity investments are made or managed is necessary for the effective and efficient administration of the State Board of Administration's asset-management program. Assets of the Florida Retirement System must grow rapidly in order to keep pace with growth in the system's liabilities and to manage the costs of employer contributions. In order to meet its investment objectives, the State Board of Administration must invest in diversified asset types, including high-return, high-risk private equity partnerships. Those partnerships that have and are able to maintain a substantial information advantage over their competitors are likely to provide an adequate

return. The release of proprietary confidential business information, including trade secrets, revealing how private equity investments are made or managed could result in inadequate returns and ultimately frustrate attainment of the investment objective of the State Board of Administration, subsequently increasing contribution costs for employers in the Florida Retirement System and lowering the system's funded ratio. It is the Legislature's intent to allow the public access to sufficient information in order to be informed regarding the alternative investments of the State Board of Administration and to balance the public's right to information against the right of private business entities to be protected from harmful disclosure of confidential and exempt proprietary confidential business information, the disclosure of which would injure them in the marketplace, impair the ability of the State Board of Administration to invest in the best performing alternative investment vehicles, and diminish investment earnings in the Florida Retirement System Trust Fund. It is also the Legislature's intent to establish consistency with regard to the classification of information relating to alternative investments by the State Board of Administration as either confidential or suitable for public disclosure. In finding that the public records exemption created by this act is a public necessity, the Legislature finds that the public and private harm in disclosing proprietary confidential business information relating to alternative investments by the State Board of Administration significantly outweighs any public benefit derived from disclosure; that the exemption created by this act will enhance the ability of the State Board of Administration to fulfill its duties as an investment fiduciary by making it more effective and competitive in the marketplace as an investor that is able to gain access to the best alternative investment vehicles; and that the public's ability to be informed regarding the alternative investments made by the State Board of Administration is preserved by the disclosure of information excepted from the created exemption.

Section 3. This act shall take effect October 1, 2006.

Approved by the Governor June 9, 2006.

Filed in Office Secretary of State June 9, 2006.