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**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE
COUNCIL FOR READY INFRASTRUCTURE
ANALYSIS**

BILL #: HB 1421 (PCB EDIT 01-02)

RELATING TO: Public Records

SPONSOR(S): Committee on Economic Development & International Trade, Representative Prieguez and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) ECONOMIC DEVELOPMENT & INTERNATIONAL TRADE YEAS 10 NAYS 0
 - (2) STATE ADMINISTRATION YEAS 4 NAYS 0
 - (3) COUNCIL FOR READY INFRASTRUCTURE YEAS 19 NAYS 0
 - (4)
 - (5)
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I. SUMMARY:

This bill saves from repeal a public records exemption for specified business information that is received by the Office of Tourism, Trade, and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities through their administration of the Qualified Defense Contractor (QDC) Tax Refund Program and the Qualified Target Industry (QTI) Tax Refund Program. The bill also revises the exemption to:

- Include within the coverage of the exemption information on actual taxes paid by a business while participating in the QDC or QTI tax refund programs, which information the business submits as part of its claim for a tax refund;
- Conform the listing of tax information covered by the public records exemption to the listing of taxes for which refunds may be obtained under the two programs; and
- Provide confidentiality for actual employment and wage data that is submitted by a participating business as proof of its compliance with performance conditions established under the program.

This bill substantially amends section 288.1066, Florida Statutes.

The effective date of the act is October 1, 2001.

See "Other Comments" section for comments by the Committee on State Administration.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. PRESENT SITUATION:

Government in the Sunshine

Florida has a long history of providing public access to the records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level (Art I, s. 24).

The State Constitution permits exemptions to open government requirements and specifies the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

In addition to the Florida Constitution, the Public Records Law (Ch. 119, F. S.) specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The term “public records” has been defined by the Legislature in s. 119.011(1), F.S., to include:

“all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency.”

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business that are used to perpetuate, communicate, or formalize knowledge (Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form (Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979)).

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, codified as s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed, unless the Legislature acts to re-enact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Only exemptions that are identified and certified are subject to legislative review and repeal under the Open Government Sunset Review Act.

Subsection 119.15(2), F.S., states that an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

Subsection 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Subsection 119.15(4)(b), F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. The purpose must be sufficiently compelling to override the strong public policy and cannot be accomplished with the exemption. An identifiable public purpose is served if the exemption meets one of the following purposes:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this provision, only information that would identify the individuals may be exempted; or
- The exemption protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

When the Legislature substantially revised the public records exemption in 1995, it included a statement of public necessity consistent with two public purposes. Specifically, the Legislature found that:

“[p]rotection of such information is necessary to prevent harm to the competitive position of companies that are contemplating a relocation or expansion into this state by the release of sensitive information concerning their operations or finances. The fear of untimely release of such information could make such companies reluctant to contact representatives of economic development agencies and, consequently, impair the public benefits from economic development activities (s. 2, ch. 95-378, L.O.F.)”

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S. (regarding the waiver of sovereign immunity in tort actions), or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and re-enactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid re-enactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act of 1995, so long as the requirements of Art. I, s. 24 of the State Constitution are not violated.

Qualified Defense Contractor Tax Refunds

Finding that high technology jobs in the state were threatened by downsizing in the national defense budget, the Legislature during a special session in 1993 created a tax refund program designed to facilitate the employment of Florida citizens by defense contractors. The Qualified Defense Contractor (QDC) Tax Refund Program authorized tax refunds to a certified contractor that: 1) secured a new Department of Defense (DOD) contract; 2) consolidated an existing DOD contract in Florida; 3) converted defense production jobs to non-defense production jobs; or 4) contracted for the reuse of a defense-related facility (s. 288.104, F.S. (1994 Supp.)). The program was repealed effective December 1, 1994.

In 1996, the QDC program was re-created and codified in s. 288.1045, F.S. (s. 1, ch. 96-348, L.O.F.) In order to participate in the program and be eligible to receive tax refunds, a business must apply to the Office of Tourism, Trade, and Economic Development (OTTED) for certification. The statute prescribes information that must be submitted by a defense contractor in order to be certified (s. 288.1045(3), F.S.). The required information varies depending upon whether the business is consolidating a DOD contract or has secured a new DOD contract; is converting defense production jobs to non-defense production jobs; or has a contract to reuse a defense-related facility. Examples of the types of information that are generally required to be submitted during the application process include: 1) the applicant's federal employer identification number and state sales tax registration number; 2) the number of full-time jobs in Florida that will be dedicated to the project and the average wage of such jobs; 3) the percentage of the applicant's gross receipts derived from DOD contracts during the five taxable years preceding the application date; 4) the amount of various state taxes paid during the 5 fiscal years preceding the application date; and 5) the estimated amount of tax refunds to be claimed in each fiscal year under the QDC program.

The QDC program features a local financial support component, under which an eligible business must secure a resolution, adopted by county government, which recommends the project and indicates that the necessary commitments of local financial support for the business exist. Local financial support means funding from local sources, public or private, which is equal to 20 percent

of the annual tax refund for a qualified business (s. 288.1045(1)(o) and (3), F.S.). Approved applicants enter into an agreement with OTTED and may receive refunds based on the payment of sales and use taxes, corporate income taxes, intangible personal property taxes, emergency excise taxes, excise taxes on documents, and ad valorem taxes paid. Tax refunds generally are paid to a participating business over a period of several years. A qualified applicant may not be qualified for any project to receive more than \$5,000 times the number of jobs provided for in the tax refund agreement.

Qualified Target Industry Tax Refunds

The Qualified Target Industry (QTI) Tax Refund Program, s. 288.106, F.S., is one of Florida's main economic development incentives. The QTI program allows new or expanding businesses in certain industrial sectors or corporate headquarters to be approved for tax refunds of \$3,000 per job created (\$6,000 in an enterprise zone or rural county). To be eligible, a business's project must create at least 10 full-time jobs, and an expansion of an existing business must result in a 10-percent increase in employment at the business. Approved applicants enter into an agreement with OTTED and may receive refunds based on the payment of sales and use taxes, corporate income taxes, intangible personal property taxes, emergency excise taxes, excise taxes on documents, ad valorem taxes paid, and insurance premium taxes. Tax refunds generally are paid to a participating business over a period of several years.

To participate in the program, an eligible business must apply to OTTED before the business has made a decision to locate a new business in this state or before the business had made the decision to expand an existing business in this state. As part of the application process, the business must submit, among other items: 1) its federal employer identification number and its state sales tax registration number; 2) the number of full-time jobs in this state that will be dedicated to the project and the average wage of such jobs; 3) an estimate of the proportion of the sales resulting from the project that will be made outside the state; and 4) any other additional information requested by OTTED (s. 288.106(3)(a), F.S.).

The QTI program features a local financial support component, under which an eligible business must submit a resolution adopted by county government, which recommends that certain types of businesses be approved as qualified and states that the commitments of local financial support necessary for the target industry business exist. Local financial support means funding from local sources, public or private, which is equal to 20 percent of the annual tax refund for a qualified business (s. 288.106(1)(j) and (3)(a)9., F.S.).

Confidentiality of QDC & QTI Records

Section 288.1066, F.S., provides a public records exemption for specified information that is received by OTTED; Enterprise Florida, Inc.; or county or municipal governmental entities and their employees under the administration of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs.

Under the QDC program, the following information is confidential for a period not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier:

- The applicant's federal employer identification number and state sales tax registration number.
- The percentage of the business's gross receipts derived from DOD contracts during the five taxable years immediately preceding the date the application for certification under the program is submitted.

- The amount of the following taxes paid during the five fiscal years preceding the date of the application: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes. In addition, the exemption applies to information on the projected amounts of such taxes that will be due in the three fiscal years following the application date.
- Any trade secret information as defined in s. 812.081, F.S., contained in statements concerning the applicant's need for or use of the tax refunds (s. 288.1066(1)(a)-(d), F.S.).

Under the QTI program, the following information is confidential for a period not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier:

- The applicant's federal employer identification number and state sales tax registration number.
- Any trade secret information as defined in s. 812.081, F.S., contained in any description of the type of activity or product covered by the creation of a new business or expansion of an existing business.
- The anticipated wages of the jobs projected to be created by the economic development project.
- The amount of the following taxes paid during the five fiscal years preceding the date of the application: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes. In addition, the exemption applies to information on the projected amounts of such taxes that will be due in the three fiscal years following the application date.
- Any trade secret information as defined in s. 812.081, F.S., contained in statements concerning the role that the tax refunds will play in the business's decision to locate or expand in Florida.
- An estimate of the proportion of sales resulting from the project that will be made outside this state (s. 288.1066(2)(a)-(f), F.S.).

The public records exemption shall stand repealed on October 2, 2001, unless the Legislature reviews it and saves it from repeal through re-enactment during the 2001 session.

Information on Taxes Paid

Currently, the exemption applies to information on the amount of specified taxes paid during the five fiscal years preceding the date the business applies to participate in the programs, as well as the projected amounts of such taxes that will be due in the three fiscal years following the application date. The applicable taxes include: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes.

Businesses, however, must report information on taxes paid as part of the claim for a tax refund under the programs. In other words, businesses are required to report on taxes paid while under the refund agreement. Currently, the public records exemption in s. 288.1066, F.S., does not cover such information. According to OTTED, this same type of information is held confidential by the Department of Revenue (DOR) and would remain confidential if shared with OTTED by DOR. There is no applicable confidentiality, however, when the business submits the information directly to OTTED as part of its request to receive tax refunds, as authorized under the QDC and QTI programs.

Employment and Wage Information

The public records exemption currently does not cover sensitive information shared by businesses on employment and wages. The portion of the exemption applicable to the QTI program does afford confidentiality to information that a program applicant shares on the "anticipated wages of those jobs projected to be created by the project" (s. 288.1066(2)(c), F.S.). As part of the claim for an annual refund under both the QDC and QTI programs, however, a business is required to submit actual evidence of the achievement of the employment and wage standards established in the tax refund agreement. OTTED reports that employment and wage data received by the Agency for Workforce Innovation is kept confidential, and it recommends that similar confidentiality be afforded to actual wage and salary data submitted as part of the QDC and QTI programs.

C. EFFECT OF PROPOSED CHANGES:

This bill abrogates the scheduled repeal of a public records exemption for certain business information that is received by the OTTED, Enterprise Florida, Inc., or county or municipal governmental entities as part of their administration of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs. Because the public records exemption is expanded, the bill specifies that the exemption is repealed on October 2, 2006, unless re-enacted after review by the Legislature under the Open Government Sunset Review Act.

Information on Taxes Paid

The bill also amends the confidentiality provisions of s. 288.1066, F.S. The bill expands the confidentiality to include information on the amount of taxes that a business pays while participating in the programs and that forms the basis for the tax refunds that the business seeks under the programs. Currently, the confidentiality applies to information on taxes paid prior to applying for the program and on estimated taxes. The bill specifies that the tax information afforded confidentiality under the public records exemption includes information on excises taxes, on documents for the QDC program, and excises taxes on documents and insurance premium taxes for the QTI program. This revision is a conforming change to reflect the fact that these taxes provide a basis for refunds under the programs, thus making the scope of the exemption consistent with the scope of the programs.

Employment and Wage Information

The bill expands the confidentiality to include information on the number of jobs created and the wages paid for those jobs by a business while participating in the programs. This information is submitted by the business as part of the claim for a tax refund and as evidence of compliance with the performance terms of the tax refund agreement.

The bill includes a legislative statement of public necessity for the changes to the public records exemption.

The bill provides an effective date of October 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

Please see the "Effects of Proposed Changes" section above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

State economic development organizations are responsible for maintaining the security of records generated through their administration of the QDC and QTI tax refund programs. The administrative costs associated with maintaining such confidentiality are estimated to be insignificant.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

Local economic development organizations are responsible for maintaining the security of records generated through their administration of the QDC and QTI tax refund programs. The administrative costs associated with maintaining such confidentiality are estimated to be insignificant.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

By protecting sensitive business information, the public records exemption addressed by this bill may help prevent private firms that are participating in the tax refund programs from being injured in the marketplace through the disclosure of insights about the businesses' finances and strategies to competitors. In addition, to the extent the public records exemption makes businesses less reluctant to participate in the programs, it may help facilitate economic development activities that benefit the businesses and the communities in which they invest.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill abrogates the scheduled repeal of an existing public records exemption and also revises the exemption to expand its scope. The provisions of the bill appear to be consistent with the public records requirements of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

Committee on State Administration

The Committee on State Administration, pursuant to the Open Government Sunset Review Act of 1995, reviewed s. 288.1066, F.S.; and, as a result thereof, passed PCB SA 01-04, now HB 391. That bill provides for a verbatim reenactment of the exemption.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON ECONOMIC DEVELOPMENT & INTERNATIONAL TRADE:

Prepared by:

Alexis L. Mead

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