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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: HB 389 (PCB SA 01-03)

RELATING TO: Public Records Exemptions for Certain Records of Economic Development Agencies which Contain Information Concerning Private Entities

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 288.075(2), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Section 288.075(2), F.S., provides that upon written request from the private entity, certain records held by an economic development agency which contain or could provide information concerning plans, intentions, or interests of such private entity to locate, relocate, or expand any of its business activities in this state are confidential and exempt from public disclosure for 24 months after the date an economic development agency receives a request for confidentiality or until disclosed by an economic development agency or the party that requested confidentiality. This bill reenacts verbatim this public records exemption. This bill also amends s. 288.075, F.S., to remove the sentence that requires its repeal.

If this exemption was repealed, economic development professionals maintain that, because confidentiality during the site-selection process is important to relocating or expanding businesses, Florida would be at a competitive disadvantage vis-à-vis other states.

This bill does not appear to have a fiscal impact on state or local governments.

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:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. 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.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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. An identifiable public purpose is served if the exemption meets one of the following purposes, and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. 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 subparagraph, only information that would identify the individuals may be exempted; or
3. 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 288.075(2), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.² Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.³

¹ An exemption is "substantially amended" if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

² The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* [Florida Constitution](#).

³ Please note that the effective date of this bill is prior to the repeal date of October 2, 2001.

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 is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. 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 created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁴

Section 288.075, F.S.

In 1977, the Legislature provided a public records exemption for records of the Division of Economic Development of the Florida Department of Commerce¹ which contain information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state. s. 1, ch. 77-75, L.O.F. Since enacting the exemption, which was codified in s. 288.075, F.S., the Legislature has made a number of substantive and technical revisions to the exemptions while retaining the basic concept of affording confidentiality to certain economic development records. Today, s. 288.075, F.S., provides:

Upon written request from a private corporation, partnership, or person, records of an economic development agency which contain or would provide information concerning plans, intentions, or interests of such private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 24 months after the date an economic development agency receives a request for confidentiality or until disclosed by an economic development agency pursuant to subsection (4) or by the party requesting confidentiality under this section.

s. 288.075(2), F.S.² (emphasis added).

The public records exemption rests with an “economic development agency,” which is defined under s. 288.075(1), F.S., to include:

- The Office of Tourism, Trade, and Economic Development (OTTED);
- Any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
- The public economic development agency that advises the county commission on issuance of industrial revenue bonds of a county that does not have an industrial development authority;
- Any research and development authority created under part V of ch. 159, F.S.;
- The Spaceport Florida Authority; or
- Any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

⁴ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

¹ The Department of Commerce was dissolved in 1996, and comparable functions performed by the department were assigned to public-private partnerships, including Enterprise Florida, Inc., and the Florida Commission on Tourism. ch. 96-320, L.O.F.

² The statute further specifies that the confidentiality must be maintained until the 24-month period expires or until there is otherwise disclosure of the information, whichever occurs first. Further, the confidentiality does not apply when a court determines that a petitioning party needs access to the documents. s. 288.075(2), F.S.

Subsection (4) of s. 288.075, F.S., provides an additional protection to private entities wanting to use this exemption by providing that a “public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information pursuant to this section, until 90 days after such information is made public.”

Confidentiality Important to Businesses

In working with and assisting a company that is considering relocating to or expanding in a Florida community, an economic development agency receives a wide variety of information related to the company’s plans and needs, such as, the company’s facility or real estate requirements; the anticipated number of employees and the likely salaries for such employees; the projected capital investment associated with the expansion or relocation; and, in some cases, details relating to product information or business processes. Economic development professionals responding to Senate surveys associated with the Open Government Sunset Review of s. 288.075(2), F.S., report that businesses engaged in site-selection processes place a premium on confidentiality for their plans. *Interim Project Report 2001-030*, Senate Committee on Commerce and Economic Opportunities (November 2000). Among the explanations respondents provided for why such confidentiality is important to a relocating or expanding business are that

- Competitor businesses could use the information to their advantage in the marketplace and at a minimum would be exposed to the strategic plans of the business;
- Release of relocation plans could cause employees of the business to leave the organization in the face of uncertainty, making it difficult for the business to meet existing workforce needs;
- The business could experience inflated real estate prices as a result of speculation by those hoping to sell property to the business;
- Firms in the prospect community may inundate the company with inquiries and information in hopes of securing business with it;
- Corporate officers may wish to explore and analyze options before presenting them to the board of directors, and premature release of information could resonate in the financial markets; and
- The business ultimately may elect not to expand or relocate, and the release of information concerning its exploration of sites could create false expectations.

Interim Project Report, at 4.

Economic development professionals maintain that, because confidentiality during the site-selection process is important to relocating or expanding businesses, Florida would be at a competitive disadvantage vis-à-vis other states if it did not have a public records exemption for information held by economic development agencies. *Id.*

Analysis of Public Purpose

The majority of state and local economic development organizations responding to the survey associated with this Open Government Sunset Review reported that their ability to conduct business recruitment and expansion activities on behalf of the state and its localities would be significantly impaired without the exemption. *Interim Project Report*, at 5. The exemption contributes to the exchange of information between a business and the economic development agency as the business evaluates alternative sites for its activities and as the agency markets a community’s attractiveness as a site. The exemption in s. 288.075(2), F.S., allows the state and its political subdivisions to effectively and efficiently administer a governmental program, which administration could be hampered without the exemption.

Also, the exemption protects confidential information concerning entities, disclosure of which could result in injury to the entity in the marketplace. During the site-selection process, a prospect company may share with an economic development agency not only information on general business plans, such as interest in moving from one state to another, but also detailed information relating to employment and salaries, capital investment, marketing strategies, product lines, and business processes that may have a bearing on its particular location needs. Release of such details could create an information advantage for competitor businesses in the marketplace, which might use the information, for example, to alter their own business strategies. *Id.*

When the Legislature substantially revised the public records exemption in 1995, it included a public necessity statement, as required by Art. I, S. 24 of the Florida Constitution. Specifically, the Legislature found that

it is a public necessity that, upon written request from a private corporation, partnership, or person, records held by an economic development agency . . . relating to the plans, intentions, or interests of the corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state be held confidential and exempt from public records requirements, until 24 months after the date an economic development agency receives a request for confidentiality of such information or until the documents are otherwise disclosed, whichever occurs first. Protection 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.

In 1995, the definition of "economic development agency" under s. 288.075(1), F.S., was broadened to include private entities authorized by the state, a municipality, or a county to promote the business interests of such governmental unit. s. 1, ch. 95-378, L.O.F. The revision reflected the reliance by many local governments on private economic development organizations, such as not-for-profit chambers of commerce or similar corporations, to carry out marketing and recruitment efforts on behalf of the communities. Questions had arisen over whether a private organization was acting on behalf of the public agency in such a manner that its records and information pertaining to company locations and expansions would be subject to disclosure.³ With the revised definition, the confidentiality provided under s. 288.075, F.S., applies to among other organizations, Enterprise Florida, Inc. (EFI), which is the statutorily authorized not-for-profit corporation that serves as the state's principal economic development organization; to OTTED; and to local not-for-profit economic development organizations serving as the principal business development entity for their respective communities.

Respondents to the Senate surveys regarding s. 288.075, F.S., noted that, although the public records exemption applies to the statewide economic development organizations and certain private economic development organizations, the exemption does not cover local government

³ Florida laws relating to Government in the Sunshine have "been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties." Office of the Attorney General/First Amendment Foundation, Government-In-The-Sunshine Manual, 2000 Edition, p. 4. For purposes of Florida's public records law, an agency includes a private corporation or entity that is "acting on behalf of" a public agency. s. 119.011(2), F.S. In interpreting this definition, the Florida Supreme Court has adopted a totality of factors approach, which considers a variety of factors, including, but not limited to, how much public money the private organization receives and the degree of control the government has over the organization. See, e.g., News and Sun-Sentinel v. Schwab, et al., 596 So. 2d 1029 (Fla. 1992).

employees carrying out similar activities (except the public agency that provides advice on industrial revenue bonds in certain counties). *Interim Project Report*, at 5-6. Consequently, the business location or expansion records of an economic development office in a city or county that conducts its own business expansion and recruitment activities – rather than utilizing a private economic development organization – are subject to disclosure.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts verbatim the public records exemption in s. 288.075, F.S., which provides that upon written request from a private entity, records of an economic development agency which contain or could provide plans, intentions, or interests of that private entity to locate, relocate, or expand any of its business activities in this state are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution for 24 months after the date an economic development agency receives a request for confidentiality or until disclosed by an economic development agency or the party that requested confidentiality. This bill also amends s. 288.075, F.S., to remove the sentence that requires its repeal.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. 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.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Jennifer D. Krell, J.D.

Staff Director:

J. Marleen Ahearn, J.D., Ph.D.

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Jennifer D. Krell, J.D.

Staff Director:

Don Rubottom