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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 391 (PCB SA 01-04)

RELATING TO: Public Records Exemption for Certain Information in Connection with Qualified Defense Contractor and Qualified Target Industry Tax Refund Programs

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)
- (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 288.1066, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Section 288.1066, F.S., provides that certain information received by specific economic development agencies, pursuant to the qualified defense contractor (QDC) and qualified target industry (QTI) tax refund programs, are confidential and exempt from public disclosure for a period of time not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier. Such information includes federal employer numbers, tax information, and trade secrets. If the exemption was repealed, it appears that businesses might be reluctant to participate in the programs because of concerns that sensitive information could be accessible by competitors. Also, competitors of a business applying for the QDC or QTI programs could have access to details relating to that business's sales, tax identification numbers, and wage rates, information that could be used to undermine that business.

Accordingly, this bill reenacts verbatim the public records exemption in s. 288.1066, F.S. Also, this bill amends s. 288.1066, F.S., to remove the sentence that requires its repeal and removes references to the Department of Commerce, which no longer exists.

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 288.1066, 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

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

- i. Secured a new Department of Defense (DOD) contract;
- ii. Consolidated an existing DOD contract in Florida;
- iii. Converted defense production jobs to non-defense production jobs; or
- iv. Contracted for the reuse of a defense-related facility.

s. 288.104, F.S. (1994 Supp.). The program was repealed effective December 1, 1994.⁵

In 1996, the QDC program was re-created and codified in s. 288.1045, F.S. See 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. Examples of the types of information that is 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 five fiscal years preceding the application date; and

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.

⁵ The Legislature had specified that the program would be repealed effective December 1, 1994, if no qualified applicant had entered into a valid new DOD contract or begun consolidation of an existing DOD contract, which was expected to result in the employment of at least 1,000 full-time employees. Because this condition was not satisfied by a single qualified applicant, the statute stood repealed.

- 5) The estimated amount of tax refunds to be claimed in each fiscal year under the QDC program.

s. 288.1045(3)(b), F.S.

Approved applicants enter into an agreement with OTTED and may receive refunds based on the 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 participate in the program, an eligible business must apply to OTTED before the business has made a decision to expand an existing business or locate a new 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.

Section 288.1066, F.S., Confidentiality of QDC & QTI Records

Section 288.1066, F.S., provides a public records exemption for specified information that is received by the Department of Commerce (which no longer exists), OTTED; Enterprise Florida, Inc.; or county or municipal governmental entities and their employees under the administration of the Qualified Defense Contractor (QDC) and QTI tax refund programs.⁶

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.

⁶ When the Legislature created the QDC Tax Refund Program during a special session in 1993, it also created a public records exemption for certain information submitted by businesses under the program. See s. 1, ch. 93-420, L.O.F., and s. 288.1065, F.S. (1994 Supp.). However, the public records exemption was repealed effective April 15, 1994. Prior to the adoption of s. 288.1066, F.S., in 1996, no comparable public records exemption existed for the QTI Tax Refund Program.

- 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 under ch. 288, F.S. 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.,⁷ 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 purpose of the exemption is to protect trade secrets and other sensitive business information, the release of which could injure the business entity applicant in the marketplace. The exemption is also designed to facilitate the administration of the QDC and QTI incentive programs by removing

⁷ Section 812.081(1)(c), F.S., defines a trade secret, in part, as "the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it".

any reluctance by businesses to expand or relocate businesses in Florida. The information covered by the public records exemption is used by OTTED, Enterprise Florida, and by local governments in evaluating the participation of businesses in two economic development incentive programs. Without the exemption, it appears that businesses might be reluctant to participate in the programs because of concerns that sensitive information could be accessible by competitors. Reluctance by businesses to participate in the programs would be contrary to the broader public policy goals of the programs.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts verbatim the public records exemption in s. 288.1066, F.S., which provides that an applicant's federal employer identification number and Florida sales tax number; the percentage of the applicant's gross receipts from Department of Defense contracts during the preceding 5 years; the amounts of sales, use and transaction, corporate income, intangible property, emergency excise, and ad valorem taxes paid during the five fiscal years preceding the date of the application; and trade secret information received by economic development agencies, such as OTTED, Enterprise Florida, Inc., and Spaceport Florida, pursuant to the qualified defense contractor and qualified target industry tax refund programs, are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution for a period of time not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier.

This bill also amends s. 288.1066, F.S., to remove the sentence that requires its repeal and removes references to the Department of Commerce, which is now Enterprise Florida, Inc.

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:

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