SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: HB 391

SPONSOR: State Administration Committee and Representative Brummer

SUBJECT: Public Records Exemption/Specified Business Information

DATE: April 9, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	CM	Favorable
2.			RC	
3.				
4.				
5.				
6.				

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 Tax Refund Program and the Qualified Target Industry Tax Refund Program.

This bill reenacts and amends section 288.1066, Florida Statutes.

II. 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 first law affording access to public records was enacted by the Florida Legislature 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. Article I, s. 24 of the Florida Constitution provides:

> (a) Every person has the right to inspect or copy any public record 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.

In addition to the Florida Constitution, the Public Records Law[1] 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.[2] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[3]

The State Constitution permits exemptions to open government requirements and establishes 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. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, 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 on October 2 of the fifth year, 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. 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”.[4]

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[1] Chapter 119, F.S.

[2] *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

[3] *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

[4] Section 119.15(3)(b), F.S.

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. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year's certification after that determination.

Section 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.

Section 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?

Section 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. 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:

- 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.

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S., 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[5]. The program was repealed effective December 1, 1994.[6]

In 1996, the QDC program was re-created and codified in s. 288.1045, F.S.[7] 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.[8] 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 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 (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

[5] Section 288.104, F.S., (1994 Supp.).

[6] 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.

[7] *See* s. 1, ch. 96-348, L.O.F.

[8] Section 288.1045(3), F.S.

and which 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.[9]

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.[10]

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.[11]

[9] Section 288.1045(1)(o) and (3), F.S.

[10] Section 288.106(3)(a), F.S.

[11] Section 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.[12]

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.[13]

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.

[12] 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.

[13] Section 288.1066(1)(a)-(d), F.S.

- 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.[14]

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.

Analysis of Public Purpose

This public records exemption was reviewed by the Legislature during the 2000-2001 interim.[15] The Open Government Sunset Review Act prescribes that a public records exemption may be maintained only if it serves an identifiable public purpose, and the statute provides conditions supporting a public-purpose finding. Based upon input from program administrators and other economic development professionals, the report found that the exemption contained in s. 288.1066, F.S., satisfies two of these conditions.

First, the exemption allows the state and its political subdivisions to effectively and efficiently administer governmental programs.[16] The information covered by the public records exemption is used by the state and by local governments in evaluating the participation of businesses in two economic development incentive programs. Several of the economic development professionals responding to a survey associated with this Open Government Sunset Review cautioned that, in the absence of the public records exemption, businesses would be reluctant to participate in the programs because of concerns that sensitive information could be accessible by competitors. One respondent noted that businesses inquiring about the incentive programs typically ask at the outset about such confidentiality.

Secondly, the exemption protects confidential information concerning entities, disclosure of which would result in injury to the entity in the marketplace.[17] In particular, the exemption protects trade secret information, such as product information or unique business processes, that a participant in the program may share in describing its need for or use of the tax refunds. If the exemption did not exist, competitors of a business applying for the QDC or QTI programs would have access to details relating to the business's sales, tax identification numbers, and wage rates, which information could be used to undermine an advantage that the business has obtained in the marketplace.[18]

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[14] Section 288.1066(2)(a)-(f), F.S.

[15] *See* Florida Senate Interim Project Report No. 2001-031, *Review of Public Records Exemption Relating to Qualified Defense Contractor and Qualified Target Industry Tax Refund Programs*, November 2000.

[16] Section 119.15(4)(b)1., F.S.

[17] Section 119.15(4)(b)3., F.S.

[18] Florida Senate Interim Project Report No. 2001-031, p. 6.

Issues Raised Concerning Exemption

The Office of Tourism, Trade, and Economic Development (OTTED), which is the principal administrator of the QDC and QTI tax refund programs, recommended some revisions to the public records exemption provided in s. 288.1066, F.S.

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.[19] 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: OTTED also noted that 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" (*emphasis added*).[20] 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 Florida Department of Labor and Employment Security (DLES) 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.

Conclusion

The report recommended reenactment of the public records exemption under s. 288.1066, F.S. The report also recommended that the Legislature revise the exemption: (1) to extend confidentiality to information on actual tax payments made during the term of the tax refund agreement, which is submitted by the business as part of the annual claim for tax refunds under

[19] Under the QTI program, for example, a business that has entered into a tax refund agreement with the state may apply once annually for a tax refund. The refund claim must include a copy of all receipts pertaining to the payment of taxes for which the refund is being sought (s. 288.106(5)(a) and (b), F.S.). The requirement is also part of the QDC program (s. 288.1045(5)(a) and (b), F.S.).

[20] Section 288.1066(2)(c), F.S.

the QDC and QTI programs; and (2) to extend confidentiality to information on actual employment and wages, which is submitted by a business as part of its evidence of compliance with performance standards established in the tax refund agreement under the programs.[21]

III. Effect of Proposed Changes:

This bill abrogates the scheduled repeal of a public records exemption for certain business information that is received by the Office of Tourism, Trade, and Economic Development; 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. The bill amends s. 288.1066, F.S., to eliminate subsection (4), which specifies that the section is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2001, unless reenacted by the Legislature. The bill also eliminates obsolete references to the former Department of Commerce.

As the public records exemption is reenacted, the following information under the QDC program 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.[22]

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.

[21] Florida Senate Interim Project Report No. 2001-031, pp. 7-8.

[22] Section 288.1066(1)(a)-(d), F.S.

- 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.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act does. As the act is a statutory provision created by the Legislature, and as one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met. Nevertheless, because the exemption contains language that repeals the exemption as of October 2, 2001, the exemption will repeal unless the Legislature reenacts the exemption.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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.

C. Government Sector Impact:

State and 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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

For related information on the public records exemption addressed by this bill, *see* Florida Senate Interim Project Report No. 2001-031, *Review of Public Records Exemption Relating to Qualified Defense Contractor and Qualified Target Industry Tax Refund Programs*, November 2000.

VIII. Amendments:

None.