

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: SB 456

SPONSOR: Commerce & Economic Opportunities Committee

SUBJECT: Public Records; Open Government Sunset Review; Identity of Respondent to Marketing Survey

DATE: March 5, 2001 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|-----------|
| 1. | Maclure | Maclure | CM | Favorable |
| 2. | Rhea | Wilson | GO | Favorable |
| 3. | _____ | _____ | RC | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This bill saves from repeal a public records exemption for the identity of a respondent to a marketing project or an advertising research project conducted by the Florida Tourism Industry Marketing Corporation, as well as for trade secrets obtained through such activities.

This bill amends section 288.1226, 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 Law¹ 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 which 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

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

¹Chapter 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).

⁴Section 119.15(3)(b), F.S.

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 reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. 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.

Florida Tourism Marketing & Promotion

The Florida Commission on Tourism (commission) is created by s. 288.1223, F.S., to oversee the state's efforts to increase the positive impact of tourism, including increased employment for state citizens, to all sectors of the economy through effective marketing activities; to continually upgrade the image of Florida as a quality destination; to promote tourism objectives with all geographic, socioeconomic, and community sectors considered equitably; and to judge its efforts by the same standards of accountability and integrity as those used by successful, respected private sector businesses.⁵ The commission is created within the Governor's Office of Tourism, Trade, and Economic Development (OTTED).

Section 288.1224, F.S., provides the powers and duties of the commission, specifying that the commission shall contract with a direct-support organization incorporated as a private, not-for-profit corporation, as defined in s. 501(c)(6) of the Internal Revenue Code, to execute the tourism and marketing promotion services of the state. Section 288.1226, F.S., identifies that direct-support organization as the Florida Tourism Industry Marketing Corporation (corporation). The corporation does business under the name "Visit Florida."

Chapter 96-297, L.O.F., created a public records exemption for certain records held by the corporation.⁶ Specifically, s. 288.1226(8), F.S., states:

The identity of any person who responds to a marketing project or advertising research project conducted by the corporation in the performance of its duties on behalf of the commission, or trade secrets as defined by s. 812.081 obtained pursuant to such activities, are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This subsection is subject to the Open Government Sunset Review Act of 1995

⁵Section 288.1223(1), F.S.

⁶Florida 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.).

in accordance with s. 119.15, and shall stand repealed on October 2, 2001, unless reviewed and saved from repeal through reenactment by the Legislature.

Further, s. 2 of ch. 96-297, L.O.F., provided that:

This exemption is needed to protect the identity of persons and trade secret information which may be included in a response to a marketing project or advertising research project dealing with tourism industry statistics, trade secrets, visitor numbers, or marketing programs of private entities. Such information in the aggregate is needed by the Florida Tourism Industry Marketing Corporation to plan the marketing programs it conducts to promote tourism growth for the benefit of this state and to measure the effectiveness of those marketing programs for the Legislature. If such records are not protected, critical confidential information regarding strategic plans, trade secrets, and research data would be revealed. Release of this proprietary information could put those companies from which the information is gathered at a competitive disadvantage in the marketplace. Consequently, private companies, whose records are not required to be open, might refrain from responding to marketing projects or advertising research projects, or from sharing tourism statistics, thereby denying the use of valuable information needed to assist this state. The harm that would result from any obstruction to receiving as much tourism-related marketing and statistical information as possible would far outweigh any public benefit derived from release of such information.

This public records exemption was reviewed by the Legislature during the 2000-2001 interim.⁷ The report found that the exemption provided to the Florida Tourism Industry Marketing Corporation uniquely affects respondents to marketing projects or advertising research projects conducted by the corporation. Section 288.1226(8), F.S., specifically protects the identity of those who provide responses to the corporation's marketing or advertising research projects. The privilege and confidentiality provided generally do not apply to the actual data or information gathered. However, the exemption in s. 288.1226(8), F.S., does provide such protection when the information gathered is a trade secret, as defined by s. 812.081, F.S.⁸ According to the corporation, under this exemption, for example, the corporation might keep confidential the name of a hotel that supplied the corporation with information on its occupancy rate for a particular period in time, as a part of a tourism-marketing research study.

Section 288.1223(1), F.S., provides purposes of the Florida Commission on Tourism. These purposes include efforts "to increase the positive impact of tourism, including increased employment for state citizens, to all sectors of the economy through effective marketing activities; to continually upgrade the image of Florida as a quality destination; to promote tourism objectives with all geographic, socioeconomic, and community sectors considered equitably; and to judge its efforts by the same standards of accountability and integrity as those

⁷ See Florida Senate Interim Project Report No. 2001-032, *Review of Public Records Exemption Relating to Florida Tourism Industry Marketing Corporation*, November 2000.

⁸ Section 812.081, 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" (s. 812.081(1)(c), F.S.).

used by successful, respected private sector businesses.” As the direct-support organization to the commission, the corporation pursues these goals, in part, with extensive advertising and market research, and the corporation reports that these activities are the foundation of the effective marketing of the state as a tourist destination.

In addition, the information collected by the corporation is of a sensitive and personal nature. Respondents to surveys gathered annually may be asked information such as household income, age, race, and travel spending patterns. This information is also potentially damaging to businesses if released to the public. For example, the corporation collects information relative to the performance of hotels and attractions, which, if released, could compromise the competitive standing of the business in the marketplace.

The corporation contends that without the exemption, the willingness of potential respondents to participate in marketing research and advertising research studies would be significantly diminished. Therefore, the report concluded, the identifiable public purpose of this exemption is not only the effective and efficient administration of Florida’s tourism promotion program, but also the protection of individuals from injury caused by the release of sensitive data, and the prevention of injury to businesses within the scope of this particular public policy in the marketplace caused by the release of trade secrets. The identities and trade secrets contained in the marketing and advertising research studies conducted by the corporation are not available through alternative means. The report recommended reenactment of the public records exemption under s. 288.1226(8), F.S.⁹

III. Effect of Proposed Changes:

This bill abrogates the scheduled repeal of the public records exemption for the identity of a person who responds to a marketing project or an advertising research project of the Florida Tourism Industry Marketing Corporation, as well as for trade secret information obtained through such activities. The bill amends s. 288.1226(8), F.S., to delete language specifying that the exemption is repealed on October 2, 2001, and to delete language requiring legislative review under the Open Government Sunset Review Act. Such review was conducted during the 2000-2001 interim.¹⁰

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁹Florida Senate Interim Project Report No. 2001-032, pp. 4-5.

¹⁰See Florida Senate Interim Project Report 2001-032, November 2000.

B. Public Records/Open Meetings Issues:

This bill abrogates the scheduled repeal of an existing public records exemption. The provisions of the bill appear to be consistent with the public records requirements of the Florida Constitution.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

By protecting information in the nature of trade secrets, the public records exemption addressed by this bill may help prevent entities from being injured in the marketplace through the disclosure of sensitive business information to competitors. In addition, to the extent the public records exemption makes potential respondents less reluctant to participate in marketing and advertising research projects, the exemption may help the Florida Tourism Industry Marketing Corporation gather data used to foster growth in the tourism sector through promotion efforts of the corporation.

C. Government Sector Impact:

The Florida Tourism Industry Marketing Corporation, which is a direct-support organization for the Florida Commission on Tourism, is responsible for maintaining the security of confidential records generated through marketing and advertising research projects of the corporation. 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. 2001-032, November 2000.

VIII. Amendments:

None.