

STORAGE NAME: h0777.ccc.doc
DATE: February 20, 2002

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS**

BILL #: HB 777
RELATING TO: Public Records / Business Information
SPONSOR(S): Representative(s) Kilmer
TIED BILL(S): CS/HB 779

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) COUNCIL FOR COMPETITIVE COMMERCE
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill creates a public records exemption for certain business information received by the Office of Tourism, Trade, and Economic Development (OTTED); Enterprise Florida, Inc.; or county or municipal governmental entities and their employees pursuant to their administration of the Qualified Defense Contractor (QDC) and the Qualified Target Industry (QTI) tax refund programs.¹

Additionally, this bill allows the OTTED, in the administration of the QDC and QTI tax refund programs for aviation-industry businesses, to have access to information made confidential and exempt by certain other provisions of law. Currently, the law does not extend the QDC and QTI tax refund programs to aviation-industry businesses. Accordingly, the exception to the exemption does not appear applicable. However, HB 779, introduced this session, does extend such tax refund programs to aviation-industry businesses. Accordingly, the bill should be amended to make the exception contingent upon the passage of HB 779.

This bill provides a public necessity statement, as required by the Florida Constitution,² which states that the release of sensitive business information could injure a business in the marketplace by providing its competitors with detailed insights into the financial status and strategic plans of that business. In addition, the bill provides for future review and repeal of the public records exemptions.

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

This bill appears to raise some constitutional concerns. See "Effect of Proposed Changes" and "Constitutional Issues" sections for further details.

On February 12, 2002, the Committee on State Administration reported HB 777 favorably with one strike-all amendment. That amendment is traveling with the bill. See "Amendments or Committee Substitute Changes" section for further details.

¹ The previously existing public records exemptions for certain business information received by OTTED; Enterprise Florida, Inc.; or a county or a municipal governmental entity and that entity's employees, under the administration of the QDC and the QTI tax refund programs repealed October 2, 2001. Last session, both the Senate and House introduced bills to reenact and expand the exemptions; however, both bills died in the House. Additionally, the House also introduced a bill to reenact the public records exemptions without expanding those exemptions. The House Bill died in the Senate Committee on Rules and Calendar.

² Article 1, section 24 (c)(b).

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:

Qualified Defense Contractor Tax Refunds

In 1993, the Legislature created the Qualified Defense Contractor (QDC) Tax Refund Program which authorized tax refunds to a certified contractor that secured a new Department of Defense (DOD) contract, consolidated an existing DOD contract in Florida, converted defense production jobs to non-defense production jobs, or contracted for the reuse of a defense-related facility.³ That program was repealed October 1, 1994.⁴ In 1996, the QDC program was recreated and codified in s. 288.1045, F.S.⁵

In order to participate in the QDC program, an applicant⁶ must apply to the Office of Tourism, Trade, and Economic Development (OTTED) for certification. During the application process, an applicant is generally required to submit his or her federal employer identification number and state sales tax registration number, the number of full-time jobs in Florida that will be dedicated to the project and their average wage, the percentage of the applicant's gross receipts derived from DOD contracts during the five taxable years preceding the application date, the amount of various state taxes paid during the five fiscal years preceding the application date, and the estimated amount of tax refunds to be claimed in each fiscal year under the QDC program.⁷ Approved applicants enter into an agreement with the OTTED and may receive tax refunds⁸ 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.⁹

³ Section 288.104, F.S. (1994 Supp.)

⁴ The Legislature specified that the QDC program would be repealed effective December 1, 1994, if no qualified applicant had entered into a valid new DOD contract or had begun consolidation of an existing DOD contract, which was expected to result in the employment of at least 1,000 full-time employees. This condition was not satisfied by a single qualified applicant, therefore, the statute repealed.

⁵ Section 1, chapter 96-348, L.O.F.

⁶ An applicant is any business entity that holds a valid DOD contract; any business entity that is a subcontractor under a valid DOD contract; or any business entity that holds a valid contract for the reuse of a defense-related facility, including all members of an affiliated group of corporations. Section 288.1045(1)(d), F.S.

⁷ Section 288.1045(3)(b), F.S.

⁸ Tax refunds generally are paid to a participating business over a period of several years.

⁹ Section 288.1045(2), F.S.

Qualified Target Industry Tax Refunds

The Qualified Target Industry (QTI) Tax Refund 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).¹⁰

In order to participate in the QTI program, an eligible business must apply to OTTED prior to deciding to locate a new business in this state or prior to deciding to expand an existing business in this state. As part of the application process, the business must submit its federal employer identification number and its state sales tax registration number; the number of full-time jobs in this state that will be dedicated to the project and the average wage of such jobs; an estimate of the proportion of the sales resulting from the project that will be made outside the state; and any other additional information requested by OTTED.¹¹ Approved businesses enter into an agreement with OTTED and may receive tax refunds¹² 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.¹³

Section 288.1066, F.S.

Section 288.1066, F.S., provided public records exemptions for specified information received by OTTED; Enterprise Florida, Inc.; or a county or a municipal governmental entity and that entity's employees, under the administration of the QDC and QTI tax refund programs. Those exemptions were repealed October 2, 2001.¹⁴

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

¹⁰ Section 288.106(2)(b), F.S.

¹¹ Section 288.106(3)(a), F.S.

¹² Tax refunds are generally paid to a participating business over a period of several years.

¹³ Section 288.106(2), F.S.

¹⁴ During the 2001 legislative session, both the House and Senate introduced bills to reenact and expand the public records exemptions previously found in s. 288.1066, F.S. Both bills died in the House. Additionally, pursuant to the Open Government Sunset Review Act of 1995, the House introduced a bill to reenact the public records exemptions without expanding those exemptions. The House Bill died in the Senate Committee on Rules and Calendar.

specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

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.

C. EFFECT OF PROPOSED CHANGES:

This bill recreates and expands the public records exemptions for certain business information *received* by the Office of Tourism, Trade, and Economic Development (OTTED); Enterprise Florida, Inc.; or county or municipal governmental entities and their employees through their administration of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs that repealed October 2, 2001.

This bill provides that the following information submitted by an applicant for participation in the QDC program is confidential and exempt¹⁵ for a period not to exceed the duration of the tax refund

¹⁵ Information and records that are made "confidential and exempt" may not be released to anyone other than to the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62, August 1, 1985.

agreement or 10 years, whichever is earlier: the applicant's federal employer identification number and state sales tax registration number; the percentage of the applicant's gross receipts derived from Department of Defense (DOD) contracts during the five taxable years preceding the date the application for certification is submitted; any trade secret information¹⁶ contained in statements regarding the applicant's need for or use of the tax refunds; and information pertaining to the number of jobs created and the wages paid for those jobs when submitted as part of a claim for a tax refund and as evidence of the achievement of performance items contained in the tax refund agreement. Additionally, the applicant must submit:

- The amount of taxes paid on sales, use, and other transactions;
- The amount of corporate income taxes paid;
- The amount of intangible personal property taxes paid;
- The amount of emergency excise taxes paid;
- The amount of excise taxes on documents paid; and
- The amount of ad valorem taxes paid.¹⁷

In addition to the previously mentioned exemption for various taxes paid, this bill provides that the following information submitted by an applicant for participation in the QTI program is confidential and exempt for a period not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier: the amount of insurance premium taxes paid; the applicant's federal employer identification number and state sales tax registration number; any trade secret information contained in any description of the type of business 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; any trade secret information contained in statements concerning the role that the tax refunds will play in the applicant's decision to locate or expand his or her business, in Florida; an estimate of the proportion of the sales resulting from the project that will be made outside of Florida; and information relating to the number of jobs created and the wages paid for those jobs by a QTI business when submitted as part of a claim for a tax refund and as evidence of the achievement of performance items contained in the tax refund agreement.

The exemptions created appear to be overly broad in that the exemptions make confidential and exempt information relating to the number of jobs created by QDC and QTI program participants. It is unclear as to why that information should be made confidential and exempt and how the release

¹⁶ Section 812.081(1)(c), F.S., defines "trade secret" 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. 'Trade secret' includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

When the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes."

¹⁷ The submission of the amount of those taxes paid is based on the five years immediately preceding the date of the application and the projected amounts to be paid in the three fiscal years immediately following the date of the application. The applicant must also submit the amount of each of those taxes paid during the term of the tax refund agreement and during the term that the qualified applicant seeks a tax refund.

of such information would negatively affect those program participants. The need to protect such information is not addressed in the public necessity statement.¹⁸

The exemptions created are made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2006, unless reviewed and saved from repeal through reenactment by the legislature. The Open Government Sunset Review Act of 1995 requires that newly created public records exemptions be reviewed after five years. Accordingly, this exemption should be scheduled for review in 2007 and not 2006.

This bill specifies that OTTED; Enterprise Florida, Inc.; or any county or municipal governmental entity may publish statistics in the aggregate and so classified as to prevent the identification of a single qualified applicant. They may also release the names of qualified businesses, the amount of refunds awarded to such businesses, and the amount of refunds claimed by such businesses.

This bill provides a public necessity statement, as required by s. 24, Art. I of the State Constitution, which states that the release of sensitive business information could injure a business in the marketplace by providing its competitors with detailed insights into the financial status and strategic plans of that business. The public necessity statement lists the numerous items that need to be made confidential and exempt, but fails to include in the list: an applicant's federal employer identification number; information relating to the number of jobs created by applicant's participating in the QDC or QTI programs; and an estimate of the proportion of the sales resulting from the project that will be made outside of Florida. Accordingly, the public necessity statement fails to meet the requirements of s. 24, Art. I of the State Constitution.

Additionally, this bill amends ss. 443.171(7)¹⁹ and 443.1715(1)²⁰, F.S., to allow public employees of OTTED, in the administration of the QDC tax refund program for aviation-industry businesses (as authorized by s. 288.1045, F.S.), to have access to information made confidential and exempt by those sections. The QDC tax refund program currently found in s. 288.1045, F.S., does not extend to aviation-industry businesses. HB 779, introduced this session, does however amend s. 288.1045, F.S., to include such businesses.

Accordingly, the effective date of this bill should be contingent upon the passage of HB 779. If HB 779 does not become law and HB 777 does, then the language amending ss. 443.171(7) and 443.1715(1), F.S., will be inappropriate because aviation-industry businesses will not be authorized to participate in the QDC tax refund program.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

¹⁸ Article I, s. 24(c) of the State Constitution, requires that a law must state with specificity the public necessity justifying the public records exemption and that such exemption must be no broader than necessary to accomplish the stated purpose of the law.

¹⁹ Section 443.171, F.S., pertains to the Division of Unemployment Compensation and the Unemployment Appeals Commission within the Department of Labor and Employment Security. Section 443.171(7), F.S., requires employers to keep work records containing information specified by the division. Those records are subject to public disclosure. However, an employer's or individual's identifying information obtained pursuant to the administration of the Unemployment Compensation chapter is confidential and exempt, except to the extent necessary for the proper presentation of a claim or upon written authorization of the claimant who has a workers' compensation claim pending. Such information is only available to public employees in the performance of their public duties. That includes OTTED in its administration of the QDC and QTI tax refund programs.

²⁰ Section 443.1715(1), F.S., provides a public records exemption for an employer's or individual's identifying information obtained pursuant to the administration of the Unemployment Compensation chapter is confidential and exempt, except to the extent necessary for the proper presentation of a claim or upon written authorization of the claimant who has a workers' compensation claim pending. Such information may be made available to OTTED in its administration of the QDC tax refund program.

II. 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.

III. 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:

This 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.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Article I, s. 24(c) of the Florida State Constitution, provides that a public records exemption must be no broader than necessary to accomplish the stated purpose of the law. The exemptions created by this bill appear to be overly broad. The exemption created by this bill makes the number of job positions created by QDC and QTI program participants confidential and exempt. It is unclear as to

why that information should be made confidential and exempt and how the release of such information would negatively affect those program participants. Furthermore, the need to protect such information is not addressed in the public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on State Administration reported HB 777 favorably with one strike-all amendment. That amendment is traveling with the bill.

The strike-all amendment, like the bill, creates a public records exemption for certain business information²¹ held by the Office of Tourism, Trade, and Economic Development (OTTED) or Enterprise Florida, Inc., when administering state economic development incentive programs. The amendment limits the exemption to the term of each incentive agreement. The amendment does not appear to raise any constitutional concerns.

The amendment, like the bill, allows the Department of Revenue to share confidential corporate tax credit information and sales tax exemption information with OTTED.

The amendment, unlike the bill, creates an effective date contingent upon the passage of HB 779 for certain provisions with regard to a qualified "aviation-industry business." Additionally, the strike-all amendment adds needed directory language and reorganizes the bill's provisions.

Staff for the Committee on State Administration believes that this amendment alleviates the constitutional concerns raised by them earlier in this analysis.

VI. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

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

AS REVISED BY THE COUNCIL FOR COMPETITIVE COMMERCE:

Prepared by:

Benjamin G. Snipes

Council Director:

Matthew Carter

²¹ The confidential and exempt business information includes: the federal employer identification, unemployment account, and sales tax registration numbers, certain trade secret information, and the percentage of a business' sales occurring outside of Florida. The exemption does not prevent OTTED or Enterprise Florida, Inc., from releasing the: names of businesses approved for refunds; number of jobs the businesses agree to create or retain; total number of jobs actually created or retained; amount of incentives approved and the amount actually paid; and aggregate program statistics.

STORAGE NAME: h0777.ccc.doc

DATE: February 20, 2002

PAGE: 9