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**\*\*AS PASSED BY THE LEGISLATURE\*\***  
CHAPTER #: 2002-68, Laws of Florida

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

**BILL #:** CS/HB 777, 1ST ENG.  
**RELATING TO:** Public Records / Business Information  
**SPONSOR(S):** Council for Competitive Commerce and Representative(s) Kilmer  
**TIED BILL(S):** CS/CS/HB 779

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) COUNCIL FOR COMPETITIVE COMMERCE YEAS 12 NAYS 0
- (3)
- (4)
- (5)

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I. SUMMARY:

**On March 20, 2002, the Senate adopted a floor amendment to CS/HB 777. That amendment was a strike-all amendment. On March 21, 2002, the House concurred with the Senate amendment and passed CS/HB 777 as amended. On April 22, 2002, CS/HB 777, 1<sup>st</sup> Engrossed, was approved by the Governor and became law as Chapter 2002-68, Laws of Florida (act). The effective date of the act is "upon becoming a law," which is April 22, 2002.**

This act creates a public records exemption for certain business information held by the Office of Tourism, Trade, and Economic Development (OTTED); Enterprise Florida, Inc.; or county or municipal governmental entities and their employees, when administering the qualified defense contractors and qualified target industry tax refund programs; the capital investment tax credit program; and the semiconductor, defense, and space tax exemption program.<sup>1</sup>

This act provides a public necessity statement, as required by the Florida Constitution, and provides for future review and repeal of the public records exemption.

This act allows the Department of Revenue to provide certain information to OTTED, or to OTTED's employees or agents who have been identified in writing by OTTED to the department, in OTTED's administration of state economic development incentive programs.

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

**THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.**

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<sup>1</sup> 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 qualified defense contractors and the qualified target industry tax refund programs repealed October 2, 2001. Last session, the House and Senate introduced bills to reenact and expand the exemptions; however, both bills died in the House. The House also introduced a bill which simply reenacted the public records exemptions, without expanding those exemptions; however, this House bill died in the Senate Committee on Rules and Calendar.

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:

**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.<sup>2</sup> That program was repealed October 1, 1994.<sup>3</sup> In 1996, the QDC program was recreated and codified in s. 288.1045, F.S.<sup>4</sup>

In order to participate in the QDC program, an applicant<sup>5</sup> 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 the average wage of such jobs, 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.<sup>6</sup> Approved applicants enter into an agreement with OTTED and may receive tax refunds<sup>7</sup> 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.<sup>8</sup>

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<sup>2</sup> Section 288.104, F.S. (1994 Supp.).

<sup>3</sup> The Legislature specified that the QDC program would repeal, 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. Because a single qualified applicant did not satisfy this condition, the statute repealed.

<sup>4</sup> Section 1, chapter 96-348, L.O.F.

<sup>5</sup> 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.

<sup>6</sup> Section 288.1045(3)(b), F.S.

<sup>7</sup> Tax refunds generally are paid to a participating business over a period of several years.

<sup>8</sup> 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 or \$6,000 in an enterprise zone or rural county.<sup>9</sup>

In order to participate in the QTI program, an eligible business must apply to OTTED prior to locating a new business in this state or prior to expanding 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.<sup>10</sup> Approved businesses enter into an agreement with OTTED and may receive tax refunds<sup>11</sup> 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.<sup>12</sup>

### **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 repealed October 2, 2001.<sup>13</sup>

### **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

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<sup>9</sup> Section 288.106(2)(b), F.S.

<sup>10</sup> Section 288.106(3)(a), F.S.

<sup>11</sup> Tax refunds are generally paid to a participating business over a period of several years.

<sup>12</sup> Section 288.106(2), F.S.

<sup>13</sup> During the 2001 legislative session, 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 simply reenact the public records exemptions without expanding those exemptions. This House bill died in the Senate Committee on Rules and Calendar.

specificity the public necessity justifying the exemption in a 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:

#### Public Records Exemption

This act creates a public records exemption for certain business information held by the Office of Tourism, Trade, and Economic Development (OTTED); Enterprise Florida, Inc.; or county or municipal governmental entities and their employees, when administering the following state economic development incentive programs: qualified defense contractors (QDC) tax credit,<sup>14</sup> qualified target industry (QTI) tax refund,<sup>15</sup> capital investment tax credit,<sup>16</sup> high impact business,<sup>17</sup> and quick action closing fund.<sup>18</sup>

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<sup>14</sup> Section 288.1045, F.S.

<sup>15</sup> Section 288.106, F.S.

This act provides that the following information submitted by a business for participation in such economic development incentive programs is confidential and exempt<sup>19</sup> for a period not to exceed the duration of the tax refund, tax credit, or incentive agreement: the business's federal employer identification number, unemployment compensation account number, and state sales tax registration number; any trade secret information;<sup>20</sup> the percentage of the business's sales occurring outside of Florida, and gross receipts derived from Department of Defense (DOD) contracts during the five taxable years preceding the date the application for certification is submitted; the anticipated wages for the project jobs that the business plans to create, as reported on the application for certification; the average wage actually paid by the business for those jobs created by the project and any detailed proprietary business information or an employee's personal identifying information, when held as evidence of the achievement or nonachievement of the wage requirements of the tax refund, tax credit, or incentive agreement programs, or of the job creation requirements for such programs; and capital investment proprietary information held by the OTTED to verify investment requirements. Additionally, the applicant must submit the amount of:

- Taxes paid on sales, use, and other transactions;<sup>21</sup>
- Corporate income taxes paid;<sup>22</sup>
- Intangible personal property taxes paid;<sup>23</sup>
- Emergency excise taxes paid;<sup>24</sup>
- Insurance premium taxes paid;<sup>25</sup>
- Excise taxes paid on documents;<sup>26</sup> or
- Ad valorem taxes paid<sup>27</sup>

which the qualified business reports on its application for certification or reports during the term of the tax refund agreement, and for which the qualified business claims a QDC or QTI tax refund, and any such information held as evidence of the achievement or nonachievement of performance items contained in the tax refund agreement.

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<sup>16</sup> Section 220.191, F.S.

<sup>17</sup> Section 288.108, F.S.

<sup>18</sup> Section 288.1088, F.S.

<sup>19</sup> 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.

<sup>20</sup> 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."

<sup>21</sup> Pertains to such taxes paid pursuant to chapter 212, F.S.

<sup>22</sup> Pertains to corporate income taxes paid pursuant to chapter 220, F.S.

<sup>23</sup> Pertains to intangible personal property taxes paid pursuant to chapter 199, F.S.

<sup>24</sup> Pertains to emergency excise taxes paid pursuant to chapter 221, F.S.

<sup>25</sup> Pertains to insurance premium taxes paid pursuant to chapter 624, F.S.

<sup>26</sup> Pertains to excise taxes paid on documents pursuant to chapter 201, F.S.

<sup>27</sup> Pertains to ad valorem taxes paid pursuant to s. 220.03(1), F.S.

This act provides that trade secret information must remain confidential and exempt even after the duration of the tax refund, tax credit, or incentive agreement.

This act makes editorial changes.

### **Information Available for Public Disclosure**

This act specifies that OTTED, Enterprise Florida, Inc., or any county or municipal governmental entity may release: the name of a qualified business, the total number of jobs a business expects to create, the total number of jobs created by a business; and the amount of tax refunds awarded to and claimed by a business under the QDC and QTI programs;<sup>28</sup> incentives awarded and claimed by a business under the high impact business and quick action closing fund programs; the names of qualified businesses, the total number of jobs each business expects to create, and the total number of jobs created by each business pursuant to the capital investment tax credit program; and statistics in the aggregate classified in such a way that a single qualified applicant may not be identified.

### **Department of Revenue**

This act allows the Department of Revenue to provide payment information to OTTED, or to OTTED's employees or agents, who have been identified in writing by OTTED, to the department, in OTTED's administration of the QDC and QTI tax refund programs. This act also allows the department to provide information relative to tax credits and exemptions taken by a business to OTTED, or OTTED's employees or agents who have been identified in writing by OTTED to the department, in OTTED's administration and evaluation of the capital investment tax credit program and the semiconductor, defense, and space tax exemption program.

### **Open Government Sunset Review**

This exemption is made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2007, unless reviewed and saved from repeal through reenactment by the legislature.

### **Public Necessity Statement**

This act provides a public necessity statement, as required by s. 24, Art. I of the State Constitution. This act states that it is a public necessity that trade secrets, tax identification numbers, *analyses of gross receipts*, the amount of taxes paid, the *amount of capital investment*, the amount of employee wages paid, and the *detailed documentation to substantiate such performance information* be made confidential and exempt, because release of such information could injure a business in the marketplace by providing its competitors with detailed insights into the financial status and strategic plans of the business. According to Senate staff, "analyses of gross receipts" is comparable to the "percentage of the business's sales occurring outside this state."<sup>29</sup> Also, the public necessity statement addresses the need to make confidential and exempt the "amount of capital investment." The actual exemption applies to any proprietary business information regarding capital investment in eligible building and equipment." The public necessity statement also references the need to make confidential and exempt "detailed documentation" to substantiate a business's performance information. It is unclear as to what "detailed documentation" means or encompasses.

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<sup>28</sup> A business applying for a QDC tax refund, based on obtaining a new Department of Defense (DOD) contract, will not have the total number of jobs expected and the amount of tax refunds claimed made available to the public until a new DOD contract is awarded.

<sup>29</sup> Telephone conversation with staff, Senate Committee on Commerce and Economic Opportunities, March 21, 2002.

This act provides that it is a public necessity to make confidential and exempt the number of new jobs that will be created to perform a new Department of Defense contract and the amount of refunds claimed by a business, because the untimely release of such information "could injure a business by providing competitors with detailed insights into the resources of the business and diminish the business's chances of obtaining a new Department of Defense contract."

The public necessity statement provides that "[s]ome of the documentation supplied to support a business's tax refund and credit claims, or other incentive claims, could reveal private information, such as employee names and social security numbers, concerning that business's employees," but does not address the need for making such information confidential and exempt.

This act provides that "[w]ithout this exemption, private-sector businesses, whose records generally are not required to be open to the public, might refrain from participating in these economic-development programs and thus would not be able to use the tax refunds available under the programs."

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This act could raise constitutional concerns. The exemption appears overly broad in that the need to make confidential and exempt the anticipated wages for the project jobs that the business plans to create is not addressed in the public necessity statement. The public necessity statement is more narrow than the actual exemption.<sup>30</sup>

Also, the public necessity statement addresses the need to make confidential and exempt the "amount of capital investment." The actual exemption applies to any proprietary business information regarding capital investment in eligible building and equipment." The exemption language appears more narrow than the public necessity statement.

The public necessity statement also references the need to make confidential and exempt "detailed documentation" to substantiate a business's performance information. It is unclear as to what "detailed documentation" means or encompasses. This statement appears overly broad.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

**Committee on State Administration**

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

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<sup>30</sup> Article I, s. 24(c) of the Florida Constitution requires that a public records exemption "state with specificity the public necessity justifying the exemption" and that the exemption be "no broader than necessary to accomplish the stated purpose of the law."



The strike-all amendment, like the bill, creates a public records exemption for certain business information<sup>31</sup> 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.

**Council for Competitive Commerce**

On February 26, 2002, the Council for Competitive Commerce adopted two new amendments to State Administration's strike-all amendment, and approved a council substitute. These two new amendments clarify that information provided to OTTED and Enterprise Florida, Inc. (EFI) will remain exempt when provided to county or municipal entities. The amendments keep all trade secret information exempt even after the expiration of the incentive agreement, and they keep confidential information about the number of jobs and amount of refunds claimed under the QDC program until an applicant wins or loses the new Department of Defense contract. The amendment also corrects a reference to s. 288.1045, F.S.

**Floor Action**

On March 19, 2002, CS/HB 777 passed the House of Representatives.<sup>32</sup> On March 20, 2002, the Senate adopted a floor amendment to CS/HB 777. That amendment was a strike-all amendment. On March 21, 2002, the Senate passed CS/HB 777 as amended by the Senate.<sup>33</sup> On March 21, 2002, the House concurred with the Senate amendment and passed CS/HB 777 as amended.<sup>34</sup>

**VII. 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

Staff Director:

Matthew Carter

<sup>31</sup> 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.

<sup>32</sup> 86 Yeas, 28 Nays

<sup>33</sup> 34 Yeas, 2 Nays

<sup>34</sup> 68 Yeas, 51 Nays

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**DATE:** April 23, 2002

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**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON STATE ADMINISTRATION:**

Prepared by:

Staff Director:

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Heather A. Williamson, M.S.W.

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