

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1027 (PCB SA 03-06) Public Records Exemption/Trade Secrets/Clean Air Act
SPONSOR(S): State Administration and Mack
TIED BILLS: None **IDEN./SIM. BILLS:** SB 252

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration</u>	<u>5 Y, 0 N</u>	<u>Williamson</u>	<u>Everhart</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Open Government Sunset Review Act of 1995 in essence requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it is automatically repealed on October 2nd of the fifth year after enactment.

This bill reenacts and clarifies the public exemptions for trade secrets held by the Department of Community Affairs in implementing the federal Clean Air Act, which will repeal on October 2, 2003, if this bill does not become law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | 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. EFFECT OF PROPOSED CHANGES:

Background

In 1998, the Accidental Release Prevention and Risk Management Planning Act (the Act) was created and codified as part IV of chapter 252, F.S., to implement the accidental release prevention, detection, and response provisions of s. 112(r)(7) of the Clean Air Act and federal implementing regulations. The federal Accidental Release Prevention Program requires the owner or operator of a stationary source which uses, stores, processes, or manufactures any one of 140 regulated substances over a certain threshold quantity in a process, to develop and implement a risk management program and submit a risk management plan (RMP) summarizing this program to a national reporting center.¹

The Act gives the Department of Community Affairs (DCA) statutory authority to seek delegation of the Accidental Release Prevention Program authorized by the Clean Air Act from the United State Environmental Protection Agency (EPA). As part of the effort to obtain delegation of the Accidental Release Prevention Program, the legislature created a public records exemption for trade secret information held by the DCA that is consistent with the protection afforded similar information under federal law.

More specifically, current law provides a public records exemption for records, reports, or information that would divulge methods or processes subject to trade secret protection as provided for in 40 C.F.R. part 2, subpart B.² Such records, reports, or information are confidential and exempt³ unless a final determination has been made by the Administrator of the EPA that the records, reports, or information are not entitled to trade secret protection, or pursuant to an order of the court.

The public records exemption provides that the term “trade secrets” is defined in 40 C.F.R. part 2, subpart B. Such subpart does not provide a definition, but rather references trade secrets. In order for the DCA to determine which records, reports, or information should receive trade secret protection pursuant to the exemption under review, the DCA refers to the “Registration Information” section of the RMP. This section includes a box to check if the stationary source is claiming “confidential business

¹ Examples of regulated sources include chemical plants, water and wastewater treatment facilities, utilities, electronic manufacturers, and pulp and paper manufacturers.

² Section 252.943(2), F.S.

³ There is a difference between information and records that the Legislature has made *exempt* from public disclosure versus those that have been made *confidential and exempt*. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

information” or “CBI”. If the box is checked, “the source has submitted a request to the EPA to substantiate that the information for which confidentiality is claimed meets the criteria of 40 CFR 2.301.” If the stationary source has filed CBI, “the EPA will not release the data in any of its RMP databases, therefore, access to any CBI data would have to be specifically requested” by the DCA.⁴

Current law provides for future review and repeal of the public records exemptions for records, reports, or information divulging trade secret information held by DCA. Pursuant to the Open Government Sunset Review Act of 1995 (Act), ss. 252.943(1) and (2), F.S., will repeal on October 2, 2003, unless otherwise reenacted by the Legislature. Pursuant to the Act, the Florida House of Representatives Committee on State Administration sent an Open Government Sunset Review Questionnaire to DCA regarding the public records exemptions for such information. As a result of the questionnaire response, this bill reenacts the exemption under review with certain clarifying and editorial changes.

Effect of Bill

This bill reenacts the public records exemptions under review and clarifies that trade secret is not defined in 40 C.F.R. part 2, subpart B, but rather provided for in such reference. This bill also makes editorial changes and removes the sentence that requires the repeal of the public records exemptions.

C. SECTION DIRECTORY:

Section 1. Amends ss. 252.943(1) and (2), F.S., by reenacting the public records exemptions with clarifying changes.

Section 2. Provides that the act shall take effect October 1, 2003.

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. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not affect municipal or county government.

⁴ The DCA has noted that none of the 542 RMPs filed in Florida by stationary sources have claimed CBI.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act of 1995

The Open Government Sunset Review Act of 1995⁵ provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

Section 119.15, F.S., also sets forth a Legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Art. 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (*e.g.*, allowing another agency access to the confidential or exempt records), then a public necessity statement is not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 21, 2003, the Committee on State Administration adopted an amendment to remove a cross-reference and to make clarifying and grammatical changes.

⁵ Section 119.15, F.S.