

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1813 (PCB SA 04-01) Business Records/Eminent Domain/OGSR  
**SPONSOR(S):** State Administration and Benson  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 712(s)

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

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**SUMMARY ANALYSIS**

This bill reenacts and expands the exemption for certain information relating to presuit damages paid in a condemnation case. The exemption is substantially clarified, and drawn with specificity. The exemption is reenacted with a requirement to review the exemption again in the 2009 session.

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 If the Legislature does not reenact this exemption, it is automatically repealed on October 2, 2004.

This bill may have a minimal non-recurring negative fiscal impact on state and local government expenditures.

An affirmative vote of 2/3 of the members voting is required for passage of this bill as it expands an existing exemption. (Art. I, s. 24, Fla.Const.)

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1813.sa.doc  
**DATE:** March 22, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                                        |                                         |
|--------------------------------------|------------------------------|----------------------------------------|-----------------------------------------|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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:

By this bill, a simple public records exemption is being made more complicated.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

Article I, s. 24, Fla.Const., provides that all records held by a public entity are public records, open to inspection and copying by any person, unless the legislature, by general law, provides that such record is exempt from public disclosure.

Eminent domain is the process by which governments compel a landowner to sell property to the government for a public purpose. Article X, s. 6(a), Fla.Const., requires that a state or local government exercising the power of eminent domain (known as a “condemning authority”) must pay the owner “full compensation” for the taking.<sup>1</sup> Chapter 73, F.S., governs the eminent domain process. Section 73.071(3)(b), F.S., provides that, where a condemning authority is taking only part of a parcel, the purpose of the taking is for acquisition of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business<sup>2</sup>, an affected business owner may seek business damages.

Business damages are the lost profits of an affected business caused by the right-of-way acquisition. During a road widening project, it is not unusual for access to businesses to be restricted, and for traffic counts along the roadway to decrease as motorists seek alternative routes to avoid the construction. The economic result to many businesses along such a roadway is a significant reduction in gross sales, and a corresponding decrease in profits. Gross sales, and the profits resulting from those sales, are a closely guarded secret for most businesses. A competitor who gains that knowledge can use it to that competitor’s advantage. In an eminent domain case filed with a court, a business owner may seek a protective order sealing such confidential information before revealing it to the court.

Section 73.015, F.S., enacted in 1999<sup>3</sup>, requires a condemning authority to negotiate in good faith with potential parties to an eminent domain lawsuit prior to filing such a suit. As the procedure is pre-suit (prior to the filing of a lawsuit with a court), there is no opportunity to obtain a court order protecting the confidential sales and profit information. Absent a public records exemption for the information, business owners would refuse to provide the sales and profitability information necessary for the

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<sup>1</sup> The Fifth Amendment to the United States Constitution similarly provides that “no private property may be taken for public use, without just compensation.”

<sup>2</sup> An established business is one “of more than 4 years’ standing before January 1, 2005, or the effect of the taking of the property involved may damage or destroy an established business of more than 5 years’ standing on or after January 1, 2005, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party”.

<sup>3</sup> Chapter 99-385, L.O.F.

condemning authority to make a responsible offer. Thus, without a public records exemption the purpose of the pre-suit procedure may be thwarted because business owners would not participate.

Section 73.0155, F.S., enacted in the same session as s. 73.015, F.S.<sup>4</sup>, provides a public records exemption to encourage business owners to provide confidential information in the pre-suit stage. The section provides that business records provided by the owner of a business to a governmental condemning authority as part of a pre-suit offer of business damages are exempt from public disclosure. This exemption only applies if the “disclosure of such records would be likely to cause substantial harm to the competitive position of the person providing such records and if the person providing such records requests that such records be held exempt.” Notwithstanding the exemption, the Attorney General, members of the Legislature and interested state agencies may inspect such records.

It is unclear which records are exempt. Also unclear is the standard by which it is determined that disclosure of records would be likely to cause substantial harm of the competitive position.

Section 73.0155, F.S., repeals on October 2, 2004, unless saved from repeal.

### **Effect of Bill**

This bill substantially amends the exemption at s. 73.0155, F.S., to:

- Change from “exempt” to “confidential and exempt”.
- Remove the unclear description of the records that are to be exempt that simply refers to records that would be likely to cause substantial harm to the competitive position of the business providing the information. In its place, the exemption specifically states the information that is exempt.
- Provide that, if the confidential and exemption information becomes publicly available from another source, the information is no longer confidential and exempt under s. 73.0155, F.S.
- Provide that other state agencies may view and inspect confidential and exempt information by the state agency, provided that confidentiality of the information is maintained. A person who violates the confidentiality of information commits a 2nd degree misdemeanor.
- Provide that this exemption does not prevent the condemning agency from introducing such information as evidence in a related court proceeding. The subsection recognizes that the court may provide traditional court procedures (sealing of files, closing of a portion of the court record) in order to maintain confidentiality of sensitive business information.
- Require a new review and potential repeal of the exemption in the 2009 legislative session.

### **C. SECTION DIRECTORY:**

Section 1 amends s. 73.0155, F.S., to make substantive changes to the exemption, and amend the repeal date from 2004 to 2009.

Section 2 provides an effective date of upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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<sup>4</sup> Chapter 99-224, L.O.F.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

This bill appears to require a minimal negative non-recurring expenditure by state government. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This PCB does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

This bill appears to require a minimal negative non-recurring expenditure by local governments. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears to require a minimal negative non-recurring expenditure by persons in the private sector. See Fiscal Comments.

D. FISCAL COMMENTS:

This bill may represent a minimal non-recurring negative fiscal impact on state government, local government, and private sector expenditures. A bill enacting or amending public records law causes a non-recurring negative fiscal impact in the year of enactment for training employees who are responsible for replying to public records requests. In the case of bills being reviewed under the Open Government Sunset Review process, the cost of such training will be incurred if the bill does not pass, as employees would have to be informed that formerly exempt records are now open. Because this bill substantially amends the exemption, employee training by governments and private sector entities involved in the eminent domain process will be required, and it is possible that the training required to recognize these changes may exceed what such entities may have had to pay in training should the exemption have simply expired. There is no apparent means of estimating these costs, although such costs do not appear substantial.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

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 1995,<sup>5</sup> 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 2<sup>nd</sup> 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

None.

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<sup>5</sup> Section 119.15, F.S.