

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.)

Prepared By: Communications and Public Utilities Committee

BILL: SPB 7006

SPONSOR: Communications and Public Utilities Committee

SUBJECT: Open Government Sunset Review of 202.195, F.S.

DATE: December 30, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Halloran	Caldwell		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill reenacts and amends a public records exemption, preserving confidentiality for proprietary confidential business information obtained by local governmental entities from a telecommunications company or franchised cable company.

The bill reenacts and amends section 202.195 of the Florida Statutes.

II. Present Situation:

Exemption statute

Section 202.195, F.S., provides that any proprietary business information obtained by a local governmental entity from a telecommunications company or franchised cable company relating to imposing fees for occupying the public rights-of-way or assessing the local communications services tax (CST) pursuant to s. 202.19, F.S., or otherwise relating to regulating public rights-of-way is confidential and exempt from the provisions of s. 119.07(1), F.S., and 24(a), Art. I, of the State Constitution, and may be used only for the purposes of imposing such fees or assessing such tax or regulating such rights-of-way, and may not be used for any other purposes, including, but not limited to, commercial or competitive purposes.

“Proprietary confidential business information” is defined to include maps, plans, billing and payment records, trade secrets, or other information relating to the provision of or facilities for communications service that is intended to be and is treated by the company as confidential and is not otherwise publicly available to the same extent and in the same format as requested by the local governmental entity. Proprietary confidential business information does not include

schematics indicating the location of facilities for a specific site that are provided in the normal course of the local governmental entity's permitting process.

The exemption will be repealed on October 1, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

Public records gathered by local governmental entities

The exemption, as currently defined, applies in three different circumstances. It applies to proprietary confidential business information relating to imposing fees for occupying the public rights-of-way; assessing the local communication services tax; or otherwise relating to regulating the public rights-of-way. However, the documents and records at issue almost exclusively concern cable franchising agreements and permitting for the regulation of rights-of-ways. In practice, CST-related records are pertinent under the statute only in rare instances, such as in audits of pass-through providers and situations where a cable provider only operates in one county.

While maps are expressly included in the statute, individual schematics currently are not covered by the exemption. It is unclear whether a compilation of individual schematics would constitute a protected map.

Public records statute review criteria

Section 119.15, F.S., requires that when the Legislature is reviewing a public records exemption before its scheduled repeal, the Legislature is to consider as part of the review process the following questions:

1. What specific records are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records be readily obtained by alternative means? If so, how?

Section 119.15, F.S., also 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 purposes set out below 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.

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 how to use it, the disclosure of which information would injure the affected entity in the marketplace.

Additionally, the exemption can be no broader than necessary to meet this purpose.

Application of public records review criteria to exemption statute

The exemption affects telecommunication and franchised cable companies. The specific information affected by the exemption are records the telecommunication and franchised cable companies file with local governmental entities in regards to franchising agreements and permitting for the use and regulation of rights-of-ways. These records often take the form of location maps, plans, and schematics and contain significant amounts of proprietary confidential business information. The information cannot be obtained elsewhere. Yet, if obtained, a competitor could use these records to gain a business advantage. As such, the exemption serves the identifiable public purpose of protecting information of a confidential nature.

Additionally, the exemption is necessary for the effective administration of public rights-of-ways and for franchising cable companies. Because of the exemption, telecommunication providers are willing to provide information, such as maps regarding the location of facilities that are necessary for the permitting, maintenance, and management of the public rights-of-ways. Furthermore, the absence of the exemption could potentially make franchising agreements between the local governments and the cable companies more difficult. At the very least, not having the exemption would seemingly make these transactions less efficient. Thus, the exemption also serves the identifiable public purpose of allowing the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exemption.

Additionally, while it is not set forth in s. 119.15, F.S., as criteria for an identifiable public purpose, the exemption also addresses concerns for network security and public safety.

Individual schematics currently are not covered by the exemption. If, however, these individual schematics were compiled, as some local governments require, competitors could get advance knowledge as to where providers may offer service. The disclosure of such information would injure the affected entity in the marketplace.

Based on the above discussion, the exemption serves an identifiable public purpose. However, the exemption as written is broader than necessary to meet this purpose. The exemption as currently written includes any proprietary business information obtained from a telecommunications or franchised cable company by a local governmental entity relating to assessing the communications services tax or occupying the public rights-of-way. The relevant public purpose for the exemption is the protection of information used to protect or further a business advantage over those who do not know how to use it, the disclosure of which would injure the affected entity in the marketplace. The exemption should be narrowed by limiting the

records covered to those whose “disclosure would be reasonably likely to be used by a competitor to harm the business interests of the provider and which is not otherwise known or cannot otherwise be legally obtained by the competitor.” This would narrow the scope of the exemption by including only those records that, in reality, could harm competition in the marketplace.

It is also unclear as to what constitutes a map or schematic under the exemption. As such, the difference between a map and a schematic should be clearly defined.

III. Effect of Proposed Changes:

The bill amends s. 202.195, F.S., to preserve the exemption from public records requirements for proprietary confidential business information obtained by a local governmental entity from a telecommunications company or franchised cable company in the context of the communication service tax or rights of way. It also deletes the automatic repeal on October 1, 2005. It also clarifies the definition of the term “proprietary confidential business information” in regards to schematics.

The bill takes effect September 30, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

In accordance with a review pursuant to the Open Government Sunset Review Act of 1995, this bill reenacts and amends s. 202.195, F.S. This bill does not expand the exemption.

The exemption makes certain proprietary business information obtained by a local governmental entity from a telecommunications or franchised cable company confidential and exempt. The definition of “proprietary confidential business information” is “maps, plans, billing and payment records, trade secrets, or other information relating to the provision of or facilities for communications service that is intended to be and is treated by the company as confidential and is not otherwise publicly available to the same extent and in the same format as requested by the local governmental entity.” Article I, s. 24(c), of the State Constitution, requires exemptions to be no broader than necessary to accomplish the stated purpose of the law. The current definition of proprietary confidential business information is not particularly specific and could be challenged on grounds of overbreadth. The committee substitute narrows the scope of what information is exempt.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

The bill reenacts a public records exemption, preserving confidentiality for proprietary confidential business information submitted to a local governmental entity by a telecommunications company or franchised cable company, thereby preventing potential competitive and economic harm to the provider.

C. Government Sector Impact:

To the extent that communications companies will be more willing to provide necessary information, the local governments will be able to regulate rights-of-way more effectively.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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