

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: Commerce and Consumer Services Committee

BILL: CS/SB 1136

INTRODUCER: Commerce and Consumer Services Committee and Senator King

SUBJECT: Public Records

DATE: April 5, 2006

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Gordon | Cooper | CM | Fav/CS |
| 2. | _____ | _____ | CA | _____ |
| 3. | _____ | _____ | TA | _____ |
| 4. | _____ | _____ | WM | _____ |
| 5. | _____ | _____ | RC | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This Committee Substitute (CS) creates an exemption from Florida's public records law for trade secrets and certain other information held by the Office of Tourism, Trade and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities and their employees or agents relating to the Florida Innovation Incentive Fund created by CS/SB 2728 (2006).

This CS amends the following sections of the Florida Statutes: 288.1067.

II. Present Situation:

Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, the electors of Florida approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides that:

Every person has the right to inspect or copy any public record 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.

The Public Records Law¹ specifies conditions under which the public must be given access to governmental records. Section 119.011(11), F.S., defines the term “public records” to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition as including all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge....”²

Under s. 24(c), Art. I of the State Constitution, the Legislature may enact a law exempting records from the open government requirements if: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995³ establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”⁴

Section 119.15(6)(a), F.S.,⁵ requires, as part of the review process, the consideration of the following questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹ Chapter 119, F.S.

² *Shevin v. Byron, Hairless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

³ Section 119.15, F.S.

⁴ Section 119.15(3)(b), F.S.

⁵ Formerly s. 119.15(4)(a), F.S. (as revised by s. 37, ch. 2005-251, L.O.F.).

An exemption may be maintained only if it serves an identifiable public purpose and only if the exemption is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes, the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government, and the purpose cannot be accomplished without the exemption:

- The exemption “[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption “[p]rotects 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.” Is the record or meeting protected by another exemption?
- The exemption “[p]rotects 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.”⁶

Innovation Incentive Program

In January 2006, Governor Jeb Bush proposed several new economic development initiatives including the creation of the Florida Innovation Incentive Fund (fund). According to Enterprise Florida, Inc., major research and development (R&D) activities, including those related to leading institutions, centers, or laboratories, or major business development projects of extraordinary scale can serve as an impetus for an emerging or evolving cluster that fosters scientific discovery, technological advances and job creation.⁷ The R&D projects that will receive funding through the fund must be predominately engaged, spending at least 50 percent of their time, in research and development activities. Moreover, business projects funded through this fund must create a minimum of 1,000 new jobs and invest a minimum of \$500 million in new capital.⁸

Trade Secrets

Section 812.081(1)(c), F.S., defines a trade secret to include, in pertinent part, “any scientific, technical, or commercial information” which provides a “business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.” According to that statute, a trade secret is: “secret, of value, for use in or use by the business; and of advantage to the business or providing an opportunity to obtain an advantage, over those who do not know or use it.”

⁶ Section 119.15(6)(b), F.S.

⁷ Enterprise Florida, Create the Florida Innovation Incentive Fund for Catalyst Projects--\$250 Million, <http://www.eflorida.com/pressroom/pubs/Innovation%20Economy%20Proposal%20-%20SPACE.pdf>.

⁸ *Id.* (These numbers will be reduced for projects in Rural Areas of Critical Economic Concern).

Public Records and Business Incentive Programs

Section 288.1067, F.S., provides that certain information received and held by the Office of Tourism, Trade and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities and their employees or agents pursuant to business responses to incentive programs is confidential and exempt from s. 119.078(1), F.S., and s. 24(a), Art. I of the State Constitution. The information that is specifically exempted includes:

- An employer identification number, unemployment compensation account numbers, and Florida sales tax registration number;
- Trade secret information as defined in s. 812.081, F.S.;
- The percentage of non-state sales and the percentage of gross receipts from certain Department of Defense contracts;
- Anticipated wages for new jobs to be created;
- The average wage paid by the business for new jobs created, detailed proprietary business information or employee personal identifying information used to demonstrate wage and job creation requirement;
- Proprietary business information regarding capital investment in certain circumstances; and
- The amount of Florida taxes paid.

III. Effect of Proposed Changes:

Section 1 of the CS amends subsections (1) and (4) of s. 288.1067, F.S., which outlines the current business incentive exemptions to the public records law. The CS adds references to the Innovation Incentive Program to be created by SB 2728.

This section of the CS also provides that, subject to the Open Government Sunset Review Act, the exemption shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 of the CS provides a statement of public necessity for the exemption. According to the statement, the exemption is necessary to protect businesses from injury that may be caused if a competitor obtained the type of detailed information that will be included in submissions for the incentive program.

The statement also indicates that the exemption is necessary to protect information about private sector businesses unaccustomed to public disclosure. Without the exemption, such businesses may not wish to participate in the program and would not be able to take advantage of the incentives offered. As a result, those businesses may locate their employment and other investment activities outside the state, thereby depriving Florida and the public of the potential economic benefits associated with such business activities in the state.

Importantly, because the exemption does not preclude the reporting of statistics in the aggregate about the program, the public will not be deprived of access to information concerning the performance of the program.

Section 3 of the CS provides this act shall take effect on July 1, 2006, if CS/SB 2728 or similar legislation is adopted in the same legislative session as this CS and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This Committee Substitute (PCS) creates an exemption from Florida's public records law for trade secrets and certain other information held by the Office of Tourism, Trade and Economic Development, Enterprise Florida, Inc., or county or municipal governmental entities and their employees or agents relating to the Florida Innovation Incentive Fund created by CS/SB 2728 (2006).

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be some costs associated with maintaining this public records exemption.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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