

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: Governmental Oversight and Productivity Committee

BILL: CS/SB 1136

INTRODUCER: Commerce and Consumer Services Committee and Senators King and Fasano

SUBJECT: Public Records Exemption

DATE: April 20, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gordon</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill expands an existing exemption for trade secrets and other specified information held by the Office of Tourism, Trade and Economic Development (OTTED), Enterprise Florida, Inc., (EFI) or county or municipal governmental entities and their employees or agents by adding the Florida Innovation Incentive Fund created by CS/SB 2728 (2006) to the exemption. Other than trade secret information, the information specified as being exempt is only exempt “. . . for a period not to exceed the duration of the relevant tax refund, tax credit, or incentive agreement.”

The expansion of the existing exemption to include the Florida Innovation Incentive Fund, in effect, creates a new exemption. Therefore, under Art. I. s. 24 of the State Constitution, two-thirds of the members present and voting are required for the bill to pass.

This bill amends section 288.1067 of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ 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. . . .

Unless specifically exempted, all agency⁵ records are available for public inspection. The term “public record” is broadly defined to mean:

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.⁶

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

³ Article I, s. 24 of the State Constitution.

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

The Public Records Act¹⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ The records custodian must state the basis for the exemption, in writing if requested.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So.2d 203 (Fla. 1998).

²¹ 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.²²

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An identifiable public purpose is served if 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;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.²⁴

The act also requires consideration of the following:

²² *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

²³ Section 119.15, F.S.

²⁴ Section 119.15(4) (b), F.S.

- 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 yes, 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²⁵ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Innovation Incentive Program -In January 2006, the Governor 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.²⁶ 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.²⁷

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.”

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

²⁶ 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>.

²⁷ *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:

The exemption created by the bill lasts “. . . for a period not to exceed the duration of the relevant tax refund, tax credit, or incentive agreement. . .” Trade secrets, however, are protected after the duration of the tax refund, tax credit, or incentive agreement.

The exemption also currently exempts a business’s federal employer identification number, unemployment compensation account number, and Florida sales tax registration number. These numbers, however, are within the list of records that are exempt for a period not to exceed the duration of the relevant tax refund, tax credit, or incentive agreement and, as a result, would be publicly available upon the end of these agreements unless another exemption protects them. The Florida sales tax registration number is confidential and exempt at the Department of Revenue under s. 213.053(2), F.S. If OTTED, EFI, or a county or municipal government obtains the Florida sales tax registration number from the Department of Revenue, the confidential and exempt status of that number must be maintained by the receiving agencies. If, however, the OTTED, EFI, or county or municipal governments receive the Florida sales tax registration number directly from the businesses, the exemption in s. 288.1067, F.S., applies.

The expansion of the existing exemption to include the Florida Innovation Incentive Fund, in effect, creates a new exemption. Therefore, under Art. I. s. 24 of the State Constitution, two-thirds of the members present and voting are required for the bill to pass.

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:

There are at least two definitions of trade secrets in the Florida Statutes. In addition to the definition referred to in the bill, the Uniform Trade Secrets Act contains a definition of trade secrets in s. 688.002, F.S., which provides that a trade secret means:

. . . information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition used in the bill is in ch. 812, F.S., which relates to the prosecution of theft, robbery, and related crimes. Typically, public records exemptions refer to the definition contained in the Uniform Trade Secrets Act.

Section 288.1067, F.S., is currently scheduled for an Open Government Sunset Review and will repeal October 2, 2007, unless the Legislature retains the exemption. This bill expands the exemption and, in effect, creates a new exemption. As it is being expanded, the Open Government Sunset Review of the exemption is postponed for another 5 years. Typically, when an existing exemption is amended so that it is expanded, the Legislature retains the currently scheduled Open Government Sunset Review for the existing exemption and establishes another sunset review for the expanded portion of the exemption.

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.
