

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

In February 1995, the State of Florida filed suit against a number of tobacco manufacturers asserting various claims for monetary and injunctive relief.¹ On March 3, 1996, the State of Florida, as one of five settling states,² settled all of its claims against Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. In August 1997, the “Big Four” tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company) entered into a \$368.5 billion tobacco settlement agreement with Florida for all past, present, and future claims by the state, including reimbursement of Medicaid expenses, fraud, RICO,³ and punitive damages. Current law defines these settlements to mean the settlement, as amended, in the case of *State v. American Tobacco Co. et al.*, No. 95-1466AH (Fla. 15th Cir. Ct. 1996).⁴

The settling tobacco companies must make settlement payments to Florida in perpetuity.⁵ The annual tobacco settlement payments are based on several factors that include the total volume of U.S. cigarette sales, each company’s share of the national market, net operating profits, and consumer price indices. Statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.⁶

In 2000, the Legislature established the Task Force on Tobacco-Settlement Revenue Protection to determine the need for, and to evaluate methods for, protecting the state’s settlement revenue from significant loss.⁷ The task force recommended that the Legislature provide a process for verifying that the tobacco settlement payments received are in accordance with the Florida Settlement Agreement. The report further recommended that the Legislature provide a public records exemption for information considered necessary to verify the accuracy of the payments made by the tobacco companies if such information is a trade secret or insider information.⁸

As a result, the Legislature enacted a public records exemption for information used to calculate the annual tobacco-settlement payments.⁹ Proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for

¹ The lawsuit included as defendants the American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., Liggett Group, Inc. Brooke Group, Ltd., Lorillard Company, British American Tobacco Co., Ltd., and Dosal Tobacco Corp, Inc.

² The five states that entered into the settlement agreement are West Virginia, Florida, Mississippi, Massachusetts, and Louisiana.

³ “Florida Racketeer Influenced and Corrupt Organization Act” in ss. 895.01-895.06, F.S.

⁴ See ss. 215.56005(1)(f) and 569.215, F.S.

⁵ From the date of the settlement, Florida was to receive \$11.3 billion over the next 25 years and an additional \$1.7 billion over the next five years because of a most favored nation clause in the settlement agreement, as amended. Florida negotiated a “Most Favored Nations” clause in the settlement, which provides the state with additional monies for a period, after Minnesota settled with the defendants on terms more favorable than Florida’s.

⁶ See s. 569.21, F.S.

⁷ See ch. 2000-128, L.O.F.

⁸ Senate Staff Analysis and Economic Impact Statement for SPB 7066, prepared by the Regulated Industries Committee, January 17, 2006, at 4.

⁹ Chapter 2001-136, L.O.F.; codified in s. 569.215, F.S.

settlement payments pursuant to the tobacco settlement agreement is confidential and exempt¹⁰ from public records requirements. Furthermore, such information received by the Chief Financial Officer or the Auditor General for verifying annual settlement payments, is confidential and exempt.

Proprietary confidential business information means information that:

- Is owned or controlled by a tobacco company that is a signatory to the settlement agreement;
- Is intended to be and is treated by a tobacco company as private in that the disclosure of the information would cause harm to the company's business operations; and
- Has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.¹¹

Such information includes:

- Trade secrets.
- Information in a Form 10-K that is confidential pursuant to an order of the Division of Corporation Finance of the Securities and Exchange Commission.
- Internal auditing control policies and procedures and reports of internal auditors.
- Financial operating and marketing information that, if disclosed, could impair the competitive business interests of the provider.
- Financial statements.¹²
- Report letters from independent auditors relating to domestic operating company income.
- Analyses of specific items of revenue and expense included in operating profit and extraordinary items.¹³
- Working papers,¹⁴ schedules,¹⁵ analyses, and reconciliations¹⁶ prepared by company personnel for the purpose of clarifying the disclosures of domestic tobacco revenues and operating profit contained in financial statements or other information related to the sale or production of tobacco products.

Pursuant to the Open Government Sunset Review Act,¹⁷ the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public records exemption. It clarifies that the exemption applies to trade secrets as defined in s. 688.002, F.S., of the Uniform Trade Secrets Act.¹⁸ The current exemption does not provide a definition for trade secrets. Finally, the bill makes editorial changes.

¹⁰ There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹¹ Section 569.215(2), F.S.

¹² Financial statements consist of balance sheets, statements of income and cash flows, and notes related thereto, of any subsidiary that is part of a consolidated group and engaged in the production or sale of tobacco products. Section 569.215(2)(e), F.S.

¹³ Extraordinary items consist of one-time tobacco litigation settlement costs and restructuring charges. Section 569.215(2)(g), F.S.

¹⁴ According to tobacco company and agency responses to staff questionnaires, working papers are evidentiary materials used by accountants and auditors to document particular entries as debits/credits or income/expense. These documents include invoices, purchase orders, policies, and memoranda.

¹⁵ According to tobacco company and agency responses to staff questionnaires, a schedule is an attachment to working papers, analysis, and reconciliations. A schedule also has been described as a list of accounting entries, such as expense items.

¹⁶ According to tobacco company and agency responses to staff questionnaires, reconciliation is a comparison between two accounting documents, sets of information, or conclusions that were derived using different procedures.

¹⁷ Section 119.15, F.S.

¹⁸ Chapter 688, F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 569.215, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may represent a minimal non-recurring positive impact on state expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, state government may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

This bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act 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 purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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,
- Protecting trade or business secrets.

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 and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), 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 and a two-thirds vote for passage are not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.