

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: SB 734

SPONSOR: Committee on Commerce and Consumer Services

SUBJECT: Public Records Exemption/Economic Development

DATE: January 11, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barrett</u>	<u>Cooper</u>	<u>CM</u>	Favorable
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Currently, s. 288.075, F.S., provides that certain business records held by economic development agencies are confidential and exempt from public records law. This public records exemption is subject to review under the Open Government Sunset Review Act, and is set to expire October 2, 2006, unless re-enacted by the Legislature during the 2006 regular session.

This bill is the result of Interim Project Report number 2006-205. In the report, committee staff recommends that s. 288.075, F.S., be reenacted.

This bill amends section 288.075 of the Florida Statutes.

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 first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

Article I, s. 24(a), of the State Constitution provides:

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 there under; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the Florida Constitution, the Public Records Law¹ specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

The term “public records” is defined in s. 119.011(11), F.S., 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 the official business by any agency.

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge (*Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form (*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c), of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (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. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. 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 of the fifth year, unless the Legislature re-enacts the exemption. Section 119.15(4)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. Paragraph (b) provides that 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.”

¹Chapter 119, F.S.

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following specific 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?

Section 119.15(6)(b), F.S., provides that an exemption may be created, revised, 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 following purposes 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:

- The exemption allows 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 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 provision, only information that would identify the individuals may be exempted; or
- The exemption 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 or use it, the disclosure of which information would injure the affected entity in the marketplace.

Economic Development Agencies

Currently, s. 288.075(2), F.S., provides that:

Upon written request from a private corporation, partnership, or person, records of an economic development agency which contain or would provide information concerning plans, intentions, or interests of such private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state are confidential and exempt from s. 119.07(1), and s. 24(a), Art. I of the State Constitution.

The statute further specifies that the confidentiality may be maintained for up to 24-months following the request, or until the information is otherwise disclosed, whichever occurs first.

Section 288.075(5), F.S., provides that, upon written request, the period of confidentiality may be extended for up to an additional 12 months, contingent on confirmation by the economic development agency that the business is still considering locating, relocating, or expanding in Florida.

Section 288.075(6), F.S., provides that trade secrets contained in the exempt records are confidential and exempt for ten years after the original request, or until otherwise disclosed.

The public records exempted by this provision are maintained by an “economic development agency,” which is defined in s. 288.075(1), F.S., to include:

- the Office of Tourism, Trade, and Economic Development (OTTED);
- any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
- any research and development authority created under part V of ch. 159, F.S.;
- the Florida Space Authority (FSA);
- the Florida Aerospace Finance Corporation (FAFC);
- the public economic development agency of a county or municipality; or
- any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

Section 288.075(4), F.S., restricts a public officer or employee from entering into a binding agreement with the entity that requested the exemption until 90 days after such information is made public, unless such public officer or employee is acting in an official capacity, the agreement does not accrue to their personal benefit and, the agreement is necessary to effectuate an economic development project.

Interim Project Report 2006-205 Findings

To complete the Open Government Sunset Review of the public records exemption found in s. 288.075, F.S., a questionnaire regarding the exemption was sent to state and local Economic Development Agencies, county and municipal governments, OTTED, Enterprise Florida (EFI), FSA, and FAFC. Questionnaire responses were compiled and analyzed in the development of recommendations.

This exemption holds confidential records of an economic development agency which contain or would provide information concerning plans, intentions or interests of businesses to locate, relocate, or expand in Florida. This covers a broad set of documents, which economic development agencies specify include: business plans and proposals, financial records, real estate contracts or leases, building information, site requirements, marketing and business strategies, business and product information, and financial incentive applications.

The information contained in the exempt records is not publicly available, and can not be otherwise obtained unless directly from the business. The records protected by this exemption are not protected elsewhere in statute.²

Economic development agencies illustrated the importance of this public records exemption through several examples.

First, without the exemption, public knowledge of business plans may have a negative effect on the workforce. Workforce disruptions may occur in the case of a business that is considering relocation. If business plans are made public, employees may seek other employment. This effect would be especially pronounced if the business subsequently decides not to relocate.

Second, the exemption allows businesses to keep strategic information confidential while considering sites for location or expansion. The disclosure of this confidential business information could adversely affect the business in the marketplace. Competitors could use this information to their advantage, reacting to business plans that would otherwise be confidential absent inquiries with a government entity.

Further, the report finds that one of the goals of this exemption is to facilitate communication between businesses and economic development agencies. Most state and local economic development agencies surveyed indicated that without the exemption, businesses would be less likely to communicate with them, and therefore possibly less likely to locate or expand in Florida.

The report recommends that the public records exemption provided in s. 288.075(2), F.S., relating to certain business records held by economic development agencies, be re-enacted. Through the review of the public records exemption, it has been determined that the exemption serves a public purpose, as it is necessary to carry out a government program and protects confidential business information.

III. Effect of Proposed Changes:

Section 1 re-enacts the public records exemption in s. 288.075, F.S., relating to business records held by economic development agencies. This section is also amended to reorganize the provision for ease of understanding and to delete redundant language. Finally, the sunset and review and repeal provision required by the Open Government Sunset Review Act is deleted.

Section 2 provides that this act shall take effect October 1, 2006.

² Records exempted under s. 288.1067, F.S., which provides confidentiality for documents relating to economic development incentive programs, are maintained by many of the same economic development agencies referenced in s. 288.075, F.S. Although both exemptions relate to economic development and it is likely that a single business may use both exemptions, it is not possible to combine the two, as they protect different sets of documents, have different periods of confidentiality, and are used in different stages of business development.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

This bill reenacts the public records exemption for certain business records held by economic development agencies. Relying on the criteria provided in the Open Government Sunset Review Act, s. 119.15, F.S., the public records exemptions contained in s. 125.585, F.S., meet the requirements for maintaining an exemption to the public records law.

This bill also removes the requirement for an Open Government Sunset Review and removes the repeal date.

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:

Information covered by this exemption will continue to be confidential and exempt from the open government requirement. The cost to maintain this exemption should be insignificant.

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 sponsor or the Florida Senate.
