

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 734

SPONSOR: Governmental Oversight and Productivity Committee and Committee on Commerce and Consumer Services

SUBJECT: Public Records Exemption/Economic Development

DATE: April 25, 2006

REVISED: _____

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

I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Commerce and Consumer Services Committee in Interim Project Report 2006-205. Section 288.075, F.S., makes confidential and exempt, upon a 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 that entity or person to locate, relocate, or expand any of its business activities in Florida. The bill narrows the period of time during which the exemption may be maintained from up to 24 months to 12-months following the request, or until the information is otherwise disclosed, whichever occurs first. A 12 month extension is authorized contingent on confirmation by the economic development agency that the business is still considering locating, relocating, or expanding in Florida. Additionally, trade secrets contained in the exempt records are confidential and exempt for ten years after the original request, or until otherwise disclosed.

The bill also substantially reorganizes the exemption for clarity.

This bill amends section 288.075 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

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

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

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

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

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.

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

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

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

¹³ *Ibid.*

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).

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 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

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.

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:

- 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.

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

²⁴ Section 119.15(4) (b), F.S.

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

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.²⁶

²⁶ 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

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 reenacts the public records exemption in s. 288.075, F.S., relating to business records held by economic development agencies, though it narrows the period of the exemption from 24-months from the initial request to 12 months, while still retaining one 12-month extension. 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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.

B. Public Records/Open Meetings Issues:

This bill reenacts the public records exemption for certain business records held by economic development agencies, while narrowing the 24-month period for the exemption to a 12-month period.

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.
