

# 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

---

BILL: SB 1182

SPONSOR: Committee on Commerce

SUBJECT: Public Records

DATE: March 6, 2007

REVISED: \_\_\_\_\_

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

---

## I. Summary:

This bill incorporates the recommendations of *Interim Report 2007-103: Review of Public Records Exemptions Relating to Economic Development Agencies*. This bill combines the two public records exemptions relating to the promotion and administration of economic development by state and local governments (ss. 288.075 and 288.1067, F.S.) into one provision. In addition, it expands the exemption to require that:

- “Proprietary business information” submitted by businesses to economic development agencies be held confidential and exempt indefinitely;
- “Trade secrets” submitted by businesses to economic development agencies be held confidential and exempt indefinitely, rather than for a period of ten years; and
- Business’ federal employment identification numbers, unemployment compensation account numbers, and Florida sales tax registration numbers be held confidential indefinitely, rather than only for the time period in which the business is participating in an incentive program.

This bill amends sections 288.075 and repeals s. 288.1067 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 Law<sup>1</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental 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.

Unless specifically exempted, all agency<sup>2</sup> records are available for public inspection. 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.<sup>3</sup> Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.<sup>4</sup>

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

---

<sup>1</sup>Chapter 119, F.S.

<sup>2</sup>The term “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.”

<sup>3</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

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.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.<sup>5</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>6</sup>

### **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.”

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

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. 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

---

<sup>5</sup> Attorney General Opinion 85-62.

<sup>6</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

be accomplished without the exemption:

1. 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;
2. 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 jeopardize the safety of such individuals. However, in exemptions under this provision, only information that would identify the individuals may be exempted; or
3. 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.

While the standards in the Open Government Sunset Review Act of 1995 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.<sup>7</sup> The Legislature is only limited in its review process by constitutional requirements.

### **Section 288.075, F.S.**

Currently, s. 288.075, F.S., provides that, upon written request, certain business records are confidential and exempt from public records law when held by an economic development agency.<sup>8</sup> Specifically, business plans, intentions, and interests to locate, relocate, or expand in Florida are confidential and exempt for 12 months. The period of confidentiality may be extended for an additional 12 months if the business demonstrates that it is continuing to consider locating, relocating, or expanding in Florida. Trade secrets within such business plans, intentions, and interests are confidential and exempt for ten years.

Interim Project Report 2006-205 by the Committee on Commerce and Consumer Services found that the goal of this exemption is to facilitate communication between businesses and economic development agencies and that the exemption allows businesses to keep strategic information confidential while considering sites to locate or expand.

The report stated that records affected by this exemption are those of an economic development agency that 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

---

<sup>7</sup> *Straughn v. Camp*, 293 So.2n 689, 694 (Fla. 1974).

<sup>8</sup> For purposes of s. 288.075, F.S., “economic development agency” means: Office of Tourism, Trade, and Economic Development; any industrial development authority created in part III of ch. 159, L.O.F., or by special law; Space Florida; the public economic development agency of a county or municipality; any research and development authority created in part V of ch. 159, L.O.F.; and any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote general business interests.

documents, which economic development agencies have specified to 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 report found that this exemption affects confidential business information, the disclosure of which 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. In cases where businesses are considering relocation, it could cause disruption in the workforce, encouraging current employees to seek other employment. Economic development agencies also indicated that public knowledge of business plans may attract unwanted media attention or affect the company's stock price.

### **Section 288.1067, F.S.**

Currently, s. 288.1067, F.S., provides that certain information relating to incentive programs received and 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, is confidential and exempt from public records law. The information that is specifically exempted includes:

- Employer identification numbers, unemployment compensation account numbers, and Florida sales tax registration numbers;
- 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 requirements;
- Proprietary business information regarding capital investment in certain circumstances; and
- The amount of Florida taxes paid.

The information is held confidential for the period of time that a business participates in an incentive program, with the exception of trade secrets, which remain confidential after the duration of the incentive agreement.

This exemption relates to the following incentive programs:

- Capital Investment Tax Credit program, s. 220.191, F.S.;
- Qualified Defense Contractor (QDC) tax refund program, s. 288.1045, F.S.;
- Qualified Target Industry (QTI) tax refund program, s. 288.106, F.S.;
- High Impact Performance Incentive (HIPI) grants program, s. 288.108, F.S.;
- Quick Action Closing Fund, s. 288.1088, F.S.; and

- Innovation Incentive Program, s. 288.1089, F.S.

Chapter 2006-59, L.O.F., expanded this exemption to include the newly created Innovation Incentive Program, which is created in ch. 2006-55, L.O.F. The purpose of the program is to provide resources for significant economic development projects, including the location or expansion of research and development entities and innovation businesses in Florida.

Section 288.1067, F.S., was scheduled for review under the Open Government Sunset Review Act during the 2006-2007 interim. However, when the exemption was expanded during the 2006 Regular Session, the expiration date of the exemption was extended, from October 2, 2007 to October 2, 2011.

### **Interim Report 2007-103**

Interim Project Report 2007-103 reviewed the two public records exemptions relating to the promotion and administration of economic development by state and local governments. Public debate during the 2006 Legislative Session and related staff research indicated that the exemption warranted further review. The report recommended the following:

- For s. 288.075, F.S., include a new category of information to exempt “proprietary business information” submitted by businesses to economic development agencies. It was also recommended that trade secrets be held confidential and exempt indefinitely, rather than for a period of ten years.
- For s. 288.1067, F.S., a business’ federal employment identification number, unemployment compensation account number, and Florida sales tax registration number be held confidential indefinitely, rather than only for the time period in which the business is participating in an incentive program.
- That the cross-references in both exemptions for the definition of trade secret be amended to reference a more appropriate definition.

### **III. Effect of Proposed Changes:**

This bill incorporates the recommendations of *Interim Report 2007-103: Review of Public Records Exemptions Relating to Economic Development Agencies*. This bill combines and reorganizes the two exemptions into one provision, and expands the exemption to require that:

- “Proprietary business information” submitted by businesses to economic development agencies be held confidential and exempt indefinitely;
- “Trade secrets” submitted by businesses to economic development agencies be held confidential and exempt indefinitely, rather than for a period of ten years; and
- Business’ federal employment identification numbers, unemployment compensation account numbers, and Florida sales tax registration numbers be held confidential indefinitely, rather than only for the time period in which the business is participating in an incentive program.

**Section 1** amends s. 288.075, F.S., to extend, from ten years to indefinitely, the period of confidentiality for trade secrets. This change is consistent with other exemptions

throughout the statutes, as the period of confidentiality for trade secrets are generally not limited. In addition, the statutory reference to the definition of trade secret is changed, from s. 812.081, F.S., to the more precise definition in s. 688.002, F.S. This second definition is also the standard definition used in similar exemptions.

This section is also amended to include proprietary confidential business information as another category of confidential and exempt information. "Proprietary confidential business information" is defined as:

Information that is owned or controlled by the corporation, partnership, or person requesting confidentiality under this section; that is intended to be and is treated by the corporation, partnership, or person as private in that the disclosure of the information would cause harm to the business operations of the corporation, partnership, or person; that has not been disclosed unless disclosed under a statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public; and that is information concerning business plans, internal auditing controls and reports of internal auditors, and reports of external auditors for privately held companies.

The combined exemption creates five distinct categories of exemptions related to the public promotion and administration of economic development by the state and local governments:

- Information related to Plans, Intentions and Interests;
- Trade Secrets;
- Proprietary Confidential Business Information;
- Identification, Account, and Registration Numbers; and
- Information related to Economic Incentive Programs.

These categories were created primarily to distinguish between the types of information to be held confidential and exempt, and the duration of each category of exemption. Information submitted under the first and last categories is protected for a limited period, thereby eventually making general information related to policy decisions by state and local officials available to the public. Information from the remaining three categories is protected indefinitely, consistent with other statutory provisions, industry practices, and businesses' expectations.

Consistent with the requirements of the Open Government Sunset Review Act, this section also provides for future review and repeal of the exemption on October 2, 2012.

**Section 2** provides a statement of public necessity.

**Section 3** provides that this act shall take effect October 1, 2007.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

This bill expands the public records exemption relating to the promotion and administration of economic development by state and local governments and requires passage by a two-thirds vote of the membership of each house.

This bill provides for future review and repeal of the exemption on October 2, 2012, and provides a statement of public necessity.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Providing that “proprietary business information, “trade secrets,” business’ federal employment identification numbers, unemployment compensation account numbers, and Florida sales tax registration numbers be held confidential and exempt indefinitely, should ensure that sensitive information submitted to economic development agencies remain inaccessible to the business’ competition, thereby protecting their interests.

**C. Government Sector Impact:**

None.

**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.

---