

# 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.)

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Prepared By: Governmental Operations Committee

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BILL: CS/SB 1182

SPONSOR: Governmental Operations Committee and Commerce Committee

SUBJECT: Public Records

DATE: April 24, 2007

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

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

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## 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 unless the proprietor no longer treats the information as proprietary confidential business information or it is otherwise publicly available;
- “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 expands a public records exemption which, in effect, is the creation of a new exemption that requires passage by two-thirds of the members present and voting in each house pursuant to Art. I, s. 24 of the State Constitution.

This bill amends sections 288.075 and repeals s. 288.1067 of the Florida Statutes.

## II. Present Situation:

**Public Records** – The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

(a) 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 thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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 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.<sup>5</sup>

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Article I, s. 24 of the State Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> 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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

<sup>5</sup> Section 119.011(11), F.S.

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.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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>12</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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 exemption meets the three statutory criteria if it:

- (1) 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) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to

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<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>8</sup> Article I, s. 24(c) of the State Constitution.

<sup>9</sup> *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).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</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).

<sup>14</sup> Section 119.15, F.S.

- the good name or reputation of such individuals, or would jeopardize their safety; or
- (3) protects 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.<sup>15</sup>

The act also requires consideration of the following:

- (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?

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.<sup>16</sup> 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.

Under s. 119.10(1) (a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

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

<sup>15</sup> Section 119.15(4)(b), F.S.

<sup>16</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

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>17</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 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.;

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<sup>17</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.

- 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:**

The bill amends the definition of economic development agency in s. 288.075, F.S., to reflect that some counties and municipalities do not have an economic development agency. The bill includes within the definition “officers or employees assigned the duty of promoting the general business interests or industrial interests of that county or municipality or responsibilities related thereto.”

The bill also defines 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 definition of “trade secrets” is defined to have the same meaning as in s. 688.002, F.S.

The bill makes “trade secrets” and “proprietary confidential business information” held by an economic development agency confidential and exempt.

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 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.



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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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