

**The Florida Senate**  
**PROFESSIONAL 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 Operations Committee

BILL: SB 1510

INTRODUCER: Senator Aronberg

SUBJECT: Public Records/Sunshine State One-Call

DATE: April 13, 2007

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stuart	Caldwell	CU	<b>Favorable</b>
2.	Rhea	Wilson	GO	<b>Favorable</b>
3.			RC	
4.				
5.				
6.				

**I. Summary:**

This bill creates an exemption from public records for proprietary confidential business information held by the Sunshine State One-Call of Florida, Inc. The exemption protects trade secrets that apply to “maps, plans, facility location diagrams, internal damage investigation reports or analyses, dispatch methodologies, or trade secrets as defined in s. 688.002, F.S., or which describes the exact location of an underground facility or protection, repair, or restoration of a facility by a member operator.”

As the bill creates a new exemption, it is subject to the requirement of Art. I, s.24(c) of the State Constitution, that the bill be passed by a two-thirds vote of the members present and voting.

The bill creates s. 556.110 of the Florida Statutes.

**II. Present Situation:**

**Sunshine State One-Call**

Chapter 556, F.S., creates the Sunshine State One-Call Of Florida Inc., as a non-profit corporation which requires each operator of an underground facility to be a member. When notice of intent to engage in excavation or demolition is filed, the systems managed by One-Call provide notice to the member operators of proposed excavation and give the opportunity for member operators to locate and identify their underground facilities. Under this notification system, Sunshine State One-Call of Florida, Inc., is not required or permitted to locate or mark underground facilities, but those member operators who are provided notice of an excavation must locate and mark underground facilities within 2 business days of notice.

To initiate an excavation or demolition, an excavator must contact One-Call by phone or electronically to file a “ticket” which provides specific information about the proposed excavation such as the name of the company or person, intended depth of the excavation, and the location of the intended excavation.

Recently, One-Call invested in a member ticket management software system which allows all excavators the opportunity to file tickets electronically and eliminates the cost of purchasing these systems for individual companies. Prior to this investment, electronic ticket filing was only accessible to member operators who bought ticket management systems.

### **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.

---

<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.

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>

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

---

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

<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.

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 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.

---

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

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

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.

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

According to a One-Call representative, One-Call has made a significant investment to make the ticket processing function more efficient by purchasing a ticket management system for all of its users. Currently, the member ticket management system is not being used by member operators to file tickets because potential excavators do not want the confidential information on ticket applications being stored on One-Call's system which is subject to public disclosure. The representative stated that without the exemption the system will continue to not be used.

Further, the One-Call representative stated that members are not filing damage reports, also subject to open record requirements to One-Call, because they don't want the public to be aware of problems during excavations. Damage reports can raise negative public opinion and can harm the reputation of an excavator. The One-Call representative commented that the nondisclosure of damages has negative repercussions on the effective operation of One-Call such as the inability of One-Call to determine the effectiveness of their service because of a lack of damage information, and the inability of One-Call to tailor their education efforts to parties most likely to experience problems resulting in damages. The One-Call representative stated that if a public records exemption existed, excavators would be comfortable with reporting damages and One-Call could better serve their legislative mandate.

This bill will create an exemption for protection of proprietary and confidential business information disclosed during the filing of a ticket and for information submitted to One-Call describing the extent of damages during an excavation of underground facilities.

Confidential business information is defined as "maps, plans, facility location diagrams, internal damage investigation reports or analyses, dispatch methodologies, or trade secrets as defined in s. 688.002, F.S., or which describes the exact location of an underground facility or protection, repair, or restoration of a facility by a member operator."

Exemptions are subject to Open Government Sunset Review Act in accordance with s.119.15, F.S., and shall stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This bill takes effect July 1, 2007.

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

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

None.

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

This bill states an identifiable public purpose to create the public record exemptions because the protection will allow One-Call to implement systems which will allow the state to more effectively and efficiently administer a government program which would be impaired without the exemption. Further, the exemptions protect information of a confidential nature concerning “disclosures of which would likely be used by a competitor to harm business interests of the member operator or could be used for the purpose of inflicting damage in underground facilities; information that is not readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as provided to Sunshine State One-Call.” These identifiable public purposes satisfy the first and third provisions of s. 119.05, F.S.

The scope of proprietary and confidential information is narrowed specifically to “maps, plans, facility location diagrams, internal damage investigation reports or analyses, dispatch methodologies, or trade secrets as defined in s. 688.002, F.S., or which describes the exact location of an underground facility or protection, repair, or restoration of a facility by a member operator.”

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

If this bill is enacted One-Call members will enjoy improvements in efficiency and decreased costs. Members will be able to more efficiently file tickets because every member will have access to the ticket management system. Members will incur less expenses because One-Call has purchased the system for member use which will eliminate the cost of buying the system for companies which do not already own a system, and will save licensing and maintenance costs for those members who already own systems.

If the bill is enacted member excavators will be able to disclose damages to One-Call which will allow One-Call to better analyze who is having problems with excavations. This information will be used to better educate member operators and should result in less damage to underground facilities which leads to better and more reliable service to customers.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---





## **viii. Summary of Amendments:**

None.

---

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---