

**The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/CS/SB 2126

INTRODUCER: Committee on Governmental Oversight and Accountability, Committee on Communications, Energy, and Public Utilities, and Senator King

SUBJECT: Public Records/Cable and Video Service Providers

DATE: April 16, 2009 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Caldwell	CU	Fav/CS
2.	Naf	Wilson	CM	Fav/CS
3.			GO	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

This bill creates a public records exemption for proprietary confidential business information obtained from a communications or broadband company by the Department of Management Services (department) or any person or agency authorized by the department. The bill defines the term “proprietary confidential business information” and includes a statement of public necessity.

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for enactment.¹

This bill creates a new, as yet unnumbered section of the Florida Statutes.

¹ Section 24, Art. I of the State Constitution.

II. Present Situation:

Public Access – Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), Art. I, State Constitution – Section 24(a), Art. I of the State Constitution provides the following:

(a) Every person has the right to inspect or copy any public records 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.

Florida's Public Records Law – Florida's public records law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency³ records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of public records to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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

² s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

³ s. 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

⁶ Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act – The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. 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.

Current Public Records Exemptions – There is no current public records exemption for proprietary business information obtained from a communications or broadband company.

III. Effect of Proposed Changes:

Section 1 creates a public records exemption for proprietary confidential business information obtained from a communications or broadband company by the Department of Management Services (department) or any person or agency authorized by the department to receive such information. The term “proprietary confidential business information” is defined to include any proprietary or otherwise confidential information or documentation, including plans, billing and payment records, trade secrets, or other information, and must be specifically marked and identified as such at the time initially provided to the department. The communications or broadband company must treat the information as confidential and intend that it be treated as such by the department. The information must not be otherwise publicly available to the same extent and in the same format as requested by the department. The defined term excludes aggregate information related to the geographic scope of the availability of broadband services or the speed of services that are available in the state so long as the information does not directly or indirectly identify a provider of broadband services.

⁷ *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).

⁸ s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Article 1, s. 24(c) of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

The bill provides that the exemption is subject to the Open Government Sunset Review Act¹² and shall stand repealed on October 2, 2014, unless reviewed and reenacted by the Legislature.

Section 2 provides a Legislative statement of public necessity.

Section 3 provides that the act takes effect on the same date that SB 2092 or similar legislation takes effect, if it is adopted in the same legislative session or an extension thereof and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption for proprietary confidential business information received from a communications or broadband company by the Department of Management Services or any person or agency authorized by the department to receive such information. In accordance with s. 24, Art. I of the State Constitution, the bill requires a two-thirds vote of each house of the Legislature for enactment. This bill complies with the requirement of s. 24, Art. I of the State Constitution that the Legislature address public records exemptions in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public will not have access to proprietary confidential business information obtained from a communications or broadband company by the Department of Management services or by any person or agency authorized by the department.

¹² Section 119.15, F.S.

C. **Government Sector Impact:**

The Department of Management Services and other potentially involved agencies may incur additional workload in the course of maintaining the confidential and exempt status of the proprietary confidential business information.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

This bill is linked to CS/SB 2092, which authorizes the Department of Management Services to engage in certain activities related to assessing the need for broadband Internet service in Florida, planning for such service, and encouraging the statewide deployment of such service. CS/SB 2902 also authorizes the department to apply for and accept certain funds, to enter into contracts, to establish committees or workgroups, and to adopt rules.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 16, 2009:

The committee substitute makes conforming changes to ensure that the term “proprietary confidential business information” is consistent throughout the bill. The committee substitutes removes a provision specifying penalties for violations of the exemption because penalties for public records violations are already provided for in s. 119.10, F.S.

B. **Amendments:**

None.