

**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 Commerce and Tourism Committee

BILL: CS/SB 994

INTRODUCER: Commerce and Tourism Committee and Senator Latvala

SUBJECT: Public Records/Airports

DATE: April 5, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	<b>Fav/1 amendment</b>
2.	Pugh	Cooper	CM	<b>Fav/CS</b>
3.			GO	
4.				
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:**

Current law provides several public records exemptions for proprietary confidential business information held by seaports, economic development organizations, and various other entities, and for contract proposals exchanged between public and private entities for the use of public infrastructure. However, the statutes do not provide similar exemptions for public airports engaged in business transactions with private companies.

CS/SB 994 creates a public records exemption for proprietary confidential business information submitted to or held by a public airport. The exemption expires when the confidential and exempt information is no longer considered to be proprietary confidential business information by the proprietor.

Also, CS/SB 994 also creates public records exemptions for trade secrets held by a public airport and for proposals or counterproposals exchanged between a public airport governing board and a nongovernmental entity relating to the sale, use, development, or lease of airport land or facilities.

CS/SB 994 provides a statement of public necessity as required by the State Constitution, and provides definitions for terms used in the proposed statutes.

Finally, CS/SB 994 provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature.

Pursuant to Article I, s. 24(c) of the State Constitution, passage of CS/SB 994 requires a two-thirds vote in each chamber of the members present and voting for final passage of a newly created public record or public meeting exemption.

CS/SB 994 creates s. 332.16, F.S., and an unnumbered section of chapter law related to the statement of necessity for the proposed public records exemption.

## 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 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.

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Section 119.011(12), F.S., defines the term "public records" 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 official business by any agency. 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 "intended to perpetuate, communicate, or formalize knowledge."<sup>1</sup>

The Legislature, however, may provide by general law an exemption of public records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (the so-called "public necessity statement") and must be no broader than necessary to accomplish its purpose.<sup>2</sup> A bill enacting an exemption<sup>3</sup> may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.<sup>4</sup>

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

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<sup>1</sup> *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>2</sup> Section 24(c), Art. I of the State Constitution.

<sup>3</sup> Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>4</sup> Section 24(c), Art. I of the State Constitution.

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.<sup>5</sup> If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>6</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>7</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

#### Proprietary Confidential Business Information

Current law provides several public record exemptions for proprietary confidential business information, such as that held by economic development agencies and utilities.<sup>8</sup> However, it does not provide a public record exemption for proprietary confidential business information held by a public airport.

#### Trade Secrets

At least two subsections in different chapters of the Florida Statutes define the term "trade secret." The first definition is part of the Uniform Trade Secrets Act<sup>9</sup> and is found in s. 688.002(4), F.S. That section defines "trade secret" to mean:

- . . . information, including a formula, pattern, compilation, program, device, method, technique, or process that:
- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
  - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

<sup>5</sup> Op. Att'y Gen. Fla. 85-62 (1985).

<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).

<sup>7</sup> Section 119.15, F.S.

<sup>8</sup> Public record exemptions for proprietary confidential business information are provided as it relates to the following: electric utility interlocal agreements (s. 163.01, F.S.); communications services tax (s. 202.195, F.S.); alternative investments for state funds (s. 215.44, F.S.); economic development agencies (s. 288.075, F.S.); Institute for Commercialization of Public Research and the Opportunity Fund (s. 288.9626, F.S.); telephone companies (s. 364.183, F.S.); emergency communications number E911 system (s. 365.174, F.S.); public utilities (s. 366.093, F.S.); natural gas transmission companies (s. 368.108, F.S.); Sunshine State One-Call of Florida, Inc. (s. 556.113, F.S.); tobacco companies (s. 569.215, F.S.); prison work program corporation records (s. 946.517, F.S.); and H. Lee Moffitt Cancer Center and Research Institute (s. 1004.43, F.S.).

<sup>9</sup> Section 688.001, F.S.

The second definition for “trade secrets” is found in s. 812.081(1)(c), F.S., which is part of a chapter of law that deals with theft, robbery and related crimes. Section 812.081(1)(c), F.S., defines “trade secret” to mean:

. . . the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. “Trade secret” includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Business entities often provide agencies with information meeting the definition of “trade secrets” under one of the foregoing sections. For example, a corporation which is negotiating with an economic development agency to relocate to Florida may provide that agency with trade secret information as part of the negotiation process.<sup>10</sup> Another example is the receipt of trade secret information by the State Board of Administration during its consideration of an alternative investment under s. 215.44, F.S. In both of these examples, trade secret information is protected by exemptions that are either specific to the agency or to a program.

#### 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 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.

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<sup>10</sup> Section 288.075, F.S.

### Public Airports in Florida

Section 330.27(6), F.S., defines “public airport” as either a publicly or privately owned airport that is open for use by the public. Florida has 21 commercial airports<sup>11</sup> (meaning they offer commercial passenger airline service) and 107 general aviation airports,<sup>12</sup> which include municipal airports and private air fields that offer flights other than military and scheduled airline and regular cargo flights.

Based on a 2010 report<sup>13</sup> prepared by the Florida Department of Transportation’s Office of Aviation, airport operations account for at least 1 million jobs and annual payroll of nearly \$31 billion, and generate an estimated \$97 billion in economic activity. For example, air cargo operations generate an estimated \$6.6 billion on economic impact, and accounts for about one-third Florida’s international trade.

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

CS/SB 994 creates three public records exemption related to public airports: one related to proprietary confidential business information submitted to or held by a public airport, and the other related to proposals or counterproposals exchanged between a public airport and a nongovernmental entity relating to the sale, use, development, or lease of airport land or airport facilities.

Section 1: Creates s. 332.16, F.S., to create an exemption for proprietary confidential business information submitted to or held by a public airport. The exemption expires when the confidential and exempt information is no longer considered to be proprietary confidential business information by the proprietor.

CS/SB 994 creates definitions for the terms “airport facilities,” “governing body,” “proprietor,” and “public airport.” The key definition is “proprietary confidential business information,” which means information that has been designated as confidential by the proprietor and includes:

- Business plans;
- Internal auditing controls and reports of internal auditors;
- Reports of external auditors for privately held companies;
- Trade secrets as defined in the Uniform Trade Secrets Act;
- Client and customer lists;
- Potentially patentable material;
- Business transactions, except those transactions between the proprietor and the airport authority; or
- The proprietor’s financial information.

CS/SB 994 also specifies that trade secrets held by a public airport are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, of the State Constitution.

<sup>11</sup> A map showing the location of these 21 airports is available at: <http://www.dot.state.fl.us/aviation/pdfs/Welcome%20to%20Fl%20Aviation112010.pdf> on page 10.

<sup>12</sup> Ibid, pages 8-9.

<sup>13</sup> Ibid, page 6.

Finally, CS/SB 994 creates a public records exemption for a proposal or counterproposal exchanged between a public airport and a nongovernmental entity relating to the sale, use, development, or lease of airport land or airport facilities. The information ceases to be exempt when the proposal or counterproposal is approved by the public airport's governing board.

CS/SB 944 provides that if a proposal or counterproposal is not submitted to the governing body for approval, then the public records exemption for the proposal or counterproposal expires 90 days after the cessation of negotiations between the public airport and the nongovernmental entity.

Additionally, CS/SB 994 provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature.

Section 2: Provides in an undesignated section of chapter law the constitutionally required statement of public necessity.

Essentially, this section states that divulging the proprietary confidential business information destroys the value of that property to the proprietor, causing a financial loss not only to the proprietor, but also to the airport and to the state and local governments due to a loss of tax revenue and employment opportunities for residents. Release of that information could give business competitors an unfair advantage and would injure the affected entity in the marketplace.

Also, divulging "sensitive information" contained in the proposals or counterproposals for airport land or facilities could give competitors for those projects an unfair competitive advantage, and limit an airport authority's ability to effectively and efficiently negotiate contracts.

Section 3: Provides an effective date of July 1, 2011.

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

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

None.

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

###### Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. Since CS/SB 994 creates new public record exemptions, it requires a two-thirds vote in each chamber for final passage.

###### Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. CS/SB 994 creates three new public records exemptions for certain information held by public

airports, and the accompanying Public Necessity Statement comments on the need for those exemptions for all three exemptions.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution, requires that an exemption be drafted as narrowly as possible. As amended, CS/SB 994 appears to meet this criterion.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**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 Commerce and Tourism Committee on April 5, 2011:**

The committee adopted a substitute strike-everything amendment to a traveling amendment that made the following modifications to the original bill:

- Narrowed the term “business transactions” to exclude as proprietary confidential business information business transactions between the private proprietor and the public airport’s governing board;
- Removed from the list of proprietary confidential business information “projections of financial results for the proprietor or the airport facilities project for which the information is provided;”
- Replaced the provision in the original bill that kept a proposal or counterproposal for airport land or facilities exempt until 10 days after an airport governing board

had made its decision, with language removing the exemption when the airport board has voted to approve the proposal or counterproposal; and

- Added language to the Statement of Public Necessity to specify why proposals and counterproposals should be exempt until after approval by an airport board.

B. Amendments:

None.