

**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/SB 994

**INTRODUCER:** Commerce and Tourism Committee and Senator Latvala

**SUBJECT:** Public Records/Airports

**DATE:** April 7, 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.	Naf	Roberts	GO	<b>Favorable</b>
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 multiple public records exemptions for proprietary confidential business information and trade secrets, as well as at least one public records exemption for proposals and counterproposals between a public entity and nongovernmental entity. However, it does not provide public records exemptions for that information as it relates to public airports.

This bill creates public records exemptions for:

- Proprietary confidential business information held by a public airport. The exemption expires when the confidential and exempt information is otherwise publicly available or is no longer treated by the proprietor as proprietary confidential business information.
- Trade secrets held by a public airport.
- A proposal or counterproposal exchanged between a public airport and a nongovernmental entity relating to the sale, use, development, or lease of airport facilities. The public records exemption expires upon approval by the governing body of a public airport. 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.

The bill creates definitions for terms used in the exemptions.

The bill provides for repeal of the exemptions pursuant to the Open Government Sunset Review Act unless reviewed and saved from repeal by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

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

This bill creates s. 332.16, F.S., and an unnumbered section of chapter law for the statement of public necessity.

## 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>

The Open Government Sunset Review Act<sup>7</sup> provides that a public records or public meetings 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.

### **Current Public Records Exemptions**

#### *Proprietary Confidential Business Information*

Current law provides multiple public records exemptions for proprietary confidential business information, such as that held by economic development agencies and public utilities.<sup>8</sup>

#### *Trade Secrets*

Current law also provides multiple public records exemptions for trade secrets.<sup>9</sup>

<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 records 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> Public records exemptions for trade secrets are provided as they relate to the following: antitrust no-action letters (s. 408.185, F.S.); citrus fruit coloring information (s. 601.76, F.S.); the federal Clean Air Act (s. 252.94, F.S.); computer systems (s. 815.04(3)(a), F.S.); correctional work programs (s. 946.517, F.S.); county tourism promotion agencies (s. 125.0104(9)(d)2., F.S.); the Department of Agriculture and Consumer Services (ss. 502.222, 526.311(2), 573.123(2), and 601.76, F.S.); the Department of Citrus (s. 601.10(8) et seq., F.S.); the Department of Environmental Protection (s. 403.73, F.S.); the Department of Financial Services (ss. 626.884(2) and 626.921(8), F.S.); the Department of Lottery (s. 23.105(12)(a), F.S.); the Department of Transportation (s. 334.049(4), F.S.); the Division of Consumer Services (s. 570.544(7), F.S.); the Division of Condominiums, Timeshares and Mobile Homes (s. 721.071, F.S.); the Division of Fruit and Vegetable Inspection (s. 570.48(3), F.S.); the Enterprise Florida Innovation Partnership (s. 288.9520, F.S.); the Florida Commission on Tourism (s. 288.1224(7), F.S.); the Florida Development Finance Corporation (s. 288.9607(5), F.S.); the Florida Export Finance Corporation (s. 288.9607(5), F.S.); the Florida Export Finance Corporation (s. 288.776(3)(d), F.S.); hazardous chemicals and materials (s. 252.88(1) et seq., F.S.); the plant industry (s. 581.199, F.S.); the Quick-Response Training Program (s. 288.047(7), F.S.); recovered materials dealers (ss. 403.7046(2) and 403.7046(3)(b), F.S.); small health insurance carriers (s. 627.6699(8)(c), F.S.); the Spaceport Florida Authority (s. 331.326, F.S.); the Tourism Marketing Corporation (s. 288.1226(6), F.S.); and the Uniform Trade Secrets Act (s. 688.006, F.S.).

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>10</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.

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>11</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.

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<sup>10</sup> Section 688.001, F.S.

<sup>11</sup> Section 288.075, F.S.

### *Proposals and Counterproposals*

Current law provides that any proposal or counterproposal exchanged between a deepwater port listed in s. 311.09(1), F.S., and any nongovernmental entity, relating to the sale, use, or lease of land or of port facilities, are confidential and exempt from public-records requirements until 30 days before such proposal or counterproposal is considered for approval by the governing body of the deepwater port.<sup>12</sup> If no proposal or counterproposal is submitted to the governing body, the proposal or counterproposal shall cease to be exempt 90 days after the cessation of negotiations.<sup>13</sup>

### **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>14</sup> (meaning they offer commercial passenger airline service) and 107 general aviation airports,<sup>15</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>16</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:**

This bill creates three public records exemptions related to public airports.

Section 1 provides that proprietary confidential business information submitted to or held by a public airport is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption expires when the confidential and exempt information is otherwise publicly available or is no longer treated by the proprietor as proprietary confidential business information.

The bill defines “proprietary confidential business information” to mean information that is owned or controlled by the proprietor requesting confidentiality; that is intended to be and is treated by the proprietor as private in that the disclosure of the information would cause harm to the business operations of the proprietor; that has not been disclosed unless disclosed pursuant to 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.

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<sup>12</sup> Section 315.18, F.S.

<sup>13</sup> *Id.*

<sup>14</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>15</sup> *Ibid*, pages 8-9.

<sup>16</sup> *Ibid*, page 6.

- Internal auditing controls and reports of internal auditors.
- Reports of external auditors for privately held companies.
- Client and customer lists.
- Potentially patentable material.
- Business transactions; however, business transactions do not include those transactions between a proprietor and a public airport.
- Financial information of the proprietor.

The bill also provides that trade secrets<sup>17</sup> 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.

Finally, the bill provides that any proposal or counterproposal exchanged between a public airport and a nongovernmental entity relating to the sale, use, development, or lease of airport facilities is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption expires when the proposal or counterproposal is approved by the governing body of the public airport. If no proposal or counterproposal is submitted to the governing body for approval, then the exemption for the proposal or counterproposal expires 90 days after the cessation of negotiations between the public airport and the nongovernmental entity.

The bill provides for repeal of the exemptions on October 2, 2016, pursuant to the Open Government Sunset Review Act, unless they are reviewed and saved from repeal by the Legislature.

Section 2 provides a statement of public necessity for the public records exemptions, as required by the State Constitution.

Section 3 specifies an effective date of July 1, 2011.

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

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

None.

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

###### Vote Requirement

Section 24(c), Art. I of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption. Because this bill creates new public records exemptions, it requires a two-thirds vote in each chamber for final passage.

###### Public Necessity Statement

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<sup>17</sup> “Trade secrets” has the same meaning as provided in the Uniform Trade Secrets Act.

Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. Because this bill creates new public records exemptions, it contains a public necessity statement.

Breadth of Exemption

Section 24(c), Art. I of the State Constitution, requires that a public records or public meetings exemption be drafted as narrowly as possible.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

**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.

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

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