

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: SB 994

INTRODUCER: Senator Latvala

SUBJECT: Public Records/Airports

DATE: March 29, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Fav/1 amendment
2.	Pugh	Cooper	CM	Pre-meeting
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Current law provides several public records exemptions for proprietary confidential business information held by various 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.

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.

The bill also 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.

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, 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 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.

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."¹

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.² A bill enacting an exemption³ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁴

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

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

² Section 24(c), Art. I of the State Constitution.

³ 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.

⁴ Section 24(c), Art. I of the State Constitution.

entities designated in the statute.⁵ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁶

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 Act⁷ 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.⁸ However, it does not provide a public record exemption for proprietary confidential business information held by a public airport.

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.

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 airports⁹ (meaning they offer

⁵ Op. Att'y Gen. Fla. 85-62 (1985).

⁶ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

⁷ Section 119.15, F.S.

⁸ 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.).

⁹ 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.

commercial passenger airline service) and 107 general aviation airports,¹⁰ 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 report¹¹ 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:

SB 994 creates two 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.

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;¹²
- Client and customer lists;
- Potentially patentable material;
- Business transactions; or
- Financial information of the proprietor or projections of financial results for the proprietor or the airport facilities project for which the information is provided.

The bill also 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 public record exemption expires 10 days after the proposal or counterproposal is approved by the governing body of a public airport.

¹⁰ Ibid, pages 8-9.

¹¹ Ibid, page 6.

¹² Section 688.002(4), F.S., defines "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that: 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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, the bill 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. However, the public necessity statement only provides the justification for creating the public record exemption for proprietary confidential business information.

Essentially, the bill 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.

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 SB 944 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. SB 994 creates two new public records exemptions. However, the public necessity statement is deficient in that it only provides justification for the public record exemption for proprietary confidential business information. The public necessity statement should be amended to include the justification for protecting 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.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution, requires that an exemption be drafted as narrowly as possible. The exemption in SB 994, as drafted, could raise concerns whether

it is narrowly drawn regarding its breadth when compared with another similar exemption for seaports.

Current law provides a public record exemption for a proposal or counterproposal exchanged between a deepwater port and a nongovernmental entity.¹³ However, that exemption expires 30 days before any such proposal or counterproposal is considered for approval by the governing body of the deepwater port.

The exemption provided by SB 994 requires that the confidentiality be maintained for a period of 10 days after approval by the governing body of the public airport. The need to maintain such confidentiality after a proposal or counterproposal is approved by the governing body at a public meeting is unclear. As such, the proposed exemption could be construed as overly broad.

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:

Line 62 of SB 994 provides that certain proposals and counterproposals are “confidential and exempt” from public records requirements; however, line 44 of the bill refers to the same proposals and counterproposals as “exempt.” The bill should be amended to clarify that the proposals and counterproposals are confidential and exempt from public records requirements, per the sponsor’s intent.

In addition, the bill defines “airport facilities” to mean airports, buildings, structures, terminal buildings, parking garages and lots, hangars, land, warehouses, shops, hotels, other aviation facilities of any kind or nature, or any other facility of any kind or nature related to or connected with a public airport and other aviation facility that a public airport is authorized by law to construct, acquire, own, lease, or operate, together with all fixtures, equipment, and property, real or personal, tangible or intangible, necessary, appurtenant, or incidental thereto. The bill

¹³ Section 315.18, F.S.

provides that the public record exemption for a proposal or counterproposal applies to the sale, use, development, or lease of airport land or airport facilities. Including a reference to land in the definition of “airport facilities” appears to be redundant.

VII. Related Issues:

The term “business transactions” could be broadly construed to include even the contracts and other transactions between the proprietor/private tenant and the public airport. In addition, the public necessity for protecting financial information associated with an airport facilities project is unclear, in the case where such projects were paid for with public tax dollars.

An amendment is expected to be filed to clarify this issue and the technical issues identified above.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

Barcode 138788 by Community Affairs Committee on March 14, 2011:

This amendment narrows the categories of public records subject to exemption from public disclosure.