

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 Budget Subcommittee on Transportation, Tourism, and Economic Development Appropriations

BILL: CS/CS/SB 1206

INTRODUCER: Governmental Oversight and Accountability Committee; Commerce and Tourism Committee; Commerce and Tourism Committee; and Senator Lynn

SUBJECT: OGSR/Economic Development Agencies

DATE: February 13, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Fav/CS
2.	Seay	Roberts	GO	Fav/CS
3.	Martin	Meyer	BTA	Favorable
4.			BC	
5.				
6.				

Please see Section VIII. for Additional Information:

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

I. Summary:

Current law provides that certain business records are confidential and exempt from Florida's public records requirements when held by an economic development agency and requested to be exempt by the affected business. Examples of economic development agencies include the Department of Economic Opportunity (DEO), Enterprise Florida (EFI), and public economic development agencies of local governments. The following information is confidential and exempt from public records requirements:

- Upon written request, information relating to a business's plans, intentions, and interests to locate, relocate, or expand its business activities in Florida.
- Trade secrets.
- Proprietary confidential business information.
- A federal employer identification number, unemployment compensation account number, or Florida sales tax registration number.
- Certain information pertaining to economic incentive programs.

This Committee Substitute for Committee Substitute (CS) reenacts the public records exemptions, which will repeal on October 2, 2012, if this CS does not become law. The CS also provides that a business's plans, intentions, and interests may become public record 180 days after a final project order for an economic incentive agreement is issued, or until a date specified in the final order; and making certain wage, job, and tax information public 180 days after a final project order for an economic incentive agreement is issued, or until a date specified in the final order.

This CS substantially amends section 288.075 of the Florida Statutes.

II. Present Situation:

Public Records Law

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 1892.¹ 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.² Article I, s. 24 of the State Constitution, provides that:

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,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

- (a) 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.

¹ Section 1390, 1391, F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ 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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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.¹² If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 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.¹⁵

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c), Fla. Constitution.

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c), Fla. Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(5)(a), F.S.

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 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- 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
- 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.¹⁶

The Act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Public Records Exemptions for Economic Development Agencies

There has been a public records exemption in state law for records that contain information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state since 1977.¹⁷ The exemption has undergone several substantive and technical revisions over the years, and the last significant modification was in 2007, which merged specific provisions of a related public-records exemption, s. 288.1067, F.S. (2006), into s. 288.075, F.S.¹⁸

¹⁶ Section 119.15(4)(b), F.S.

¹⁷ Senate Committee on Commerce and Consumer Services, Interim Project Report 2006-205: Open Government Sunset Review of s. 288.075, F.S., Economic Development Agencies (September 2005), available at http://archive.flSenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-205cm.pdf (last visited February 13, 2012).

¹⁸ Chapter 2007-203, L.O.F. This law also repealed s. 288.1067, F.S. See Senate Committee on Commerce, Interim Project Report 2007-103: Review of Public Records Exemptions Relating to Economic Development Agencies (October 2006), available at http://archive.flSenate.gov/data/Publications/2007/Senate/reports/interim_reports/pdf/2007-103cm.pdf (last visited February 13, 2012); and House of Representatives, Government Efficiency and Accountability Council, Staff Analysis for HB 7201 (April 23, 2007), available at <http://archive.flSenate.gov/data/session/2007/House/bills/analysis/pdf/h7201.GEAC.pdf> (last visited February 13, 2012).

Currently, the exemption applies to information held by economic development agencies, including Department of Economic Opportunity (DEO), Enterprise Florida, Inc., (EFI), Space Florida, and public economic development agencies of local governments.¹⁹

There are five distinct categories of information that are exempt from public records:

Exempted Material	Timeframe
Plans, intentions, or interests of a private company, person or individual considering locating, relocating, or expanding its business operations in Florida ²⁰	Confidential and exempt for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed, whichever occurs first May be extended for up to an additional 12 months upon written request from the private company or individual upon a finding by the economic development agency that the entity is still actively seeking to locate, relocate, or expand in Florida
Trade secrets ²¹	Permanent
Proprietary confidential business information ²²	Confidential and exempt until such time as the information becomes otherwise publically available or is no longer treated by the proprietor as confidential
Federal employer identification number, unemployment compensation account number, or Florida sales tax registration number ²³	Permanent
Specific sales, employee wage, and tax information related to the administration of state economic development incentives ²⁴	Exempt for a period not to exceed the duration of the incentive agreement or upon termination of the incentive agreement

Generally, “proprietary confidential business information” is business information that would cause harm to the business’s operations if disclosed and has not been previously disclosed to the public or pursuant to a court order or statutory provision. It includes information concerning

¹⁹ Section 288.075(1)(a), F.S.

²⁰ Section 288.075(2), F.S.

²¹ Section 288.075(3), F.S.

²² Section 288.075(4), F.S.

²³ Section 288.075(5), F.S.

²⁴ Section 288.075(6), F.S.

business plans, internal auditing controls and reports, and reports of external auditors for privately held companies.²⁵

Section 288.075(2)(c), F.S., states that a public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information related to plans, intentions, or interests until 90 days after the information is made public unless:

- The public officer or employee is acting in an official capacity;
- The agreement does not accrue to the personal benefit of such public officer or employee; and
- In the professional judgment of the officer or employee, the agreement is necessary to effectuate an economic development project.

This section of law prevents public officers or employees from using confidential information to their personal benefit.

Any person who is an employee of an economic development agency who violates the provisions of s. 288.075, F.S., commits a second-degree misdemeanor, punishable by a maximum penalty of 60 days in jail and a \$500 fine.²⁶

III. Effect of Proposed Changes:

Section 1 amends s. 288.075, F.S., reenacting and saving the public records exemption for economic development agencies from repeal; providing that information may become public record 180 days after a final project order for an economic incentive agreement is issued, until a date specified in the final order, 12 months after a request for confidentiality is received, or until the information is publically disclosed, whichever occurs first.

This section also provides that information related to certain wage, job, and tax information becomes public at the earlier of 180 days after a final project order for an economic incentive agreement is issued, until a date specified in the final order or if the information is otherwise disclosed. This section also specifies that tax information that is still considered confidential and exempt may be reported in the aggregate in Enterprise Florida's annual incentive report.

Section 2 provides that this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁵ Section 288.075(1)(b), F.S.

²⁶ Section 288.075(7), F.S.

B. Public Records/Open Meetings Issues:

This CS retains an already-existing public records exemption and thus is not subject to requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The CS complies with the requirement of article I, section 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

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/CS by Governmental Oversight and Accountability – February 16, 2012:**

The CS clarifies that a date specified in a final project order that designates the period of confidentiality may not extend beyond the period of confidentiality of 12 months or 24 months that are established in current law. The CS restores language that an economic development agency may extend the period of confidentiality for up to an additional 12 months if certain conditions are met by the entity seeking an extension.

CS by Commerce and Tourism – January 19, 2012:

The committee substitute (CS) changes the time that plans, intentions, and interests are exempt from public record from 90 days after the signing of an economic incentives

agreement is signed to 180 days after a final project order for an economic incentive agreement is issued or until a date specified in the final order.

Additionally, the CS changes the time that information related to economic incentive programs becomes available from 90 days after the signing of an economic incentives agreement is signed to the earlier of 180 days after a final project order for an economic incentive agreement is issued, until a date specified in the final order, or if the information is otherwise disclosed.

B. Amendments:

None.