

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 1206

INTRODUCER: Commerce and Tourism Committee and Commerce and Tourism Committee

SUBJECT: OGSR/Economic Development Agencies

DATE: January 19, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
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:

Currently, 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, Inc., (EFI), and public economic development agencies of local governments.

Section 288.075, F.S., is scheduled to be repealed October 2, 2012. CS/SB 1206 saves the exemption from repeal and removes the repeal date in statute.

The CS makes additional changes, including:

- Reducing the time that a business's plans, intentions, and interests in locating to Florida are exempted from public record by repealing the 12 month extension;
- Providing 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.

These changes do not expand the public records exemption currently in law.

II. Present Situation:

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 1977.¹ 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.²

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.³

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 ⁴	<p>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</p> <p>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</p>

¹ 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 1/13/2012).

² 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 1/13/2012); 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 1/13/2012).

³ Section 288.075(1)(a), F.S.

⁴ Section 288.075(2), F.S.

Exempted Material	Timeframe
Trade secrets ⁵	Permanent
Proprietary confidential business information ⁶	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 ⁷	Permanent
Specific sales, employee wage, and tax information related to the administration of state economic development incentives ⁸	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 business plans, internal auditing controls and reports, and reports of external auditors for privately held companies.⁹

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.¹⁰

⁵ Section 288.075(3), F.S.

⁶ Section 288.075(4), F.S.

⁷ Section 288.075(5), F.S.

⁸ Section 288.075(6), F.S.

⁹ Section 288.075(1)(b), F.S.

¹⁰ Section 288.075(7), F.S.

Interim Report 2012-302¹¹ involved a mandatory Open Government Sunset Review by the Senate Commerce and Tourism Committee of the public records exemption in s. 288.075, F.S. The report recommended re-enactment of this exemption, without changes.

General Background on Florida's Public Records Laws

Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹² 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.¹³

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

(a) 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,¹⁴ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency¹⁵ 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,

¹¹ Florida Senate Commerce and Tourism Committee, Interim Report 2012-302: Open Government Sunset Review of Section 288.075, F.S., Public Records Exemption for Information Held by Economic Development Agencies (September 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-302cm1.pdf> (last visited 1/13/2012).

¹² Sections 1390 and 1391, F.S. (Rev. 1892).

¹³ Article I, s. 24, of the State Constitution.

¹⁴ Chapter 119, F.S.

¹⁵ 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."

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.”¹⁶

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.¹⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁸

Only the Legislature is authorized to create exemptions to open government requirements.¹⁹ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.²⁰ A bill enacting an exemption²¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.²²

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.²³ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.²⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (the act)²⁵ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Sunshine 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.

The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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. The three statutory criteria are that the exemption:

¹⁶ Section 119.011(12), F.S.

¹⁷ Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980).

¹⁸ Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979).

¹⁹ Article I, s. 24(c), of the State Constitution.

²⁰ 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).

²¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

²² Article I, s. 24(c) of the State Constitution.

²³ Attorney General Opinion 85-62.

²⁴ Williams v. City of Minneola, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁵ Section 119.15, F.S.

- 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 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.²⁶

The act also requires the Legislature to consider 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?²⁷

III. Effect of Proposed Changes:

CS/SB 1206 saves the public records exemption for certain information held by economic development agencies from repeal.

Section 1 amends s. 288.075, F.S., by repealing the scheduled repeal date of October 2, 2012.

Additionally, the CS changes the current exemption for information related to the plans, intentions, or interests of a private company, person or individual considering locating, relocating, or expanding its business operations in Florida. The CS reduces the time that such information may be exempt from public records by repealing the optional 12 month extension of such exemption.

Under current law, information related to the plans, intentions, or interests is 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. The CS provides that the information may now become public record 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,
- 12 months after a request for confidentiality is received, or
- Until the information is publically disclosed.

²⁶ Section 119.15(6)(b), F.S.

²⁷ Section 119.15(6)(a), F.S.

The CS also makes changes to the exemption for information related to economic incentive programs. The CS 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. For example, the amount of tax refunds, tax credits, incentives paid to the business, and monies refunded back to the state could become public record after the 180-day time period.

The CS also specifies that tax information that is still considered confidential and exempt may be reported in the aggregate in EFI's annual incentive report.

Section 2 provides that the CS is effective upon becoming a law.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for the information obtained by economic development agencies, then the exemption will expire on October 2, 2012. Without the exemption, certain types of proprietary business information will become public – at least, what is not otherwise protected under federal law. DEO, EFI, Space Florida, local economic development organizations, and other entities that rely on this exemption during the economic recruitment efforts contend the loss of the exemption would hamper their ability to recruit new businesses to Florida and to retain existing businesses.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

SB 1206 retains the substance of an existing public records exemption and existing public meetings exemption. It also complies with the requirement of Art. I, s. 24, of the Florida Constitution, that public-records exemptions be addressed in legislation separate from substantive law changes. Finally, the CS complies with s. 119.15(4)(c), F.S., which specifies that only existing exemptions that are substantially amended must undergo another scheduled repeal in 5 years.

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 by Commerce and Tourism on 1/19/2012:

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.