

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: SPB 7014

INTRODUCER: For consideration by Commerce and Tourism Committee

SUBJECT: OGSR/Economic Development Agencies

DATE: October 31, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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 other specified economic development agencies.

Section 288.075, F.S., lists as the categories of information to held confidential and exempt the following: business plans, intentions and interests; trade secrets; proprietary confidential business information; identification, account, and registration numbers; and information related to economic incentive programs. This section is scheduled to be repealed October 2, 2012.

SB 7014 is the result of Interim Report 2012-302,¹ the Commerce and Tourism Committee's Open Government Sunset Review of the public records exemption in s. 288.075, F.S. The report recommended re-enactment of this exemption, without changes.

The proposed committee bill removes the October 2, 2012, repeal date in s. 288.075, F.S. It must pass each chamber of the Legislature by a two-thirds vote of the members voting and present in order to become law.

¹ *Open Government Sunset Review of Section 288.075, F.S., Public Records Exemption for Information Held by Economic Development Agencies*. Report available at: <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-302cm.pdf>. Site last visited Oct. 21, 2011.

II. Present Situation:

Public Records Exemptions for Economic Development Agencies

In 1977, the Legislature provided a public-records exemption for records of the Division of Economic Development of the Florida Department of Commerce that contained information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state.² Since enacting the exemption, the Legislature has made several substantive and technical revisions while retaining the basic concept of affording confidentiality for records of an economic development agency. The last significant modification was in 2007, when a new category of business information was added and specific provisions of a related public-records exemption, s. 288.1067, F.S. (2006), were merged into s. 288.075, F.S., to create five distinct categories of exemptions related to the administration of economic development.³ They are:

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	-- 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 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

² Senate Interim Project Report 2006-205, *Open Government Sunset Review of s. 288.075, F.S., Economic Development Agencies*. Available at: http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-205cm.pdf. Site last visited Oct. 25, 2011.

³ Chapter 2007-203, L.O.F. This law also repealed s. 288.1067, F.S. See *Review of Public Records Exemptions Relating to Economic Development Agencies*, The Florida Senate Committee on Commerce, Interim Project Report 2007-103 (October 2006), available at: http://archive.flsenate.gov/data/Publications/2007/Senate/reports/interim_reports/pdf/2007-103cm.pdf; and *House of Representatives Staff Analysis Bill # HB 7201*, Government Efficiency and Accountability Council (April 23, 2007), available at: <http://archive.flsenate.gov/data/session/2007/House/bills/analysis/pdf/h7201.GEAC.pdf>. All sites last visited Oct. 21, 2011.

⁴ Section 288.075(2), F.S.

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.

The public records exempted by s. 288.075, F.S., are maintained by an “economic development agency,” which is defined in s. 288.075(1)(a), F.S., to include:

- The Department of Economic Opportunity;⁹
- Any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
- Space Florida created in part II of ch. 331, F.S.;¹⁰
- The public economic development agency of a county or municipality or, if the county or municipality does not have a public economic development agency, the county or municipal officers or employees assigned the duty to promote the local government’s business or industrial interests;
- Any research and development authority created in accordance with part V of ch. 159, F.S.; or
- Any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state, municipality, or county.¹¹

Section 288.075(1)(b), F.S., states that “proprietary confidential business information” means¹² information that is owned or controlled by the corporation, partnership, or person requesting confidentiality under this section; that is intended to be and is treated by the corporation, partnership, or person as private in that the disclosure of the information would cause harm to the business operations of the corporation, partnership, or person; 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 is information concerning:

- Business plans;
- Internal auditing controls and reports of internal auditors, or
- Reports of external auditors for privately held companies.

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 under this subsection 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.

⁹ Previously the Office of Tourism, Trade, and Economic Development (OTTED) within the Executive Office of the Governor was listed as an economic development agency. However, ch. 2011-142, L.O.F., abolished OTTED and amended s. 288.075, F.S. See s. 148, ch. 2011-142, L.O.F. The Division of Strategic Business Development is the division within the Department of Economic Opportunity that is responsible for many of OTTED’s functions and responsibilities.

¹⁰ Space Florida is an Independent Special District of the State of Florida, created by part II of ch. 331, F.S., for the purposes of fostering the growth and development of a sustainable and world-leading space industry in Florida. See Space Florida’s website, available at <http://www.spaceflorida.gov/>. Site last visited Oct. 21, 2011.

¹¹ This refers to entities such as Enterprise Florida, Inc., and public private partnerships that work with local governments, also known as economic development organization.

¹² This definition was created in 2007 by ch. 2007-203, L.O.F., as part of the recommendations of Interim Project Report 2007-103 (October 2006). See FN 3.

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

Section 288.075(7), F.S., states that any person who is an employee of an economic development agency who violates the provisions of this section commits a second-degree misdemeanor, punishable by a maximum penalty of 60 days in jail and a \$500 fine.

General Background on Florida's Public Records and Public Meetings Laws

Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹³ 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.¹⁴

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,¹⁵ 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 agency¹⁶ 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,

¹³ Sections 1390 and 1391, F.S. (Rev. 1892)

¹⁴ Article I, s. 24, of the State Constitution.

¹⁵ Chapter 119, F.S.

¹⁶ 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.”¹⁷

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.¹⁸ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁹

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Art. III, s. 4(e), of the State Constitution, except with respect to meetings exempted pursuant to this section or specifically closed by the Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.²⁰ 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.²¹ A bill enacting an exemption²² may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.²³

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.²⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.²⁵

The Open Government Sunset Review Act (the act)²⁶ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the

¹⁷ Section 119.011(12), F.S.

¹⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹⁹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

²⁰ Article I, s. 24(c), of the State Constitution.

²¹ *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).

²² Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

²³ Article I, s. 24(c) of the State Constitution.

²⁴ Attorney General Opinion 85-62.

²⁵ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁶ Section 119.15, F.S.

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:

- 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.²⁷

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?²⁸

While the standards in the act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²⁹ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

“... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this

²⁷ Section 119.15(6)(b), F.S.

²⁸ Section 119.15(6)(a), F.S.

²⁹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.”

III. **Effect of Proposed Changes:**

SPB 7014 implements the recommendations in Senate Interim Report 2012-302.

Section 1: Removes the scheduled repeal date of October 2, 2012, in s. 288.075, F.S.

Section 2: Specifies the bill takes effect upon becoming a law.

SPB 7014 requires passage by a two-thirds vote of the Senate and the House of Representatives, of the members present and voting, in order to become 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 7014 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 proposed committee bill 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.)

None.

B. Amendments:

None.