

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 Regulated Industries Committee

BILL: SB 714

INTRODUCER: Senator Bogdanoff

SUBJECT: Public Records/State Gaming Commission

DATE: January 5, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Pre-meeting
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The Florida Constitution and the Florida Statutes ensure public access to documents received and maintained by government agencies as part of their official duties. However, the Legislature may exempt agency documents from public access. An exemption must be created by a general law specifically stating the public necessity justifying the exemption. Further, an exemption must be no broader than necessary to accomplish the stated purpose of the law.

This bill creates a public-records exemption for the State Gaming Commission (commission). The commission is created in SB 710, a linked companion bill. Proprietary confidential business information and trade secrets that might be part of the applications submitted to the commission by prospective destination resorts, or other documents submitted by licensed destination resorts in the future, would be confidential and exempt from public disclosure.

Additionally, the investigative techniques and procedures to be used by the commission when evaluating the applications, reviewing a destination resort's regulatory compliance, or collecting data, records, and testimony for the purpose of documenting violations at a destination resort would be confidential and exempt from public disclosure.

The bill also specifies that there is a public necessity for the exemptions in order to ensure that the best qualified applicants for a destination resort are not deterred from applying because of confidentiality concerns, and to aid the commission in conducting investigations.

This bill requires a two-thirds vote of the membership of each house of the Legislature for passage.

The bill creates section 551.303, Florida Statutes.

II. Present Situation:

Florida's Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24(a), of the State Constitution provides:

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 Florida Constitution, the Public Records Law,¹ which predates the constitutional provisions, specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental 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 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.

Unless specifically exempted, all agency² records are available for public inspection. The term "public records" is defined in s. 119.011(12), F.S., to include:

[A]ll 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 the official business by any agency.

¹Chapter 119, F.S.

²The term "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."

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.³ Unless these materials have been made exempt by the Legislature, they are open for public inspection.

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.⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁹

Trade Secrets

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 Act¹⁰ and is found in s. 688.002(4), F.S. That section defines “trade secret” to mean:

[I]nformation, 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:

[T]he 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

³ *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ Fla. AGO 85-62 (August 1, 1985).

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

⁶ Article I, s. 24(c), Florida Constitution.

⁷ *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).

⁸ Under s. 119.15(4), F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Art. I, s. 24(c), Florida Constitution.

¹⁰ Section 688.001, F.S.

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.¹¹ 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.

Open Government Sunset Review Act

The Open Government Sunset Review Act (act) in s. 119.15, F.S., provides a process for the review, and repeal or reenactment of, public records exemptions.¹² Under Florida law, a new exemption or substantial amendment to an existing exemption shall be repealed on October 2nd of the 5th year after enactment, unless the Legislature acts to reenact the exemption.¹³ By June 1 of each year, 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.¹⁴

State Gaming Commission

SB 710, the linked companion to SB 714, creates the Department of Gaming Control (department). The head of the department is the State Gaming Commission (commission). The commission is authorized to license up to three “destination resorts” and to regulate those facilities, along with other gaming activities that occur throughout the state, including pari-mutuel wagering activities. Among its powers and duties, the commission will have the authority to accept and review applications for destination resorts; license a total of three destination resorts; inspect the resorts’ premises and gaming machines; and conduct investigations and issue subpoenas, as necessary, to gather information essential to licensing and regulating the destination resorts.

¹¹ Section 288.075, F.S.

¹² This act applies to exemptions from s. 24, Art. I, of the State Constitution and s. 119.07(1), F.S., or s. 286.011, F.S.

¹³ Section 119.15(3), F.S.

¹⁴ Section 119.15(5)(a), F.S.

A destination resort is defined in the companion bill as a multi-use, free-standing, land-based structure in which limited gaming may be conducted, and may include a combination of tourism amenities, such as hotels, restaurants, attractions, shopping centers, and convention centers. The types of gaming that may be offered at destination resorts include baccarat, roulette, poker and other card games, craps, slot machines, and video gaming.

The initial application fee is \$50 million, and licensed destination resorts must pay an annual \$2 million renewal fee. Destination resorts must invest a minimum of \$2 billion in new development and construction for the resort, excluding the purchase price and costs associated with the acquisition of any real property. In addition, destination resorts must pay a 10 percent tax on its gross receipts from all gaming activities.

III. Effect of Proposed Changes:

This bill creates a public records exemption for certain information received, and investigative techniques and procedures used, by the State Gaming Commission. The proposed statute is modeled after exemption language in s. 288.075, F.S., for economic development agencies.

Section 1 creates s. 551.303, F.S., to provide a public records exemption for the commission for specific categories of information, defines terms, creates penalties, and establishes its review date per statutory requirement.

Defined are the following terms:

- “Proprietary confidential business information” means:
 - Information that is owned or controlled by an applicant for a license or licensee under the Destination Resort Act who requests confidentiality under this section;
 - That is intended to be and is treated by the applicant or licensee as private in that the disclosure of the information would cause harm to the business operations of the applicant or licensee;
 - That has not been disclosed unless disclosed pursuant to a statute or rule, 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;
 - Internal auditing controls and reports of internal auditors; or
 - Reports of external auditors for privately held companies.
- “Trade secrets” as defined in s. 688.002, F.S.; and
- “Investigation techniques and procedures” means the methods, processes, and guidelines used to evaluate regulatory compliance and to collect and analyze data, records, and testimony for the purpose of documenting violations of the Destination Resort Act and any promulgated rules to implement it.

This bill specifies that proprietary confidential business information, trade secrets, and the commission’s investigative techniques and procedures, as defined in the bill, are confidential and exempt, as are information shared by other regulatory agencies, the federal employer identification number, unemployment compensation account number, or Florida sales tax

registration number held by the commission in the course of receiving and reviewing applications, or conducting investigations.

Any employee of the commission who violates the public records exemptions created in the bill has committed a misdemeanor of the second degree, punishable by a maximum 60 days in jail¹⁵ and a \$500 fine.¹⁶

These exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and are repealed on October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 expresses the required Statement of Public Necessity for the public records exemptions sought for the proposed State Gaming Commission.

A number of findings are expressed in this section about the public necessity of keeping certain information, investigative techniques, and procedures confidential and exempt. Briefly, the Legislature finds that the exemptions are necessary to:

- Ensure that the best-qualified applicants are not deterred from applying for destination resort licenses by the prospect of the disclosure of proprietary confidential business information and trade secrets.
- Protect the competitive process the commission will use to select the licensees. Selection of the best-qualified applicants for licenses is critical to ensure that the state receives the most economic benefits and greatest amount of tax revenues in granting these licenses.
- Ensure the commission's ability to effectively and efficiently enforce compliance with the Destination Resort Act, which would be significantly impaired without the exemption.
- Prevent the commission's investigations from being compromised by the release of sensitive information relating to investigations from other regulators.

Section 3 provides that this act becomes effective on the same date as SB 710 or similar legislation takes effect, if such legislation is enacted in the same legislative session, or an extension thereof, and becomes law, and only if this act is enacted by a two-thirds vote of the membership of each house of the Legislature.

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 each chamber of the Legislature for passage of a newly created or expanded public-records or public-

¹⁵ Section 775.082(4)(b), F.S.

¹⁶ Section 775.083(1)(e), F.S.

meetings exemption. Since SB 714 creates a new public-records exemption, it will require a two-thirds vote of each chamber of the Legislature for passage.

Statement of Public Necessity

Section 24(c), Art. I, of the State Constitution requires a statement of public necessity for a newly-created or expanded public-records or public-meetings exemption. Section 3 of this bill provides a statement of public necessity for the new public record exemptions proposed therein.

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:

The bill provides public records exemptions for the State Gaming Commission when the exemption is necessary for the Department of Gaming Control. Senate staff have been informed that this will be corrected through an amendment.

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.