

**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.)

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Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

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BILL: SB 714

INTRODUCER: Senator Simmons

SUBJECT: Public Records/Proprietary Confidential Business Information

DATE: March 4, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Geeker/Wiehle	Caldwell	CU	<b>Pre-meeting</b>
2.			GO	
3.			RC	
4.				
5.				
6.				

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**I. Summary:**

SB 714 creates a new subsection of the Florida Statutes that defines proprietary confidential business information, as the term is defined in s. 366.093(3), F.S. The bill creates a public records exemption for proprietary confidential business information received by a municipal electric utility in conjunction with a due diligence review and allows this information to be returned to the entity after the due diligence review is completed.

The bill also states that the public necessity for the exemption pertains to the inability of a municipal electric utility to otherwise operate efficiently with a partnership that can improve the delivery, cost, or diversification of fuel or renewable energy resources.

This bill substantially amends s. 119.0713 of the Florida Statutes.

**II. Present Situation:**

**Public Access**

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.

**Section 24(a), Art. I, State Constitution**

Section 24(a), Art. I of the State Constitution provides the following:

(a) Every person has the right to inspect or copy any public records 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.

### **Florida's Public Records Law**

Florida's public records law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record<sup>1</sup> must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency<sup>2</sup> records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of public records to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."<sup>3</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>4</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>5</sup> 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.<sup>6</sup> A bill enacting an exemption<sup>7</sup> may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.<sup>8</sup>

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

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<sup>1</sup> s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

<sup>2</sup> s. 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

<sup>3</sup> *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

<sup>5</sup> Article I, s. 24(c) of the State Constitution.

<sup>6</sup> *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).

<sup>7</sup> s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>8</sup> Article 1, s. 24(c) of the State Constitution

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 entities designated in the statute.<sup>9</sup> If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>10</sup>

### **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 Joint Legislative Management Committee 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 the 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.

### **Information from First Amendment Foundation**

Pursuant to a telephone conversation with Barbara Petersen, President of The First Amendment Foundation, the foundation has two issues with the bill as drafted. First, the term “proprietary confidential business information” is defined by cross-reference and not specifically stated. Second, the foundation requested that a utility hold the information for one year.

### **Local Government Agency Exemptions from Inspection or Copying of Public Records**

The three types of electric utilities defined in s. 366.02(2), F.S., are the municipal electric utility, investor-owned electric utility, and rural electric cooperative. Any records produced or held by

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<sup>9</sup> Attorney General Opinion 85-62, August 1, 1985.

<sup>10</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d. 289 (Fla. 1991).

investor-owned utilities or rural electric cooperatives are unaffected by public records law, as both are privately owned. Municipal utilities, however, are owned by a municipality and their records are subject to public records law. Section 119.0713, F.S., provides public records exemptions for local government agencies. It includes an exemption for a municipally-owned utility pertaining to any data, record, or document used directly or solely by the utility to prepare and submit a bid relative to the sale, distribution, or use of any service, commodity, or tangible personal property to any customer or prospective customer.

### **Florida Interlocal Cooperation Act of 1969**

The Florida Interlocal Cooperation Act of 1969 is found in s. 163.01, F.S. This section permits local governmental entities to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities. Paragraph (3)(d) defines the term “electric project” to mean: any plant, together with all parts thereof and appurtenances thereto; any interest in, or right to, the use of any such plant; and any study to determine the feasibility or costs of any plant.

### **Public Utility Records; Confidentiality**

Section 366.093, F.S., provides for confidentiality of public records. Proprietary confidential business information, as defined in paragraph (3), is information regardless of form or characteristics, which is owned or controlled by a person or company, is intended to be and is treated by a person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person’s or company’s business operations. Proprietary confidential business information includes: trade secrets; internal auditing controls and reports of internal auditors; security measures, systems, or procedures; information concerning bids or other contractual data, the disclosure of which would impair the competitive business of the provider of the information; and employee personnel information unrelated to compensations, duties, qualifications, or responsibilities.

## **III. Effect of Proposed Changes:**

**Section 1** creates a public records exemption for proprietary confidential business information received by an electric utility and defines the term, by cross reference to s. 366.093, F.S. The definition requires that to be exempt from public records disclosure, proprietary confidential business information must:

- Meet the definition as given in s. 366.093(3), F.S.;
- Be provided by a private or out-of-state entity to an electric utility that is subject to chapter 119, F.S. and;
- Be provided in conjunction with a due diligence review of either:
  - An electric project as defined in s. 163.01(3)(d), F.S., or
  - A project to improve the delivery, cost, or diversification of fuel or renewable energy resources.

Section 1 also requires that all proprietary confidential business information be returned to the custody of the person or entity providing the information after the due diligence review has been completed or once the utility has decided whether or not to participate in the project.

The bill provides that the exemption stands repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature through the Open Government Sunset Review Act.

**Section 2** sets forth the public necessity of ensuring exemption and confidentiality of proprietary confidential business information belonging to a private or out-of-state entity and given to an electric utility in the event that they enter into an electric project or partnership. Disclosure of any proprietary confidential business information under the public records law could destroy the value of the information provided by the private entity by giving its competitors detailed insights into its financial status and strategic plans, and cause economic harm not only to the entity or person providing the information, but ratepayers and electric utilities as well. The ratepayers would be at a disadvantage by being deprived of opportunities for rate reductions or improvements to their utility services. The electric utilities would also have limited opportunities to find cost-effective solutions in providing electric services and improving the delivery, cost, or diversification of fuel or renewable energy to its customers. As a result, public and private harm in the disclosure of such information would far outweigh any benefit of the public disclosure of proprietary confidential business information. This bill will allow electric utilities to expand and enhance their energy capabilities, which in turn may allow them to provide optimal services to their customers, the ratepayers.

**Section 3** provides that the act take effect on July 1, 2013.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

The requirement of Article I, s. 24(c) of the State Constitution and s. 119.15, F.S. are met in that the public records exemption contained in s. 119.0713(4), F.S.:

- Serves an identifiable public purpose in that it:
  - Protects information of a confidential nature concerning entities, including, but not limited to, a 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 that affected entity in the marketplace, and
  - Allows government-owned electric utilities to effectively and efficiently administer services to their ratepayers, providing an electric project would potentially improve the delivery, cost, or diversification of fuel or renewable energy that a utility can provide, whereas administration would be significantly impaired without the exemption;

- The exemption is no broader than is necessary to meet the public purpose it serves; and
- The purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public will not have access to proprietary confidential business information received by a government-owned electric utility. Out-of-state energy generators and other technology providers will be more inclined to enter into public-private partnerships in Florida; to the extent that such electric partnerships would potentially improve the delivery, cost, or diversification of fuel or renewable energy so that government-owned electric utilities and their customers may benefit.

C. Government Sector Impact:

Electric utilities that are government owned will be able to obtain information and negotiate with private companies or other entities.

**VI. Technical Deficiencies:**

SB 714 appears to have several technical deficiencies.

The first deficiency is found on line 28 where the language states that, “a project to improve the delivery, cost, or diversification of fuel or renewable energy resources is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.” The legislative intent in line 47 states that proprietary confidential business information should be *confidential and exempt*, which is inconsistent with line 28, where the language does not reflect the necessity that the information be both confidential and exempt.

The second deficiency is found on line 79 where the term “propriety” is used, and where the term should be “proprietary.”

**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.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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