

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 745 Pub. Rec./Fracturing Chemical Usage Disclosure Act

**SPONSOR(S):** Rodrigues

**TIED BILLS:** HB 743 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	11 Y, 0 N	Renner	Blalock
2) Government Operations Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

Article I, s. 24(a) of the State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Hydraulic fracturing (fracking) is the use of fluid and material to create or restore fractures in a formation in order to stimulate production from new and existing oil and gas wells. The composition of a fracturing fluid varies with the nature of the formation, but typically contains mostly water, a proppant to keep the fractures open such as sand, and a small percentage of chemical additives. The number of chemical additives used in a typical fracture treatment varies depending on the conditions of the specific oil and gas well.

Currently, there is no federal law or regulation that requires the disclosure of the chemicals added to the fluid used in hydraulic fracturing. In May, 2012, the Bureau of Land Management published a proposed rule that would require disclosure of the content of fracturing fluids used on lands managed by the agency. Of the states that produce oil, natural gas, or both, at least 15 require some disclosure of information about the chemicals added to the hydraulic fracturing fluid used to stimulate a particular well. There is no hydraulic fracturing being carried out in Florida.

The bill provides a public records exemption for information obtained relating to the hydraulic fracturing chemical reporting and disclosure requirements if persons who provided the information also provide suitable proof to the Division of Resource Management (Division) within the Department of Environmental Protection (DEP) that such information contains trade secrets as defined by Florida law.

The bill provides that such trade secrets are confidential and exempt from public records requirements. The person submitting the trade secret information to the Division must request it be kept confidential and exempt and provide a basis to the Division for the claim of trade secret. The Division must determine the validity of the claim of the information being a trade secret.

The bill provides that such trade secrets may be disclosed to authorized representatives of the Division or, pursuant to request, other governmental entities in order for them to properly perform their duties, or when relevant, in any proceeding relating to hydraulic fracturing treatments. Authorized representatives and other governmental entities receiving such trade secrets must maintain the confidentiality of such information. This includes those involved in any proceeding relating to hydraulic fracturing treatments, including an administrative law judge, a hearing officer, or a judge or justice.

The bill provides that this public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

**Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record of public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

##### **Hydraulic Fracturing Chemical Registry**

HB 743 instructs the Division of Resource Management (Division) within the Department of Environmental Protection to establish and maintain an online hydraulic fracturing chemical registry for all wells on which hydraulic fracturing treatments are performed. The registry must include, at a minimum, the total volume of water used in the hydraulic fracturing treatment and each chemical ingredient that is subject to 29 C.F.R. s. 1910.1200(g)(2),<sup>1</sup> for each well on which hydraulic fracturing treatments are performed, as provided by a service company or chemical supplier, or by the well owner or operator if the owner or operator provides such chemical ingredients. The Division may not require chemical ingredients to be identified by concentration or based on the additive in which they are found.

The registry and the information provided must be accessible to the public through the Division's website. The owner or operator of a well on which a hydraulic fracturing treatment is performed must report information as required by the Division and notify the Division of any chemical ingredients not previously reported that are intentionally included and used for the purpose of creating a hydraulic fracturing treatment for the well.

Service companies that perform hydraulic fracturing treatments on a well or a supplier of an additive used in a hydraulic fracturing treatment on a well must disclose the chemical ingredients used to perform the treatment to the owner or operator of the well.

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<sup>1</sup> 29 C.F.R. s. 1910.1200(g)(2) provides that material safety data sheets are required for each hazardous chemical in the workplace and that the sheets be in English and contain specific information.

The reporting and disclosure requirements in the bill do not apply to ingredients that:

- Were not purposefully added to the hydraulic fracturing treatment.
- Occur incidentally or are otherwise unintentionally present in the treatment.
- Are not disclosed to the well owner or operator by a service company or supplier.

### **Effect of Proposed Changes**

The bill provides a public records exemption for information obtained relating to the hydraulic fracturing chemical reporting and disclosure requirements if persons who provided the information also provides suitable proof to the Division of Resource Management (Division) within the Department of Environmental Protection (DEP) that such information contains trade secrets as defined by Florida law.

The bill provides that such trade secrets are confidential and exempt from public records requirements. The person submitting the trade secret information to the Division must request it be kept confidential and exempt and provide a basis to the Division for the claim of trade secret. The Division must determine the validity of the claim of the information being a trade secret.

The bill provides that such trade secrets may be disclosed to authorized representatives of the Division or, pursuant to request, other governmental entities in order for them to properly perform their duties, or when relevant in any proceeding relating to hydraulic fracturing treatments. Authorized representatives and other governmental entities receiving such trade secrets must maintain the confidentiality of such information. This includes those involved in any proceeding relating to hydraulic fracturing treatments, including an administrative law judge, a hearing officer, or a judge or justice.

The bill provides that this public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

#### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 377.45, F.S., providing an exemption from the public records requirement for trade secrets contained within information relating to hydraulic fracturing treatments obtained by the Division of Resource Management of the Department of Environmental Protection in connection with the Division's online hydraulic fracturing chemical registry; providing procedures and requirements with respect to the granting of confidential and exempt status; providing for disclosure under specified circumstances; and, providing for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.

**Section 2:** Providing a statement of public necessity.

**Section 3:** Providing a contingent effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None

2. Expenditures:

None

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None

2. Expenditures:

None

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None

**D. FISCAL COMMENTS:**

None

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county of municipal governments.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a current public records exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it includes a public necessity statement.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or require additional rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Other Comments: Retroactive Application

The Supreme Court of Florida rules that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively.<sup>2</sup> The bill does not contain a provision requiring retroactive application. As such, the public record exemption would apply prospectively.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None

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<sup>2</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001)