

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

SPONSOR(S): Government Operations Subcommittee; Rodrigues

TIED BILLS: CS/HB 743 **IDEN./SIM. BILLS:** SB 1028

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	11 Y, 0 N	Renner	Blalock
2) Government Operations Subcommittee	11 Y, 0 N, As CS	Stramski	Williamson
3) State Affairs Committee	15 Y, 0 N	Renner	Camechis

SUMMARY ANALYSIS

CS/HB 743 directs the Department of Environmental Protection (DEP) to establish and maintain an online hydraulic fracturing chemical registry for all wells on which hydraulic fracturing treatments are performed. The registry and the information provided must be accessible to the public through DEP's website. The owner or operator of a well on which a hydraulic fracturing treatment is performed must report information as required by DEP and notify DEP 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.

The bill, which is linked to the passage of HB 743 or similar legislation, creates a public records exemption for trade secrets relating to hydraulic fracturing treatments held by DEP in connection with the online hydraulic fracturing chemical registry.

The person submitting trade secret information to DEP who wishes to maintain confidentiality of that information must request that the information be kept confidential and exempt, provide a basis to DEP for the claim of trade secret, and clearly mark each portion of a document containing information claimed to be a trade secret as "trade secret." If DEP receives a public records request for information claimed as a trade secret under this bill, DEP must promptly notify the person who submitted the information. That person then has 30 days to file a court action to seek an order barring disclosure of the information. DEP may not release the information if any such action is pending. Failure to file an action within 30 days constitutes a waiver of any claim to confidentiality.

Confidential and exempt trade secrets may be disclosed to another governmental entity in order for such entity to properly perform its statutory duties and responsibilities. In addition, such trade secrets may be disclosed, when relevant, in any proceeding relating to hydraulic fracturing treatments.

The bill provides that the 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. It 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. This 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.¹

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 Act² 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.

House Bill 743, Hydraulic Fracturing Chemical Registry

CS/HB 743 (2013) directs the Department of Environmental Protection (DEP) 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)³, for each well on which hydraulic fracturing treatments are performed by a service provider or vendor, or by the well owner or operator if the owner or operator provides such chemical ingredients. Solely for the purpose of s. 377.45(1), F.S., DEP may not require chemical ingredients to be identified by concentration or based on the additive in which they are found. DEP must provide a link through DEP's website to FracFocus.org, the national hydraulic fracturing chemical registry website, operated by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. If the chemical disclosure registry is unable to accept and make publicly available any information, the operator must submit the information, required in this Act, to DEP.

The service provider, vendor, or owner or operator of a well on which a hydraulic fracturing treatment is performed must report information as required by DEP and notify DEP 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.

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ 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.

Effect of Proposed Changes

The bill, which is linked to the passage of HB 743 or similar legislation, creates a public records exemption for trade secrets⁴ relating to hydraulic fracturing treatments held by DEP in connection with the online hydraulic fracturing chemical registry. The bill provides that such trade secrets are confidential and exempt⁵ from public records requirements.

A person submitting trade secret information to DEP who wishes to maintain confidentiality of such information must request that it be kept confidential and exempt, provide a basis to DEP for the claim of trade secret, and clearly mark each portion of a document containing information claimed to be a trade secret as “trade secret.” If DEP receives a public records request for a document that is marked trade secret, DEP must promptly notify the person who submitted the information as a trade secret. The notice must inform such person that the person has 30 days following receipt of the notice to file an action in circuit court seeking a determination whether the information in question contains trade secrets and an order barring public disclosure of the information. If the person files an action within 30 days after receipt of the notice, DEP may not release the documents pending the outcome of the legal action. Failure to file an action within 30 days constitutes a waiver of any claim of confidentiality.

Confidential and exempt trade secrets may be disclosed to another governmental entity in order for such entity to properly perform its statutory duties and responsibilities. In addition, such trade secrets may be disclosed, when relevant, in any proceeding relating to hydraulic fracturing treatments. Those involved in any proceeding relating to hydraulic fracturing treatments, including an administrative law judge, a hearing officer, or a judge or justice, must maintain the confidentiality of any trade secret information released at such proceeding.

The bill provides that the 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. It also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

⁴ The bill provides that the public records exemption applies to trade secrets as defined in s. 812.081(1)(c), F.S. That paragraph defines the term “trade secret” to mean the 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 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.

⁵ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

Section 1: Amends s. 377.45, F.S., providing an exemption from public records requirements for trade secrets relating to hydraulic fracturing treatments held by DEP in connection with the department's online hydraulic fracturing chemical registry; providing procedures and requirements with respect to maintaining the confidentiality of trade secrets; 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: Provides a statement of public necessity.

Section 3: Provides a contingent effective date to match the effective date of HB 743 or similar legislation, if such legislation is adopted in the same legislative session and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on DEP, because staff responsible for complying with public records requests could require training related to creation of the public records exemption. In addition, DEP could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the department.

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 creates a 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.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to information submitted to DEP that is a trade secret. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

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 ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such.⁶ The bill does not contain a provision requiring retroactive application. As such, the public records exemption would apply prospectively.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2013, the Government Operations Subcommittee adopted a strike-all amendment to House Bill 745 and reported the bill favorably with committee substitute.

The committee substitute removes the requirement that DEP make a determination, subject to notice and hearing, of whether information submitted to DEP pursuant to CS/HB 743 is a trade secret. Instead, it creates a process for a person submitting trade secret information to follow if they want the public record exemption to apply. It also provides a process for DEP to follow when a public records request is made for confidential and exempt trade secrets, including notifying the person who submitted such trade secrets and requiring that person to file a court action to seek an order barring disclosure of the trade secrets within a certain period of time. Failure to file an action within the specified period of time constitutes a waiver of any claim to confidentiality.

The strike-all amendment also removes references to the Division of Resource Management, because such division does not exist.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.

⁶ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001)