

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 Committee on Gaming

BILL: SPB 7054

INTRODUCER: For consideration by the Gaming Committee

SUBJECT: Public Records/Gaming Control

DATE: February 28, 2014

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Kraemer</u>	<u>Guthrie</u>	_____	Pre-meeting

I. Summary:

SPB 7054 creates a public records exemption for proprietary confidential business information submitted in an application for licensure or renewal by a destination casino resort owner/operator, supplier, or manufacturer. It is linked to SPB 7052, which authorizes a newly created Gaming Control Board, through a competitive “invitation to negotiate” process, to license one destination casino resort in Miami-Dade County and one in Broward County. The exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2019, unless reviewed and saved from repeal by the Legislature.

As required by the State Constitution, the bill contains a statement of public necessity and must be passed by a two-thirds vote of each house.

The bill is not anticipated to have a significant fiscal impact on state funds.

II. Present Situation:

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person’s right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable

¹ Fla. Const., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines “public records” to mean “all 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

conditions, and under supervision by the custodian of the public records.⁵ However, under separation of powers principles, neither the Legislature nor the judiciary is an “agency” for purposes of the Public Records Act.⁶ There is a distinction between records designated by law as exempt from disclosure and those designated as *confidential and exempt*. A record classified as confidential and exempt from public disclosure is not subject to inspection by the public⁷

Only the Legislature may create an exemption to public records requirements.⁸ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁰

The Open Government Sunset Review Act (act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹² The act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹³

The term “trade secret” is defined in the Florida Statutes in several contexts. In the Uniform Trade Secrets Act, ch. 688.001-688.009, trade secret is defined as information which is maintained with reasonable secrecy, and consisting of a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value from not being generally known and not being readily ascertainable.¹⁴

A more detailed definition for trade secret is applicable to prosecutions for stolen, embezzled, or copied information:

“Trade secret” means 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

of official business by any agency.” Section 119.011(2), F.S., defines “agency” to mean as “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.”

⁵ Section 119.07(1)(a), F.S.

⁶ See, e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995) and (*Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

⁷ See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004).

⁸ Fla. Const., art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ Section 688.004, F.S.

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.¹⁵

There are a number of exemptions for “trade secrets” from the Public Records Act,¹⁶ as well as for certain proprietary confidential business information submitted to and held by certain agencies.¹⁷

Section 624.4213, F.S., details a specific procedure for a person to claim that a portion of a submission to the Department of Financial Services, the Financial Services Commission, or the Office of Insurance Regulation of the Financial Services Commission contains a trade secret. Each such page must be marked as a trade secret. All such material must be segregated in a separate envelope, with a certificate under oath. The procedure to be followed if there is a public records request puts the obligation to file an action in court to bar disclosure of requested material on the person who submitted it.

There are similar requirements and procedures for information claimed to be proprietary confidential business information.¹⁸

III. Effect of Proposed Changes:

The bill creates a public records exemption for proprietary confidential business information submitted in an application for licensure or renewal by a destination casino resort owner/operator, supplier, or manufacturer. It is linked to SPB 7052, which authorizes a newly created Gaming Control Board, through a competitive “invitation to negotiate” process, to license one destination casino resort in Miami-Dade County and one in Broward County.

The bill provides that proprietary confidential business information will be confidential and exempt from public disclosure if an applicant:

- Requests that proprietary confidential business information submitted in an application for licensure or renewal be confidential and exempt from inspection and copying;

¹⁵ Section 812.081(1)(c), F.S.

¹⁶ Office of Attorney General Pam Bondi, *Government in the Sunshine Manual*, pages 132-133 (2014).

¹⁷ *Id.* at pages 134-134.

¹⁸ See, e.g. s. 288.075, F.S., (Department of Economic Opportunity and other economic development agencies), s. 288.9626, F.S., (the Florida Opportunity Fund defined in s. 288.9623, F.S.), and ss. 364.183, 366.093, 367.156, and 368.108, F.S. (the Public Service Commission).

- Describes the basis for the claim; and
- Marks each page or portion of a document containing information claimed to be proprietary confidential business information.

The term “proprietary confidential business information” is defined as information that is treated by applicants as private which, if disclosed would cause harm to business operations and which has not been disclosed previously except pursuant to a statutory provision, a court or administrative order, or a private agreement that provides that the information will not be released to the public. The term is defined to include, but is not limited to:

- Trade secrets;
- Business plans;
- Internal auditing controls and reports of internal auditors;
- Security measures, systems, or procedures; and
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the person providing the information.

The bill provides that if there is a public records request, the Department of Gaming Control must notify the applicant/licensee, who within 30 days must file a circuit court action to bar disclosure. Pending the outcome, the Department of Gaming Control may not disclose the proprietary confidential business information. Failure by the applicant/licensee to file a circuit court action within 30 days constitutes a waiver of any claim of confidentiality.

The bill provides that proprietary confidential business information may be disclosed to government employees performing official duties or to a hearing officer or judge involved in a proceeding relating to disclosure.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature.

The statement of public necessity as required by the Florida Constitution is the advantage given to competitors if an applicant or licensee’s financial status and business plan is made public, thereby putting the applicant or licensee at a disadvantage.

The bill’s effective date is on the same date that SPB 7052 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:**Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public records or open meetings exemption to pass by a two-thirds vote of the members present and voting in each house of the Legislature. This bill creates a public records exemption, and a two-thirds vote in each house is required.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain a public necessity statement. This bill contains a public necessity statement.

Single Subject Requirement

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain no other substantive provisions. This bill contains no other substantive provisions.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public records or open meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. This bill creates a public records exemption by allowing specified applicants for licensure or renewal associated with a destination casino resort to mark specific pages or portions of pages of an application as proprietary confidential business information. If a public records request is made for such information, the applicant/licensee bears the burden to seek a circuit court order to: (1) determine the records in question to be proprietary confidential business information, and (2) bar disclosure.

The public necessity statement provides that the exemption is necessary to prevent a competitive disadvantage to applicants for license or license renewal as a destination casino resort, or supplier or manufacturer associated with destination casino resorts. The public necessity statement further provides that harm to applicants significantly outweighs any public benefit derived from disclosure.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill allows certain applicants and licensees associated with destination casino resorts to request that proprietary confidential business information submitted in their license applications or renewal applications be confidential and exempt from inspection and copying. The applicants and licensees must mark each page or portion of a document containing information claimed to be propriety confidential business information in order to claim the exemption.

C. Government Sector Impact:

The bill will create an impact on the staff handling applications for licenses or renewals submitted by persons associated with destination casino resorts. Staff responsible for complying with public records requests will require training related to the exemption. The cost will be absorbed as are part of the day-to-day responsibilities of the department. The bill also will create an indeterminate impact on circuit courts hearing cases relating to public records disclosure of documents claimed as propriety confidential business information.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 551.427 of the Florida Statutes:

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.