

**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 Governmental Oversight and Accountability

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BILL: SB 7006

INTRODUCER: Environment and Natural Resources Committee

SUBJECT: OGSR/Trade Secrets/Department of Environmental Protection

DATE: March 29, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Anderson</u>	<u>Rogers</u>		<b>EN Submitted as Committee Bill</b>
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
2.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 7006 saves from repeal the public records exemption relating to trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection (DEP) under part IV of ch. 403, F.S., which regulates solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste.

The bill continues to maintain this trade secret information as confidential and exempt from public inspection and copying. These confidential records may be disclosed to authorized representatives of DEP or, pursuant to request, to other governmental entities in order for them to properly perform their duties, when relevant to a proceeding involving the regulation of solid waste management and recycling, provided the authorized representative or governmental entity retains confidentiality.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 403.73, F.S., is scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” 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.”

<sup>6</sup> Section 119.011(12), F.S., defines “public record” 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 of official business by any agency.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>18</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>26</sup>

### **Confidentiality of Trade Secrets Contained in Information Submitted to DEP Under Part IV of Ch. 403, F.S.**

Part IV of ch. 403, F.S., governs solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste. Section 403.73, F.S., provides a public record exemption for trade secrets<sup>27</sup> contained in records, reports, or information submitted to the Department of Environmental Protection (DEP) under part IV of ch. 403, F.S. The exemption also requires persons submitting trade secret information to the DEP to request that such information be kept confidential and inform the DEP of the basis for the

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<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</sup> Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 812.081, F.S. defines "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.

claim of trade secret.<sup>28</sup> The DEP then is required to, subject to notice and an opportunity for hearing, determine whether the information, or any portion thereof, is or is not a trade secret.<sup>29</sup>

The DEP may disclose information made confidential and exempt to authorized representatives of the DEP or, pursuant to request, to another state or federal government entity if disclosure is necessary for the receiving entity to perform its duties or responsibilities or when relevant to any proceeding in ch. 403, F.S.<sup>30</sup> Those involved in a proceeding may include an administrative law judge, a hearing officer, or a judge or justice.

Section 403.73, F.S., provides for future review and repeal of the public records exemption on October 2, 2021.

In 2016, the definition of “trade secret” in s. 812.081, F.S., was expanded to include financial information. As a result, the public record exemption in s. 403.73, F.S., was reenacted to include the new definition of “trade secret” and is subject to the Act.<sup>31</sup>

Chapter 2016-6, Laws of Florida, reenacted the exemption for public record disclosure requirements for trade secret information contained in records, reports, or information submitted to the DEP under part IV of ch. 403, F.S. Chapter 2016-6, Laws of Florida, included a public necessity statement that provided a rationale for the exemption, which recognized that, in many instances, businesses are required to provide financial information for regulatory or other purposes to public entities and that disclosure of such information to competitors of those businesses would be detrimental to the businesses.<sup>32</sup> The Legislature stated its intent to protect trade secret information of a confidential nature which includes, but is not limited to, a formula, a pattern, a device, a combination of devices, or a compilation of information used to protect or further a business advantage over those who do not know or use the information, the disclosure of which would injure the affected business in the marketplace.<sup>33</sup>

### **Open Government Sunset Review Findings and Recommendations**

In July 2020, the Senate Environment and Natural Resources Committee and the House Oversight, Transparency & Public Management Subcommittee sent an Open Government Sunset Review Questionnaire to the DEP regarding the exemption for trade secrets contained in records, reports, or information submitted to the DEP under part IV of ch. 403, F.S.

The DEP responded to the questionnaire but did not take a position on whether the exemption should remain in effect to protect the trade secret information it obtains. The DEP estimates that under five percent of the records and reports it receives are affected by the exemption for trade

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<sup>28</sup> Section 403.73(1), F.S.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Section 119.15, F.S.

<sup>32</sup> Ch. 2016-6, Laws of Fla.

<sup>33</sup> Ch. 2016-6, Laws of Fla.

secrets under s. 403.73, F.S., and under one percent of the records and reports contain financial information claimed to be trade secrets.<sup>34</sup>

The DEP stated that the information typically contained in records and reports it receives includes, “[p]ermit application[s], engineering report[s], foundation and stability calculations, site plans, hydrogeological and geotechnical reports, design and construction drawings, groundwater monitoring plan[s], operation plan[s] including details on operating procedures, processes and contingency plans, gas monitoring, landfill/facility design and construction details, technical specifications, Construction Quality Assurance plans, cost estimates for closure and long-term care, financial mechanisms, and groundwater and landfill gas monitoring results.”<sup>35</sup>

### III. Effect of Proposed Changes:

The bill saves from repeal the current public records exemption relating to trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403, F.S., which regulates solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste. The information will continue to be confidential and exempt from public disclosure beyond October 2, 2021.

The bill takes effect October 1, 2021.

### IV. Constitutional Issues:

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

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor 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 State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal. The bill does not create or expand an exemption. Thus, the bill does not require an extraordinary vote for enactment.

##### *Public Necessity Statement*

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity

<sup>34</sup> Email, Department of Environmental Protection (Aug. 12, 2020), *Open Government Sunset Review Questionnaire (Trade Secrets contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403)* (Aug. 12, 2020)(on file with the Senate Committee on Environment and Natural Resources).

<sup>35</sup> *Id.*

justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403, F.S. This bill exempts only trade secret information from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The private sector will continue to be subject to the cost, to the extent imposed, associated with the DEP making redactions and/or making copies in response to public records requests.

**C. Government Sector Impact:**

The DEP will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 403.73 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.

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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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