

**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 Commerce and Tourism

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BILL: SPB 7020

INTRODUCER: Commerce and Tourism Committee

SUBJECT: OGSR/County Tourism Promotion Agencies/Florida Tourism Industry Marketing Corporation

DATE: February 16, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Reeve	McKay		<b>CM Submitted as Committee Bill/Fav.</b>

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## I. Summary:

SPB 7020 saves from repeal the public records exemption relating to trade secrets held by a county tourism promotion agency. The bill also saves from repeal the public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation, doing business as VISIT FLORIDA, or trade secrets obtained pursuant to such activities.

Unless saved from repeal by the Legislature, both exemptions are scheduled to sunset on October 2, 2021.

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, section 11.0431, Florida Statutes (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

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

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

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, chapter 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 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>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<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).

<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).

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> 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>

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<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.

<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.

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>

### **Trade Secrets**

Section 812.081, F.S., defines a “trade secret” as information used in the operation of a business which provides the business an advantage or an opportunity to obtain an advantage over those who do not know it. The term includes scientific, technical, commercial, and financial information.<sup>27</sup> Irrespective of the field to which the trade secret pertains, a trade secret is considered to be secret; of value; for use or in use by the business; and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know it or use it.<sup>28</sup>

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt from public records requirements. Some exemptions only protect trade secrets, while others protect “proprietary business information” and define that term to specifically include trade secrets.

### **Public Records Exemption for Trade Secrets Held by a County Tourism Promotion Agency**

Section 125.0104(9)(d)3., F.S., provides a public records exemption for trade secrets, as defined in s. 812.081, F.S., held by a county tourism promotion agency. In 2016, the Legislature expanded the definition of a trade secret in s. 812.081, F.S., to include financial information.<sup>29</sup> Thus, all public records exemptions for trade secrets were considered to have been substantially amended and subject to the Open Government Sunset Review Act. The public records exemption

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<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(1)(c), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> Chapter 2016-6, s. 21, Laws of Fla., provides a public necessity statement with a rationale for expanding the public records exemption for trade secrets. The statement recognized that businesses are often required to provide financial information to public entities for regulatory or other purposes and that the disclosure of such information to competitors would be detrimental to businesses.

for trade secrets in s. 125.0104(9)(d)3., F.S., is scheduled to be repealed on October 2, 2021, unless it is reviewed and saved from repeal by the Legislature.

***Open Government Sunset Review of s. 125.0104, F.S.***

In September 2020, the Senate Committee on Commerce and Tourism and the House Oversight, Transparency, and Public Management Subcommittee sent an Open Government Sunset Review questionnaire to the county tourism promotion agencies operating within the state regarding the scheduled repeal of the public records exemption and the need to maintain said exemption.

Agencies were asked about the types of records held, how records that contain trade secrets are reviewed, public records requests, and various other questions related to how agencies work with public records that contain trade secrets. The surveyed agencies reported holding public records containing trade secrets that include contracts, financial and budget information, consumer trend data, marketing initiatives and research, visitor center and convention center data, business leads, industry partner contacts, consumer databases, administrative records, funding requests, purchased data, and paid research. Agencies cited the need to remain competitive and effectively market their counties as the general purposes of using trade secret information. Of the agencies that responded to the questionnaire, 13 reported receiving a public records request for a records containing trade secrets within the last 4 years. The questionnaire also asked agencies whether they recommend that the Legislature repeal or reenact the public record exemption, the majority of which recommended reenacting the exemption as it is written.

**Public Records Exemption for VISIT FLORIDA**

Section 288.1226(9), F.S., provides a public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by VISIT FLORIDA, or trade secrets as defined by s. 812.081, F.S., obtained through such activities. In 2016, the Legislature expanded the definition of a trade secret in s. 812.081, F.S., to include financial information.<sup>30</sup> Thus, all public records exemptions for trade secrets were considered to have been substantially amended and subject to the Open Government Sunset Review Act. The public records exemption for information and trade secrets in s. 288.1226(9), F.S., is scheduled to be repealed on October 2, 2021, unless it is reviewed and saved from repeal by the Legislature.

***Open Government Sunset Review of s. 288.1226, F.S.***

In August 2020, the Senate Committee on Commerce and Tourism and the House Oversight, Transparency, and Public Management Subcommittee held a meeting with a representative from VISIT FLORIDA to discuss marketing projects or advertising research projects and how records associated with those projects are handled, the types of records that include trade secret information, and how VISIT FLORIDA addresses public record requests for such records.

Representatives from VISIT FLORIDA stated that they rely on the ability to protect trade secrets gathered from marketing projects in order to remain competitive. Specifically, VISIT FLORIDA tends to apply the exemption to data gathered from marketing projects and research that will be used to further develop other marketing strategies. Because VISIT FLORIDA is subject to several reporting and transparency requirements necessitating making contracts and other

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

documents available to the public, VISIT FLORIDA relies on the exemption found in s. 288.1226(9), F.S., to protect information found in the publicly available contracts and documents, such as the timing and distribution locations of marketing activities before the activities take place and financial information relating to the marketing activities, from use by competing destinations.

VISIT FLORIDA recommended the Legislature reenact the exemption as written in order to remain at a competitive advantage.

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

SPB 7020 amends s. 125.0104, F.S., to remove the scheduled repeal of the public records exemption for trade secrets held by a county tourism promotion agency. The bill also amends s. 288.1226, F.S., to remove the scheduled repeal of the public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation, doing business as VISIT FLORIDA, or trade secrets obtained through such activities.

Under the bill trade secrets held by a county tourism promotion agency, as well as information and trade secrets obtained by VISIT FLORIDA, will continue to be exempt from public disclosure beyond October 2, 2021.

The bill takes effect October 1, 2021.

### **IV. Constitutional Issues:**

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

None.

#### **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. The bill continues current public records exemptions beyond their scheduled repeal dates. 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 justifying the exemption. This bill continues current public records exemptions without substantial amendment. 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 the identity of any person who responds to a marketing or advertising research project conducted by VISIT FLORIDA, or trade secrets as defined by s. 812.081, F.S., obtained through such activities, and to protect trade secrets, as defined in s. 812.081, F.S., held by a county tourism promotion agency. This bill continues the public records exemption for information and trade secrets held by VISIT FLORIDA and for trade secrets held by a county tourism promotion agency. 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.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 125.0104 and 288.1226.

**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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