

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: SB 7028 OGSR/Data Processing Software

SPONSOR(S): Regulated Industries

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

FINAL HOUSE FLOOR ACTION: 113 Y's 3 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

SB 7028 passed the House on April 28, 2021, as amended. The Senate concurred in the House amendment to the Senate bill and subsequently passed the bill as amended on April 29, 2021.

The Open Government Sunset Review Act requires the Legislature to review each public record exemption and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides a public records exemption for data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, and agency-produced data processing software that is sensitive.

The bill saves from repeal the public record exemption for agency-produced data processing software that is sensitive, which will repeal on October 2, 2021, if this bill does not become law, and removes the public record exemption for data processing software that is a trade secret and obtained by an agency under a licensing agreement that prohibits its disclosure.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 16, 2021, ch. 2021-105, L.O.F., and will become effective on October 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The 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:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created, then a public necessity statement and a two-thirds vote for passage are not required.

Public Record Exemption under Review

Current law provides a public records exemption for data processing software obtained by an agency⁵ under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081(1)(c), F.S.⁶ The term "trade secret" means:

[T]he 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. The term includes any scientific, technical, or commercial information, including financial information, and includes 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;

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I, FLA. CONST.

⁵ Section 119.011(2), F.S., defines "agency" to mean 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 the Public Records Act, 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.

⁶ Section 119.071(1)(f), F.S.

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.

Current law provides a public record exemption for agency-produced data processing software that is sensitive.⁷ The term “sensitive” means only those portions of data processing software, including the specifications and documentation, used to:

- Collect, process, store, and retrieve information that is exempt from public record requirements;
- Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or
- Control and direct access authorizations and security measures for automated systems.⁸

In 2016, the definition of “trade secret” in s. 812.081, F.S., was expanded to include financial information. As a result, the above-described public record exemptions were reenacted to include the new definition of “trade secret” and as such, were made subject to the Open Government Sunset Review Act. Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2021, unless reenacted by the Legislature.

Effect of the Bill

The bill saves from repeal the public record exemption for agency-produced data processing software that is sensitive, and removes the public record exemption for data processing software that is a trade secret and obtained by an agency under a licensing agreement that prohibits its disclosure.

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:

⁷ *Id.*

⁸ Section 119.011(14), F.S.

None.

D. FISCAL COMMENTS:

None.