



The Florida Senate

Interim Report 2012-302

September 2011

Committee on Commerce and Tourism

OPEN GOVERNMENT SUNSET REVIEW OF S. 228.075, F.S., PUBLIC RECORDS EXEMPTION FOR INFORMATION HELD BY ECONOMIC DEVELOPMENT AGENCIES

Issue Description

Chapter 77-75, L.O.F., created the general economic development exemption from Florida's public records requirements in s. 288.075, F.S.

Briefly, s. 288.075, F.S., currently identifies several categories of economic development agencies, and makes confidential and exempt the following information held by such agencies:

- Plans, intentions, or interests of a private company or individual considering locating, relocating, or expanding its business operations in Florida;
- Proprietary confidential business information;
- Trade secrets;
- Sales, employee wage and tax information related to businesses receiving state economic development incentives; and
- Identification, account, and registration numbers.

The length of time the above-mentioned categories of information are shielded from the public and the conditions for publicly releasing such information vary. The law also provides a criminal penalty for any person who fails to maintain the confidentiality of this information. This exemption is repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature prior to that date.

Background

Public Records and Meetings

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24, of the State Constitution, provides that:

- (a) Every person has 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

¹ Section 1390, 139, F. S. (Rev. 1892).

² Article I, s. 24, of the State Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term “public record” is broadly defined 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Article I, s. 24, of the State Constitution, also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Article III, s. 4(e), State Constitution, except with respect to meetings exempted pursuant to this section or specifically closed by the constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.⁸ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), F.S., 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 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 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c), of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records. Under Florida law a two-thirds vote of each house is required for a public records or public meeting exemption to be created or expanded.

¹¹ Article I, s. 24(c), of the State Constitution.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act (the act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- 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 information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires the Legislature to consider the following:

- 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?¹⁶

While the standards in the act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁷ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ Section 119.15(6)(a), F.S.

¹⁷ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Public Records Exemptions for Economic Development Agencies

In 1977, the Legislature provided a public records exemption for records of the Division of Economic Development of the Florida Department of Commerce which contained information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state.¹⁸ Since enacting the exemption, the Legislature has made several substantive and technical revisions while retaining the basic concept of affording confidentiality for records of an economic development agency. The last significant modification was in 2007, when a new category of business information was added and specific provisions of a related public-records exemption, s. 288.1067, F.S. (2006), were merged into s. 288.075, F.S., to create 5 distinct categories of exemptions related to the administration of economic development.¹⁹ Currently, the 5 categories of information held by economic development agencies that are exempt from public records are:

Exempted Material	Timeframe
Plans, intentions, or interests of a private company, person or individual considering locating, relocating, or expanding its business operations in Florida ²⁰	Confidential and exempt for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed whichever occurs first May be extended for up to an additional 12 months upon written request from the private company or individual upon a finding by the economic development agency that the entity is still actively seeking to locate, relocate, or expand in Florida
Trade secrets ²¹	Permanent
Proprietary confidential business information ²²	Confidential and exempt until such time as the information becomes otherwise publicly available or is no longer treated by the proprietor as confidential
Federal employer identification number, unemployment compensation account number, or Florida sales tax registration number ²³	Permanent
Specific sales, employee wage, and tax information related to the administration of state economic development incentives ²⁴	Exempt for a period not to exceed the duration of the incentive agreement or upon termination of the incentive agreement

¹⁸ Adapted from Senate Interim Project Report 2006-205, *Open Government Sunset Review of s. 288.075, F.S., Economic Development Agencies*. Available at: http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-205cm.pdf. Site last visited Oct. 25, 2011.

¹⁹ Chapter 2007-203, L.O.F. This law also repealed s. 288.1067, F.S. See also *Review of Public Records Exemptions Relating to Economic Development Agencies*, The Florida Senate Committee on Commerce, Interim Project Report 2007-103 (October 2006), available at http://archive.flsenate.gov/data/Publications/2007/Senate/reports/interim_reports/pdf/2007-103cm.pdf (last visited 7/26/2011); and *House of Representatives Staff Analysis Bill #: HB 7201*, Government Efficiency and Accountability Council (April 23, 2007), available at <http://archive.flsenate.gov/data/session/2007/House/bills/analysis/pdf/h7201.GEAC.pdf> (last visited 7/26/2011).

²⁰ Section 288.075(2), F.S.

²¹ Section 288.075(3), F.S.

²² Section 288.075(4), F.S.

²³ Section 288.075(5), F.S.

²⁴ Section 288.075(6), F.S.

The public records exempted by s. 288.075, F.S., are maintained by an “economic development agency,” which is defined in s. 288.075(1)(a), F.S., to include:

1. The Department of Economic Opportunity;²⁵
2. Any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
3. Space Florida created in part II of ch. 331, F.S.;²⁶
4. The public economic development agency of a county or municipality or, if the county or municipality does not have a public economic development agency, the county or municipal officers or employees assigned the duty to promote the general business interests or industrial interests of that county or municipality or the responsibilities related thereto;
5. Any research and development authority created in accordance with part V of ch. 159, F.S.; or
6. Any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.²⁷

Section 288.075(1)(b), F.S., states that “proprietary confidential business information” means²⁸ information that is owned or controlled by the corporation, partnership, or person requesting confidentiality under this section; that is intended to be and is treated by the corporation, partnership, or person as private in that the disclosure of the information would cause harm to the business operations of the corporation, partnership, or person; that has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public; and that is information concerning:

1. Business plans.
2. Internal auditing controls and reports of internal auditors.
3. Reports of external auditors for privately held companies.

Section 288.075(2)(c), F.S., states that a public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information under this subsection until 90 days after the information is made public unless:

1. The public officer or employee is acting in an official capacity;
2. The agreement does not accrue to the personal benefit of such public officer or employee; and
3. In the professional judgment of the officer or employee, the agreement is necessary to effectuate an economic development project.

This section prevents public officers or employees from using confidential information to their personal benefit.

Section 288.075(7), F.S., states that any person who is an employee of an economic development agency who violates the provisions of this section commits a misdemeanor of the second degree.

Commission on Open Government Reform

The Commission on Open Government Reform was created by Executive Order 07-107 to review, evaluate, and issue recommendations regarding Florida’s public records and public meetings laws. The commission’s final report was issued in January 2009 and contained the following recommendations with respect to s. 288.075, F.S.:

²⁵ Previously the Office of Tourism, Trade, and Economic Development (OTTED) within the Executive Office of the Governor was listed as an economic development agency. However, ch. 2011-142, L.O.F., abolished OTTED and amended s. 288.075, F.S. See s. 148, ch. 2011-142, L.O.F. The Division of Strategic Business Development is the division within the Department of Economic Opportunity that is responsible for many of OTTED’s functions and responsibilities.

²⁶ Space Florida is an Independent Special District of the State of Florida, created by part II of ch. 331, F.S., for the purposes of fostering the growth and development of a sustainable and world-leading space industry in Florida. See Space Florida’s website, available at <http://www.spaceflorida.gov/> (last visited 7/26/2011).

²⁷ This refers to entities such as Enterprise Florida, Inc., and public private partnerships that work with local governments, also known as economic development organization.

²⁸ This definition was created in 2007 by ch. 2007-203, L.O.F., as part of the recommendations of Interim Project Report 2007-103 (October 2006).

1. The Legislature amend s. 288.075, F.S., to include a definition of “economic development project” and to subject the exemption to review and reenactment under the Open Government Sunset Review Act.
2. The Florida Economic Development Council coordinate with the Office of Open Government to provide training to local government economic development agencies on the scope and application of s. 288.075, F.S.²⁹

Florida Economic Development Council states that its purpose is to educate, advocate and connect the state wide network of economic developers through communications and events, providing leadership and vision to advance economic development professionals and economic development throughout the state of Florida as a whole.³⁰

“The Office of Open Government is charged with providing both the Executive Office of the Governor and each of Florida’s agencies with the guidance and tools to serve Florida with integrity and transparency.”³¹ The Office of Open Government was created by Governor Crist³² and reestablished by Governor Scott.³³

Findings and/or Conclusions

Methodology

A telephone survey was conducted regarding the exemption that included contacting state and local economic development agencies, the First Amendment Foundation, the Department of Economic Opportunity, Enterprise Florida, Inc. (EFI), and Space Florida. Responses were compiled and analyzed in the development of recommendations. There were a total of 75 entities contacted with 48 responding.

Findings

All of the 48 entities who responded to staff indicated that they supported reenacting the statute. The Governor’s Office may be developing legislation to name the Governor and EFI as economic development agencies within s. 288.075, F.S., to “clarify any confusion that may exist regarding their roles in the economic development process.”

While not related to the specific exemption under s. 288.075, F.S., some economic development organizations expressed concerns about whether the organizations were considered to be “state agencies” for purposes of the Public Records Act and Sunshine Law. There has been some debate as to the nature of these organizations.³⁴ These organizations may be developing draft legislation to clarify this issue, such as the creation of a bright line test.

Sunset Review Questions

The Open Government Sunset Review Act prescribes questions to be considered by the Legislature in deciding whether to save a public records exemption from its scheduled repeal. These questions address the content and general purpose of the exemption, and detail the specific documents and entities that are affected.

²⁹ *Reforming Florida’s Open Government Laws in the 21st Century*, The Commission on Open Government Reform, p. 20 (January 2009), on file with the Senate Commerce and Tourism Committee.

³⁰ Florida Economic Development Council, available at <http://www.fedc.net/join-fedc/purpose> (last visited 8/1/11).

³¹ The Office of the 45th Governor of Florida, Rick Scott, Office of Open Government, available at http://www.flgov.com/open_government/ (last visited 8/4/11).

³² Fla. Exec. Order No. 07-01, (January 2, 2007).

³³ Fla. Exec. Order No. 11-03, (January 4, 2011).

³⁴ See Inf. Op. to The Honorable Don Gaetz and The Honorable Marti Coley dated December 17, 2009, available at <http://www.myfloridalegal.com/ago.nsf/Opinions/9FCB14946923BD198525768F00686F5A> (last visited 8/2/11); and see Inf. Op. to Mr. Derek P. Rooney Dated June 8, 2011, available at <http://www.myfloridalegal.com/ago.nsf/Opinions/9BF33427865CA616852578B1005568A4> (last visited 8/2/11).

Whom does the exemption uniquely affect, as opposed to the general public?

The exemption affects businesses that are considering locating or expanding in Florida. Maintaining the confidentiality of the five categories of information encourages them to communicate with economic development agencies without concerns that confidential business information will be available to their competitors.

What specific records or meetings are affected by the exemption?

Records affected by this exemption are those held by an economic development agency relating to:

- Plans, Intentions, and Interests of a private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state.
- Trade Secrets.
- Proprietary Confidential Business Information meaning information that is owned or controlled by the corporation, partnership, or person requesting confidentiality under this statute; that is intended to be and is treated by the corporation, partnership, or person as private in that the disclosure of the information would cause harm to the business operations of the corporation, partnership, or person; that has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public; and that is information concerning:
 1. Business plans.
 2. Internal auditing controls and reports of internal auditors.
 3. Reports of external auditors for privately held companies.
- Identification, Account, and Registration Numbers meaning a federal employer identification number, unemployment compensation account number, or Florida sales tax registration number.
- Economic Incentive Programs.

Can the information contained in the records be readily obtained by alternative means?

The information contained in the exempt records is not publicly available, and cannot be otherwise obtained unless directly from the business.

Is the record protected by another exemption and would it be appropriate to merge the exemptions?

The broad range of records protected by this exemption is not protected elsewhere in statute. Trade secrets are protected under s. 812.081, F.S., and s. 688.002, F.S., however these sections of law do not specifically deal with public records exemptions and records held by an economic development agency, and it is not recommended that these sections of law be merged as this would only lead to confusion as to the status of trade secrets as it relates to economic development.

What is the identifiable public purpose or goal of the exemption?

The goal of this exemption is to facilitate communications between businesses and economic development agencies. The exemption allows businesses to keep strategic information confidential while considering sites to locate or expand, the release of which may adversely affect them in the marketplace.

Conclusion

As discussed above, the Open Government Sunset Review Act requires that a public records exemption must serve an identifiable public purpose in order to be maintained. The exemption provided in s. 288.075, F.S., serves a public purpose in two ways. First, the exemption allows state and local economic development agencies to effectively and efficiently administer their programs. The goal of these agencies is to promote growth and attract businesses to Florida. Most state and local economic development agencies surveyed indicated that without the exemption, businesses would be less likely to communicate with them, and therefore possibly less likely to locate or expand in Florida. Second, this exemption affects confidential business information, the disclosure of which could adversely affect the business in the marketplace. Competitors could use this information to their advantage, reacting to business plans that would otherwise be confidential absent inquiries with a government entity. In cases

where businesses are considering relocation, it could cause disruption in the workforce, encouraging current employees to seek other employment.

Options and/or Recommendations

Options

The Committee may consider the recommendations of the Commission on Open Government Reform in its deliberation of this matter.

The following language could be added to s. 288.075(6)(c), F.S., to clarify that an economic development agency must comply with other provisions of law relating to reporting requirements, examples of which would include:

- The annual state incentives report prepared by EFI is in s. 288. 907, F.S.
- The reporting by EDOs to the applicable county or city that gave it public dollars for ecodevelopment activities about how the EDOs spent the money in s. 125.045(4), F.S., and s. 166.021(9)(d), F.S.
- The annual reporting by all counties and certain cities (with annual revenues or expenditures greater \$250,000) on local incentives in excess of \$25,000 is specified in s. 125.045(5), F.S., and s. 166.021(9)(e), F.S.

“An economic development agency shall comply with all applicable reporting requirement outlined in Florida Statutes and may publish statistics in the aggregate and classified so as to prevent the identification of a single qualified applicant.”

Recommendations

Committee staff recommends that the public records exemption provided in s. 288.075, F.S., relating to certain business records held by economic development agencies, be re-enacted. Through the review of the public records exemption, it has been determined that the exemption serves a public purpose, as it is necessary to carry out a government program and protects confidential business information.