

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 157 Pub. Rec./Fracturing Chemical Usage Disclosure Act

SPONSOR(S): Rodrigues

TIED BILLS: HB 71 **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	8 Y, 4 N	Renner	Blalock
2) Government Operations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

HB 71 directs the Department of Environmental Protection (DEP) to designate or establish an online hydraulic fracturing chemical registry for all wells on which hydraulic fracturing treatments are performed. If DEP designates FracFocus.org, a chemical disclosure registry, as the state's official registry, DEP must provide a link to the FracFocus.org website on the department's website. Any registry established by DEP pursuant to the "Fracturing Chemical Usage Disclosure Act" (Act) must include, at a minimum, the total volume of water used in the hydraulic fracturing treatment and each chemical ingredient for each well on which hydraulic fracturing treatments are performed by a service provider or vendor, or by the well owner or operator if the owner or operator provides such chemical ingredients. Solely for the purpose of this Act, DEP may not require chemical ingredients to be identified by concentration or based on the additive in which they are found. If the chemical disclosure registry is unable to accept and make publicly available any information, the service provider, vendor, or well owner or operator must submit the information, required in this Act, to DEP.

This bill, which is linked to the passage of HB 71 or similar legislation, creates a public records exemption for trade secrets relating to hydraulic fracturing treatments held by DEP in connection with the online hydraulic fracturing chemical registry.

The person submitting trade secret information to DEP who wishes to maintain confidentiality of that information must request that the information be kept confidential and exempt, provide a basis to DEP for the claim of trade secret, and clearly mark each portion of a document containing information claimed to be a trade secret as "trade secret." If DEP receives a public records request for information claimed as a trade secret under this bill, DEP must promptly notify the person who submitted the information. That person then has 30 days to file a court action to seek an order barring disclosure of the information. DEP may not release the information if any such action is pending. Failure to file an action within 30 days constitutes a waiver of any claim to confidentiality. The bill does not direct DEP to determine what is or is not a trade secret.

Confidential and exempt trade secrets may be disclosed to another governmental entity in order for such entity to properly perform its statutory duties and responsibilities. In addition, such trade secrets may be disclosed, when relevant, in any proceeding relating to hydraulic fracturing treatments.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

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 newly created or expanded public record of public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act² 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:

- 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 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.
- Protects trade or business secrets.

House Bill 71, Hydraulic Fracturing Chemical Registry

HB 71 directs DEP to designate or establish an online hydraulic fracturing chemical registry for all wells on which hydraulic fracturing treatments are performed.

If DEP designates FracFocus.org, a chemical disclosure registry, as the state's official registry, DEP must provide a link to the FracFocus.org website on the department's website. Any registry established by DEP pursuant to the Act must include, at a minimum, the total volume of water used in the hydraulic fracturing treatment and each chemical ingredient for each well on which hydraulic fracturing treatments are performed by a service provider or vendor, or by the well owner or operator if the owner or operator provides such chemical ingredients. Solely for the purpose of this Act, DEP may not require chemical ingredients to be identified by concentration or based on the additive in which they are found. If the chemical disclosure registry is unable to accept and make publicly available any information, the service provider, vendor, or well owner or operator must submit the information, required in this Act, to DEP.

The service provider, vendor, or owner or operator of a well on which a hydraulic fracturing treatment is performed must report information as required by s. 377.45(2), F.S.; update the Chemical Disclosure Registry; and notify DEP of any chemical ingredients not previously reported that are intentionally included and used for the purpose of creating a hydraulic fracturing treatment for the well.

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

The reporting and disclosure requirements in the bill do not apply to ingredients that:

- Were not purposefully added to the hydraulic fracturing treatment.
- Occur incidentally or are otherwise unintentionally present in the treatment.

Effect of Proposed Changes

The bill, which is linked to the passage of HB 71 or similar legislation, creates a public records exemption for trade secrets³ relating to hydraulic fracturing treatments held by DEP in connection with the online hydraulic fracturing chemical registry. The bill provides that such trade secrets are confidential and exempt⁴ from public records requirements.

A person submitting trade secret information to DEP who wishes to maintain confidentiality of such information must request that it be kept confidential and exempt, provide a basis to DEP for the claim of trade secret, and clearly mark each portion of a document containing information claimed to be a trade secret as "trade secret." If DEP receives a public records request for a document that is marked trade secret, DEP must promptly notify the person who submitted the information as a trade secret. The notice must inform such person that the person has 30 days following receipt of the notice to file an action in circuit court seeking a determination whether the information in question contains trade secrets and an order barring public disclosure of the information. If the person files an action within 30 days after receipt of the notice, DEP may not release the documents pending the outcome of the legal action. Failure to file an action within 30 days constitutes a waiver of any claim of confidentiality, and DEP must release the document as requested. The bill does not direct DEP to determine what is or is not a trade secret.

Confidential and exempt trade secrets may be disclosed to another governmental entity in order for such entity to properly perform its statutory duties and responsibilities. In addition, such trade secrets may be disclosed, when relevant, in any proceeding relating to hydraulic fracturing treatments. Those involved in any proceeding relating to hydraulic fracturing treatments, including an administrative law judge, a hearing officer, or a judge or justice, must maintain the confidentiality of any trade secret information released at such proceeding.

The bill also provides that the public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

³ The bill provides that the public records exemption applies to trade secrets as defined in s. 812.081(1)(c), F.S. That paragraph defines the term "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. "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.

⁴ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

B. SECTION DIRECTORY:

Section 1: Amends s. 377.45, F.S., providing an exemption from public records requirements for trade secrets relating to hydraulic fracturing chemicals held by DEP in connection with the department's online hydraulic fracturing chemical registry; providing procedures and requirements with respect to maintaining the confidentiality of trade secrets; providing for disclosure under specified circumstances; and providing for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.

Section 2: Provides a statement of public necessity.

Section 3: Provides a contingent effective date to match the effective date of HB 71 or similar legislation, if such legislation is adopted in the same legislative session and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on DEP because staff responsible for complying with public records requests could require training related to creation of the public records exemption. In addition, DEP could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, according to DEP, could be absorbed, as they are part of the day-to-day responsibilities of the department.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

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 newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to information submitted to DEP that is a trade secret. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or require additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Retroactive Application

The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such.⁵ The bill does not contain a provision requiring retroactive application. As such, the public records exemption would apply prospectively.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

⁵ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001)