
SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 3, 1998

Revised: _____

Subject: Public Records

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Maclure</u>	<u>Austin</u>	<u>CM</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Under Art. I, s. 24 of the State Constitution, and ch. 119, F.S., the Public Records Law, the records of governmental and other public entities are open to the public unless made exempt. The committee substitute creates an exemption for certain records of the entertainment industry that are in the possession of the Entertainment Industry Commissioner, the Entertainment Florida Council or other entity authorized to perform council functions.

Specifically, the committee substitute provides that entertainment industry businesses or individuals seeking to locate, relocate, or expand business activities in Florida may make a written request that records of the Entertainment Industry Commissioner, the Entertainment Florida Council, or other entity authorized to carry out the council's functions, that contain the identity of the business or individual, trade secrets, or information concerning the location plans, intentions, or interests of such persons, be held as confidential. The committee substitute provides for the release of confidential records under specified conditions. The measure's effective date is linked to adoption of a companion bill creating the Entertainment Florida Council and the position of Entertainment Industry Commissioner. (See Committee Substitute for Senate Bill 1612.)

The committee substitute creates section 288.1256, Florida Statutes.

II. Present Situation:

A. Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the State Constitution

that raised the statutory right of public access to public records to a constitutional level.¹ Article I, s. 24 of the State Constitution expresses Florida's public policy regarding access to public records by providing that:

(a) Every person has the right to inspect or copy any public records 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.

In addition to the State Constitution, the Public Records Law² specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

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

The Public Records Law states that, unless specifically exempted, all agency³ records are to be 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.⁴

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,

¹Article I, s. 24 of the State Constitution.

²Chapter 119, F.S.

³The 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

⁴Section 119.011(1), F.S.

communicate or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

The Open Government Sunset Review Act of 1995⁸ states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than 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 if the exemption:

- 1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) 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
- 3) 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.⁹

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁷Art. I, s. 24(c) of the State Constitution.

⁸Section 119.15, F.S.

⁹Section 119.15(4)(b), F.S.

the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

B. Trade Secrets

Section 812.081(1)(c), F.S., 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.

Florida has in place a number of public records exemptions relating to trade secrets. For example, s. 403.7199(5), F.S., provides that information obtained pursuant to that section relating to the Florida Packaging Council which, if disclosed, would reveal a trade secret, as defined by s. 812.081, F.S., is confidential and exempt from disclosure. Additionally, s. 408.185, F.S., provides that trade secrets and other confidential proprietary business information submitted by a member of the health care community to the Office of the Attorney General pursuant to a request for an antitrust no-action letter is confidential and exempt from disclosure for one year after the date of submission.¹⁰

C. Entertainment Industry Promotion and Development

Currently, the Office of Tourism, Trade, and Economic Development (OTTED) contracts with a private, not-for-profit corporation, known as the Florida Entertainment Industry Council, Inc. (FEIC), for assistance in the promotion and development of the entertainment industry in Florida.¹¹ The contract naming the FEIC as the State’s designee refers to a contracted services contract for specifics on what activities the FEIC is to perform for remuneration. This second

¹⁰The Government-In-The-Sunshine Manual, which is published by the Office of the Attorney General, lists and categorizes many of the exemptions to public records requirements.

¹¹Sections 288.1228 and 14.2015(2)(a), F.S.

contract stipulates that the FEIC will receive remuneration for the publication of a directory and four quarterly magazines and that the FEIC will make public the records it maintains that directly relate to these publications. The contract specifies that the FEIC is not under a contractual obligation to disclose corporate records or documents unrelated to the services performed under the contract.

Other agents of the state which perform economic development promotion and development functions have been afforded a limited exemption from the public records law under s. 288.075, F.S., for information related to the identity and intentions of private companies or persons interested in locating or expanding their businesses in Florida. In addition, some of the state's economic development incentive programs provide for confidentiality of trade secrets or similar sensitive business information.¹²

III. Effect of Proposed Changes:

This committee substitute provides a limited exemption from the public records requirements for records of the Entertainment Industry Commissioner and of the Entertainment Florida Council, or other entity authorized to perform the council's functions, that contain the identity of an entertainment industry private corporation, partnership, or person seeking to locate, relocate, or expand business activities in this state. The committee substitute also provides the same level of confidentiality for trade secrets, as defined by s. 812.081, F.S., and for information concerning the plans, intentions, or interests of such businesses or persons to locate, relocate, or expand in Florida. The business or person seeking the confidentiality must request it in writing.

The committee substitute does provide that the corporation's, partnership's, or person's identity may be released when that party retains a business location in the state. Other records covered by the exemption provided in this committee substitute may be released if such records have been otherwise released by the party requesting confidentiality.

The committee substitute also provides a public necessity statement outlining reasons for the exemption. The stated necessity behind the exemption is to protect contract negotiations common to the preproduction state of an entertainment industry business venture which occurs prior to retaining a business location in the state. Protecting trade secrets, the identity of persons, and planning, is stated to be necessary to encourage relocation to the state or expansion of businesses already in Florida. If these records which are in the possession of the Entertainment Industry Commissioner and the Entertainment Florida Council are not protected, the bill states that these entities may choose not to locate, relocate or expand their activities in Florida.

Section 3 of the committee substitute specifies that the measure shall take effect on the same date as SB 1612 or similar legislation creating the Entertainment Florida Council and the position of Entertainment Industry Commissioner.

¹²See, e.g., s. 288.1066, F.S., providing confidentiality under the tax refund programs for qualified target industry businesses and qualified defense contractors.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This committee substitute appears to comply with the requirements of s. 24, Art. I of the Florida Constitution that general laws providing for exemptions from the public records: (1) state with specificity the public necessity justifying the exemption and be no broader than necessary to accomplish the stated purpose; (2) contain no provisions unrelated to public records exemptions or enforcement of such exemptions; and (3) relate to one subject only.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Entertainment industry entities that are considering Florida as a location for business activities will be able to request confidentiality for their identities, trade secrets, and location intentions, thus helping to safeguard against the potential disclosure of their business plans and information to competitors.

C. Government Sector Impact:

This committee substitute does not appear to generate significant additional costs for an agency of government.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This committee substitute is a companion measure to Committee Substitute for Senate Bill 1612, which, among other provisions, creates an Entertainment Florida Council and the position of Entertainment Industry Commissioner for the promotion and development of the entertainment industry in Florida.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
