

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/Florida Land Sales

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Rodriguez</u>	<u>Guthrie</u>	<u>RI</u>	<u>Favorable</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 must be open to the public unless made exempt. The bill creates a public records exemption for information relating to an active investigation by the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business & Professional Regulation pursuant to ch. 498, F.S. Information relative to such an investigation is confidential until the investigation is complete or ceases to be active. Additionally, the bill provides that information that would jeopardize the integrity of another active investigation, information identifying a purchaser or complainant, and trade secrets remain confidential and exempt after the investigation is closed. The division, however, is authorized to provide confidential information to any law enforcement agency or administrative agency or regulatory organization.

This bill amends s. 498.047, Florida Statutes.

**II. Present Situation:**

**A. Public Records Law**

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.<sup>1</sup> 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. Article I,

<sup>1</sup>Section 1, ch. 5942 (1909).

s. 24, 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 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.

The Public Records Law<sup>2</sup> specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The Public Records Law states that, unless specifically exempted, all agency<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

The Constitution does, however, permit the Legislature to create exemptions by general law. The general law exempting a public record must state with specificity the public necessity justifying the exemption and can 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.<sup>7</sup>

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<sup>2</sup>Chapter 119, F.S.

<sup>3</sup>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."

<sup>4</sup>Section 119.011(1), F.S.

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

<sup>6</sup>*Wait v. Florida Power & Light Company*, 372 So.2d 420 (1979).

<sup>7</sup>Article I, s. 24(c) of the State Constitution.

Section 119.15, F.S., which was enacted prior to Art. I, s. 24, of the State Constitution, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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:

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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

## **B. Land Sales**

The Department of Business and Professional Regulation (DBPR) is created in s. 20.165, F.S. The head of the DBPR is a secretary appointed by the Governor, subject to confirmation by the Senate.<sup>8</sup> The Division of Land Sales, Condominiums, and Mobile Homes is one of ten divisions established by law in the DBPR.<sup>9</sup> Chapter 498, F.S., the Florida Uniform Land Sales Practices Law, sets forth statutory requirements for the sale of subdivided land in Florida and delegates to the division authority to enforce the act. Under s. 498.047, F.S., the division is authorized to investigate possible violations of laws, rules and orders governing land sales practices.

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

This bill creates a public records exemption information relative to an investigation by the Division of Florida Land Sales, Condominiums, and Mobile Homes pursuant to ch. 498, F.S. The bill exempts investigatory records until 10 days after a notice to show cause has been filed by the division, or, in the case in which no notice to show cause is filed, the investigation is completed or

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<sup>8</sup>Section 20.165(1), F.S.

<sup>9</sup>Section 20.165(2), F.S.

ceases to be active. The bill defines the term “active.”<sup>10</sup> The bill, however, authorizes the division to disclose the existence and the status of an active investigation in response to a specific inquiry about the registration status of a registered or unregistered subdivider.

Other types of information related to an investigation are to remain confidential and exempt after a notice to show cause is filed or an investigation is closed. Specifically, the bill provides that consumer complaints and other information relative to an investigation remain confidential and exempt if disclosure would:

1. Jeopardize the integrity of another active investigation;
2. Reveal the name, address, telephone number, social security number, or any other identifying number or information of any purchaser or account holder, or social security number or any account number of a complainant; or
3. Reveal a trade secret as defined in s. 688.002, F.S.<sup>11</sup>

Nothing in the bill is to be construed to prohibit the division from providing information to any law enforcement or administrative agency or regulatory organization. Any entity that receives confidential and exempt information in the course of its duties, however, is required to maintain the confidentiality of the information.

As required by Art. I, s.24(c), State Constitution, the bill contains a statement of public necessity for the exemptions created by the bill. Specifically, the bill states that public disclosure of information relative to an investigation could jeopardize the integrity of an investigation because a person or entity under investigation could obtain copies of the file and alter records or otherwise thwart the investigation. Further, a person under investigation could contact a complainant prior to the filing of a notice to show cause, or other resolution of the investigation, and interfere with the investigation. Exposure of the identity of a complainant also could discourage complainants from coming forward.

The statement of public necessity also provides that information from a closed investigation that relates to another investigation must remain confidential because release of that information could jeopardize the active investigation. Additionally, information that reveals the name, address, telephone number, social security number, or any other identifying number or information of any purchaser or account holder, or social security number or any account number of a complainant

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<sup>10</sup>An investigation is “active” so long as the division or any law enforcement or administrative agency or regulatory organization is proceeding with reasonable dispatch and has a reasonable good-faith belief that the investigation may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a license or registration.

<sup>11</sup>Section 688.002(4), F.S., defines a “trade secret” to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

must remain confidential and exempt to encourage individuals to report illegal activity without fear of reprisal. Finally, trade secrets must remain confidential and exempt because release of such information would give competitors an economic advantage, and could cause financial harm to the entity whose trade secrets are disclosed.

Pursuant to the Open Government Sunset Review Act of 1995, this section shall stand repealed October 2, 2003, unless reenacted.

The effective date is October 1, 1998.

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

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

None.

##### **B. Public Records/Open Meetings Issues:**

The bill exempts information obtained in an active investigation of land sales practices by the Division of Florida Land Sales, Condominiums and Mobile Homes. Additionally, the bill provides that information that would jeopardize the integrity of another active investigation, identifying information about a complainant, and trade secrets remain confidential and exempt. As is required by Art. I, s. 24(c), State Constitution, the bill contains a statement of public necessity explaining the rationale for the exemptions.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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