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## 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 20, 1998

Revised: \_\_\_\_\_

Subject: Public Records

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Gee</u>	<u>Voigt</u>	<u>NR</u>	<u>Fav/2 amendments</u>
2.	<u>Schmith</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable</u>
3.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

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### I. Summary:

Under Art. I, s. 24 of the State Constitution and ch. 119, F.S., the Public Records Law, records of governmental and other public entities are open to the public unless made exempt. The committee substitute creates a public records exemption for certain records, reports, or information contained in a risk management plan that is received by the Department of Community Affairs when the Administrator of the U.S. Environmental Protection Agency determines such information is entitled to protection as trade secrets pursuant to Sections 112(r) and 114(c) of the federal Clean Air Act. The bill contains a statement of public necessity for the exemption and an expiration date. The exemption will become law only if SB812, or similar legislation, is enacted.

This committee substitute creates section 252.943, Florida Statutes.

### II. Present Situation:

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> 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

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

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

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:

[A]ll 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>

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, s. 24, of the State Constitution, provides:

(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.

Exemptions to s. 24, Art. I of the State Constitution and the Public Records Law are permitted. Article I, s. 24(c), of the State Constitution, requires that:

- (a) the Legislature create exemptions in general law;
- (b) a law creating an exemption specifically state the public necessity justifying the exemption; and
- (c) an exemption be no broader than necessary to accomplish the stated purpose of the law.<sup>7</sup>

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<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 (Fla.1979).

<sup>7</sup>Section 119.15, F.S., provides 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

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>8</sup>

Section 112(r) of the federal Clean Air Act establishes the Accidental Release Prevention Program.<sup>9</sup> The program is intended to prevent accidental releases of specific toxic, flammable, and explosive substances and to minimize the consequences of such releases. The program establishes a general duty for owners and operators of stationary sources who produce, process, handle, or store listed substances or any other extremely hazardous substances to initiate specific activities to prevent and mitigate accidental releases. Additionally, it requires the development of Risk Management Plans, which require that listed substances be reported if on the premises.

Section 112 creates an independent safety board, the Chemical Safety and Hazard Investigation Board. Among other duties, the board investigates (or causes to be investigated) and reports to the public the circumstances and causes of serious accidental releases. Because making public certain information regarding specific substances and their uses could reveal trade secrets, section 112 exempts such information from being released, upon a determination by the board that to do so would cause substantial harm to a person's competitive position.

The federal Accidental Release Prevention Program may be delegated to a state when the state has in place a program meeting federal requirements. Senate Bill 812, if enacted, would establish such a program for the State of Florida. If the program is established in Florida, however, creation of a public records exemption is necessary to protect information that is confidential under the federal program.

### III. Effect of Proposed Changes:

**Section 1.** Section 252.943, F.S., is created to provide two related exemptions from s. 119.07(1), F.S. The committee substitute first provides that when the Department of Community Affairs receives records, reports, or information, other than release or emissions data, that is contained in a risk management plan, those records, reports, or information are confidential and exempt from Florida public records requirements if the Administrator of the U.S. Environmental Protection Agency (EPA) has determined that methods or processes entitled to protection as trade secrets would be divulged by their release. "Trade secrets" are defined in 40

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the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption: (a) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; (b) 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 (c) 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.

<sup>8</sup>Article I, s. 24(c), of the State Constitution.

<sup>9</sup>The program is codified in 42 USCS 7412.

CFR Part II Subpart B. The records, reports, or information may not be disclosed except under a final determination by the EPA administrator that they are not entitled to trade secret protection or pursuant to an order of the court.

The committee substitute also provides that when the Department of Community Affairs is required to protect from public disclosure records, reports, or information, other than release or emissions data, obtained from an investigation, inspection, or audit, based upon a showing satisfactory to the EPA administrator that public release would divulge methods or processes entitled to protection, those records, reports, or information are confidential and exempt from public records requirements.

Both exemptions are subject to the s. 119.15, F.S., of the Open Government Sunset Review Act, and expire on October 2, 2003, unless reviewed and reenacted by the Legislature.

**Section 2.** The committee substitute provides a statement of public necessity. The Legislature finds that it is a public necessity that trade secret information provided by the owner or operator of a stationary source subject to the Accidental Release Prevention Program under the federal Clean Air Act must be held confidential and exempt in order to protect the legitimate property interests associated with trade secrets while allowing state officials to review and oversee Risk Management Plans and conduct necessary investigations, inspections, or audits. Additionally, the Legislature finds that disclosure of trade secret information is likely to cause substantial harm to the competitive position of the owner or operator of a stationary source.

**Section 3.** The committee substitute takes effect on the effective date of Senate Bill 812 or similar legislation, relating to clean air, and does not take effect if that legislation does not become law.

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

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

None.

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

This committee substitute provides exemptions from ch. 119, F.S., for trade secrets found in reports, records, and other information contained in risk management plans, as determined by the administrator of the EPA based upon the definition in 40 CFR Part II Subpart B. The exemptions are subject to s. 119.15, F.S., the Open Government Sunset Review Act, and expire on October 2, 2003, unless reenacted.

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

None.

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

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption could benefit companies using listed chemicals, as disclosure could reveal trade secrets.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.