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DATE: March 30, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 1541 (PCB EDIT 01-01)
RELATING TO: Public Records
SPONSOR(S): Committee on Economic Development and International Trade
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) ECONOMIC DEVELOPMENT AND INTERNATIONAL TRADE YEAS 10 NAYS 0
 - (2) STATE ADMINISTRATION
 - (3) COUNCIL FOR COMPETITIVE COMMERCE
 - (4)
 - (5)
-

I. SUMMARY:

This bill saves from repeal a public records exemption for records of an economic development agency that contain or would provide information on the plans of a business to locate, relocate, or expand its activities in this state. The bill also revises the exemption to:

- Include the records of a county or a municipal economic development office within the coverage of the exemption;
- Clarify a prohibition against entering into an agreement with a business that has requested confidentiality, by allowing such agreements if they are executed in the official capacity of a public officer or employee, do not accrue to the personal benefit of that officer or employee, and are necessary to effectuate the economic development project;
- Allow confidentiality to be maintained for longer than 24 months and for up to an additional 12 months if it can be shown that a business is still engaged in the site-selection or expansion process for its economic development project; and
- Allow confidentiality of trade secrets for up to 10 years or until otherwise disclosed.

This bill substantially amends section 288.075, Florida Statutes.

The effective date of the act is October 1, 2001.

See "Other Comments" section for comments by the Committee on State Administration.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Government in the Sunshine

Florida has a long history of providing public access to the records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level (Art I, s. 24).

The State Constitution permits exemptions to open government requirements and specifies the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

In addition to the Florida Constitution, the Public Records Law (Ch. 119, F. S.) specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., to include:

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 the official business by any agency.

This definition of "public records" has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge (*Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form (*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)).

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, codified as s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed, unless the Legislature acts to re-enact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Only exemptions that are identified and certified are subject to legislative review and repeal under the Open Government Sunset Review Act.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

- 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?

Section 119.15(4)(b), F.S., 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. The purpose must be sufficiently compelling to override the strong public policy and cannot be accomplished with the exemption. An identifiable public purpose is served if the exemption meets one of the following purposes:

- 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;
- The exemption 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 provision, only information that would identify the individuals may be exempted; or
- The exemption 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.

When the Legislature substantially revised the public records exemption in 1995, it included a statement of public necessity consistent with two public purposes. Specifically, the Legislature found that:

[p]rotection of such information is necessary to prevent harm to the competitive position of companies that are contemplating a relocation or expansion into this state by the release of sensitive information concerning their operations or finances. The fear of untimely release of such information could make such companies reluctant to contact representatives of economic development agencies and, consequently, impair the public benefits from economic development activities (s. 2, ch. 95-378, L.O.F.).

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S. (regarding the waiver of sovereign immunity in tort actions), 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 re-enactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid re-enactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act of 1995, so long as the requirements of Art. I, s. 24 of the State Constitution are not violated.

Confidentiality of Economic Development Records

In 1977, the Legislature provided a public records exemption for records of the Division of Economic Development of the Florida Department of Commerce, which contain information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state (s. 1, ch. 77-75, L.O.F.). Since enacting the exemption, which was codified in s. 288.075, F.S., the Legislature has made a number of substantive and technical revisions to its wording while retaining the basic concept of affording confidentiality to certain economic development records. Today, s. 288.075, F.S., provides that upon written request from a private corporation, partnership, or person, records of an economic development agency that contain plans to locate, relocate, or expand any of the business activities in the state are confidential and exempt from s. 119.07(1), F.S., and s. 24(a) Art. 1 of the State Constitution for 24 months after the request.

Economic Development Agencies

The public records exemption rests with an “economic development agency,” which is defined under s. 288.075(1), F.S., as including:

- The Office of Tourism, Trade, and Economic Development (OTTED);
- Any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
- The public economic development agency that advises the county commission on issuance of industrial revenue bonds of a county that does not have an industrial development authority;
- Any research and development authority created under part V of ch. 159, F.S.;
- The Spaceport Florida Authority; or
- 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.

In 1995, the definition of “economic development agency” under s. 288.075(1), F.S., was broadened to include private entities authorized by the state, a municipality, or a county to promote the business interests of such governmental unit (s. 1, ch. 95-378, L.O.F.). With the revised definition, the confidentiality provided under s. 288.075, F.S., applies, among other organizations, to Enterprise Florida, Inc., which is the statutorily authorized not-for-profit corporation that serves as the state’s principal economic development organization, to OTTED, and to local not-for-profit economic development organizations serving as the principal business development entity for their respective communities. The exemption does not cover local government employees carrying out similar activities (except the public agency that provides advice on industrial revenue bonds in certain counties).

Public Officer or Employee Subsection

Under subsection (4) of s. 288.075, F.S., a “public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information pursuant to this section, until 90 days after such information is made public.” In addition, the confidentiality provided by this public records exemption does not apply if a party petitions a court and proves the need for access to the documents (s. 288.075(2), F.S.).

Prior to 1995, this prohibition applied to a public officer or employee “acting in his individual capacity . . . when such public officer or employee has knowledge” that information concerning such business is confidential (s. 288.075(4), F.S. (1993)). When the revisions to the definition of economic development agency were adopted in 1995, the Legislature also revised this provision regarding a public officer’s ability to enter into an agreement with a locating business in his individual capacity. Among other changes, the Legislature deleted from the statute the language “acting in his individual capacity” and “when such public officer or employee has knowledge.” As a result, under the provision as currently written, a public officer is prohibited from entering into any binding agreement with a corporation that is considering relocating to Florida until 90 days after the disclosure of any information relative to the relocation that is being kept confidential by an economic development agency.

Time Period of Confidentiality

Currently, the confidentiality for economic development records under s. 288.075(2), F.S., exists for 24 months or until the information is disclosed by the economic development agency or the business requesting confidentiality. There may be circumstances in which a business’s site-selection process continues for a period longer than 24 months. Consequently, an economic development agency may exchange information with a business for a longer period as well.

Currently s. 288.1066, F.S., protects certain trade secrets shared by businesses as part of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs for up to 10 years. However, if a business provided trade secret information as part of its initial inquiries about locating or expanding in Florida and did not apply for the QDC or QTI programs, the period of confidentiality under s. 288.075, F.S., would be 24 months. The QDC and QTI public records exemption uses the definition provided in s. 812.081(1)(c), F.S., which describes a trade secret as “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.”

C. EFFECT OF PROPOSED CHANGES:

This bill abrogates the October 2, 2001, repeal of a public records exemption for the records of an economic development agency that contain or would provide information on the plans or intentions of a business to locate, relocate, or expand its activities in this state. Because the public records

exemption is expanded, the bill specifies that the exemption is repealed on October 2, 2006, unless re-enacted after review by the Legislature under the Open Government Sunset Review Act. In addition, under current law, the 24-month confidentiality provided under s. 288.075(2), F.S., does not apply if a party successfully petitions to a court that the documents are needed. This bill clarifies that this exception applies to any confidentiality provided by s. 288.075, F.S., thus capturing the expanded confidentiality addressed by the bill. The bill also amends the confidentiality provisions of s. 288.075, F.S., in several respects:

Economic Development Agencies

The bills broadens the definition of "economic development agency" to include any county or municipal economic development office, rather than being limited to a public economic development agency that advises the county commission on the issuance of industrial revenue bonds. With the broader definition, confidentiality would apply to the records of a local government economic development office that works with businesses as they evaluate site-selection options in the community.

Public Officer or Employee Subsection

The bill creates an exception to the current prohibition against a public officer or employee entering into a binding agreement with a business that has requested confidentiality, until 90 days after the information is made public. Under the bill, such an agreement would be permissible if the agreement is executed in the officer's or employee's official capacity, does not accrue to the personal benefit of the officer or employee, and is necessary to effectuate an economic development project.

Time Period of Confidentiality

The bill authorizes an economic development agency to extend the 24-month period of confidentiality for up to an additional 12 months if it finds that the business is still engaged in its site-selection process. The bill also provides a 10-year period of confidentiality for trade secret information (as defined in s. 812.081, F.S.) that an economic development agency obtains while working with a locating, relocating, or expanding business.

The bill includes a legislative statement of public necessity for the changes to the public records exemption.

The bill provides an effective date of October 1, 2001

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

State economic development organizations are responsible for maintaining the security of records generated through their work with businesses that are considering locating, relocating, or expanding their activities in Florida and that request confidentiality of information about their

plans under s. 288.075, F.S. The administrative costs associated with maintaining such confidentiality are estimated to be insignificant.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Local economic development organizations are responsible for maintaining the security of records generated through their work with businesses that are considering locating, relocating, or expanding their activities in Florida and that request confidentiality of information about their plans under s. 288.075, F.S. The administrative costs associated with maintaining such confidentiality are estimated to be insignificant.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

By protecting sensitive business information, the public records exemption addressed by this bill may help prevent private firms that are working with state and local economic development organizations from being injured in the marketplace through the disclosure of insights about the businesses' strategies and finances to competitors. In addition, to the extent the public records exemption makes business prospects more willing to interact with economic development organizations, it may help facilitate the site-selection process to the potential benefit of the business and the community in which the business ultimately locates.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill abrogates the scheduled repeal of an existing public records exemption and also revises the exemption to expand its scope. The provisions of the bill appear to be consistent with the public records requirements of the Florida Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Committee on State Administration, pursuant to the Open Government Sunset Review Act of 1995, reviewed s. 288.075, F.S.; and, as a result thereof, passed PCB SA 01-03, now HB 389. That bill provides for a verbatim reenactment of the exemption.

This bill appears to have an insignificant fiscal impact on state and local governments.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON ECONOMIC DEVELOPMENT AND INTERNATIONAL TRADE:

Prepared by:

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AS REVISED BY THE COMMITTEE ON STATE ADMINISTRATION:

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