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****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2001-69, Laws of Florida

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
STATE ADMINISTRATION
FINAL ANALYSIS**

BILL #: HB 393 (PCB SA 01-05)
RELATING TO: Public Records Exemption for Certain Information Obtained by the Florida Tourism Industry Marketing Corporation
SPONSOR(S): Committee on State Administration, Representative(s) Brummer and others
TIED BILL(S): None
ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
 (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 11 NAYS 0
 (3)
 (4)
 (5)

I. SUMMARY:

On May 29, 2001, HB 393 was approved by the Governor and became law as Chapter 2001-69, Laws of Florida (the "act"). The effective date of the act is October 1, 2001.

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 288.1226(8), F.S., provides that the identity of a person who responds to a marketing project or advertising research project conducted by the "Florida Tourism Industry Marketing Corporation" in the performance of its duties on behalf of the Florida Commission on Tourism, or certain trade secrets obtained pursuant to such activities are exempt from public disclosure. This section was certified by the Division of Statutory Revision for repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

This act reenacts this exemption verbatim. In addition, the language directing the repeal of the exemption is removed.

This act does not appear to have a fiscal impact on state or local governments.

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:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. 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.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or “substantial amendment”¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 288.1226(8), F.S., was certified by the Division of Statutory Revision for repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.² Nonetheless, because the certified exemption as

¹ An exemption is “substantially amended” if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

² The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.³ If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁴

Florida Tourism Marketing & Promotion

The Florida Commission on Tourism (commission) created by s. 288.1223, F.S., oversees the state's efforts to increase the positive impact of tourism. Those efforts include increasing employment for state citizens through effective marketing activities; continually upgrading the image of Florida as a quality destination; promoting tourism objectives with all sectors considered equitably; and judging its efforts by the same standards of accountability and integrity as those used by private sector businesses.⁵ The commission is created within the Office of Tourism, Trade, and Economic Development (OTTED).

Section 288.1224, F.S., provides the powers and duties of the commission, specifying that the commission must contract with a direct-support organization incorporated as a private, not-for-profit corporation, as defined in s. 501(c)(6) of the Internal Revenue Code, to execute the tourism and marketing promotion services of the state. Section 288.1226, F.S., identifies the direct-support organization as the Florida Tourism Industry Marketing Corporation (corporation). The corporation does business under the name "Visit Florida."

Section 288.1226(8), F.S.

Chapter 96-297, L.O.F., created a public records exemption for certain records held by the corporation.⁶ Specifically, s. 288.1226(8), F.S., states:

The identity of any person who responds to a marketing project or advertising research project conducted by the corporation in the performance of its duties on behalf of the commission, or trade secrets as defined by s. 812.081 obtained pursuant to such activities, are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This subsection is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2001, unless reviewed and saved from repeal through reenactment by the Legislature.

³ Please note that the effective date of this act is prior to the repeal date of October 2, 2001.

⁴ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

⁵ See s. 288.1223(1), F.S.

⁶ Florida laws relating to Government in the Sunshine have "been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties" (Office of the Attorney General/First Amendment Foundation, Government-In-The-Sunshine Manual, 2000 Edition, p. 4.).

Further, s. 2 of chapter 96-297, L.O.F., provided a public necessity statement for the exemption as required by Art. I, s. 24 of the Florida Constitution:

This exemption is needed to protect the identity of persons and trade secret information which may be included in a response to a marketing project or advertising research project dealing with tourism industry statistics, trade secrets, visitor numbers, or marketing programs of private entities. Such information in the aggregate is needed by the Florida Tourism Industry Marketing Corporation to plan the marketing programs it conducts to promote tourism growth for the benefit of this state and to measure the effectiveness of those marketing programs for the Legislature. If such records are not protected, critical confidential information regarding strategic plans, trade secrets, and research data would be revealed. Release of this proprietary information could put those companies from which the information is gathered at a competitive disadvantage in the marketplace. Consequently, private companies, whose records are not required to be open, might refrain from responding to marketing projects or advertising research projects, or from sharing tourism statistics, thereby denying the use of valuable information needed to assist this state. The harm that would result from any obstruction to receiving as much tourism-related marketing and statistical information as possible would far outweigh any public benefit derived from release of such information.

The public records exemption provided in s. 288.1226(8), F.S., uniquely affects respondents to marketing projects or advertising research projects conducted by the corporation. This public records exemption specifically protects the identity of those who provide responses to the corporation's marketing or advertising research projects. The privilege and confidentiality provided generally do not apply to the actual data or information gathered. However, the exemption in s. 288.1226(8), F.S., does apply if the information gathered is a trade secret, as defined by s. 812.081, F.S.⁷ According to the corporation, under this exemption, the corporation might keep confidential the name of a hotel that supplied the corporation with information on its occupancy rate for a particular period in time, as a part of a tourism-marketing research study.⁸

In addition, the information collected by the corporation is of a sensitive and personal nature. Respondents to surveys gathered annually may be asked information such as household income, age, race, and travel spending patterns. This information is also potentially damaging to businesses if released to the public. For example, the corporation collects information relative to the performance of hotels and attractions, which if released, could compromise competitive standing of the business in the marketplace.⁹

The corporation contends that without the exemption, the willingness of potential respondents to participate in marketing research and advertising research studies would be significantly diminished. Therefore, the identifiable public purpose of this exemption is not only the effective and efficient administration of Florida's tourism promotion program, but also the protection of individuals from injury caused by the release of sensitive data, and the prevention of injury to businesses within the scope of this particular public policy in the marketplace caused by the release of trade secrets.

⁷ Section 812.081, F.S., defines a trade secret, in part, 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" (s. 812.081(1)(c), F.S.).

⁸ See Interim Report 2001-032, Florida Senate Committee on Commerce and Economic Opportunities (November 2000).

⁹ *Id* at 4.

The identities and trade secrets contained in the marketing and advertising research studies conducted by the corporation are not available through alternative means.¹⁰

C. EFFECT OF PROPOSED CHANGES:

This act amends s. 288.1226(8), F.S., to remove the sentence that requires its repeal. In addition, this act reenacts, verbatim, the public records exemption. The public records exemption provides that the identity of any person who responds to a marketing project or advertising research project conducted by the corporation for the commission, or trade secrets obtained through these projects are exempt from public disclosure.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

¹⁰ *Id.*

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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