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**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 275 (PCB SA 02-03)

RELATING TO: Public Records/Deepwater Ports

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S):

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

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 9 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) 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. The Act, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new 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 315.18, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature. This section provides for the confidentiality of certain records held by deepwater ports. More specifically, this section provides an exemption from public records requirements for any proposal or counterproposal exchanged between a nongovernmental entity and a deepwater port, or any financial records submitted by a nongovernmental entity to a deepwater port, relating to the sale, use, or lease of land or of port facilities. This section provides, however, that in the 30-day period prior to the consideration of a proposal or counterproposal by a deepwater port, the information contained in such proposals is subject to public disclosure. If the proposal or counterproposal is not submitted to the governing body of the deepwater port for approval, the information contained within is subject to public disclosure after 90 days following the end of negotiations.

This bill reenacts verbatim the exemption in s. 315.18, F.S., and removes the repeal language. See "Present Situation".

This bill 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 and must be no broader than necessary to accomplish its purpose (public necessity statement).

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 (Act), 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 315.18, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, 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 Act 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. Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.²

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 Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

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.³

Section 315.18, F.S.

In 1997, HB 99 (Chapter 97-186, L.O.F.) created s. 315.18, F.S., which provides a public records exemption for certain records held by deepwater ports. More specifically, s. 315.18, F.S., provides that any proposal or counterproposal exchanged between a deepwater port and any nongovernmental entity, relating to the sale, use, or lease of land of port facilities is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Additionally, any financial records received by a port from a nongovernmental entity pursuant to the sale, use, or lease of land or of port facilities are also confidential and exempt from public records requirements. Section 315.18, F.S., provides, however, that in the 30-day period prior to the consideration of a proposal or counterproposal by a deepwater port, the information contained in such proposals is subject to public disclosure. If the proposal or counterproposal is not submitted to the governing body of the deepwater port for approval, the information contained within is subject to public disclosure after 90 days following the end of negotiations.

The 1997 Legislature found it was a public necessity to maintain the confidentiality of these records. Proposals and counterproposals submitted to a deepwater port contain sensitive business and financial information, which if disclosed, can result in the nongovernmental entity abandoning its contractual effort to the financial detriment of the deepwater port. In addition, financial information is sensitive, proprietary information, and if disclosed, would give competitors an unfair economic advantage. In sum, the Legislature found that this public records exemption is necessary for the efficient and effective negotiation of contracts involving the use of port facilities.⁴

Open Government Sunset Review Questionnaire

The Committee on State Administration sent out an Open Government Sunset Review Questionnaire in June 2001 to the 14 ports in the State of Florida⁵ regarding the public records exemption found in s. 315.18, F.S. Nine ports returned a completed survey: Tampa, Jacksonville, Palm Beach, Pensacola, Port Everglades, Panama City, St. Petersburg, Port Manatee, and Port St. Joe. Five ports did not return a survey: Port Canaveral, Fort Pierce, Miami, Key West, and Fernandina.⁶ All nine ports who returned the survey supported the reenactment of the public records exemption.

The deepwater port public records exemption allows Florida ports to successfully compete with other US and international ports in attracting new or strengthening existing businesses to the state. Provides non-governmental entities confidentiality while negotiating with Florida

³ 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.

⁴ Chapter 97-186, Laws of Florida.

⁵ Section 311.09(1), F.S., lists the following ports: Jacksonville, Port Canaveral, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina.

⁶ The Vice President of the Florida Ports Council was contacted on several occasions regarding the failure of 5 ports to respond.

deepwater ports; loss of the exemption could severely impair ability of Florida deepwater ports to attract new lines of business.⁷

Repealing of s. 315.18 F.S. could hamper the District's enterprise and marketing efforts and could also interfere with the District's ability to attract and secure new business by revealing sources, terms and conditions prior to completed negotiations and final agreements. Any loss of potential revenues and/or business to the ports could also result in losses of revenues to the local economy including loss of potential new jobs. If smaller deepwater ports . . . are unable to stimulate the economy through cultivation of new and existing business and are unable to remain competitive, then initiation of taxes on an area that is already economically challenged could be an issue the District will face in the future.⁸

The purchase of land is a pre-requisite to port growth and expansion and the resultant economic benefits to the community. If this exemption is not reenacted the purchase of land could be inhibited by the reluctance of nongovernmental entities to reveal confidential information.⁹

Additionally, 8 of the 9 ports who responded did not recommend any changes to s. 315.18, F.S.¹⁰

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts verbatim the public records exemption found in s. 315.18, F.S., which provides that certain records held by deepwater ports are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. This bill strikes the language in s. 315.18, F.S., which subjects the exemption to repeal.

More specifically, any proposal or counterproposal exchanged between a nongovernmental entity and a deepwater port, or any financial records submitted by a nongovernmental entity to a deepwater port, relating to the sale, use, or lease of land or of port facilities, are confidential and exempt from public records requirements. Additionally, this bill provides that in the 30 day period prior to the consideration of a proposal or counterproposal by a deepwater port, the information contained in such proposals is subject to public disclosure. If the proposal or counterproposal is not submitted to the governing body of the deepwater port for approval, the information contained within is subject to public disclosure after 90 days following the end of negotiations.

This bill removes the language in s. 315.18, F.S., repealing this exemption.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

⁷ Response by the Tampa Port Authority's Director of Government Relations.

⁸ Response by the Executive Director of the Port of Palm Beach District.

⁹ Response by the Port Director of the Port St. Joe Port Authority.

¹⁰ The Tampa Port Authority recommended to "amend s. 315.18, F.S., to provide Florida deepwater ports with the same exemption from the disclosure of confidential business information as that of Brownfield district."

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 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:

None.

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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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