SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 1530

SPONSOR: Governmental Oversight and Productivity Committee and Regulated Industries Committee

SUBJECT: Tobacco-settlement Agreement/OGSR

DATE: April 5, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Favorable**
2.	Rhea	Wilson	GO	**Fav/CS**
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill would reenact the public records exemption in s. 569.215, F.S., for proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement. It also exempts from public records requirements the proprietary confidential business information of the tobacco industry received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

The bill also amends s. 569.215, F.S., to provide that the term “trade secret” has the same meaning as the definition of that term in s. 688.002, F.S.

The bill would save the exemption from repeal as required under the Open Government Sunset Review Act. It deletes the provision that would repeal the exemption effective October 1, 2006, unless reenacted and saved from repeal by the Legislature.

The bill provides an effective date of October 1, 2006.

This bill amends section 569.215, Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] 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. . . .

Unless specifically exempted, all agency[5] records are 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.[6]

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[5] 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."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

> 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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation

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[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53; *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So. 2d 203 (Fla. 1998).
[21] 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994).

> or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" (emphasis added). Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act[23] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states 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 the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

[22] *Ragsdale*, 720 So. 2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).
[23] Section 119.15, F.S.

- [p]rotects 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
- [p]rotects 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.[24]

The act also requires consideration of the following:

- 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 by readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[25] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

> … notwithstanding s. 768.28 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 reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Florida's Tobacco Settlements

In February 1995, the State of Florida sued a number of tobacco manufacturers, and others, asserting various claims for monetary and injunctive relief. The lawsuit included as defendants the American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., Liggett Group, Inc. Brooke Group, Ltd., Lorillard Company, British American Tobacco Co., Ltd. and Dosal Tobacco Corp, Inc., among others.

[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

On March 3, 1996, the State of Florida, as one of five settling states,[26] settled all of its claims against Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. (collectively herein referred to as Liggett). In August 1997, the "Big Four" tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp.,[27] and Lorillard Tobacco Company) entered into the landmark $368.5 billion tobacco settlement agreement with Florida for all past, present and future claims by the state, including reimbursement of Medicaid expenses, fraud, RICO,[28] and punitive damages. Sections 215.56005(1)(f), and 569.215, F.S., define these settlements to mean the settlement, as amended, in the case of *State v. American Tobacco Co. et al.*, No. 95-1466AH (Fla. 15th Cir. Ct. 1996).

The settling tobacco companies will be making settlement payments to Florida in perpetuity. From the date of the settlement, Florida was to receive $11.3 billion over the next 25 years and an additional $1.7 billion over the next 5 years as a result of a most favored nation clause in the settlement agreement as amended.[29] The annual tobacco settlement payments are based on several factors, including the total volume of U.S. cigarette sales, each company's share of the national market, net operating profits, and consumer price indices. Statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds.[30]

Task Force on Tobacco-Settlement Revenue Protection

The Florida Legislature established the Task Force on Tobacco-Settlement Revenue Protection (task force) to determine the need for, and to evaluate methods for, protecting the state's settlement revenue from diminution or significant loss.[31] The task force submitted its findings and recommendations in March 2001. The first recommendation of the Task Force was for the Legislature to ". . . provide a process for verifying that the tobacco settlement payments received are in accordance with the Florida Settlement Agreement." The report further recommends that the ". . . Legislature should also provide an exemption from the Florida Public Records Act for information considered necessary to verify the accuracy of the payments made by the tobacco companies if such information is considered a trade secret or insider information at the time of its receipt."

Public Records Exemption Relating to the Tobacco Settlement Agreement

Section 1, ch. 1, 2001-136, L.O.F., as codified in s. 569.215, F.S., provides an exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a) of Art. I of the State Constitution for information used to calculate the annual tobacco-settlement payments. The exemption applies to proprietary confidential business information received by the Governor, the

[26] The five states that entered into the March 3, 1996, settlement agreement are: West Virginia, Florida, Mississippi, Massachusetts, and Louisiana. These states are known as the "initially settling states."
[27] In 2003, R.J. Reynolds Tobacco Company and Brown & Williamson Tobacco Corp. merged to form R.J. Reynolds Tobacco Company as a wholly owned subsidiary of Reynolds American, Inc.
[28] "Florida Racketeer Influenced and Corrupt Organization Act" in ss. 895.01-895.06, F.S.
[29] Florida also negotiated a "Most Favored Nations" clause in the settlement, which provides the state with additional monies for a period of time after Minnesota settled with the defendants on terms more favorable than Florida's.
[30] *See* s. 569.21, F.S.
[31] *See* ch. 2000-128, s. 5, L.O.F.

Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement.

Section 569.215, F.S., also exempts from public records requirements proprietary confidential business information of the tobacco industry received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

Section 569.215(2), F.S., defines the term "proprietary confidential information" to mean:

> information, regardless of form or characteristics, which is owned or controlled by a tobacco company that is a signatory to the settlement agreement, as amended, in the case of State of Florida et al. v. American Tobacco Company et al., No. 95-1466AH, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, is intended to be and is treated by a tobacco company as private in that the disclosure of the information would cause harm to the company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. The term includes, but is not limited to:
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> (a) Trade secrets.
> (b) Information in a Form 10-K that is confidential pursuant to an order of the Division of Corporation Finance of the Securities and Exchange Commission.
> (c) Internal auditing control policies and procedures and reports of internal auditors.
> (d) Financial operating and marketing information prepared in the ordinary course of business, the disclosure of which could impair the competitive business of the provider of information.
> (e) Financial statements, which consist of balance sheets, statements of income and cash flows, and notes related thereto, of any subsidiary that is part of a consolidated group and engaged in the production or sale of tobacco products.
> (f) Report letters from independent auditors relating to domestic operating company income.
> (g) Analyses of specific items of revenue and expense included in operating profit and extraordinary items. As used in this paragraph, the term "extraordinary items" consists of one-time tobacco litigation settlement costs and restructuring charges.
> (h) Working papers,[32] schedules,[33] analyses, and reconciliations[34] prepared by company personnel for the purpose of clarifying the disclosures of domestic

[32] According to tobacco company and agency responses to staff questionnaires in Interim Project 2006-224, working papers are evidentiary materials used by accountants and auditors to document particular entries as debits/credits or income/expense. These documents include invoices, purchase orders, policies, memoranda, etc.
[33] According to tobacco company and agency responses to staff questionnaires in Interim Project 2006-224, a schedule is an attachment to working papers, analysis and reconciliations. A schedule has also been described as a list of accounting entries, such as expense items.
[34] According to tobacco company and agency responses to staff questionnaires in Interim Project 2006-224, reconciliation is

tobacco revenues and operating profit contained in financial statements or other information related to the sale or production of tobacco products.

Section 1, ch. 2001-136, L.O.F., provides the following constitutionally required legislative finding of public necessity. It finds that it is in the public interest that information be obtained for the purpose of negotiating and verifying the calculation of annual tobacco settlement payments. It also finds that if the information provided to the state were disclosed, the tobacco companies could be harmed in the market place, affecting their annual sales, which could cause a reduction in the amounts paid to the state under the agreement. This reduction in payment could harm the financial interests of the state and the people of Florida, and the public and private harm in disclosing the information significantly outweighs any public benefit derived from its ability to scrutinize and monitor governmental action with regard to the settlement payments.

This public records exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2006, unless reviewed and reenacted by the Legislature.

Interim Project 2006-224

The Senate President approved Interim Project No. 2006-224 to review the public records exemption using the criteria established in the Open Government Sunset Review Act and recommends whether the exemptions should be reenacted or revised.[35]

In the course of the study, committee staff sent written questionnaires to the Office of the Attorney General, the Office of the Chief Financial Officer, and the Office of the Auditor General regarding these agencies' administration of the public records exemption in s. 569.215, F.S, and the exceptions' public necessity under the criteria specified in s. 119.15, F.S. Committee staff also sent questionnaires to the settling tobacco companies, Liggett, Phillip Morris, Inc., R.J. Reynolds Tobacco Company, and Lorillard Tobacco Company. The First Amendment Foundation was also contacted and provided information for the report.

The interim project resulted in the recommendation that the Legislature reenact the public records exemption in s. 561.215, F.S., and that the Legislature revise the exemption to further define the term "trade secret." The report recommended the term "trade secret" be defined as identical with the definition of the term in s. 812.081, F.S.

Sunset Review Questions

The interim project applied the questions that the Open Government Sunset Review Act requires that the Legislature consider in deciding whether to save a public records exemption from its scheduled repeal.[36]

1. What specific records are affected by the exemption?

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a comparison between two accounting documents, sets of information or conclusions that were derived using different procedures.

[35] *See, Open Government Sunset Review of s. 561.215, F.S., Tobacco Settlement*, Interim Report No. 2006-224, Florida Senate Committee on Regulated Industries, September 2005.

[36] Section 119.15(4)(a), F.S.

The exemption in s. 569.215, F.S., is limited to proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, and received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

Section 569.215(2), F.S., defines the term "proprietary confidential information" and provides specific examples of the types of information and documents included within the meaning of the term, e.g., financial statements, working papers, schedules, and reconciliations, etc. The definition also lists "trade secrets" within the meaning of the term. However, the exemption does not further define this more general term or describe what types of information would qualify as a trade secret.

In *Star Scientific v. Carter*, 204 F.R.D. 410, (S.D. Ind. 2001), the Federal District Court for the Southern District of Indiana held that information relating to the tobacco company's customer lists, consumer purchasing habits, pricing information, sales techniques, and sales volumes were protected as trade secrets since the information was not readily obtainable, the information possessed economic value, and the company took steps to maintain the secrecy of the information. Techniques for manufacturing the product, such as the operation and handling of the cutting barns, processing the tobacco, and agronomic practices would also be trade secrets if they met the same requirements. The Indiana trade secret statute has definitions similar to Florida's s. 812.081, F.S., [37] and exactly the same as s. 688.002(4), F.S. [38]

The interim project report found that the Office of the Attorney General (Attorney General) advised that it uses the definition for the term "trade secrets" as that term is defined in the Florida Statutes, e.g., s. 812.081, F.S., and relevant case law. However, two of the surveyed tobacco

[37] Section 812.081, F.S., prohibits the theft of trade secrets and defines that term as follows:

(c) "Trade secret" means 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. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

[38] Section 688.002(4), F.S., defines the term "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.

companies advised that they use the definition of the term in s. 688.002(4), F.S., and the interpretation of that term by the Florida courts. The Attorney General's response to this issue indicated that it also references the definition in s. 688.002(4), F.S.

The interim project report found that, although the definitions in ss. 688.002(4) and 812.081(1)(c), F.S., are not inconsistent, the definition of the term "trade secrets" in s. 812.081, F.S., is more detailed and descriptive and this may lead to confusion regarding whether a public records exemption has been properly claimed. The report noted the example that s. 812.081(1)(c), F.S., requires that the trade secret must provide "the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it." Section 688.002(4), F.S., does not require such a condition. The interim project report concluded that further defining this term by use of the more narrow, and also more detailed and descriptive, definition in s. 812.081(1)(c), F.S., may avoid confusion or conflict.

The interim project report found that, according to the Department of Financial Services (DFS), which conducts the settlement payment verification process, the DFS does not believe that specific "trade secrets" are implicated in connection with the information received by the department, and that the information that the department receives is confidential financial information relating to the tobacco companies' operating income and profits, if any.

The interim project report found that trade secrets may be implicated in settlement negotiations because, although the substantive case was settled in 1996, issues have arisen in the past relating to the calculation of the settlement payments, and there are currently unresolved issues related to the calculation of the settlement payments that are the subject of ongoing negotiations.[39]

2. Whom does the exemption uniquely affect, as opposed to the general public?

The interim project report found that the exemption in s. 569.215, F.S., uniquely affects the settling tobacco companies. It found that the public purpose behind the exemption is to protect proprietary confidential business information of the settling tobacco companies from being acquired by their competitors. The report noted that the legislative finding of public necessity for this exemption[40] stated that the tobacco companies could be harmed in the market place if the exempted information were disclosed.

3. What is the identifiable public goal of the exemption?

Section 119.15, F.S., also 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 purposes discussed below 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.

[39] *See Florida's Tobacco Settlement Agreement, An Accountability Update*, Report No. 02-052, Office of the Auditor General, Florida Legislature, October 2001; *Florida Tobacco Settlement and Nonsettling Manufacturers*, Interim Report No. 2005-157, Florida Senate Committee on Regulated Industries, November 2004.
[40] *See* s. 1, ch. 2001-136, L.O.F.

As determined by the Legislature in 2001, the constitutionally required legislative finding of public necessity found that it was in the public interest to exempt the settling manufacturer's proprietary confidential information for the following reasons:

- The information is necessary to ensure that the tobacco settlement payments are accurate; and
- If the tobacco companies disclose this information, they would be at a competitive disadvantage in the marketplace, which may in turn adversely affect their business interests.

The interim project report noted that the Legislature also found that "if the participating tobacco companies are harmed in the marketplace, their annual sales of tobacco products will be reduced, which will diminish the annual amounts that they pay to the State of Florida, and will thereby harm the financial interests of the state and the people of Florida." The interim project report also noted that tobacco settlement payments are based, in part, on each company's market share, and that the exemption is based on the assumption that the settling tobacco companies may be placed at a competitive disadvantage in the marketplace relative to the other tobacco manufacturers if the exempted information were disclosed. Consequently, such a competitive disadvantage may translate to a reduced market share for the settling tobacco companies, and a reduction in tobacco settlement payments.[41]

The interim project report found that, according to the DFS, in the absence of the exemption, the tobacco companies would remain obligated to make payments to the state but would likely refuse to present any documentation of the basis on which the payment was calculated in order to avoid public disclosure of the underlying financial information.

The interim project report concluded that the exemption serves an identifiable public purpose.

4. Can the information contained in the records be readily obtained by alternate means?

The interim project report found that the exempted information could not be readily obtained by alternate means. It also noted that, if the information regarding which a public records exemption is claimed pursuant to s. 569.215, F.S., were readily available by alternate means, then such information would not qualify for the public records exemption. Section 569.215(2), F.S., requires that to qualify for the exemption the information must not have been previously disclosed, "unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public."

5. Is there a continued necessity for the exemption?

Settling tobacco companies are required to make settlement payments to Florida in perpetuity. The interim project report found that the DFS has an ongoing verification process for assuring that the settling tobacco companies have made the appropriate annual payments.[42] The interim

[41] *See* s. 2, ch. 2001-136, L.O.F.
[42] This process is based on the Auditor General's recommendations regarding the administration of the tobacco settlement.

project report also noted that the Legislature created the exemption to assist in the process of negotiating or verifying annual settlement payments.[43]

6. Can the exemption be narrowed?

The interim project report expressed the concerns of the First Amendment Foundation (FAF), which advised that the exemption provides a too broad definition of what constitutes "proprietary confidential business information" because it is the tobacco companies and not the state agencies that are required to determine whether the information is confidential and exempt. Section 569.215, F.S., applies the exemption to information that the tobacco companies determine to be "proprietary confidential business information" within the intent of the exemption. The governmental recipients are not required to determine whether the information submitted by the companies is, in fact, "proprietary confidential business information."

According to the FAF, the affected state agencies may deny public access to the information without any means or process to verify whether the information qualifies for confidential and exempt status. The FAF recommends that the exemption be narrowed to require that the governmental recipients determine whether the information submitted by the companies is "proprietary confidential business information upon receipt of the information," and that the tobacco companies must first be required to request that the submitted information be treated as confidential.

According to the DFS, all documentation related to calculating the settlement payments is confidential proprietary information because of the nature of the settlement terms. The DFS also believes that there is little question, however, that the information received in conjunction with settlement payments is non-public in nature.

The interim project report found that verification of an exemption that has been claimed by tobacco companies is performed by the DFS when the DFS refers the information to the department's verification consultant for a review. The DFS's consultant compares for "reasonableness" the information received with the published industry data from Securities and Exchange Commission filings.

The interim project report found that, according to the Attorney General, the Attorney General has received only two public records requests for materials protected by the exemption since its enactment in 2001. Both requests were subsequently withdrawn by the requestors. Therefore, the Attorney General has not been required to assess the validity of the information that the companies' have identified as "proprietary confidential business information" as defined in s. 569.215, F.S. Nor has the Attorney General been required to research whether this information has been made public. According to the Attorney General, in the event of a dispute between a public records requestor and a company over claimed confidentiality, the agency would assess the company's claims in accordance with the principle that exemptions to the public records laws

An Accountability Review, Florida's Tobacco Settlement Agreement, Report No. 13686, Office of the Auditor General, Florida Legislature, June 2000; *An Accountability Update*, *supra* at n. 16.

[43] *See* ch. 2001-136, L.O.F., codified at s. 569.215, F.S.

are strictly construed in accordance with existing statutory definitions of the relevant terms as well as applicable case law.

The interim project report also noted that the information subject to the exemption may also be protected as "attorney work product" pursuant to s. 119.07 (5)(l), F.S.[44] According to the DFS, it has been informed by the Attorney General that all information received by the DFS from the tobacco companies also constitutes "work product" within the meaning of s. 119.07(5)(l), F.S.

The interim project report concluded that, other than narrowing the definition of the term "trade secret," the exemption should not be further narrowed at this time. Information supplied to the state agencies involved would be proprietary business information in the possession of the tobacco companies. Any narrowing of the exemption at this time may trigger additional litigation and delay the ability of the state to ascertain the correctness of the funds being paid to the state by the tobacco companies.

III. Effect of Proposed Changes:

The bill would reenact the public records exemption in s. 561.215, F.S for proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement. It also exempts from public records requirements proprietary confidential business information of the tobacco industry received by the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, or received by the Chief Financial Officer or the Auditor General for the purpose of verifying annual settlement payments.

The bill also amends s. 561.215, F.S., to provide that the term "trade secret" has the same meaning as the definition of that term in s. 688.002, F.S.

The bill would save the exemption from repeal as required under the Open Government Sunset Review Act. It deletes the provision that would repeal the exemption effective October 1, 2006, unless reenacted and saved from repeal by the Legislature.

The bill provides an effective date of October 1, 2006.

[44] Section 119.07 (5)(l)1., F.S., provides:

A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

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. Summary of Amendments:

None.