

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 714

INTRODUCER: Communications, Energy, and Public Utilities Committee and Senator Simmons

SUBJECT: Public Records/Proprietary Confidential Business Information

DATE: April 1, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Geeker/Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	Fav/CS
2.	<u>Naf</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:	
A. COMMITTEE SUBSTITUTE.....	<input checked="" type="checkbox"/> Statement of Substantial Changes
B. AMENDMENTS.....	<input type="checkbox"/> Technical amendments were recommended
	<input type="checkbox"/> Amendments were recommended
	<input type="checkbox"/> Significant amendments were recommended

I. Summary:

CS/SB 714 creates a public records exemption for proprietary confidential business information held by an electric utility in conjunction with a due diligence review of an electric project or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources.

The bill requires such proprietary confidential business information to be retained for one year after the due diligence review has been completed and the electric utility has decided whether or not to participate in the project.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the Florida Constitution.

Because the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

The bill substantially amends section 119.0713 of the Florida Statutes.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ It

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. 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 (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹¹ The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹²

Applicability of Public Records Requirements to Electric Utilities

The three types of electric utilities defined in s. 366.02(2), F.S., are the municipal electric utility, investor-owned electric utility, and rural electric cooperative. Any records produced or held by investor-owned utilities or rural electric cooperatives are unaffected by public records law, as both are privately owned. Municipal utilities, however, are owned by a municipality and their records are subject to public records law.

Public Records Exemptions for Municipal Electric Utility Records

Current law provides a variety of public records exemptions relating to utilities,¹³ but there is no current exemption that applies to proprietary confidential business information held by a municipal electric utility in conjunction with a due diligence review of projects related to the provision of electric service.

III. Effect of Proposed Changes:

This bill creates a new public records exemption for proprietary confidential business information held by an electric utility that is subject to chapter 119, F.S., in conjunction with a due diligence review of an electric project as defined in s. 163.01(3)(d), F.S.,¹⁴ or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources. The bill provides that such information is confidential and exempt¹⁵ from s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution. Further, the bill requires that such information be retained for one year after the due diligence review has been completed and the electric utility has decided whether or not to participate in the project.

The bill defines “proprietary confidential business information” as:

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

¹³ See, e.g., ss. 119.0713(3) (municipal utility bids to provide an item or service to customers), 364.183 (telecommunications), 366.093 (investor-owned electric and natural gas utilities), 367.156 (water and wastewater utilities), and 368.108, F.S. (natural gas transmission companies).

¹⁴ Section 163.01(3)(d), F.S., defines an “electric project” as:

1. Any plant, works, system, facilities, and real property and personal property of any nature whatsoever, together with all parts thereof and appurtenances thereto, which is located within or without the state and which is used or useful in the generation, production, transmission, purchase, sale, exchange, or interchange of electric capacity and energy, including facilities and property for the acquisition, extraction, conversion, transportation, storage, reprocessing, or disposal of fuel and other materials of any kind for any such purposes.
2. Any interest in, or right to, the use, services, output, or capacity of any such plant, works, system, or facilities.
3. Any study to determine the feasibility or costs of any of the foregoing, including, but not limited to, engineering, legal, financial, and other services necessary or appropriate to determine the legality and financial and engineering feasibility of any project referred to in subparagraph 1. or subparagraph 2.

¹⁵ There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. See footnote 6.

[I]nformation, regardless of form or characteristics, which is owned or controlled by an electric utility that is subject to chapter 119, is intended to be and is treated by the entity that provided the information to the electric utility as private in that the disclosure of the information would cause harm to the providing entity or its 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:

1. Trade secrets.
2. Internal auditing controls and reports of internal auditors.
3. Security measures, systems, or procedures.
4. Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the company or its affiliates to contract for goods or services on favorable terms.
5. Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of information.

This definition is substantially similar to existing provisions of law defining proprietary confidential business information.¹⁶

The bill provides that the public record exemption created by the bill is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also provides a statement of public necessity as required by the Florida Constitution.

The bill's effective date is July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage of a new public records exemption; therefore, this bill requires a two-thirds vote for passage.

¹⁶ See, e.g., ss. 364.183 (telecommunications), 366.093 (investor-owned electric and natural gas utilities), 367.156 (water and wastewater utilities), and 368.108, F.S. (natural gas transmission companies).

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a law creating a new public records exemption to contain a public necessity statement justifying the exemption; therefore, this bill contains a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may expand opportunities for private sector entities to do business with municipal electric utilities by creating a public records exemption for proprietary confidential business information, as the exemption may encourage more private sector participation and sharing of information.

C. Government Sector Impact:

Out-of-state energy generators and other technology providers may be more inclined to enter into public-private partnerships in Florida; to the extent that such electric partnerships would potentially improve the delivery, cost, or diversification of fuel or renewable energy, government-owned electric utilities and their customers may benefit.

Electric utilities may experience a minimal fiscal impact, because staff responsible for complying with public records requests could require training related to the new public records exemption. In addition, electric utilities could incur costs associated with redacting the confidential and exempt information. Such costs would be absorbed, however, as they are part of the day-to-day responsibilities of the electric utilities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not define “trade secrets.”

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Communications, Energy, and Public Utilities on March 6, 2013:

Expressly defines the term proprietary confidential business information instead of defining it by cross-reference.

- Clarifies that proprietary confidential business information is “held by” an electric utility instead of “provided to.”
- Consistently states that proprietary confidential business information is both confidential and exempt.
- Requires that the proprietary confidential business information be retained for one year by the electric utility.
- Deletes “propriety” and replaces with “proprietary.”

- B. **Amendments:**

None.