

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1209 Public Records/High-pressure Well Stimulation Chemical Disclosure Registry

SPONSOR(S): Government Operations Subcommittee; Agriculture & Natural Resources Subcommittee; Rodrigues

TIED BILLS: HB 1205 **IDEN./SIM. BILLS:** SB 1582

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|-----------------|---------|---------------------------------------|
| 1) Agriculture & Natural Resources Subcommittee | 8 Y, 4 N, As CS | Moore | Blalock |
| 2) Government Operations Subcommittee | 7 Y, 4 N, As CS | Moore | Williamson |
| 3) State Affairs Committee | 11 Y, 6 N | Moore | Camechis |

SUMMARY ANALYSIS

HB 1205, this bill's companion, requires the Department of Environmental Protection (DEP) to designate the national chemical registry, known as FracFocus, as the state's registry for chemical disclosure for all wells on which high-pressure well stimulations are performed. A service provider, vendor, or well owner or operator is required to report specified information relating to high-pressure well stimulations to DEP, including each chemical ingredient and its concentration used in the high-pressure well stimulation fluid, within 60 days of initiating the well stimulation. The chemical disclosure requirements do not apply to an ingredient that is not intentionally added to the high-pressure well stimulation or that occurs incidentally or is otherwise unintentionally present in a high-pressure well stimulation.

This bill, which is linked to the passage of HB 1205 or similar legislation, creates a public records exemption for proprietary business information relating to high-pressure well stimulations held by DEP in connection with the online high-pressure well stimulation chemical disclosure registry.

The bill requires a person submitting proprietary business information to DEP who wishes to maintain confidentiality of that information to request that the information be kept confidential and exempt, provide a basis to DEP for claiming the information is proprietary business information, and clearly mark each page of a document containing information claimed to be proprietary business information as "proprietary business information." If DEP receives a public records request for information claimed as proprietary business information under this bill, DEP must promptly notify the person who submitted the information. That person then has 10 days to file a circuit court action to seek an order barring disclosure of the information. DEP may not release the information if any such action is pending. Failure to file an action within 10 days constitutes a waiver of any claim to confidentiality. The bill does not direct DEP to determine whether information constitutes proprietary business information.

The bill authorizes confidential and exempt proprietary business information to be disclosed to another governmental entity if the receiving entity agrees in writing to maintain the confidential and exempt status of the information and has verified in writing its legal authority to maintain such confidentiality. In addition, such proprietary business information may be disclosed when relevant in any proceeding relating to high-pressure well stimulations.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record of public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. 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.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act² provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

House Bill 1205, Regulation of Oil and Gas Resources

HB 1205, this bill's companion, requires the Department of Environmental Protection (DEP) to designate the national chemical registry, known as FracFocus, as the state's registry for chemical disclosure for all wells on which high-pressure well stimulations are performed. DEP must provide a link to FracFocus on its website. A service provider, vendor, or well owner or operator must report to DEP, at a minimum, the following information:

- The name of the service provider, vendor, or well owner or operator;
- The date of completion of the high-pressure well stimulation;
- The county in which the well is located;
- The American Petroleum Institute number for the well;
- The well name and number;
- The longitude and latitude of the wellhead;
- The total vertical depth of the well;
- The total volume of water used in the high-pressure well stimulation; and
- Each chemical ingredient that is subject to 29 C.F.R. s. 1910.1200(g)(2) and the ingredient concentration in the high-pressure well stimulation fluid by mass for each well on which a high-pressure well stimulation is performed.

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

If FracFocus cannot accept and make publicly available any of the required information, DEP must post the information on its website.

HB 1205 requires a service provider, vendor, or well owner or operator to report the required information to DEP within 60 days after the initiation of a high-pressure well stimulation for each well on which it is performed. The service provider, vendor, or well owner or operator is also required to notify DEP if any chemical ingredient not previously reported is intentionally included and used for the purpose of performing a high-pressure well stimulation.

The bill specifies that the chemical disclosure requirements do not apply to an ingredient that is not intentionally added to the high-pressure well stimulation or that occurs incidentally or is otherwise unintentionally present in a high-pressure well stimulation.

Effect of Proposed Changes

The bill defines “proprietary business information” as information that:

- Is owned or controlled by the applicant or a person affiliated with the applicant;
- Is intended to be private and is treated by the applicant as private because disclosure would harm the applicant or the applicant’s business operations;
- Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public; and
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as requested by DEP.

The bill specifies that proprietary business information includes:

- Trade secrets, as defined in s. 688.002, F.S.;³
- Leasing plans, real property acquisition plans, exploration budgets, or marketing studies, the disclosure of which would impair the efforts of the applicant or its affiliates to contract for goods or services or to acquire real property interests on favorable terms; and
- Competitive interests, which may include well design or completion plans, geological or engineering studies related to storage reservoir performance characteristics, or field utilization strategies or operating plans, the disclosure of which would impair the competitive business of the applicant providing the information.

The bill, which is linked to the passage of HB 1205 or similar legislation, creates a public records exemption for proprietary business information relating to high-pressure well stimulations held by DEP in connection with the online high-pressure well stimulation chemical disclosure registry. The bill provides that such proprietary business information is confidential and exempt⁴ from public records requirements if the person submitting the information:

- Requests that the proprietary business information be kept confidential and exempt;
- Informs DEP of the basis for claiming the information is proprietary business information; and

³ Section 688.002, F.S., defines “trade secret” as 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.

⁴ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems 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, 53 (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 1994); *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 statute. See Attorney General Opinion 85-62 (August 1, 1985).

- Clearly marks each page of a document or specific portion of a document containing information claimed to be proprietary business information as “proprietary business information.”

If DEP receives a public records request for a document that is marked proprietary business information, DEP must promptly notify the person who submitted the information as proprietary business information. The notice must inform such person that the person has 10 days following receipt of the notice to file an action in circuit court seeking a determination whether the information in question contains proprietary business information and an order barring public disclosure of the information. If the person files an action within 10 days after receipt of the notice, DEP may not release the documents pending the outcome of the legal action. Failure to file an action within 10 days constitutes a waiver of any claim of confidentiality, and DEP must release the document as requested. The bill does not direct DEP to determine whether information constitutes proprietary business information.

The bill authorizes confidential and exempt proprietary business information to be disclosed to another governmental entity if the receiving entity agrees in writing to maintain the confidential and exempt status of the information and has verified in writing its legal authority to maintain such confidentiality. In addition, such proprietary business information may be disclosed when relevant in any proceeding relating to high-pressure well stimulations. Those involved in any proceeding relating to high-pressure well stimulations, including an administrative law judge, a hearing officer, or a judge or justice, must maintain the confidentiality of any proprietary business information released at such proceeding.

The bill specifies that the public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1. amends s. 377.45, F.S, relating to disclosure of high-pressure well stimulation chemicals.

Section 2. provides a statement of public necessity.

Section 3. provides a contingent effective date to match the effective date of HB 1205 or similar legislation, if such legislation is adopted in the same legislative session and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have a minimal negative fiscal impact on DEP because staff responsible for complying with public records requests may require training related to creation of the public records exemption. In addition, DEP may incur costs associated with redacting the confidential and exempt information prior to releasing a record.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to information submitted to DEP that is proprietary business information. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or require additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Inter-Agency Transfer of a Document

In *Ragsdale v. State*,⁵ the Florida Supreme Court held that the applicability of a particular public records exemption is determined by the document being withheld, not by the identity of the agency possessing the record. The Court concluded that information that is exempt from public records disclosure due to confidentiality does not lose its exempt status when it is transferred from one state agency to another.⁶ Thus, the requirement in the bill that a governmental entity receiving proprietary business information from DEP must verify in writing its legal authority to maintain the confidentiality of the information may not be necessary.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Agriculture & Natural Resources Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

⁵ 720 So.2d 203 (Fla. 1998).

⁶ *Id.* at 206.

- Replaces the term “trade secret” with “proprietary business information” throughout the bill;
- Adds a definition of “proprietary business information”;
- Requires a governmental entity that receives proprietary business information to agree in writing to maintain the confidential and exempt status of the information and verify in writing its legal authority to maintain the confidentiality; and
- Reduces the number of days a person has to file an action in circuit court to determine whether a document is proprietary business information from 30 days to 10 days.

On March 24, 2015, the Government Operations Subcommittee adopted a technical amendment and reported the bill favorably as a committee substitute.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.