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Committee on Commerce and Economic Opportunities

Senator George Kirkpatrick, Chairman

REVIEW OF PUBLIC RECORDS EXEMPTION RELATING TO ECONOMIC DEVELOPMENT AGENCIES

SUMMARY

Upon written request of a business, the records of an economic development agency which contain or would provide information about the plans of the business to locate or expand its activities in Florida are confidential and exempt from the public records law. Under s. 288.075(2), F.S., the records are exempt from disclosure for 24 months after the request for confidentiality or until the records are disclosed by the economic development agency or the business. This public records exemption for economic development prospects expires October 2, 2001, unless it is saved from repeal by the Legislature through re-enactment during the 2001 session, following a review under the Open Government Sunset Review Act (act).

Based upon survey responses from state and local economic development professionals and based upon an analysis of the criteria set forth in the act, it is recommended that the public records exemption for these economic development records be preserved. It further is recommended that the exemption be revised:

- To include local government employees who are directly involved in business recruitment and expansion activities within the definition of the term "economic development agency";
- To allow confidentiality to be maintained for a period longer than 24 months in the case of trade secret information, or in the case of other information if it can be shown that a business legitimately is still considering locating, relocating, or expanding activities in this state; and
- To clarify the prohibition against a public officer or employee entering into a binding agreement with a business until 90 days after disclosure of the exempt information, by allowing such agreements under specified conditions.

BACKGROUND

Government in the Sunshine

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the Florida Constitution provides:

- (a) Every person 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. 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.

In addition to the Florida Constitution, the Public Records Law¹ specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of

¹Chapter 119, F.S.

the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency.

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge (*Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form (*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c), of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2 of the fifth year, unless the Legislature acts to re-enact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.).

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal

the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year’s certification after that determination.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Section 119.15(4)(b), F.S., 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. The exemption 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. The exemption 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 provision, only information that would identify the individuals may be exempted; or
3. The exemption 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.

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S., 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 re-enactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid re-enactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act of 1995, so long as the requirements of Art. I, s. 24, of the State Constitution are not violated.

Economic Development Agencies

In 1977, the Legislature provided a public records exemption for records of the Division of Economic Development of the Florida Department of Commerce² which contain information concerning the plans of a corporation to locate, relocate, or expand any of its business activities in this state (s. 1, ch. 77-75, L.O.F.). Since enacting the exemption, which was codified in s. 288.075, F.S., the Legislature has made a number of substantive and technical revisions to its wording while retaining the basic concept of affording confidentiality to certain economic development records. Today, s. 288.075, F.S., provides that:

Upon written request from a private corporation, partnership, or person, records of an economic development agency which contain or would provide information concerning plans, intentions, or interests of such private corporation, partnership, or person to locate, relocate, or expand any of its business activities in this state are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 24 months after the date an economic development agency receives a request for confidentiality or until disclosed by an economic development agency pursuant to subsection (4) or by the party requesting confidentiality under this section.

(s. 288.075(2), F.S.).³

The public records exemption rests with an “economic development agency,” which is defined under s. 288.075(1), F.S., as including:

- the Office of Tourism, Trade, and Economic Development (OTTED);
- any industrial development authority created in accordance with part III of ch. 159, F.S., or by special law;
- the public economic development agency that advises the county commission on issuance of industrial revenue bonds of a county that does not have an industrial development authority;
- any research and development authority created under part V of ch. 159, F.S.;
- the Spaceport Florida Authority; or
- any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county.

Under subsection (4) of s. 288.075, F.S., a “public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information pursuant to this section, until 90 days after such information is made public.”

² The Department of Commerce was dissolved in 1996, and comparable functions performed by the department were assigned to public-private partnerships, including Enterprise Florida, Inc., and the Florida Commission on Tourism (ch. 96-320, L.O.F.).

³ The statute further specifies that the confidentiality must be maintained until the 24-month period expires or until there is otherwise disclosure of the information, whichever occurs first. Further, the confidentiality does not apply when a court determines that a petitioning party needs access to the documents (s. 288.075(2), F.S.).

METHODOLOGY

The primary methodological tool for this report was a survey instrument mailed to economic development organizations (EDOs), including, but not limited to, the primary EDO in each county in the state, as identified by Enterprise Florida, Inc. In addition, the survey was provided to OTTED, EFI, the Spaceport Florida Authority, the First Amendment Foundation, and a sampling of industrial development authorities and research and development authorities. Research for this report also included conducting a legislative history of changes made to s. 288.075, F.S., since its enactment in 1977.

FINDINGS

Confidentiality Important to Businesses

In working with and assisting a company that is considering relocating or expanding in a Florida community, an economic development agency is exposed to a wide variety of information related to the company's plans and needs, such as, for example, the company's facility or real estate requirements, the anticipated number of employees and the likely salaries for such employees, the projected capital investment associated with the expansion or relocation, and, in some cases, details relating to product information or business processes. Economic development professionals responding to surveys associated with the Open Government Sunset Review of s. 288.075(2), F.S., report that businesses engaged in site-selection processes place a premium on confidentiality for their plans. Among the explanations respondents provided for why such confidentiality is important to a relocating or expanding business are that:

- competitor businesses could use the information to their advantage in the marketplace and at a minimum would be exposed to the strategic plans of the business;
- release of relocation plans could cause employees of the business to leave the organization in the face of uncertainty, making it difficult for the business to meet existing workforce needs;
- the business could experience inflated real estate prices as a result of speculation by those hoping to sell property to the business;
- firms in the prospect community may inundate the company with inquiries and information in hopes of securing business with it;
- corporate officers may wish to explore and analyze options before presenting them to the board of directors, and premature release of information could resonate in the financial markets; and
- the business ultimately may elect not to expand or relocate, and the release of information concerning its exploration of sites could create false expectations.

Economic development professionals maintained that, because confidentiality during the site-selection process is important to relocating or expanding businesses, Florida would be at a competitive disadvantage vis-à-vis other states if it did not have a public records exemption for information held by economic development agencies. One respondent suggested that lack of an exemption might not cause a business to disregard Florida as a potential site, but it could cause such a business to minimize contact with state or local economic development organizations for assistance and information that ultimately might be influential in the site-selection decision.

Sunset Review Questions

The Open Government Sunset Review Act requires that the review process include consideration of the following questions:

- *What specific records or meetings are affected by the exemption?* Generally, the records affected by the exemption are files maintained by economic development agencies which contain or would provide information about a specific company's relocation or expansion plans. Based upon the survey responses, it appears that economic development agencies in practice are keeping confidential all documents relating to a specific company's interest in a Florida location.
- *Whom does the exemption uniquely affect, as opposed to the general public?* The exemption affects businesses that are working with economic development agencies as those businesses consider whether to locate or expand business activities in Florida.
- *What is the identifiable public purpose or goal of the exemption?* (See public-purpose analysis below.)
- *Can the information contained in the records be readily obtained by alternative means? If so, how?* Generally, the information could not be obtained unless the company voluntarily disclosed it.

Analysis of Public Purpose

As discussed in the “Background” section of this report, the Open Government Sunset Review Act prescribes that a public records exemption may be maintained only if it serves an identifiable public purpose, and the statute provides conditions supporting a public-purpose finding. Based upon the input from economic development professionals, it is found that the exemption contained in s. 288.075(2), F.S., satisfies two of these conditions.

First, the exemption allows the state and its political subdivisions to effectively and efficiently administer a governmental program, which administration would be hampered without the exemption (s. 119.15(4)(b)1., F.S.). The majority of state and local economic development organizations responding to the survey associated with this Open Government Sunset Review reported that their ability to conduct business recruitment and expansion activities on behalf of the state and its localities would be significantly impaired without the exemption. The exemption contributes to the exchange of information between a business and the economic development agency as the business evaluates alternative sites for its activities and as the agency markets a community’s attractiveness as a site.

Secondly, the exemption protects confidential information concerning entities, disclosure of which would result in injury to the entity in the marketplace (s. 119.15(4)(b)3., F.S.). During the site-selection process, a prospect company may share with an economic development agency not only information on general business plans, such as interest in moving from one state to another, but also detailed information relating to employment and salaries, capital investment, marketing strategies, product lines, and business processes that may have a bearing on its particular location needs. Release of such details would create an information advantage for competitor businesses in the marketplace, which could use the information, for example, to alter their own business strategies.

When the Legislature substantially revised the public records exemption in 1995, it included a statement of public necessity consistent with these two public purposes. Specifically, the Legislature found that:

[p]rotection of such information is necessary to prevent harm to the competitive position of companies that are contemplating a relocation or expansion into this state by the release of sensitive information concerning their operations or finances. The fear of untimely release of such information could make such companies reluctant to contact

representatives of economic development agencies and, consequently, impair the public benefits from economic development activities (s. 2, ch. 95-378, L.O.F.).

Concerns Raised on Elements of Exemption

Definition of “Economic Development Agency”

In 1995, the definition of “economic development agency” under s. 288.075(1), F.S., was broadened to include private entities authorized by the state, a municipality, or a county to promote the business interests of such governmental unit (s. 1, ch. 95-378, L.O.F.). The revision reflected the reliance by many local governments on private economic development organizations, such as not-for-profit chambers of commerce or similar corporations, to carry out marketing and recruitment efforts on behalf of the communities. Questions had arisen over whether a private organization was acting on behalf of the public agency in such a manner that its records and information pertaining to company locations and expansions would be subject to disclosure.⁴ With the revised definition, the confidentiality provided under s. 288.075, F.S., applies, among other organizations, to Enterprise Florida, Inc., which is the statutorily authorized not-for-profit corporation that serves as the state’s principal economic development organization, to OTTED, and to local not-for-profit economic development organizations serving as the principal business development entity for their respective communities.

Some survey respondents noted that, although the public records exemption applies to the statewide economic development organizations and certain private economic development organizations, the exemption does not cover local government employees carrying out similar

⁴ 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.). For purposes of Florida’s public records law, an agency includes a private corporation or entity that is “acting on behalf of” a public agency (s. 119.011(2), F.S.). In interpreting this definition, the Florida Supreme Court has adopted a totality of factors approach, which considers a variety of factors, including, but not limited to, how much public money the private organization receives and the degree of control the government has over the organization. (See, e.g., *News and Sun-Sentinel v. Schwab, et al.*, 596 So. 2d 1029 (Fla. 1992).)

activities (except the public agency that provides advice on industrial revenue bonds in certain counties). Consequently, the business location or expansion records of an economic development office in a city or county that conducts its own business expansion and recruitment activities – rather than utilizing a private economic development organization – are subject to disclosure, potentially placing such community at a disadvantage in dealing with business prospects. In addition, for a local government economic development office that does partner with a private economic development organization, the lack of coverage by the exemption could complicate the exchange of information between the two organizations.

It was suggested by some survey respondents that the Legislature consider broadening the definition of “economic development agency” under s. 288.075(1), F.S., to include local government employees directly involved in economic development activities.

In its survey response, the Department of Community Affairs expressed concern that it is not included within the definition of “economic development agency.” The department reports that it collects personal and financial data from sole proprietors, business partners, and principals of non-publicly traded corporations as part of the application process under the economic development category of the Small Cities Community Development Block Grant (CDBG) Program. Although the CDBG application is submitted by a local government, it typically includes information from businesses acting as participating parties. The department reported that in recent months two local governments had participating parties withdraw because of confidentiality issues. While suggesting that it may need to be included within the definition of the term “economic development agency,” the department also noted that business partners, sole proprietors, and business principals participating in the CDBG application would desire confidentiality longer than 24 months.

Because of the specialized nature of the information gathered from program participants, the Legislature may wish to consider creating a public records exemption applicable to the CDBG program, separate from the Open Government Sunset Review of s. 288.075(2), F.S. Public records exemptions have been created previously for specific economic development programs. (See, e.g., s. 288.1066, F.S., providing confidentiality for trade secret, tax, and other business information provided under the QDC and QTI tax refund programs; s. 288.712(7), F.S., providing confidentiality for personal financial records of persons participating in certain

programs of the Black Business Investment Board; and s. 288.776(3)(d), F.S., providing confidentiality for personal financial records, trade secrets, or proprietary information of applicants to the Florida Export Finance Corporation.)

Prohibition on Binding Agreements

OTTED, as well as some other economic development organizations responding to a survey for this Open Government Sunset Review, raised concerns about the portion of the public records exemption which prohibits a public officer or employee from entering into a binding agreement with a business that has requested confidentiality under the statute – until 90 days after the confidential information is made public (s. 288.075(4), F.S.).

Prior to 1995, this prohibition applied to a public officer or employee “*acting in his individual capacity . . . when such public officer or employee has knowledge*” that information concerning such business is confidential (s. 288.075(4), F.S. (1993), emphasis added). When the revisions to the definition of economic development agency were adopted in 1995, the Legislature also revised this provision regarding a public officer’s ability to enter into an agreement with a locating business in his individual capacity. Among other changes, the Legislature deleted from the statute the language “acting in his individual capacity” and “when such public officer or employee has knowledge.”⁵ As a result, under the provision as currently written, a public officer is prohibited from entering into any binding agreement with a corporation that is considering relocating to Florida until 90 days after the disclosure of any information relative to the relocation that is being kept confidential by an economic development agency.

It appears that the pre-1995 language – by referring to the individual capacity of a public officer – may have been designed to prevent a public official from benefiting personally from an agreement entered into on the basis of “inside” or confidential information about an expanding or relocating company. OTTED has noted that there may be circumstances, however, in which the state or a local government needs to enter into an agreement with a relocating business that has requested confidentiality and still maintain the confidentiality. For example, prior to the formal announcement of that company’s decision to locate in Florida, the business may need to enter into an agreement with a local government establishing performance standards as a condition for the award of local incentives. The

⁵ Section 1, ch. 95-378, L.O.F.

Legislature may wish to consider statutory language that would give governments flexibility to work with businesses while also ensuring that public officers do not benefit personally from such information, and that would establish limited circumstances under which a public officer or employee could enter into an agreement with a prospective business.

Scope of the Exemption

In its survey response, the First Amendment Foundation expressed concerns that the public records exemption may be unconstitutionally⁶ overbroad. The foundation noted that the purpose of the exemption is to protect information concerning the plans or intentions of a business to locate, relocate, or expand its activities, yet it applies to records *which contain* such information. The foundation suggested that an individual record of an economic development agency could contain some information unrelated to the business's plans and that such portion of the record should be subject to disclosure. The foundation recommended that the Legislature narrow the exemption, for example, to apply only to that portion of an economic development record that would reveal information about a business's plans.

Because the knowledge that a particular business is working with an economic development agency may, in and of itself, indicate that the business is considering locating, relocating, or expanding, it appears that the exemption needs to be broad enough to protect the identities of businesses that contact economic development agencies during the site selection process. In addition, representatives of EFI and OTTED note that providing a description of the business, while shielding the business's name, might nonetheless provide enough information for someone to positively identify the business, particularly competitors who are especially knowledgeable about their industry. Consequently, it appears that a comparatively broad public records exemption is necessary to satisfy the purpose of protecting a business's plans or intentions.

Time Period of Confidentiality

Currently, the confidentiality for economic development records under s. 288.075(2), F.S., exists for 24 months or until the information is disclosed by the economic development agency or the business requesting confidentiality. OTTED reports that there may be circumstances in which a business's site selection

process continues for a period longer than 24 months. Consequently, an economic development agency may exchange information with a business for a longer period as well. OTTED has recommended that the exemption be revised to allow for renewal or extension of the 24-month period if the business has not made a location decision and the economic development project remains in an active status.

A few economic development professionals responding to surveys also noted that the Legislature may wish to consider providing a longer period of confidentiality in the case of trade secret or proprietary information. Currently s. 288.1066, F.S., protects certain trade secrets shared by businesses as part of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs for up to 10 years. However, if a business provided trade secret information as part of its initial inquiries about locating or expanding in Florida and did not apply for the QDC or QTI programs, the period of confidentiality under s. 288.075, F.S., would be 24 months. The QDC and QTI public records exemption uses the definition provided in s. 812.081(1)(c), F.S., which describes a trade secret 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."

RECOMMENDATIONS

Committee staff recommends that the public records exemption provided in s. 288.075(2), F.S., for information relating to the interest of a business in locating, relocating, or expanding in Florida be maintained. The exemption enables the state and localities to effectively and efficiently administer economic development programs. The exemption also protects information that if released would injure a business entity in the competitive marketplace. It is further recommended, however, that the Legislature consider revising the exemption as follows:

- The exemption currently applies to an "economic development agency," which term by its definition encompasses, among others, the state Office of Tourism, Trade, and Economic Development; Enterprise Florida, Inc.; and private organizations conducting economic development activities under authority from local governments. The term generally does not currently encompass local government employees who may be directly

⁶Section 24 of Article I of the Florida Constitution prescribes that a law enacting a public records exemption shall be no broader than necessary to accomplish the stated purpose of the law.

involved in business recruitment and expansion activities, which may create a competitive disadvantage for local governments that conduct their own economic development efforts rather than partnering with a private organization. It is recommended that the Legislature include such local government economic development agencies and employees within the scope of the exemption.

- The confidentiality for economic development records exists for 24 months, or until the information is disclosed by the economic development agency or the business. It is recommended that the Legislature consider allowing the 24-month period to be extended for a limited time if it can be shown that the business is still actively evaluating its site-selection options. In addition, it is recommended that the Legislature consider providing a period of confidentiality longer than 24 months in the case of trade secret information, as defined in s. 812.081(1)(c), F.S.,

and certain proprietary information that a business prospect shares during the site selection process.

- The statute currently prohibits a public officer or employee from entering into a binding agreement with an entity requesting confidentiality under this public records exemption until 90 days after the confidential information is made public. It is recommended that the Legislature clarify the intent underlying this prohibition and specify circumstances under which agreements are permissible. Conditions for allowing such agreements could include that the agreement is necessary to effectuate the economic development project and that the agreement must not accrue to the personal benefit of the public officer or employee.

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

N/A