



# The Florida Senate

Interim Project Report 2001-031

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Committee on Commerce and Economic Opportunities

Senator George Kirkpatrick, Chairman

## REVIEW OF PUBLIC RECORDS EXEMPTION RELATING TO QUALIFIED DEFENSE CONTRACTOR AND QUALIFIED TARGET INDUSTRY TAX REFUND PROGRAMS

### SUMMARY

The Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs are economic development incentives, under which eligible businesses may receive tax refunds based upon the creation of new jobs. Section 288.1066, F.S., provides a public records exemption for specified information that is received by the Office of Tourism, Trade, and Economic Development; Enterprise Florida, Inc.; and local governments and their employees during the administration of these programs. The information covered by the exemption includes trade secrets and other sensitive details about the business, such as tax payments, wages, and sales information.

Survey responses from program administrators and economic development professionals demonstrate that the exemption enables the state and localities to effectively and efficiently administer these two economic development incentive programs. In addition, the exemption protects information that if released would injure a business entity in the competitive marketplace. It is recommended, therefore, that the Legislature re-enact the public records exemption provided in s. 288.1066, F.S.

Additionally, however, it is recommended that the Legislature consider revising the public records exemption:

- To include within the coverage of the exemption information on *actual* taxes paid by a business while participating in the QDC or QTI tax refund programs, rather than the current coverage for taxes paid in years preceding the business's participation in the programs; and
- To provide confidentiality for actual employment and wage data that is submitted by participating businesses as proof of their compliance with

performance conditions established under the programs, which would represent an addition to the exemption's current coverage for projected wage data.

### 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 Law<sup>1</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

<sup>1</sup>Chapter 119, F.S.

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 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.

### **Qualified Defense Contractor Tax Refunds**

Finding that high technology jobs in the state were threatened by downsizing in the national defense budget, the Legislature during a special session in 1993 created a tax refund program designed to facilitate the employment of Florida citizens by defense contractors. The Qualified Defense Contractor (QDC) Tax Refund Program authorized tax refunds to a certified contractor that: 1) secured a new Department of Defense (DOD) contract, 2) consolidated an existing DOD contract in Florida, 3) converted defense production jobs to non-defense

production jobs, or 4) contracted for the reuse of a defense-related facility (s. 288.104, F.S. (1994 Supp.)). The program was repealed effective December 1, 1994.<sup>2</sup>

In 1996, the QDC program was re-created and codified in s. 288.1045, F.S. (*See* s. 1, ch. 96-348, L.O.F.) In order to participate in the program and be eligible to receive tax refunds, a business must apply to the Office of Tourism, Trade, and Economic Development (OTTED) for certification. The statute prescribes information that must be submitted by a defense contractor in order to be certified (s. 288.1045(3), F.S.). The required information varies depending upon whether the business is consolidating a DOD contract or has secured a new DOD contract; is converting defense production jobs to non-defense production jobs; or has a contract to reuse a defense-related facility. Examples of the types of information that is generally required to be submitted during the application process include: 1) the applicant's federal employer identification number and state sales tax registration number; 2) the number of full-time jobs in Florida that will be dedicated to the project and the average wage of such jobs; 3) the percentage of the applicant's gross receipts derived from DOD contracts during the five taxable years preceding the application date; 4) the amount of various state taxes paid during the five fiscal years preceding the application date; and 5) the estimated amount of tax refunds to be claimed in each fiscal year under the QDC program.

The QDC program features a local financial support component, under which an eligible business must secure a resolution adopted by county government which recommends the project and which indicates that the necessary commitments of local financial support for the business exist. Local financial support means funding from local sources, public or private, which is equal to 20 percent of the annual tax refund for a qualified business (s. 288.1045(1)(o) and (3), F.S.).

Approved applicants enter into an agreement with OTTED and may receive refunds based on the payment of sales and use taxes, corporate income taxes, intangible personal property taxes, emergency excise taxes, excise taxes on documents, and ad valorem taxes paid. Tax refunds generally are paid to a participating business over

<sup>2</sup>The Legislature had specified that the program would be repealed effective December 1, 1994, if no qualified applicant had entered into a valid new DOD contract or begun consolidation of an existing DOD contract, which was expected to result in the employment of at least 1,000 full-time employees. Because this condition was not satisfied by a single qualified applicant, the statute stood repealed.

a period of several years. A qualified applicant may not be qualified for any project to receive more than \$5,000 times the number of jobs provided for in the tax refund agreement.

### Qualified Target Industry Tax Refunds

The Qualified Target Industry (QTI) Tax Refund Program, s. 288.106, F.S., is one of Florida's main economic development incentives. The QTI program allows new or expanding businesses in certain industrial sectors or corporate headquarters to be approved for tax refunds of \$3,000 per job created (\$6,000 in an enterprise zone or rural county). To be eligible, a business's project must create at least 10 full-time jobs, and an expansion of an existing business must result in a 10-percent increase in employment at the business. Approved applicants enter into an agreement with OTTED and may receive refunds based on the payment of sales and use taxes, corporate income taxes, intangible personal property taxes, emergency excise taxes, excise taxes on documents, ad valorem taxes paid, and insurance premium taxes. Tax refunds generally are paid to a participating business over a period of several years.

To participate in the program, an eligible business must apply to OTTED before the business has made a decision to locate a new business in this state or before the business had made the decision to expand an existing business in this state. As part of the application process, the business must submit, among other items: 1) its federal employer identification number and its state sales tax registration number; 2) the number of full-time jobs in this state that will be dedicated to the project and the average wage of such jobs; 3) an estimate of the proportion of the sales resulting from the project that will be made outside the state; and 4) any other additional information requested by OTTED (s. 288.106(3)(a), F.S.).

The QTI program features a local financial support component, under which an eligible business must submit a resolution adopted by county government which recommends that certain types of businesses be approved as qualified and states that the commitments of local financial support necessary for the target industry business exist. Local financial support means funding from local sources, public or private, which is equal to 20 percent of the annual tax refund for a qualified business (s. 288.106(1)(j) and (3)(a)9., F.S.).

### Confidentiality of QDC & QTI Records

Section 288.1066, F.S., provides a public records exemption for specified information that is received by OTTED; Enterprise Florida, Inc.; or county or municipal governmental entities and their employees under the administration of the Qualified Defense Contractor (QDC) and Qualified Target Industry (QTI) tax refund programs.<sup>3</sup>

Under the QDC program, the following information is confidential for a period not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier:

- The applicant's federal employer identification number and state sales tax registration number.
- The percentage of the business's gross receipts derived from DOD contracts during the five taxable years immediately preceding the date the application for certification under the program is submitted.
- The amount of the following taxes paid during the five fiscal years preceding the date of the application: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes. In addition, the exemption applies to information on the projected amounts of such taxes that will be due in the three fiscal years following the application date.
- Any trade secret information as defined in s. 812.081, F.S., contained in statements concerning the applicant's need for or use of the tax refunds<sup>4</sup> (s. 288.1066(1)(a)-(d), F.S.).

<sup>3</sup> When the Legislature created the QDC Tax Refund Program during a special session in 1993, it also created a public records exemption for certain information submitted by businesses under the program. (*See* s. 1, ch. 93-420, L.O.F., and s. 288.1065, F.S. (1994 Supp.)) However, the public records exemption was repealed effective April 15, 1994. Prior to the adoption of s. 288.1066, F.S., in 1996, no comparable public records exemption existed for the QTI Tax Refund Program.

<sup>4</sup> Section 812.081, F.S., defines a trade secret, in part, 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" (s. 812.081(1)(c), F.S.).

Under the QTI program, the following information is confidential for a period not to exceed the duration of the tax refund agreement or 10 years, whichever is earlier:

- The applicant's federal employer identification number and state sales tax registration number.
- Any trade secret information as defined in s. 812.081, F.S., contained in any description of the type of activity or product covered by the creation of a new business or expansion of an existing business.
- The anticipated wages of the jobs projected to be created by the economic development project.
- The amount of the following taxes paid during the five fiscal years preceding the date of the application: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes. In addition, the exemption applies to information on the projected amounts of such taxes that will be due in the three fiscal years following the application date.
- Any trade secret information as defined in s. 812.081, F.S., contained in statements concerning the role that the tax refunds will play in the business's decision to locate or expand in Florida.
- An estimate of the proportion of sales resulting from the project that will be made outside this state (s. 288.1066(2)(a)-(f), F.S.).

The public records exemption shall stand repealed on October 2, 2001, unless the Legislature reviews it and saves it from repeal through re-enactment during the 2001 session.

## METHODOLOGY

The primary methodological tool for this report was a survey instrument mailed to economic development organizations (EDOs) throughout the state, including, but not limited to, OTTED, EFI, and the primary EDO in each county, as identified by EFI. In addition, the survey was mailed to the First Amendment Foundation. Research for this report also included conducting a legislative history of s. 288.1066, F.S.

## FINDINGS

### Sunset Review Questions

The Open Government Sunset Review Act requires that the review process for the public records exemption under s. 288.1066, F.S., include consideration of the following questions:

- *What specific records or meetings are affected by the exemption?* The records are part of the files under the QDC and QTI programs that are maintained by OTTED, EFI, and local governments. The statute prescribes the specific information covered by the exemption, which includes trade secrets and information relating to business sales, wages, and taxes paid.
- *Whom does the exemption uniquely affect, as opposed to the general public?* The exemption affects businesses that seek to participate in the QDC and QTI economic development incentives as part of a business location or expansion in Florida.
- *What is the identifiable public purpose or goal of the exemption?* The purpose of the exemption is to protect trade secrets and other sensitive business information, the release of which could injure the business in the marketplace. The exemption is also designed to facilitate the administration of the QDC and QTI incentive programs by removing any reluctance of expanding or relocating businesses to apply for the programs. (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 program administrators and other economic development professionals, this report finds that the exemption contained in s. 288.1066, F.S., satisfies two of these conditions.

First, the exemption allows the state and its political subdivisions to effectively and efficiently administer

governmental programs (s. 119.15(4)(b)1., F.S.). The information covered by the public records exemption is used by the state and by local governments in evaluating the participation of businesses in two economic development incentive programs. Several of the economic development professionals responding to the survey associated with this Open Government Sunset Review cautioned that, in the absence of the public records exemption, businesses would be reluctant to participate in the programs because of concerns that sensitive information could be accessible by competitors. One respondent noted that businesses inquiring about the incentive programs typically ask at the outset about such confidentiality. The Legislature created the programs in an effort to encourage job creation in the state. Reluctance by businesses to participate in the programs would be contrary to the broader public policy goals of the programs.

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.). In particular, the exemption protects trade secret information, such as product information or unique business processes, that a participant in the program may share in describing its need for or use of the tax refunds. If the exemption did not exist, competitors of a business applying for the QDC or QTI programs would have access to details relating to the business's sales, tax identification numbers, and wage rates, which information could be used to undermine an advantage that the business has obtained in the marketplace.

### **Issues Raised Concerning Exemption**

The Office of Tourism, Trade, and Economic Development, which is the principal administrator of the QDC and QTI tax refund programs recommended some revisions to the public records exemption provided in s. 288.1066, F.S.

#### ***Information on Taxes Paid***

Currently the exemption applies to information on the amount of specified taxes paid during the five fiscal years preceding the date the business applies to participate in the programs, as well as the projected amounts of such taxes that will be due in the three fiscal years following the application date. The applicable taxes include: sales and use taxes under ch. 212, F.S.; corporate income taxes under ch. 220, F.S.; intangible personal property taxes under ch. 199, F.S.; emergency excise taxes under ch. 221, F.S.; and ad valorem taxes.

OTTED reports that this information is no longer required as part of the application process. Businesses, however, must report information on taxes paid as part of the claim for a tax refund under the programs.<sup>5</sup> In other words, although businesses no longer have to report on taxes paid prior to entrance into the program, they are required to report on taxes paid while under the refund agreement. Currently, the public records exemption in s. 288.1066, F.S., does not cover such information. According to OTTED, this same type of information is held confidential by the Department of Revenue (DOR) and would remain confidential if shared with OTTED by DOR. There is no applicable confidentiality, however, when the business submits the information directly to OTTED as part of its request to receive tax refunds, as authorized under the QDC and QTI programs.

#### ***Employment and Wage Information***

OTTED also noted that the public records exemption currently does not cover sensitive information shared by businesses on employment and wages. The portion of the exemption applicable to the QTI program does afford confidentiality to information that a program applicant shares on the “*anticipated wages of those jobs projected to be created by the project*” (s. 288.1066(2)(c), F.S. (emphasis added)). As part of the claim for an annual refund under both the QDC and QTI programs, however, a business is required to submit actual evidence of the achievement of the employment and wage standards established in the tax refund agreement. OTTED reports that employment and wage data received by the Florida Department of Labor and Employment Security (DLES) is kept confidential, and it recommends that similar confidentiality be afforded to actual wage and salary data submitted as part of the QDC and QTI programs.

#### ***Other Economic Development Incentives***

The public records exemption provided in s. 288.1066, F.S., is for sensitive business information received in connection with the two economic development incentive programs specifically named in the statute: the

<sup>5</sup> Under the QTI program, for example, a business that has entered into a tax refund agreement with the state may apply once annually for a tax refund. The refund claim must include a copy of all receipts pertaining to the payment of taxes for which the refund is being sought (s. 288.106(5)(a) and (b), F.S.). The requirement is also part of the QDC program (s. 288.1045(5)(a) and (b), F.S.).

QDC and QTI tax refund programs. In recent years, the Legislature has enacted a number of other economic development incentives. Examples of such incentives include: the Quick Action Closing Fund, under which high-impact business facilities are eligible for payments from the fund (s. 288.1088, F.S.); High Impact Performance Incentive (HIPI) Grant, under which a grant is provided to an eligible business that makes a cumulative investment in the state of at least \$100 million in a three-year period and creates 100 full-time jobs (s. 288.108, F.S.); and Capital Investment Tax Credit, which provides an annual credit against corporate income tax equal to 5 percent of the eligible capital costs generated by a qualifying project (s. 220.191, F.S.). As part of their participation in such programs, businesses are required to submit a variety of information to the administering agencies, some of which may be sensitive in nature. OTTED noted that there are currently no public records exemptions specific to these programs, and it recommended revising and expanding s. 288.1066, F.S., to include these programs. Because this public records exemption currently applies only to the QDC and QTI tax refund programs, however, an analysis of the information requirements associated with other economic development incentives was not a component of the research conducted by committee staff as part of this Open Government Sunset Review.

### RECOMMENDATIONS

Committee staff recommends that the public records exemption provided in s. 288.1066, F.S., for specified business information received as part of the administration of the QDC and QTI tax refund programs be maintained. The exemption enables the state and localities to effectively and efficiently administer these

two economic development incentive programs. In addition, the exemption protects information that if released would injure a business entity in the competitive marketplace.

It is further recommended that, in response to concerns posed by program administrators, the Legislature consider revising the exemption in the following manner:

- Extend confidentiality to information on actual tax payments made, which is submitted by businesses as part of the annual claim for tax refunds under the QDC and QTI programs.
- Extend confidentiality to information on actual employment and wages, which is submitted by businesses as part of their evidence of compliance with performance standards established in tax refund agreements under the two programs.

Separate from this Open Government Sunset Review, it is recommended that the Legislature consider evaluating the extent to which distinct public records exemptions may be necessary for the effective and efficient administration of other recently created economic development incentive programs. Alternatively, the Legislature could evaluate the extent to which an encompassing public records exemption could be created that would be applicable to all state economic development incentive programs and activities, consistent with the constitutional and statutory requirements governing open records in Florida.

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

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**MEMBER OVERSIGHT**

N/A