



The Florida Senate

Interim Project Report 2004-201

November 2003

Committee on Commerce, Economic Opportunities, and Consumer Services James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF PUBLIC RECORDS EXEMPTION FOR BUSINESS RECORDS IN EMINENT DOMAIN NEGOTIATIONS (S. 73.0155, F.S.)

SUMMARY

Business records provided to a governmental condemning authority as part of an offer to settle a business-damage claim under the eminent domain law are exempt from the state's open government requirements. This public records exemption, codified in s. 73.0155, F.S., expires on October 2, 2004, unless the Legislature saves it from repeal after reviewing it under the Open Government Sunset Review Act (act).

Evaluating the public records exemption against the criteria prescribed in the act, this report finds that the exemption protects information of a confidential nature concerning a business that suffers damages when the government, for right-of-way purposes, condemns part of the property on which the business operates. Without the exemption, the business, which must submit a settlement offer or forego the business-damage claim, risks having competitors access sensitive information like tax and other financial data. In addition, by promoting the exchange of information between the business and the condemning authority early in the property-acquisition process, the exemption helps governments evaluate business-damage offers and facilitates settlements, thereby allowing for effective and efficient administration of eminent domain programs. The public records exemption, however, does not clearly describe the information exempt from disclosure. Therefore, this report recommends that the Legislature retain but also revise the exemption to clarify its coverage.

BACKGROUND

Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to

public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a), of the State Constitution provides that:

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.

The Public Records Law¹ also specifies conditions under which the public must have access to governmental records. Section 119.011(1), F.S., defines the term "public records" 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.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used "to perpetuate, communicate, or formalize knowledge."² Unless the

¹ Chapter 119, F.S.

² *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs.*,

Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

Under Article I, s. 24(c), of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (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.

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 public records exemptions. 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, unless the Legislature reenacts the exemption. 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.).

Under s. 119.15(2), F.S., an exemption may 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 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?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. 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 policy of open government and cannot be accomplished without the exemption:

- 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.”
- 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.”
- 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.”

(Section 119.15(4)(b), F.S.)

Eminent Domain Negotiations & Damages

Eminent domain is the power to take private property for public use. To encourage presuit settlement and reduce litigation costs, the Legislature in 1999 substantially revised the eminent domain law by establishing a presuit negotiation process,⁴ under which a condemning authority must attempt to negotiate with the property owner, provide the property owner with a written offer, and attempt to reach an agreement on the amount of compensation to be paid for the property (s. 73.015, F.S.).

Notice to Fee Owners

The process begins with the condemning authority making an offer of compensation and notifying the property owner of the necessity for the parcel, the nature of the project, the availability of an appraisal report, and the owner’s rights and responsibilities under the law. The property owner has 30 days to respond to the offer, during which time the

Inc., 379 So. 2d 633, 640 (Fla. 1980).

³ See *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

⁴ See ch. 99-385, L.O.F.; Paul D. Bain, “1999 Amendments to Florida’s Eminent Domain Statutes,” *The Florida Bar Journal*, Nov. 1999, at 68.

condemning authority may not file a condemnation action in circuit court⁵ (s. 73.015(1)(a) and (b), F.S.).

Notice to Business Owners

The 1999 eminent domain revisions also provided that before the state Department of Transportation or a county, municipality, board, district, or other public body may initiate an action to condemn property for a right of way,⁶ it must make a good-faith effort to notify businesses that operate on the property, which notice is substantially similar to the notice to the fee owner (s. 73.015(2)(a), F.S.). The condemning authority, however, is not required to negotiate with the business owner prior to initiating an action in circuit court.

Business-Damage Offer

If a business intends to claim a statutory right to business damages,⁷ it must submit to the condemning authority, within 180 days of the notice from the authority, a good-faith written offer to settle any claim of business damages (s. 73.015(2)(c), F.S.). Unless the court finds that a business was justified in failing to do so, the court must strike the damage claim if the business fails to submit the settlement offer in a timely manner. The offer to settle business damages “must include an

⁵ Jurisdiction over eminent domain cases rests with the circuit court, where the cases are tried before a 12-member jury and are given preference over other civil actions (s. 73.071(1), F.S.).

⁶ A “right of way” is defined in s. 334.03(22), F.S., as “land in which the state, the department, a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility.”

⁷ Florida law provides that, under certain circumstances, a business operating on property to be acquired for right-of-way purposes may receive compensation for damages caused by the acquisition. The following conditions must be met: 1) the business must hold a property interest in the portion of the property being acquired; 2) the acquisition must be a partial acquisition of the property; 3) the business must have been in operation for at least four years; and 4) the business must demonstrate that the damages are directly attributable to the loss of property. See s. 73.071(3)(b), F.S.; Florida Department of Transportation, *The Real Estate Acquisition Process*, Jan. 1, 2000, at 12-13, available at <http://www.dot.state.fl.us/rightofway/documents/acqhn.pdf>. However, in contrast to the payment to the fee owner for the property taking, which is constitutionally protected, the payment of compensation for business damages is granted or withheld simply as a matter of legislative grace. *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So. 2d 926, 928 (Fla. 1983).

explanation of the nature, extent, and monetary amount of such damage” (s. 73.015(2)(c)1., F.S.).

Business Records

Accompanying the offer to settle a business-damage claim, the business must submit to the condemning authority copies of “business records” that substantiate the offer. The term includes, but is not limited to:

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim

(s. 73.015(2)(c)2., F.S.).

Exemption for Business Records

Concurrent with the 1999 reforms to the eminent domain law, the Legislature enacted a public records exemption for business records submitted with an offer to settle a business-damage claim.⁸ Codified in s. 73.0155, F.S., the provision specifies that business records submitted by a business owner to a governmental condemning authority as part of an offer to settle business damages are exempt from the open government provisions: 1) if disclosure of the records “would be likely to cause substantial harm to the competitive position of the person providing” the records; and 2) if the person providing the records requests that they be held exempt.

In its statement of public necessity for the public records exemption, the Legislature found that the exemption was necessary to encourage presuit settlements and to prevent a business from being placed at a competitive disadvantage through the release of sensitive business records to the public.⁹ This exemption expires on October 2, 2004, unless it is reviewed and reenacted by the Legislature. The purpose of this report is to evaluate, under the Open Government Sunset Review Act, this public records exemption for eminent domain business records.

⁸ Section 1, ch. 99-224, L.O.F.

⁹ Section 2, ch. 99-224, L.O.F.

Related Public Records Exemption

Florida law provides a public records exemption for records held by a state executive branch agency¹⁰ seeking to acquire real property by purchase or through the exercise of the power of eminent domain (s. 119.07(3)(n), F.S.). The exempt records include “all appraisals, other reports relating to value, offers, and counteroffers.” The exemption is operative until execution of a valid option contract or a written offer to sell that has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, the exemption expires at the conclusion of the condemnation litigation of the property. The exemption does not apply to a public record which was made a part of a court file and which is not specifically closed by order of court (s. 119.07(4), F.S.). Committee staff has found no reported case law on the question of whether the term “other reports relating to value” includes business records provided by a business to a condemning authority to be used to establish a value for the business damages. This exemption is not being reviewed as part of this report.

METHODOLOGY

Committee staff, with the assistance of staff from the Legislative Committee on Intergovernmental Relations, surveyed counties and municipalities for information on operation of the public records exemption and for opinions on reenactment or repeal of the exemption. Committee staff solicited similar input from the Department of Transportation, business organizations, attorneys experienced in eminent domain law, and the First Amendment Foundation.¹¹

FINDINGS

Sunset Review Questions

The Open Government Sunset Review Act prescribes questions to be considered by the Legislature in deciding whether to save a public records exemption from its scheduled repeal (s. 119.15(4)(a), F.S.).

¹⁰ Sections 125.355, 166.045, and 1013.14, F.S., provide comparable exemptions for counties, municipalities, and educational boards acquiring property for public purposes.

¹¹ The First Amendment Foundation is a not-for-profit organization whose stated purpose is “to protect and advance the public’s constitutional right to open government by providing education and training, legal aid and information services.” See <http://www.floridafaf.org>.

What specific records does the exemption affect?

The public records exemption under review applies to “business records” submitted to a governmental condemning authority as part of a business-damage offer under s. 73.015, F.S. The term “business records” is not specifically defined with the statutory section creating the public records exemption. The term, however, is defined in s. 73.015, F.S., which is the statutory section that the public records exemption refers to and which is the section that establishes the process for negotiating business-damage claims – suggesting that this definition of business records applies to the public records exemption as well.

For purposes of business-damage negotiations and what may be submitted to substantiate a claim, the term “business records” includes, but is not limited to:

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim

(s. 73.015(2)(c)2., F.S.).

The Department of Transportation and eminent domain attorneys note that businesses submit, and condemning authorities may request, a wide variety of records. In addition to the items specifically identified in statute, businesses may submit, or be asked to submit, items such as: unemployment tax returns, tangible personal property tax returns, sales records, cash-flow statements, customer counts, leases, franchise agreements, appraisal reports or business damage studies, inventories and valuations of fixtures and personal property, and similar types of information.

Neither the public records exemption nor the statutory section illustrating items that a business may submit to substantiate a damage offer specifically cites trade secrets or “proprietary confidential business information.” There are precedents in the Florida Statutes for providing disclosure protection for this type of information.¹² Although not typically submitted

¹² See, e.g., s. 288.047(7), F.S., providing confidentiality for materials that relate to potential trade secrets, business transactions, or proprietary information under the Quick-Response Training Program; s. 350.121, F.S., authorizing

as part of a business-damage claim, there may be situations, the department noted as an example, when the property taking could affect the physical design of a manufacturing facility. If the design is integral to the business processes of the facility, it may be necessary to review information in the nature of trade secrets or similar proprietary business information.

Although business records may be exempt from disclosure, the payments approved by the condemning authority typically are available for the public to evaluate the authority's decision. For example, the Department of Transportation prepares a settlement recommendation, which is a written explanation relating to endorsement of the terms of a settlement.

Whom does the exemption uniquely affect?

The public records exemption under review has the potential to uniquely affect a business that operates on property acquired by a governmental condemning authority for a right-of-way and that is eligible to claim damages to the business directly caused by the acquisition. As the result of changes made to the eminent domain law in 1999, such a business must submit a good-faith written offer to settle any claims of business damages in order to preserve its right to a determination of such damages in court. In addition, the business must submit business records to substantiate the offer.

The public records exemption also has the potential to uniquely affect governmental condemning authorities, which would utilize the business records to evaluate the merits of a business's damage offer. Survey responses from local governments, however, reveal that many counties and municipalities simply have had no practical experience with the new eminent domain notification and negotiation processes or the public records exemption. These communities – particularly ones with smaller populations or that are more rural in character – report that condemnations occur infrequently. Other communities reported that they

the Public Service Commission to keep certain inquiry records confidential if they are deemed to contain trade secrets or proprietary confidential business information; s. 381.83, F.S., providing confidentiality for trade secrets obtained under the public health law; s. 408.185, F.S., providing confidentiality for trade secrets and proprietary confidential business information held by the Office of the Attorney General as part of a health care antitrust review; and s. 1004.43(8)(b), F.S., providing confidentiality for propriety confidential business information held by the H. Lee Moffitt Cancer Center.

have not acquired property through eminent domain since the 1999 revisions.

The Department of Transportation is the principal governmental authority engaged in right-of-way acquisition in this state. In fiscal year 2002-2003, the department acquired, through negotiation or formal condemnation, 1,778 parcels.¹³ (See Table 1, below.)

Table 1: State Right-of-Way Acquisition Data

	Fiscal Year		
	2000/01	2001/02	2002/03
# Negotiated	1,363	1,558	1,133
# Condemned	610	854	645
Total Parcels	1,973	2,412	1,778

Source: Florida Transportation Commission

Total expenditures for right-of-way acquisition activities for the same year were \$443.3 million, with business damages representing \$28.8 million or 6.5 percent of the total.¹⁴

The department estimates that, in fiscal year 2002-2003, it resolved approximately 75 cases that included a business-damage claim, which figure is fairly typical for the department on an annual basis. The department explained, however, that a low percentage of businesses engaged in business-damage claims actually request that business records be held exempt from disclosure. For example, the department reports that it received 10 requests statewide for business records to be held exempt under the public records exemption during fiscal year 2002-2003. Local governments that did report experience with the notification and negotiation process established in 1999 similarly stated that generally few businesses specifically evoked the protection of the public records exemption.

Attorneys who represent businesses in eminent domain proceedings, nonetheless, stated that the public records exemption is important because the 1999 revisions to the eminent domain process have the effect of placing the onus on businesses that are already being affected, through no fault of their own, by significant governmental action. The public records exemption, they maintain, helps to ensure that the business is not further harmed through the disclosure of sensitive information that could jeopardize its competitive position in the marketplace. (See discussion of the public purpose of the exemption, below.)

¹³ Florida Transportation Commission, *Performance and Production Review of the Department of Transportation: Fiscal Year 2002-2003*, Sept. 2003, at 71.

¹⁴ *Id.* at 74.

What is the exemption's public purpose or goal?

In the statement of public necessity accompanying creation of the public records exemption, the Legislature articulated two justifications for exempting eminent domain business records from disclosure: 1) to encourage presuit settlement of business damages, and 2) to prevent a business from being placed at a competitive disadvantage through the release of sensitive business records to the public.¹⁵

Based upon discussions with the Department of Transportation, it appears that, as a practical matter, the ability of the public records exemption to encourage *presuit* settlement is somewhat limited. The eminent domain statute authorizes the condemning authority to initiate its condemnation lawsuit in circuit court after it has fulfilled the requirement to notify an affected business of its rights to pursue business damages.¹⁶ Because the business has 180 days after notification to submit its offer to settle business-damage claims, the department very often has already filed the lawsuit, naming the business as a defendant, before the business submits the offer and the supportive business records. Although the vast majority of business-damage claims involving the department are settled without arguing the case before a jury,¹⁷ they are nonetheless settled within the ambit of filed litigation and, therefore, are not technically *presuit* settlements.

Thus, it may be more accurate to conclude that one purpose of the public records exemption is to encourage settlement of business damage claims before the litigation advances fully to trial, potentially reducing overall litigation costs. The exemption, as a component of the more fundamental requirement for the business to make the first offer, helps facilitate settlement of business damages by removing a potential barrier to the exchange of information used by the parties to evaluate the merits of claims earlier in the litigation process than occurred in the past.

According to the eminent domain attorneys, concern about being placed at a competitive disadvantage through the release of sensitive business records makes a business hesitant to submit the information to a governmental condemning authority. This concern relates to the second reason cited by the Legislature as justification for the public records exemption.

Proponents of the public records exemption maintain that the exemption is necessary to counterbalance the 1999 statutory change that requires the business to take the first step of submitting a good-faith offer to the condemning authority or risk losing its right to maintain a business-damage claim in court. Prior to the 1999 revisions, details related to business damages were not as likely to be explored until the parties were further engaged in eminent domain litigation. A business typically sought a protective order from the circuit court to exempt business records from disclosure. Without the public records exemption, eminent domain attorneys note, a business would be in the position of having to submit sensitive business information to a governmental agency which could then be obtained and used by competitor businesses to their advantage in the marketplace. Also, but for the property taking, the business would not typically be in a position of having to release sensitive information.

Beyond the two primary justifications cited by the Legislature in creating the public records exemption, research for this report indicates a complementary purpose. To the extent the exemption removes any reluctance on the part of a business to share sensitive information early in the condemnation process, it enables the condemning authority to obtain factual data to evaluate the merits of a business damage offer and thereby make a more prudent decision regarding acceptance of that offer and the expenditure of public dollars to pay business damages.

Is the information otherwise readily obtainable?

The items that are listed in the statutory provision requiring the submission of business records to substantiate a claim for business damages – and which arguably are the same business records intended to be protected from disclosure under the public records exemption – do not appear to be readily accessible to the general public. Much of the information delineated in the statute, and which is typically used by the Department of Transportation or other condemning authorities to evaluate an offer of business damages, relates to federal or state tax filings. In general, federal tax returns and return information are confidential under 26 USC s. 6103(a). Similarly, under Florida law,

¹⁵ Section 2, ch. 99-224, L.O.F.

¹⁶ See s. 73.015(2), F.S. The condemner also must have provided the property owner with the mandatory 30 days to respond to the condemner's offer before filing the lawsuit. However, "[u]nlike the mandatory pre-suit negotiations when dealing with a property owner, the condemner is not required to negotiate with the business owner before initiating litigation." Paul D. Bain, *supra* note 4, at 68.

¹⁷ The department estimates that, even with the existence of business-damage claims, which are typically complex, less than 3 percent of parcel disputes are heard by a jury.

information in returns and reports received by the Department of Revenue is confidential and exempt from the state's open government requirements, with specific exceptions (s. 213.053, F.S.).

Eminent domain attorneys also report that balance sheets and profit-and-loss statements, which are among the delineated items that may be submitted to substantiate a business-damage offer, cannot be readily obtained by the public. Condemning authorities, they report, are interested in this kind of data for the particular business operation affected by the property taking, which usually is a small or medium-sized private business or franchise. Therefore, even though a large publicly held company may, for regulatory or other reasons, release earnings or similar information, it is unlikely to do so on a disaggregated level that would result in the release of that information on a property-specific basis.

Maintenance of the Exemption

Under the Open Government Sunset Review Act, a public records exemption may be maintained only if it serves an identifiable public purpose, and an exemption may be no broader than necessary to meet that purpose (s. 119.15(4)(b), F.S.). A satisfactory public purpose includes: allowing for effective and efficient administration of a governmental program; protecting sensitive personal information about individuals; or protecting confidential information about entities. Additionally, the Legislature must find the purpose is "sufficiently compelling" to take priority over the state's policy tradition of open government. (See discussion of the Open Government Sunset Review Act in the Background section, above.)

Public Purpose Analysis

Based upon the insights shared by governmental condemning authorities and attorneys or organizations representing the interests of businesses in eminent domain matters, the exemption for business records submitted to substantiate a business-damage offer principally serves the public purpose of protecting information of a confidential nature about entities. The tax filings, profit-and-loss statements, balance sheets, customer counts, franchise and lease agreements, sales records, and similar information often used by a condemning authority in evaluating a business's offer are not typically accessible to the public and may be used by a business to protect or further an advantage over those who do not know the information. Disclosing the information would provide competitor businesses with previously inaccessible insights into

the financial status and operations of the business and thereby potentially injure the business in the marketplace – exacerbating those injuries already caused by the government's condemnation of property on which the business operates.

In addition, the research for this report, on balance, suggests that the public records exemption does contribute to effective and efficient administration of governmental eminent domain activities. All governmental condemning authorities do not agree that the administration of their eminent domain programs would be significantly impaired without the exemption. For example, three larger counties responding to the committee's survey recommended that the Legislature allow the exemption to expire, and some other local governments expressed tepid support for or took no position on reenactment. However, more communities offering an opinion on reenactment of the exemption were supportive of it, reasoning that the exemption, by addressing a business's concerns about releasing sensitive financial information, enables the condemning authority to gather information critical to the valuation of business-damage claims and that the exemption, by promoting candid exchange of information, creates opportunities for the parties to negotiate a settlement, potentially avoiding the expense of a full trial on the issue of business damages.

Coverage of the Exemption

The eminent domain statute that requires a business to submit substantiating business records with its business-damage offer defines the term "business records" in an open-ended fashion. Although the statute provides a specific listing of items that qualify as business records, it prefaces the list by stating that the list "includes, but is not limited to," those items (s. 73.015(2)(c)2., F.S.). In addition, the statute concludes the list by stating that the term business records includes "other records relied upon by the business owner that substantiate the business damage claim" (*id.*, *emphasis supplied*), without further defining what those "other records" might be. For the purposes of the negotiation process prescribed in the eminent domain law, an open-ended listing of business records appears necessary, because what a business relies upon to substantiate its damages claim, and what a condemning authority needs to evaluate the claim, may be unique to the circumstances of that particular business and that particular eminent domain case.

Although the public records exemption shields "business records" from disclosure, it does not specifically define the term. The exemption does

include a general cross reference to the section of the Florida Statutes governing the submission process for business-damage offers, thus creating an implication that the definition of business records contained in that statutory section applies to the public records exemption as well. Applying this open-ended definition of “business records” to the exemption, however, creates some uncertainty over precisely what records are covered by the exemption and creates the potential for inconsistent application of the exemption.

The public records exemption does contain a qualification that disclosure of the business records must be “likely to cause substantial harm to the competitive position” of the business. However, the exemption does not specify who makes the determination of whether the potential for substantial harm exists (e.g., the condemning authority or the business requesting protection for business records). There is the potential that an item of business information submitted to substantiate the business-damage offer may be relevant to the evaluation of the offer but may not create a risk for injury to the competitive position of the business if it were accessible by the public. If the public purpose of the exemption is to prevent such injury in the marketplace, then the exemption may be attacked as being overbroad if it does capture business records that do not have this risk associated with them.¹⁸

To clarify the exemption’s coverage, promote consistent application, and ensure that the exemption is not overbroad, the Legislature may wish – within the language of s. 73.0155, F.S., – to describe further the information exempt from disclosure and the conditions under which it is exempt. The Legislature, for example, could list specific sensitive items commonly submitted by businesses or requested by condemners. Recognizing that the items in each case may be unique, however, the language could also include flexibility to cover other sensitive business records, provided that

¹⁸ See *Halifax Hosp. Medical Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 569-570 (Fla. 1999) (finding to be overly broad and unconstitutional a public meetings exemption because it applied to discussion of a hospital’s strategic plan even though not all aspects of the plan would be critical confidential information). The courts have required a “close and content-based fit” between a public records exemption and the justification for the exemption and have deemed an exemption to be overbroad where it suppresses information beyond the parameters of the justification. *Memorial Hospital-West Volusia, Inc., v. News Journal Corp.*, 2002 WL 390687; 30 Media L. Rep. 1300 (Fla. Cir. Ct. 2002).

they have not been disclosed or are not readily obtainable by the public, are being relied upon to establish business damages, and are integral to maintenance of the business’s competitive position.

Exempt v. Confidential Status of Information

Public records law recognizes a distinction between records that are made exempt and records that are made confidential. If a record is made exempt only, an agency is not prohibited from disclosing the document in all circumstances.¹⁹ If the Legislature makes certain information confidential and exempt, however, such information may not be released to anyone other than to the persons or entities designated in statute.²⁰ The public records exemption under review applies an “exempt” status to business records rather than a “confidential and exempt” status. To make the exemption consistent with some comparable exemptions for business data, the Legislature may wish to add “confidential” status and specify the extent to which a condemning authority may share the information with employees in public agencies acting within the scope of their public duties.²¹

RECOMMENDATIONS

Committee staff recommends that the Legislature retain the public records exemption in s. 73.0155, F.S., for business records submitted to a governmental condemning authority as part of an offer to settle a claim of business damages under the eminent domain law. Committee staff further recommends, however, that the Legislature revise the public records exemption consistent with the findings of this report, to:

- more clearly describe the information that is exempt from disclosure; and
- provide that the relevant information is both confidential and exempt from disclosure and provide for interagency exchange of the information in the performance of public duties.

¹⁹ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *rev. denied*, 589 So. 2d 289 (Fla. 1991).

²⁰ See Inf. Op. to Chiaro, January 24, 1997.

²¹ Currently the exemption provides that it does not preclude access by the Legislature, the Attorney General, and “interested state agencies,” which term is not defined (s. 73.0155, F.S.).