



# The Florida Senate

Interim Project Report 2006-205

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Committee on Commerce and Consumer Services

Senator James E. "Jim" King, Jr., Chair

## OPEN GOVERNMENT SUNSET REVIEW OF S.288.075, F.S., ECONOMIC DEVELOPMENT AGENCIES

### SUMMARY

Pursuant to s. 288.075, F.S., upon written request of a business, the records of an economic development agency that contain information about the plans of the business to locate, relocate, or expand its activities in Florida, are confidential and exempt from public records law for a specified period of time. This public records exemption is subject to review under the Open Government Sunset Review Act (act), and is set to expire October 2, 2006, unless re-enacted by the Legislature during the 2006 session.

Committee staff recommends that s. 288.075, F.S., the public records exemption relating to economic development agencies, be reenacted.

the legislative, executive, and judicial branches of government and each agency or department created there under; 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.

The term "public records" is defined in s. 119.011(11), 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

### BACKGROUND

#### Public Records Law

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(a), of the State Constitution provides:

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

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

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 re-enacts the exemption. Section 119.15(4)(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. Paragraph (b) provides that 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”

Section 119.15(6)(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?

5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Section 119.15(6)(b), F.S., provides that an exemption may be created, revised, 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.

### 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 Commerce<sup>2</sup> which contain information concerning

<sup>2</sup> The Department of Commerce was dissolved in 1996, and comparable functions performed by the department were assigned to OTTED and to public-private

the plans of a corporation to locate, relocate, or expand any of its business activities in this state.<sup>3</sup> Since enacting the exemption, the Legislature enacted substantive and technical revisions while retaining the basic concept of affording confidentiality for records of an economic development agency. Today, s. 288.075(2), 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.

The statute further specifies that the confidentiality may be maintained for up to 24-months following the request, or until the information is otherwise disclosed, whichever occurs first.

Section 288.075(5), F.S., provides that, upon written request, the period of confidentiality may be extended for up to an additional 12 months, contingent on confirmation by the economic development agency that the business is still considering locating, relocating, or expanding in Florida.

The confidentiality does not apply when a court determines that a petitioning party needs access to the documents.

Section 288.075(6), F.S., provides that trade secrets contained in the exempt records are confidential and exempt for ten years after the original request, or until otherwise disclosed.

The public records exempted by this provision are maintained by an “economic development agency,” which is defined in s. 288.075(1), F.S., to include:

- 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;

- any research and development authority created under part V of ch. 159, F.S.;
- the Florida Space Authority (FSA);
- the Florida Aerospace Finance Corporation (FAFC);
- the public economic development agency of a county or municipality; and
- 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.

Section 288.075(4), F.S., restricts a public officer or employee from entering into a binding agreement with the entity that requested the exemption until 90 days after such information is made public, unless such public officer or employee is acting in an official capacity, the agreement does not accrue to their personal benefit and, the agreement is necessary to effectuate an economic development project.

## METHODOLOGY

A questionnaire regarding the exemption was sent to state and local Economic Development Agencies, county and municipal governments, OTTED, Enterprise Florida (EFI), FSA, and FAFC. Questionnaire responses were compiled and analyzed in the development of recommendations.

## 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. These questions address the content and general purpose of the exemption, and detail the specific documents and entities that are affected.

#### *Whom does the exemption uniquely affect, as opposed to the general public?*

The exemption affects businesses that are considering locating or expanding in Florida. Maintaining the confidentiality of business plans encourages them to communicate with economic development agencies without concerns that

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partnerships, including Enterprise Florida, Inc., and the Florida Commission on Tourism (ch. 96-320, L.O.F.).

<sup>3</sup> S. 1, ch. 77-75, L.O.F., codified in s. 288.075, F.S.

confidential business information will be available to their competitors.

***What specific records or meetings are affected by the exemption?***

Records affected by this exemption are those of an economic development agency which contain or would provide information concerning plans, intentions or interests of businesses to locate, relocate, or expand in Florida. This covers a broad set of documents, which economic development agencies specify include: business plans and proposals, financial records, real estate contracts or leases, building information, site requirements, marketing and business strategies, business and product information, and financial incentive applications.

***Can the information contained in the records be readily obtained by alternative means?***

The information contained in the exempt records is not publicly available, and can not be otherwise obtained unless directly from the business.

***Is the record protected by another exemption and would it be appropriate to merge the exemptions?***

The broad range of records protected by this exemption is not protected elsewhere in statute. However, s. 288.1067, F.S., also relates to economic development and the records exempted under this section are maintained by many of the same economic development agencies. This section provides confidentiality for documents relating to incentive programs such as the Qualified Target Industry tax refund program. The confidential documents include information about jobs created, wages of those jobs, and taxes paid.

Although these exemptions both relate to economic development and it is likely that a single business may use both exemptions, it is not possible to combine the two, as they protect different sets of documents, have different periods of confidentiality, and are used in different stages of business development.

***What is the identifiable public purpose or goal of the exemption?***

The goal of this exemption is to facilitate communications between businesses and economic

development agencies. The exemption allows businesses to keep strategic information confidential while considering sites to locate or expand, the release of which may adversely affect them in the marketplace.

**Maintenance of the Exemption**

As discussed above, the Open Government Sunset Review Act requires that a public records exemption must serve an identifiable public purpose in order to be maintained. The exemption provided in s. 288.075, F.S., serves a public purpose in two ways.

First, the exemption allows state and local economic development agencies to effectively and efficiently administer their programs. The goal of these agencies is to promote growth and attract businesses to Florida. Most state and local economic development agencies surveyed indicated that without the exemption, businesses would be less likely to communicate with them, and therefore possibly less likely to locate or expand in Florida.

Second, this exemption affects confidential business information, the disclosure of which could adversely affect the business in the marketplace. Competitors could use this information to their advantage, reacting to business plans that would otherwise be confidential absent inquiries with a government entity. In cases where businesses are considering relocation, it could cause disruption in the workforce, encouraging current employees to seek other employment. (This negative impact would be especially pronounced if the business subsequently decides not to relocate.) Economic development agencies have also indicated that public knowledge of business plans may attract unwanted media attention or affect the company's stock price.

**RECOMMENDATIONS**

Committee staff recommends that the public records exemption provided in s. 288.075(2), F.S., relating to certain business records held by economic development agencies, be re-enacted. Through the review of the public records exemption, it has been determined that the exemption serves a public purpose, as it is necessary to carry out a government program and protects confidential business information.