



# The Florida Senate

*Interim Project Report 2007-103*

*October 2006*

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Committee on Commerce

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## REVIEW OF PUBLIC RECORDS EXEMPTIONS RELATING TO ECONOMIC DEVELOPMENT AGENCIES

### SUMMARY

This report reviews two public records exemptions relating to economic development: business records held by economic development agencies that include plans, intentions, and interests of a business to locate, relocate, or expand in Florida, as well as any trade secrets within such records (s. 288.075, F.S.); and information submitted to an economic development agency that qualifies businesses for state incentive programs (s. 288.1067, F.S.).

Based on the review of these public records exemptions, committee staff recommends the following:

For s. 288.075, F.S., a new category of information be included to exempt “proprietary business information” submitted by businesses to economic development agencies. It is also recommended that trade secrets be held confidential and exempt indefinitely, rather than for a period of ten years.

For s. 288.1067, F.S., business’ federal employment identification number, unemployment compensation account number, and Florida sales tax registration number be held confidential indefinitely, rather than only for the time period in which the business is participating in an incentive program.

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 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. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency<sup>2</sup> records are available for public inspection. The term “public records” is defined in s. 119.011(11), F.S., to include:

### 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

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

<sup>2</sup>The term “agency” is defined in s. 119.011(2), F.S., to mean “...any state, county district, authority, or municipal officer, department, division, board, bureau, commission

... 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.<sup>3</sup> Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.<sup>4</sup>

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.

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>5</sup> If a record is simply made exempt from

disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>6</sup>

### 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?

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or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>3</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>5</sup> Attorney General Opinion 85-62.

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<sup>6</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

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.

While the standards in the Open Government Sunset Review Act of 1995 may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>7</sup> The Legislature is only limited in its review process by constitutional requirements.

### Section 288.075, F.S.

Currently, s. 288.075, F.S., provides that, upon written request, certain business records are confidential and exempt from public records law when held by an economic development agency.<sup>8</sup> Specifically, business plans, intentions, and interests to locate, relocate, or expand in Florida are confidential and exempt for 12 months. The period of confidentiality may be extended for an additional 12 months if the business demonstrates that it is continuing to consider locating, relocating, or expanding in Florida. Trade secrets within such business plans, intentions, and interests are confidential and exempt for ten years.

Interim Project Report 2006-205 by the Committee on Commerce and Consumer Services found that the goal of this exemption is to facilitate communication between businesses and economic development agencies and that the exemption allows businesses to keep strategic information confidential while considering sites to locate or expand.

The report stated that 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 have specified to 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.

The report found that 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

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<sup>8</sup> For purposes of s. 288.075, F.S., “economic development agency” means: Office of Tourism, Trade, and Economic Development; any industrial development authority created in part III of ch. 159, L.O.F., or by special law; Space Florida; the public economic development agency of a county or municipality; any research and development authority created in part V of ch. 159, L.O.F.; and any private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote general business interests.

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<sup>7</sup> *Straughn v. Camp*, 293 So.2n 689, 694 (Fla. 1974).

government entity. In cases where businesses are considering relocation, it could cause disruption in the workforce, encouraging current employees to seek other employment. Economic development agencies also indicated that public knowledge of business plans may attract unwanted media attention or affect the company's stock price.

This exemption was set to expire on October 2, 2006. However, ch. 2006-157, L.O.F., re-enacted the exemption, and amended the exemption to:

- Narrow the initial exemption period from 24-months to 12-months, while retaining the 12-month extension option;
- Reorganize the provision for ease of understanding; and
- Remove review and repeal provisions required by the Open Government Sunset Review Act.

Public debate during the 2006 Legislative Session and related staff research indicated that the exemption warranted further review. First, because of the broad nature of the exemption for business "plans, intentions, and interests," it remained unclear as to what specific documents are held confidential. Second, it is not clear why trade secrets within these documents are held confidential and exempt for ten years in this particular exemption; generally, trade secrets are held confidential and exempt indefinitely.<sup>9</sup>

#### **Section 288.1067, F.S.**

Currently, s. 288.1067, F.S., provides that certain information relating to incentive programs received and held by the Office of Tourism, Trade and Economic Development (OTTED), Enterprise Florida, Inc. (EFI), or county or municipal governmental entities and their employees or agents, is confidential and exempt from public records law. The information that is specifically exempted includes:

- Employer identification numbers, unemployment compensation account numbers, and Florida sales tax registration numbers;

- Trade secret information as defined in s. 812.081, F.S.;
- The percentage of non-state sales and the percentage of gross receipts from certain Department of Defense contracts;
- Anticipated wages for new jobs to be created;
- The average wage paid by the business for new jobs created, detailed proprietary business information or employee personal identifying information used to demonstrate wage and job creation requirements;
- Proprietary business information regarding capital investment in certain circumstances; and
- The amount of Florida taxes paid.

The information is held confidential for the period of time that a business participates in an incentive program, with the exception of trade secrets, which remain confidential after the duration of the incentive agreement.

This exemption relates to the following incentive programs:

- Capital Investment Tax Credit program, s. 220.191, F.S.;
- Qualified Defense Contractor (QDC) tax refund program, s. 288.1045, F.S.;
- Qualified Target Industry (QTI) tax refund program, s. 288.106, F.S.;
- High Impact Performance Incentive (HIPI) grants program, s. 288.108, F.S.;
- Quick Action Closing Fund, s. 288.1088, F.S.; and
- Innovation Incentive Program, s. 288.1089, F.S.

Chapter 2006-59, L.O.F., expanded this exemption to include the newly created Innovation Incentive Program, which is created in ch. 2006-55, L.O.F. The purpose of the program is to provide resources for significant economic development projects, including the location or expansion of research and development entities and innovation businesses in Florida.

Section 288.1067, F.S., was scheduled for review under the Open Government Sunset Review Act during the 2006-2007 interim. However, when the exemption was expanded during the 2006 Regular Session, the expiration date of the exemption was extended, from October 2, 2007, to October 2, 2011.

<sup>9</sup> Staff research indicates, that in 55 out of 58 cases, trade secrets are held confidential indefinitely. The exceptions are: s. 288.075, F.S., s. 215.44, F.S., which exempts trade secrets for ten years following the duration of an alternative investment by the state board, and s. 408.185, which exempts trade secrets for one year.

Although the review of this public records exemption is no longer mandatory, it will be beneficial to evaluate this exemption in conjunction with the review of s. 288.075, F.S. This review is intended to develop a better understanding of the relationship between the two exemptions. Both of these exemptions relate to economic development, and it is likely that a single project or business may have records that are confidential under both exemptions. Section 288.075, F.S., provides confidentiality of records in the planning stages of economic development projects, while s. 288.1067, F.S., provides confidentiality of records while a project or business is participating in an incentive program.

## METHODOLOGY

The review of these public records exemptions was conducted in cooperation with staff of the Senate Governmental Oversight and Productivity Committee and in consultation with economic development agencies, including EFI and OTTED. Specific examples of project files were reviewed in order to develop a greater understanding of the documents included in such files.

## FINDINGS

### Section 288.075, F.S.

Pursuant to s. 288.075, F.S., “plans, intentions, and interests” of a business “to locate, relocate, or expand” in Florida are confidential and exempt. A narrow reading of the statute suggests a limited range of specified documents may be confidential and exempt, to include inquiries about available incentives.

A broader reading of the statute, however, suggests that a wide range of documents may be held confidential and exempt. As reported in Interim Report 2006-205, documents that are held confidential and exempt 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.

If the narrow interpretation of the exemption is applied, some of the documents may not fit into the categories of “plans, intentions, and interests” or “trade secrets.” To address this issue, a third category of

document – proprietary business information – could be included in the exemption. This category could include things like business plans, site requirements, workforce requirements, real estate contracts, and business and product information. Furthermore, this exemption could be maintained indefinitely.

“Proprietary business information” is distinct from a “trade secret,” which if included in documents submitted to economic development agencies, is confidential and exempt for up to ten years. Trade secret is defined in s. 812.081, F.S.,<sup>10</sup> 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....”

The term “proprietary confidential business information” is defined in several places in Florida Statutes.<sup>11</sup> The following definition,<sup>12</sup> slightly modified (see *italics*), may be appropriate for use in this context:

“Proprietary confidential business information” means information, regardless of form or characteristics, which is owned or controlled by the *corporation, partnership, or person that has requested confidentiality pursuant to this section*, is intended to be and is treated by the *corporation, partnership, or person* as private in that the disclosure of the information would cause harm to the *corporation’s, partnership’s, or person’s* business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public. The term includes, but is not limited to: *Business Plans*; internal auditing controls and reports of internal

<sup>10</sup> Trade secret is also defined in s. 688.002, F.S. This definition is referenced in many exemptions, and may be a more appropriate definition than s. 812.081, F.S.

<sup>11</sup> Definitions of proprietary confidential business information may be found in ss. 368.108, 364.183, 367.156, 366.093, 569.215, 202.195, 163.01, 1004.43, 365.174, 946.517, 287.0943, and 408.061, F.S.

<sup>12</sup> This definition can be found in ss. 368.108, 364.183, 367.156, and 366.093, F.S.

auditors; security measures, systems, or procedures; information concerning bids or other contractual data, the disclosure of which would impair the efforts of the corporation, partnership, or person to contract for goods or services on favorable terms; information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information; and employee personnel information unrelated to duties, qualification, or responsibilities.

If this third category of document is included in the exemption, it should provide businesses with the necessary protection they expect when working with public entities. In addition, it may encourage economic development agencies to release the information relating to “plans, intentions and interests to locate, relocate, or expand” in a timely manner.

Section 288.075(6), F.S., provides that trade secrets are confidential and exempt from public records law for a period not to exceed ten years. However, trade secret exemptions are provided in several places throughout the Florida Statutes, and the period of confidentiality is generally not limited.

More relevantly, trade secrets are confidential and exempt indefinitely in s. 288.1067, F.S., the exemption for certain information relating to incentive programs received and held by OTTED, EFI, and local governments.<sup>13</sup> Finally, staff research did not ascertain any policy justification for a ten year exemption period for trade secrets within documents that are confidential and exempt pursuant to s. 288.075, F.S.

### **Section 288.1067, F.S.**

Section 288.1067, F.S., provides that certain information relating to incentive programs received and held by the OTTED, EFI, or county or municipal governmental entities and their employees or agents, is confidential and exempt from public records law.

While this exemption may overlap with the exemption for “plans, intention, and interests” of a business “to locate, relocate, or expand” in Florida, as

<sup>13</sup> Section 288.1067, F.S., was enacted in 2002. Section 288.1066, F.S., which was repealed in 2001, did include a ten year exemption on trade secret information related to incentive programs, as submitted to economic development agencies.

provided in s. 288.075, F.S, it is distinct in that it pertains to specified incentive programs. Consequently, the two exemptions need not be combined.

This review has found that some of the information listed in s. 288.1067, F.S., may need to be held confidential indefinitely, rather than for the time period that the business participates in the incentive program. These items include: a business’ federal employer identification number, unemployment compensation account number, and Florida sales tax registration number.

This type of information is required to be confidential and exempt *indefinitely* pursuant to other state and federal regulations. Pursuant to 20 CFR 603.2, state unemployment compensation agencies are required to keep federal unemployment identification numbers and federal employer identification numbers confidential. In addition, s. 443.1715, F.S., provides that,

“...when held by the Agency for Workforce Innovation (AWI), information revealing an employing unit’s or individual’s identity, obtained from the employing unit or individual .... is confidential and exempt from s. 119.07(1) and s. 24(a), Art.1 of the State Constitution.”

Further, s. 213.053, F.S., provides that

“...all information contained in returns, reports, accounts, or declarations received by the Department of Revenue (DOR).... is confidential and exempt from s. 119.07(1), F.S.”

## **RECOMMENDATIONS**

Based on the review of these public records exemptions, committee staff recommends the following.

For s. 288.075, F.S., a new category of information should be included to exempt “proprietary business information” submitted by businesses when exploring or negotiating a business expansion or relocation with an economic development agency. It is also recommended that trade secrets be held confidential indefinitely, rather than for a period of ten years.

For s. 288.1067, F.S., business' federal employment identification number, unemployment compensation account number, and Florida sales tax registration number should be held confidential indefinitely, rather than only for the time period in which the business is participating in an incentive program.