

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 252

SPONSOR: Comprehensive Planning Committee

SUBJECT: Public Records and the Accidental Release Prevention Program

DATE: January 29, 2003 REVISED: 02/04/03 02/07/03 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/1 amendment</u>
2.	<u>Branning</u>	<u>Kiger</u>	<u>NR</u>	<u>Favorable</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill amends and reenacts the public records exemption for information that constitutes a trade secret and is submitted as part of a risk management plan or found in records or reports obtained during an investigation, inspection, or audit under the Accidental Release Prevention Program. The objective of the program is to prevent accidental chemical releases and minimize the consequences of such releases if they do occur.

In addition, the bill includes editorial changes for clarification and adds a cross-reference to the definition of “trade secret” in s. 688.002, F.S.

The bill amends section 252.943 of the Florida Statutes.

II. Present Situation:

The Florida Accidental Release Prevention and Risk Management Planning Act — The Accidental Release Prevention and Risk Management Planning Act¹, enacted in 1998, gave the Department of Community Affairs statutory authority to seek delegation of the Accidental Release Prevention Program, authorized by s. 112(r)(7) of the Clean Air Act, from the United States Environmental Protection Agency (EPA). As part of the effort to obtain delegation of the program, the Legislature enacted s. 252.943, F.S., to provide a public records exemption for trade secret information held by the department that is consistent with the protection afforded similar information under federal law. These exemptions are necessary to maintain delegation of the program.

¹ Ch. 98-193, L.O.F., codified as amended at ch. 252, part IV, F.S.

The federal Accidental Release Prevention Program, codified at 40 C.F.R. part 68, requires the owner or operator of a stationary source (a facility that emits or has the potential to emit air pollutants) which uses, stores, processes, or manufactures any one of 140 regulated substances, over a certain threshold quantity in a process, to develop and implement a risk management program and submit a plan summarizing this program to a national reporting center. Examples of regulated sources include chemical plants, water and wastewater treatment facilities, utilities, electronic manufacturers, and pulp and paper manufacturers.

A risk management plan (RMP) must include these basic elements: a hazard assessment of accidental chemical releases upon the surrounding community and the environment; a five-year accident history of any accidental releases which occurred on the site; a prevention program designed to minimize the occurrence of any releases through improved safety practices; and an emergency response program to reduce the effects of any releases which do occur. The summary plan must be resubmitted every five years and revised as conditions at the facility warrant.

The “Registration Information” section of an RMP includes a box to check if the stationary source is claiming “confidential business information.” If the box is checked, the source has submitted a request for EPA to substantiate that the information for which confidentiality is claimed meets the criteria of 40 C.F.R. s. 2.208. In order to assert the business confidentiality claim, a business submitting information to the EPA must place on it a “cover sheet, stamped or typed legend, or other suitable form of notice employing language such as a trade secret, proprietary, or company confidential.”² Following the submittal of information that a business identifies as confidential, EPA makes a determination as to whether the information is entitled to protection as confidential business information. Lastly, an EPA legal office makes a final determination as to whether business information constitutes a trade secret and is entitled to confidential treatment.

All plans nationwide must be submitted to the Risk Management Plan Reporting Center. This center is responsible for uploading all plans to a national database. All of the national RMP information is located at a centralized point and can be electronically retrieved by the implementing agency, and EPA staff. This allows EPA and delegated state agencies to directly retrieve plans for individual states as well as to draw national comparisons across industry sectors on process accident data and prevention techniques. The database for the implementing agencies is known as the RMP*REVIEW. There is also a public access database, which does not include hazard assessment information, called RMP*INFO. Due to the events of September 11, 2001, RMP files are currently not available online. Approximately 15,000 facilities nationwide have submitted plans to the reporting center as of August 1999, and 524 of these are located in Florida.

If a business submits information that EPA determines has met the criteria for “confidential business information” as provided for in 40 C.F.R. part 2, subpart B, the EPA will not release the information deemed confidential in any of its RMP databases. Therefore, access to any of this data would have to be specifically requested by the department from EPA. Release of this information to the department is contingent upon the department having authority under state or local law to compel a business with such information to disclose it and whether the department is

² 40 C.F.R. § 2.203(b) (2002).

governed by state law that adequately protects the interests of the affected business. To date, however, none of the 524 stationary sources for whom RMPs have been filed in Florida have claimed “confidential business information.”

Section 252.943, Florida Statutes — Section 252.943, F.S., creates two exemptions from the provisions of s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution for information held by the department as part of the administration of the Accidental Release Prevention Program. The first exemption covers certain information contained in a Risk Management Plan, other than release or emissions data, that contains trade secret information as provided for in 40 C.F.R. part 2, subpart B. Similarly, the second exemption protects certain records or reports, other than release or emissions data, that is obtained during an investigation, inspection or audit conducted under the program, where the public release of such information would divulge methods or processes entitled to protection as a trade secret under 40 C.F.R. part 2, subpart B. Both of these exemptions expire on October 2, 2003, unless reviewed and reenacted by the Legislature.

Specifically, the public records exemption in s. 252.943, F.S., prohibits disclosure of information “entitled to protection as trade secrets defined in 40 C.F.R. part 2, subpart B . . .” This federal regulation provides a process for EPA to determine that certain information constitutes a “trade secret” and is confidential, but does not define the term. Instead, “trade secret” is included in the broader category of “confidentiality of business information” governed by subpart B. Section 2.201 defines “Reasons of business confidentiality” to

include the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in ss. 2.301-2.309.

Confidential business information found in an RMP or obtained during an audit or investigation will most likely fall under the category of “trade secret.” Chapter 688, F.S., the “Uniform Trade Secrets Act”, defines the term “trade secret” as “information, including a formula, pattern, compilation, program, device, method, technique, or process” that derives economic value from not being generally known and efforts are made to maintain its secrecy.

OCA Information — One of the major purposes of the “Chemical Safety Information, Site Security and Fuels Regulatory Relief Act”, enacted in 1999, was to address the release of Off-site Consequence Analysis (OCA) information that is required to be included in an RMP. Prior to the act, OCA information sections of an RMP, and any EPA electronic databases created from those sections were subject to public release in an electronic format under the Freedom of Information Act, 5 U.S.C. s. 552. On July 31, 2000, EPA and the United States Department of Justice issued a rule governing the “Distribution of Off-site Consequence Analysis Information,” codified at 40 C.F.R. part 1400, subchapter A. The rule imposes restrictions on public access to off-site consequence information. Moreover, the act expressly preempts a state from enacting a public records exemption or other law that is inconsistent with the provisions of the federal act or

rule. Because of the federal preemption, a public records exemption from Florida law is not necessary for the department to legally restrict access to OCA information.

Post September 11 — Since the events of September 11, 2001, EPA has limited access to certain information under the Accidental Release Prevention Program beyond what was required by the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act. For example, EPA has removed access to the database containing RMPs from its Web page. The EPA is reviewing the information available over the Internet and is assessing the best method of providing public access to the information.

Risk Management Plan data, other than OCA information covered by the act and information falling under the trade secret public records exemption, is subject to public inspection under the Florida Public Records Act. Because RMP data is not currently available on EPA's web site, the frequency to which requests are made to the department for RMP information may increase. According to the department, however, no RMPs have been requested within the last two years. During this same period of time, the department received only one request for an audit report and this report did not contain any confidential or exempt information.

Constitutional Access to Public Records and Meetings — Section 24(a), Article I of the State Constitution provides every person with 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

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

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under s. 24, Article I 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

³ Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980).

⁴ Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

of the law. Additionally, a bill that creates a public records exemption may not contain other substantive provisions, but may contain multiple exemptions that relate to a single subject.

Considerations Under the Open Government Sunset Act — The Open Government Sunset Review Act of 1995, contained in s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state 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. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature reenacts the exemption.

Staff prepared an interim project on this public records exemption. As part of the project, staff reviewed relevant statutory provisions, legislative history, and contacted the Department of Community Affairs and other interested entities. Also, staff considered an Open Government Sunset Review Questionnaire completed by the department.

Pursuant to s. 119.15(4)(b), F.S., an exemption must satisfy three levels of review to be reenacted. First, an exemption should be maintained only if it is necessary for the effective and efficient administration of a governmental program, the exempted record is of a sensitive, personal nature concerning individuals, or the exemption protects confidential information concerning an entity that provides a business advantage. In this instance, the exemption for a trade secret contained either in an RMP or records or reports obtained during an investigation or audit of a facility can be characterized as necessary for the effective administration of a program. Without the exemption, the department risks losing delegation of the Accidental Release and Prevention Program. The exemption also encourages voluntary compliance with the program. In addition, this exemption protects trade secret information which, if disclosed, could eliminate a business advantage and injure the entity in the marketplace.

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

First, what specific records or meetings are affected by the exemption?

Portions of an RMP, other than release or emissions data, that are determined to be a trade secret as provided for in 40 C.F.R. part 2, subpart B. Also, any trade secret information contained in records, reports, or information or parts thereof, other than release or emissions data, that are obtained from an investigation, inspection, or audit under the Accidental Release Prevention Program are affected by the exemption.

Second, whom does the exemption uniquely affect, as opposed to the general public?

This exemption has the potential to affect the following: the Department of Community Affairs, the State Emergency Response Commission for Hazardous Materials, the EPA, as well as any

owner or operator of public and private facilities including governmental entities, corporations and individuals using hazardous materials in accordance with s. 112(r) of the Clean Air Act.

Third, what is the identifiable public purpose or goal of the exemption?

The exemption is consistent with federal law and necessary for the department to maintain delegation of the Accidental Release Prevention Program.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means and if so, how?

The information protected by the exemption cannot be readily obtained elsewhere. The EPA is not required to disclose trade secret information and s. 252.943, F.S., affords this information the same protection.

Finally, to satisfy the criteria of the Open Government Sunset Review Act, an exemption may be maintained only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose it serves. The public records exemption for trade secret information found in an RMP or records or reports obtained during an investigation, inspection or audit serves the public purpose of maintaining the delegation to the department of the Accidental Release Prevention Program. In addition, the exemption encourages voluntary compliance with the reporting requirements of the program. The exemption is narrowly drawn to include only confidential information that is deemed a trade secret by the EPA.

III. **Effect of Proposed Changes:**

Section 1 of the bill clarifies provisions specifying that information held by the Department of Community Affairs as part of a risk management plan or obtained as part of an investigation, inspection, or audit and that constitutes a trade secret is exempt from the provisions of s. 119.07(1) and s. 24(a), Article I of the State Constitution.

This section also adds a cross-reference to the definition of “trade secret” in Florida Statutes for clarification.

Finally, the section reenacts the exemption and removes the repeal October 2, 2003 thereof scheduled under the Open Government Sunset Review Act of 1995.

Section 2 of the bill provides an effective date.

IV. **Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill reenacts two public records exemptions. Relying on the criteria provided in the Open Government Sunset Review Act, s. 119.15, F.S., the public records exemptions

contained in s. 252.943, F.S., meet the requirements for maintaining an exemption to the public records law.

In the November 2002 election, voters approved a constitutional amendment concerning public records. This amendment to s. 24, Article I of the State Constitution requires any law after the effective date of the amendment containing exemptions to public records or public meetings be passed by a two-thirds vote of each house of the Legislature. Previously, the constitution required a simple majority vote for these exemptions.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill maintains an exemption that provides protection for trade secret information obtained in compliance with the Accidental Release Prevention Program under the Clean Air Act. The exemption protects information which, if released to the public, could have a negative fiscal impact on facilities complying with program requirements.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Comprehensive Planning:
Technical amendment deleting a cross-reference.