

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: SPB 7008

INTRODUCER: For Consideration by the Environment and Natural Resources Committee

SUBJECT: OGSR/Trade Secrets/Department of Environmental Protection

DATE: February 1, 2021

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Schreiber</u>	<u>Rogers</u>	_____	<b>Pre-Meeting</b>
1. _____	_____	_____	_____

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**I. Summary:**

SPB 7008 amends s. 403.7046, F.S., to save from repeal and narrow the scope of the public records exemption for trade secret information reported under s. 403.7046, F.S., which involves information on recovered materials reported to the Department of Environmental Protection (DEP) or local governments by recovered materials dealers or pyrolysis facilities. The bill also deletes another exemption in s. 403.7046, F.S., which pertains only to similar information that is reported to local governments under s. 403.7046(3), F.S.

The bill continues to maintain information reported on recovered materials as confidential and exempt, but it narrows the scope of the exemption to information reported under s. 403.7046, F.S., relating to the types or amounts of recovered materials. The bill retains the current provision that DEP may provide information covered by the exemption in such form that the names of the persons reporting the information and the specific information reported are not revealed.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The two exemptions contained in s. 403.7046 F.S., are scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal of the exemption for information reported under s. 403.7046, F.S., to continue the confidential and exempt status of such information with a narrowed scope of application. The exemption for only information reported under s. 403.7046(3), F.S., is deleted.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate* (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S.; s. 119.011(2), F.S. “Agency” is defined as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, 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>6</sup> Section 119.011(12), F.S. “Public record” is defined as “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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions, with specified exceptions.<sup>17</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>18</sup> Under the Act, substantially amending an exemption means expanding the scope of the exemption to include more records or information or to include meetings, but narrowing the scope of an exemption is not substantially amending the exemption.<sup>19</sup>

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<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id.*; see, e.g., *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>18</sup> Section 119.15(3), F.S.

<sup>19</sup> Section 119.15(4)(b), F.S.

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>20</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided by law.<sup>26</sup>

### **Information Reported Under s. 403.7046, F.S.**

The Department of Environmental Protection (DEP) regulates resource recovery and management under part IV of ch. 403, F.S. "Recovered materials" are defined in that part to mean materials with known recycling potential, that can be feasibly recycled, that have been diverted and separated or have been removed from the solid waste stream for sale, use, or reuse as raw materials.<sup>27</sup>

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<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</sup> Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 403.703(28), F.S. "Recovered materials" is defined as "metal, paper, glass, plastic, textile, or rubber materials that have known recycling potential, can be feasibly recycled, and have been diverted and source separated or have been removed

Section 403.7046, F.S., requires persons dealing in recovered materials (or post-use polymers<sup>28</sup>) to follow specified procedures.<sup>29</sup> Any person who handles, purchases, receives, recovers, sells, or is an end user of 600 tons or more of recovered materials must annually apply to DEP for certification by April 1.<sup>30</sup> Such persons must report by February 1st of each year to DEP, and to all counties from which they received materials, certain information for the preceding year.<sup>31</sup> Such reporting is submitted through a specified DEP form<sup>32</sup>, incorporated into rule by reference.<sup>33</sup> Information reported on the form includes the total tons of recovered materials for a given year, organized by types of materials: paper, plastic, metals, glass, rubber, and textiles.

Section 403.7046, F.S., contains a public records exemption that applies to any information reported pursuant to the section or any rule adopted pursuant thereto.<sup>34</sup> The exemption states that reported information which, if disclosed, would reveal a trade secret, as defined in s. 812.081, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.<sup>35</sup> The exemption provides that, for reporting or information purposes, DEP may provide this information “in such form that the names of the persons reporting such information and the specific information reported are not revealed.”<sup>36</sup> DEP publishes various reports and data on statewide recycling efforts and solid waste management.<sup>37</sup>

Section 403.7046(3)(b), F.S., authorizes local governments to establish an additional registration process for recovered materials dealers and pyrolysis facilities doing business within their jurisdiction. Local governments whose population exceeds 35,000 may establish an additional reporting process, limited to the requirements established for reporting to DEP, which must include the types and approximate amounts of recovered materials collected, recycled, or reused during the reporting period.<sup>38</sup> Section 403.7046(3)(b)2., F.S., contains a separate public records

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from the solid waste stream for sale, use, or reuse as raw materials, whether or not the materials require subsequent processing or separation from each other, but the term does not include materials destined for any use that constitutes disposal. Recovered materials as described in this subsection are not solid waste.”

<sup>28</sup> Chapter 2017-167, Laws of Fla. In 2017, the Legislature amended pt. IV, ch. 403, F.S., to include emerging technologies involving post-use polymers, and these are included in the reporting requirements under s. 403.7046, F.S.; s. 403.703(10), (24), and (26), F.S. Post-use polymer means a plastic polymer that is converted to raw materials using gasification or pyrolysis. Gasification means heating post-use polymers and converting them to synthetic gas in an oxygen-deficient atmosphere. Pyrolysis means heating post-use polymers in the absence of oxygen until they are melted and converted to raw materials or products.

<sup>29</sup> DEP, *Recovered Materials Certification and Reporting Program*, <https://floridadep.gov/waste/waste-reduction/content/recovered-materials-certification-and-reporting-program> (last visited Jan. 22, 2021).

<sup>30</sup> Section 403.7046(1), F.S.; Fla. Admin. Code. R. 62-722.400.

<sup>31</sup> Section 403.7046(1), F.S.; Fla. Admin. Code. R. 62-722.400.

<sup>32</sup> DEP, *Form # 62-722.400(9)(b)*, F.A.C. (2013), available at [https://floridadep.gov/sites/default/files/62-722\\_400\\_9b.pdf](https://floridadep.gov/sites/default/files/62-722_400_9b.pdf) (last visited Jan. 22, 2021).

<sup>33</sup> Fla. Admin. Code. R. 62-722.400(2).

<sup>34</sup> Section 403.7046(2), F.S.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> DEP, *Recycling*, <https://floridadep.gov/waste/waste-reduction/content/recycling> (last visited Jan. 22, 2021); s. 403.706(7), F.S. Counties are required to provide DEP with recycling and solid waste information so that DEP can assess progress towards the state’s recycling goals; Fla. Admin. Code R. 62-716.450.

<sup>38</sup> Section 403.7046(3)(b)1., F.S.

exemption, similar to the public records exemption in s. 403.7046(2), F.S., but which only applies to information reported under subsection (3).<sup>39</sup>

In 2016, the definition of “trade secret” in s. 812.081, F.S., was expanded to include financial information.<sup>40</sup> As a result, the two public records exemptions in s. 403.7046, F.S., were reenacted to include the expanded definition of “trade secret,” and, thus, became subject to the Open Government Sunset Review Act.<sup>41</sup> Chapter 2016-6, L.O.F., included a broad public necessity statement that provided a rationale for the exemption, recognizing that, in many instances, businesses are required to provide financial information to public entities and that disclosure of such information to competitors of those businesses would be detrimental to the businesses.<sup>42</sup> The Legislature stated its intent to protect trade secret information of a confidential nature.<sup>43</sup>

### **Open Government Sunset Review Findings and Recommendations**

In July of 2020, the Senate Environment and Natural Resources Committee and the House Oversight, Transparency, and Public Management Subcommittee sent an Open Government Sunset Review Questionnaire to DEP regarding the trade secret exemption in s. 403.7046(2), F.S., for information submitted to DEP under s. 403.7046, F.S.

DEP responded to the questionnaire, but did not take a position on whether the exemption in s. 403.7046(2), F.S., should remain in effect.<sup>44</sup> The questionnaire asked DEP what types of information reported to DEP under s. 403.7046, F.S., would reveal a trade secret if disclosed. DEP’s response was the tonnage information reported by the recovered materials dealers. DEP explained that disclosing such information could provide confidential information regarding tonnage to the competitors of recovered materials dealers, allowing the competitors to evaluate market share.<sup>45</sup>

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 403.7046, F.S., which requires persons dealing in recovered materials or post-use polymers to report to the Department of Environmental Protection (DEP) and certain local governments information on recovered materials. The section includes two public records exemptions.

For the exemption in s. 403.7046(2), F.S., the bill saves the exemption from repeal by deleting the repeal date of October 2, 2021. The bill narrows the scope of the exemption, from applying to anything constituting a trade secret as defined in s. 812.081, F.S., to applying to information relating to the types and amounts of recovered materials. This exemption applies to any information reported pursuant to s. 403.7046, F.S., or any rule adopted pursuant thereto.

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<sup>39</sup> Section 403.7046(3)(b)2., F.S.

<sup>40</sup> Chapter 2016-5, Laws of Fla.

<sup>41</sup> Section 119.15, F.S.; *see* s. 403.7046(2), (3)(b)2., F.S.

<sup>42</sup> Chapter 2016-6, s. 21, Laws of Fla.

<sup>43</sup> *Id.*

<sup>44</sup> Open Government Sunset Review Questionnaire, DEP’s Responses, *Information Reported to DEP by Certified Recovered Materials Dealers*, 5 (Aug. 12, 2020)(on file with the Florida Senate Environment and Natural Resources Committee).

<sup>45</sup> *Id.* at 3.

For the exemption in s. 403.7046(3)(b)2., F.S., the bill deletes the exemption. This exemption currently applies only to information reported under subsection (3) of s. 403.7046, F.S. Information reported under s. 403.7046(3)(b), F.S., would still be covered under the exemption in s. 403.7046(2), F.S., since that exemption applies to any information reported pursuant to s. 403.7046, F.S.

**Section 2** states that the bill takes effect October 1, 2021.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Not applicable.

##### **B. Public Records/Open Meetings Issues:**

###### ***Vote Requirement***

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues one current public records exemption beyond its current date of repeal and narrows the scope of that exemption, and also deletes one current exemption. The bill does not create or expand the scope of an exemption. Thus, the bill does not require an extraordinary vote for enactment.

###### ***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill does not create or expand the scope of an exemption. Thus, a statement of public necessity is not required.

###### ***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect information that must be reported to the Department of Environmental Protection and local governments under s. 403.7046, F.S. This bill narrows the scope of the exemption to apply to such reported information only as broadly as necessary. Thus, the bill revises the exemption so it is no broader than necessary to accomplish the purpose of the law.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost, to the extent imposed, associated with the Department of Environmental Protection (DEP) or local governments making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

DEP and local governments will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 403.7046 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.