

S.5000 (Hoylman-Sigal)/A.1410 (Rosenthal)

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BILL S.5000 (Hoylman-Sigal)/A.1410 (Rosenthal)
SUBJECT Limits on FOIL Exemption for Trade Secrets
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OPPOSE

The Business Council strongly oppose this legislation that could lead to the inadvertent release of trade secrets and other sensitive business information, and that would add significantly to the administrative burdens of state agencies and private entities under the Freedom of Information Law (FOIL).

Currently, Public Officers Law § 87.2(d) allows for the exemption from FOIL disclosure of information that constitutes “trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

The provisions for requesting such exemption are set forth in POL §89.5 and requires that all requests for an exception must be in writing and specify the reasons why the information should be excepted from disclosure, and in all related proceedings, the entity requesting the exception has the “burden of proving entitlement to the exception.”

Under this legislation, any application for a disclosure exception must also propose an expiration date for such exception, no later than three years from the application date, and if the exemption is approved, must within 60 days of its expiration apply for an extension, or the disclosure exception expires, and their information is eligible for disclosure.

Importantly, the Public Officers Law also already includes provisions for third parties to challenge such exemptions, and for state agencies to determine whether such exemption should be continued or terminated.

We believe this process works well to protect the interests of entities that subject trade secret and other confidential information to state agencies, and members of the public seeking access to public information.

Therefore, we strongly oppose this legislation as unnecessary and likely to result in unintended consequences.

- First, it could result in the release of sensitive information due to inattentiveness on behalf of the business. This could be caused if the timetable for seeking an extension of a disclosure exemption is missed, whether due to a change in a company’s personnel, a change in the business’ organizational or ownership structure, or other factors. Under such circumstances, the disclosure could still be very harmful to the submitting entity. In many cases, the sensitive nature of the material does not

diminish over time and would unlikely be significantly different in just 3 years from initial submission, the limit proposed in this bill for the duration of a disclosure exemption request.

- Second, the sponsor's memo says the bill is intended to "streamline" the current process, an outcome that seems contrary to the expected effect. Under current law, the granting of a disclosure exemption for submitted information is permanent and only reviewed if a third party asks specifically for its disclosure, at which time the agency must reach out to the submitting entity to see if the exclusion needs to be maintained or if the document can be released. In stark contrast, under this bill every disclosure exemption expires no less frequently than every three years, at which time the agency may have to re-review a renewal request for all its disclosure exempted documents. To us, this bill would produce a massive increase in state agencies' FOIL compliance activities, rather than streamline them, in addition to adding to the compliance burdens, and disclosure risks, of business and other entities.

While we recognize the need for transparency in governmental actions, and the importance for the public to have reasonable access to public information, we also stress the need to assure non-disclosure of critically sensitive business information.

We believe this legislation would unnecessarily jeopardize such protections, for little increased public benefit.

We also note that in its 2024 Annual Report, the state's Committee on Open Government said that, with regard to an earlier version of this bill, it "does not have information sufficient to draw a conclusion about the impact this new requirement might have," adding that in general the Committee "support[s] efforts to ensure that the trade secret exemption does not unnecessarily restrict access to information for which confidentiality no longer serves a compelling purpose while also balancing the need for agencies to have access to private sector services."

We believe the Committee's interest in balancing the interests of the public and private entities is already achieved under provisions of the Public Officers Law mentioned above.

Moreover, we also note that the Committee also makes unequivocal endorsements of other legislative proposals, as compared to its lack of a clear endorsement of this legislation, and the Committee's uncertainty of its impact.

For these reasons, The Business Council opposes approval of S.5000/A.1410.