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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: HB 1537 (PCB SA 01-14)
RELATING TO: Public Records Exemption for Certain Records Held by Agency Employees and Their Employers
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill creates a public records exemption. If an agency is contemplating contracting for a service, through competitive bids or otherwise, then the following records are exempt from public disclosure:

- All records created or acquired by that agency or its employees for the purpose of contracting for such service; including draft bids or draft proposals and supporting documentation.
- All records created or acquired by another agency for the purpose of delivering such service including draft bids or draft proposals and supporting documentation.

If those records include information that is otherwise publicly available, this exemption does not limit that other access.

This bill also provides that if an agency or its employees submit a bid or a proposal, then that submitted bid or proposal is governed by existing public records law applicable to the receiving agency. The exemption created in this bill is no longer applicable once a contract is awarded, a decision is made not to award such contract, or the project is no longer under active consideration.

This bill provides a public necessity statement as is required by the State Constitution.

This exemption is subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2006, unless reenacted by the Legislature.

Without this public records exemption, competition might otherwise be stifled as a result of the agency or agency employee's disadvantaged position in the bidding and proposal process.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

Every person has the right to inspect or copy any public records 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 thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created 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. 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. 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 subparagraph, only information that would identify the individuals may be exempted; or
3. 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.

Municipally Owned Utilities / Exempt Bid Information

Section 119.07(3)(aa), F.S., provides a public records exemption for “any data, record, or document used directly or solely by a municipally owned utility to prepare and submit” a sealed bid “relative to the sale, distribution, or use of any service, commodity, or tangible personal property to any customer or prospective customer”. The submitted bid documents are no longer exempt once the customer or prospective customer opens the bid. The remaining exempt information becomes available to the public once the “contract for sale, distribution, or use of the service, commodity, or tangible personal property is executed, a decision is made not to execute such contract, or the project is no longer under active consideration”. This exemption exists in order for a publicly owned utility to be able to effectively compete with private utilities.

Agency Employees / Bid Information

Currently there is no public records exemption similar to that for a municipally owned utility which would allow an agency¹ employee to submit a bid or proposal to an agency pursuant to a request for proposal, request for information, or an invitation to bid without the

¹ The word “agency” is defined in s. 119.011, F.S., to mean 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 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. “Agencies” are subject to the public records provisions set forth in Chapter 119, F.S.

employee's bid or proposal becoming a public record prior to the opening of the bid or proposal.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 119.07(3), F.S., to create a public records exemption. If an agency is contemplating contracting for a service, through competitive bids or otherwise, then the following records are exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- All records created or acquired by that agency or its employees for the purpose of contracting for such service; including draft bids or draft proposals and supporting documentation.
- All records created or acquired by another agency for the purpose of delivering such service including draft bids or draft proposals and supporting documentation.

If those records include information that is otherwise publicly available, this exemption does not limit that other access.

This bill also provides that if an agency or its employees submit a bid or a proposal, then that submitted bid or proposal is governed by existing public records law applicable to the receiving agency. This exemption no longer applies once a contract is awarded, a decision is made not to award such contract, or the project is no longer under active consideration.

This bill provides a public necessity statement as is required by s. 24, Art. I of the State Constitution. Without this public records exemption, competition might otherwise be stifled as a result of the agency or agency employee's disadvantaged position in the bidding and proposal process. If these documents were not exempt from public disclosure, then the private sector businesses could request this information and then prepare a bid or proposal that would effectively eliminate an agency or its employee's ability to successfully compete. If this occurred, an agency or its employees might be discouraged from participating in the bidding and proposal process, thus stifling competition.

This exemption is made subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and will repeal on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

Section 14.203, F.S., which creates the State Council on Competitive Government, sets forth the state's policy regarding the delivery of state services:

It is the policy of this state that all state services be performed in the most effective and efficient manner in order to provide the best value to the citizens of the state. The state also recognizes that competition among service providers may improve the quality of services provided,

and that competition, innovation, and creativity among service providers should be encouraged.

To implement this policy, the Florida Legislature created the State Council on Competitive Government. The council, among others, is charged with identifying commercial activities² presently being performed by state agencies and, "if it is determined that such services may be better provided by requiring competition with private sources or other state agency service providers," then the council may recommend that a state agency *engage* in any process, "including competitive bidding, that creates competition with private sources or other state agency service providers."³

In performing its duties, the State Council on Competitive Government may

- Prescribe, in consultation with affected state agencies, the specifications and conditions of purchase procedures that must be followed by a state agency or a private source engaged in competitive bidding to provide an identified state service.⁴
- Award a contract to a state agency currently providing the service, another state agency, a private source, or any combination of such entities, if the bidder presents the best and most reasonable bid.⁵
- **Require the state agency to encourage state employees to organize and submit a bid for the identified state service.**⁶

This public records exemption in no way affects the application of the laws set forth in chapter 112, F.S., regarding standards of conduct for agency employees.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

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² Section 14.203(1)(a), F.S., defines "commercial activity" as an activity that provides a product or service that is available from a private source.

³ Section 14.203(2), F.S.

⁴ Section 14.203(3)(g), F.S.

⁵ Section 14.203(3)(h), F.S.

⁶ Section 14.203(3)(j), F.S.