

STORAGE NAME: h1769.sgc.doc
DATE: February 22, 2002

**HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: HB 1769
RELATING TO: Public Records / Transportation Facilities
SPONSOR(S): Representative(s) Andrews
TIED BILL(S): CS/HB 435

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

- (1) COUNCIL FOR SMARTER GOVERNMENT
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

This bill creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the Department of Transportation. The unsolicited proposal is to remain confidential and exempt from the date of receipt of such proposal until the deadline for receiving competing proposals has expired. The bill also provides that any information or record from such proposal that the department provides to another governmental entity for the purpose of substantiating or evaluating the unsolicited proposal is also exempt from public disclosure until the deadline for receiving competing proposals has expired. According to the bill, the unsolicited proposal is *confidential and exempt* when held by the department and such proposal is only *exempt* when held by other governmental entities.

This bill provides a public necessity statement, as required by the Florida Constitution, which states that the exemption is a necessity due to the need to prevent potential competing proposers of public-private transportation facilities from obtaining an unfair advantage over the initial unsolicited proposer. To make unsolicited proposals available for public disclosure would adversely affect the integrity of the competitive selection process and would deter the submission of unsolicited proposals for public-private transportation facilities.

This bill provides for future review and repeal of the public records exemption.

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

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

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:

Section 334.30, F.S.

Section 334.30, F.S., amended in CS/HB 435 by the Committee on Transportation and Representative Kyle, allows the Department of Transportation (DOT) to request proposals for public-private transportation projects¹. The amended section also provides that if DOT receives an unsolicited proposal² for such project, then DOT must publish a notice in the Florida Administrative Weekly and a newspaper of general circulation at least once a week for two weeks. The notice must state that DOT has received an unsolicited proposal and that DOT will accept other proposals for the same project purpose. DOT will accept proposals for 60 days following the initial date of publication. At present, there is no public records exemption for the unsolicited proposal.

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,

¹ Public-private transportation projects are usually toll roads. Telephone conversation with Legislative Analyst, Committee on Transportation, February 22, 2002.

² The Committee Substitute for House Bill 445 by the Committee on Transportation and Representative Kyle inconsistently references "unsolicited proposals" as a "proposal" throughout the bill. That bill should be amended to make the reference to an "unsolicited proposal" consistent throughout the bill.

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.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the Department of Transportation (DOT) under s. 334.30, F.S. The unsolicited proposal is to remain confidential and exempt from the date of receipt of such

proposal until the deadline for receiving competing proposals has expired.³ The bill also provides that any information or record from such proposal that DOT provides to another governmental entity for the purpose of substantiating or evaluating the unsolicited proposal is also exempt from public disclosure until the deadline for receiving competing proposals has expired. According to the bill, the unsolicited proposal is *confidential and exempt*⁴ when held by DOT and such proposal is only *exempt*⁵ when held by other governmental entities.

This bill provides a public necessity statement, as required by s. 24, Art. I of the State Constitution, which states that the exemption is a necessity due to the need to prevent potential competing proposers of public-private transportation facilities from obtaining an unfair advantage over the initial unsolicited proposer. To make unsolicited proposals available for public disclosure would adversely affect the integrity of the competitive selection process and would deter the submission of unsolicited proposals for public-private transportation facilities.

This exemption is made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2007, 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.

³ Pursuant to s. 334.30, F.S., as amended in CS/HB 435 by the Committee on Transportation and Representative Kyle, once the Department of Transportation (DOT) receives an unsolicited proposal for public-private transportation projects, DOT must then publish a notice in the Florida Administrative Weekly and a newspaper of general circulation (at least once a week for two weeks) stating that DOT has received such proposal and will accept other proposals for the same project purpose for 60 days after the initial date of publication of the notice.

⁴ Information and records that are made "confidential and exempt" may not be released to anyone other than to the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62, August 1, 1985.

⁵ Information and records that are simply made "exempt" from public disclosure are still permitted to be disclosed under certain circumstances. An agency is permitted to share exempt information with another agency if it is necessary for the furtherance of official business. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994).

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 any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties 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:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Council Director:

Heather A. Williamson, M.S.W.

Don Rubottom

STORAGE NAME: h1769.sgc.doc

DATE: February 22, 2002

PAGE: 6