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**DATE:** February 27, 2002

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

**BILL #:** CS/HB 1769  
**RELATING TO:** Public Records / Transportation Facilities  
**SPONSOR(S):** Council for Smarter Government and Representative(s) Andrews  
**TIED BILL(S):** CS/HB 435

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

- (1) COUNCIL FOR SMARTER GOVERNMENT YEAS 14 NAYS 0
  - (2)
  - (3)
  - (4)
  - (5)
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I. SUMMARY:

The council substitute creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the Department of Transportation or an expressway authority. The unsolicited proposal is to remain exempt from the date the unsolicited proposal is received until the deadline date for receiving competing proposals has expired. The council substitute provides an exception to the public records exemption.

The council substitute 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.

The council substitute provides for future review and repeal of the public records exemption.

The council substitute does not appear to have a fiscal impact on state or local governments.

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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 projects<sup>1</sup>. The amended section also provides that if DOT receives an unsolicited proposal<sup>2</sup> 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. Even if DOT does not consider the unsolicited proposal as viable, DOT is still required to publish such notice. 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.

**Section 384.0004, F.S.**

Section 384.0004, F.S., amended in CS/HB 435 by the Committee on Transportation and Representative Kyle, allows an expressway authority<sup>3</sup> to

receive or solicit proposals and enter into agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing or extensions or other improvements to existing expressway authority transportation facilities or new transportation facilities that are within the jurisdiction of such an expressway authority.

The section also requires an expressway authority to establish an application fee for the submission of unsolicited proposals, but does not establish a fee cap. This appears to be an unlawful

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

<sup>2</sup> 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.

<sup>3</sup> Section 348.0002(2), F.S., defines "authority" as "an expressway authority established pursuant to the Florida Expressway Authority Act which is a body politic and corporate and a public instrumentality."

delegation of power, thereby raising a constitutional concern. The section should be amended to reflect an application fee cap.

The section also provides that if an expressway authority receives an unsolicited proposal that it has interest in evaluating, such expressway must publish a notice in the Florida Administrative Weekly and a newspaper of general circulation in the county in which the expressway authority is located. Such notice must be published at least once a week for two weeks. The notice must state that the expressway authority has received an unsolicited proposal and will accept other proposals for the same project purpose. The expressway authority will receive proposals for 60 days after the initial date of publication. A copy of the notice must be mailed to each local government in the affected areas.

### **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.

**C. EFFECT OF PROPOSED CHANGES:**

The council substitute creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the Department of Transportation (DOT) pursuant to s. 334.30, F.S., or an expressway authority pursuant to s. 348.0004, F.S. The unsolicited proposal is to remain exempt from the date the unsolicited proposal is received until the deadline date for receiving competing proposals has expired.<sup>4</sup> The council substitute provides an exception to the public records exemption by allowing DOT or the expressway authority to share information contained in the unsolicited proposal with any other governmental entity for the purpose of substantiating or evaluating such proposal. The receiving governmental entity must maintain the exempt status of such information until the deadline date for receiving competing proposals has expired.

The council substitute 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".

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<sup>4</sup> 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. The same provisions apply regarding unsolicited proposals received by an expressway authority.

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:

The council substitute 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:

The council substitute 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:

The council substitute 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:

On February 26, 2002, the Council for Smarter Government head HB 1769 and adopted a strike-all amendment. The bill was reported favorably as a council substitute.

The council substitute maintains the public records exemption contained in the bill for unsolicited proposals for a public-private transportation facility received by the Department of Transportation (DOT). The council substitute expands the exemption contained in the bill to include unsolicited proposals for such facilities when received by an expressway authority. The council substitute provides that such proposal is *exempt*<sup>5</sup> when received by DOT or an expressway authority, whereas the bill provided that such proposal was *confidential and exempt*<sup>6</sup>. Additionally, the council substitute makes clarifying changes, editorial changes, and removes superfluous language.

VII. SIGNATURES:

COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Council Director:

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Heather A. Williamson, M.S.W.

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Don Rubottom

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<sup>5</sup> 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. 5<sup>th</sup>DCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4<sup>th</sup>DCA 1994).

<sup>6</sup> 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.