

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2370

SPONSOR: Governmental Oversight & Productivity and Senator Posey

SUBJECT: Public Records

DATE: March 11, 2002      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McAuliffe</u>	<u>Meyer</u>	<u>TR</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the Florida Department of Transportation (FDOT). 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 FDOT 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.

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 public-private transportation facility proposals from obtaining an unfair advantage over the initial unsolicited proposal. The bill further provides making 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.

**II. Present Situation:**

This bill is linked with SB 1582 which passed the Senate Transportation Committee and was heard in the Senate Governmental Oversight and Productivity Committee on March 5, 2002. Senate Bill 1582 provides for the development of toll roads and other transportation projects that combine public and private resources. Under SB 1582, State Transportation Trust Fund (STTF) funds could be used on these projects that are in FDOT's 5-Year Work Program, or which the

FDOT otherwise believes serves an overriding public interest. In such a case, no more than \$50 million in STTF monies could be spent annually by the FDOT. Legislative approval is necessary only if the FDOT and its private-sector partner want to build projects valued in excess of the \$50 million. The FDOT also could contribute operating and maintenance funds to these projects, without being reimbursed by its private-sector partner. The FDOT retains the discretion to decide whether to participate in one of these public-private partnership projects. The bill also specifies all reasonable costs associated with a project that is not a part of the State Highway System or that is a private facility, be borne by the public-private entity.

In addition, SB 1582 amends s. 348.0004, F.S., with similar provisions to allow the Miami-Dade County Expressway Authority to participate in these public-private partnerships. However, there are no limits on the expressway authority's financial investment, and the expressway authority doesn't need legislative approval for projects over a certain dollar amount.

**Public Records Law** - 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 public records requirements. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

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

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.

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.

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

This bill creates a public records exemption for unsolicited proposals for a public-private transportation facility received by the FDOT. 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 FDOT 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. The receiving governmental entity must maintain the exempt status of such information.

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 public-private transportation facility proposals from obtaining an unfair advantage over the initial unsolicited proposal. The bill further provides, 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.

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

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

None.

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

Article I, s. 24(c) of the State Constitution, authorizes the Legislature to create exemptions to public records and meetings requirements:

. . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.

The bill is narrowly tailored to meet the constitutional requirement that it be no broader than necessary to accomplish its purpose.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.