

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1889 (PCB SA 04-13A) Public Records Exemptions for Procurement
SPONSOR(S): State Administration and Benson
TIED BILLS: HB 1819 **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration</u>	<u>7 Y, 0 N</u>	<u>Williamson</u>	<u>Everhart</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill creates a public records exemption for proprietary confidential business information received from a vendor or contractor by an agency, upon determination by the receiving agency that disclosure of such information would impair the competitive interest of the information provider. Determination must be reflected in writing by the agency. It also creates a public records exemption for a business case submitted to the President of the Senate and the Speaker of the House of Representatives pursuant to law, which is held by an agency, and provides for expiration of the exemption.

This bill provides for future review and repeal of the exemptions on October 2, 2009, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity and a contingent effective date.

This bill appears to have a minimal fiscal impact on state and local governments. See "FISCAL COMMENTS" section.

This bill requires a two-thirds vote of the members present and voting for passage because it creates new public records exemptions.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1889.sa.doc
DATE: March 29, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

Not applicable.

B. EFFECT OF PROPOSED CHANGES:

Proprietary Confidential Business Information

Background

PCB SA 04-08 creates s. 287.037, F.S., relating to cost or pricing data. The section requires the head of a procuring agency to require vendors to provide data regarding, cost, pricing, or consideration prior to the award of a contract or modification of a contract if the price, cost, or consideration required by the contract exceeds \$1,000,000, and the price, cost, or consideration is not:

- Based on adequate price competition;
- Based on established catalogue or market prices; or
- Set by law or regulation.

“Data about cost, pricing, or consideration” includes all facts that a prudent buyer or seller would reasonably expect to affect price, cost, or consideration negotiations. It does not include information that is in the form of opinion or conjecture, but does include factual information from which an opinion or conjecture regarding cost, pricing, or consideration may be derived. Such data is information that, if made public, could put a company at a disadvantage with other companies offering the same product or service.

Effect of Bill

This bill creates a public records exemption for proprietary confidential business information received by an agency pursuant to s. 287.037, F.S., upon a determination by the receiving agency that disclosure of such information would impair the competitive interest of the provider of that information. The agency must reflect such determination in writing. Such exempt¹ information is available for public inspection 50 years after the date of receipt of that information.

¹ There is a difference between information and records that the Legislature has made *exempt* from public disclosure versus those that have been made *confidential and exempt*. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. 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). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

This bill provides for future review and repeal of the exemption on October 2, 2009, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity and a contingent effective date.

Business Case

Background

PCB SA 04-08 creates s. 287.046, F.S., relating to outsourcing or privatizing of functions or responsibilities. It requires agencies to develop a business case describing and analyzing their outsourcing or privatization initiative. A business case includes information such as a:

- Detailed description of the program or service to be outsourced or privatized;
- Cost-benefit analysis describing the estimated specific tangible and intangible costs, savings, performance improvements, risks, and qualitative and quantitative benefits involved in or resulting from the outsourcing or privatization;
- Statement of the potential impact on state revenues and expenditures; and
- Listing of assets proposed for transfer to or use by a contractor.

A current and updated business case reflecting the proposed contract for outsourcing any function or service in excess of \$10 million and when the business case has changed more than 10% from the business case submitted with the solicitation documents, along with a detailed listing of the changes to the business case in the update, must be furnished to the President of the Senate and the Speaker of the House of Representatives at least 15 days prior to contract execution. Submission of such information is required if the quantitative aspects of the updated business case's objectives, business benefits, costs, savings, benefits, project scope, implementation approach, or timeline, as compared with those in the business case provided with the solicitation documents, have changed by 10 percent or more, or the qualitative aspects have changed significantly.

Effect of Bill

This bill creates a public records exemption for a business case submitted to the President and the Speaker pursuant to s. 287.04(3)(d), F.S., which is held by an agency. Such case is made exempt from public disclosure.

This bill provides for future review and repeal of the exemption on October 2, 2009, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity and a contingent effective date.

C. SECTION DIRECTORY:

Section 1 creates s. 287.0371, F.S., creating a public records exemption for proprietary confidential business information received by an agency; creating a public records exemption for a business case submitted to the legislature and held by an agency; and providing for future review and repeal of the exemptions.

Section 2 provides a statement of public necessity.

Section 3 provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested records, and must examine every requested record to determine if a public records exemption prohibits release of the record. There is likely no measurable fiscal impact to a single public records exemption; the location and examination process remains whether or not a particular public records exemption exists.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not affect local governments.

2. Expenditures:

None. This bill does not affect local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None. This bill does not regulate the conduct of persons in the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not affect municipal or county government.

2. Other:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, this bill requires a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Public Records Law

Article I, s. 24(a), Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature may, however, provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida

Constitution. 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.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995² provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 24, 2004, the Committee on State Administration adopted an amendment to PCB SA 04-13A and reported the bill favorably. The amendment inserted into section three the bill number of the tied bill.

² Section 119.15, F.S.