

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1369 CS

Public Records and Public Meetings

**SPONSOR(S):** Evers

**TIED BILLS:**

**IDEN./SIM. BILLS:** CS/SB 2316

<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1) <u>Governmental Operations Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Williamson</u>	<u>Williamson</u>
2) <u>State Administration Council</u>	<u></u>	<u></u>	<u></u>
3) <u></u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

**SUMMARY ANALYSIS**

Current law provides a public records exemption for sealed bids or proposals received by an agency pursuant to an invitation to bid or request for proposal. The sealed bid or proposal is exempt until the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier. Current law does not provide a public records exemption for an invitation to negotiate.

The bill expands the current public records exemption for sealed bids or proposals. It provides that a sealed bid or proposal remains exempt if an agency rejects all bids or proposals submitted in response to an invitation to bid (ITB) or a request for proposal (RFP) and concurrently provides notice of its intent to reopen the ITB or RFP. The bill provides for expiration of the exemption.

The bill also expands the public records exemption to include a competitive sealed reply in response to an invitation to negotiate. Further, the bill creates a public meetings exemption for a meeting at which a negotiation with a vendor is conducted. A complete recording must be made of the exempt meeting. The recording is exempt from public records requirements for a limited period.

The bill provides for future review and repeal of the exemptions and provides a public necessity statement.

The bill does not grant rule-making authority to any administrative agency.

The bill could have a minimal fiscal impact on state and local governments.

**The bill requires a two-thirds vote of the members present and voting for passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

#### B. EFFECT OF PROPOSED CHANGES:

##### 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, however, may 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 also is addressed in the Florida Statutes.

Chapter 119, F.S., more completely addresses the issue of public records. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record.

##### Open Government Sunset Review Act

Section 119.15, F.S., the "Open Government Sunset Review Act," sets forth a legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption. It 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:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- Protecting trade or business secrets.

##### Agency Procurement

Agency procurements of commodities or contractual services that exceed \$25,000 are governed by statute and rule that requires utilization of one of the following three types of competitive solicitations, unless otherwise authorized by law:<sup>1</sup>

- Invitation to bid (ITB): An agency must use an ITB when it is capable of specifically defining the scope of work for which a contractual service is required or capable of establishing the precise specifications defining the commodities sought.<sup>2</sup> The contract must be awarded to the responsible<sup>3</sup> and responsive vendor<sup>4</sup> that submits the lowest responsive bid.<sup>5</sup>

<sup>1</sup> See, *infra*, at pp. (discussing general exceptions and emergency, sole source, and state term contract purchases).

<sup>2</sup> Section 287.012(16), F.S.

<sup>3</sup> The term "responsible vendor" means, ". . . a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." Section 287.012(24), F.S.

<sup>4</sup> "Responsive vendor" means, ". . . a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." Section 287.012(26), F.S.

- Request for proposals (RFP): An agency may use a RFP when it determines in writing that it is not practicable for it to define specifically the scope of work for which the commodity or contractual service is required and when it is requesting that the vendor propose commodities or contractual services to meet the RFP's specifications.<sup>6</sup> Unlike the ITB process, the contract need not be awarded to the lowest priced vendor; rather, the award must be given to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state after consideration of the price and other criteria set forth in the RFP.<sup>7</sup>
- Invitation to negotiate (ITN): An agency may use an ITN when it determines in writing that negotiation is necessary for the state to achieve the best value.<sup>8</sup> After ranking the replies received in response to the ITN, the agency must select, based on the rankings, one or vendors with which to commence negotiations. The contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.<sup>9</sup>

### Public Records Exemption for Bids and Proposals

Current law provides a public records exemption for sealed bids or proposals received by an agency pursuant to an ITB or RFP. The sealed bid or proposal is exempt until the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier.<sup>10</sup> Current law does not provide a public records exemption for an ITN.

The bill expands the current public records exemption for sealed bids or proposals. It provides that a sealed bid or proposal remains exempt if an agency rejects all bids or proposals submitted in response to an ITB or RFP and concurrently provides notice of its intent to reopen the ITB or RFP. The exemption expires once:

- Notice of a decision or intended decision is provided concerning the reopened ITB or RFP, or
- The agency withdraws the reopened ITB or RFP.

The bill provides for future review and repeal of the newly expanded exemption on October 2, 2011, and provides a public necessity statement.

### Public Records and Public Meetings Exemptions for ITNs

The bill also expands the public records exemption to include a competitive sealed reply in response to an ITN. The competitive sealed reply is exempt from public records requirements until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed replies are opened, whichever occurs earlier.

If an agency rejects all competitive sealed replies in response to an ITN and reissues the ITN within 90 days after the notice of intent to reissue, then the bill provides that the rejected replies remain exempt. The extended exemption expires when the agency:

- Provides notice of a decision or intended decision concerning the reissued ITN, or
- Withdraws the reissued ITN.

The bill specifies that a competitive sealed reply is not exempt from public records requirements for longer than 12 months after the initial notice rejecting all replies.

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<sup>5</sup> Section 287.057(1), F.S.; "Responsive bid," "responsive proposal," or "responsive reply" means, ". . . a bid, proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation." Section 287.012(25), F.S.

<sup>6</sup> Sections 287.017(22) and 287.057(2), F.S.

<sup>7</sup> Section 287.057(2), F.S.

<sup>8</sup> Sections 287.012(17) and 287.057(3), F.S.; "Best value" means, ". . . the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." Section 287.012(4), F.S.

<sup>9</sup> Section 287.057(3), F.S.

<sup>10</sup> Section 119.071(1)(b), F.S.

The bill also creates a public meetings exemption for a meeting at which a negotiation with a vendor is conducted pursuant to s. 287.057(3), F.S. A complete recording must be made of any exempt portion of a meeting and no portion of such meeting may be held off the record.

The bill further provides that the recording is exempt from public records requirements until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed replies are opened, whichever occurs earlier. If the agency, however, rejects all sealed replies then the recording remains exempt until the agency:

- Provides notice of a decision or intended decision concerning the reissued ITN, or
- Withdraws the reissued ITN.

The bill specifies that the recording is not exempt for longer than 12 months after the initial notice rejecting all replies.

The bill provides for future review and repeal of the exemption on October 2, 2011, and provides a public necessity statement.

C. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to expand the current exemption for sealed bids or proposals.

Section 2 amends s. 286.0113, F.S., to create a public meetings exemption relating to the ITN process.

Section 3 provides a public necessity statement.

Section 4 provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The exemption could improve the ability of state and local governments to obtain the best pricing, which could increase state and local government revenues. The bill likely could create a fiscal impact on state and local governments, because staff responsible for complying with public records requests will require training related to the newly created public records exemptions. In addition, costs could be associated with the requirement to make a complete recording of an exempt meeting.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

##### 2. Other:

###### Vote Requirement

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

###### Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it includes a public necessity statement.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 17, 2006, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with committee substitute. The strike-all amendment:

- Clarified that the initial response to an invitation to negotiate is exempt from public records requirements.
- Created a public meetings exemption for a meeting at which a negotiation with a vendor is conducted.
- Required a complete recording to be made of the closed meeting, which is temporarily exempt from public records requirements.