

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: PCB 7228

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Open Government Sunset Review/Competitive procurement solicitations

DATE: September 27, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Roberts		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill is the result of Open Government Sunset Reviews by the Governmental Oversight and Accountability Committee of public-records and -meetings exemptions pertaining to competitive procurement solicitations.

Agency procurements of commodities or contractual services exceeding \$30,000 are governed by statute and rule and require one of the following three types of competitive solicitations to be used, unless otherwise authorized by law: invitation to bid (ITB), request for proposals (RFP), or invitation to negotiate (ITN).

Current law provides general public-records and –meetings exemptions associated with competitive solicitations. Sealed bids, proposals, or replies in response to an ITB, RFP, or ITN are exempt from public-records requirements until a time certain. In addition, a meeting at which a negotiation with a vendor is conducted pursuant to an ITN is exempt from public-meetings requirements. A complete recording must be made of the exempt meeting. The recording is exempt from public-records requirements until a time certain.

This bill reenacts the exemptions, which will repeal on October 2, 2011, if this bill does not become law.

This bill expands the public-records exemption by extending the exemption for sealed bids and replies from 10 days to 30 days. This change also makes the timeframes consistent.

The bill expands the public-meetings exemption to include any portion of a meeting at which a vendor makes an oral presentation or a vendor answers questions as part of a competitive

solicitation. It is further expanded to include any portion of a team meeting at which negotiation strategies are discussed.

The bill expands the public-records exemption for recordings of exempt meetings to comport with the public-records exemption for sealed bids, proposals, or replies. It extends the public-records exemption from 20 days to 30 days. It also expands the public-records exemption by including those records presented by a vendor at a closed meeting.

The bill extends the repeal date for the exemptions to October 2, 2016, and provides a public necessity statement as required by the State Constitution.

Because this bill expands existing exemptions, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends the following sections of the Florida Statutes: 119.071(1)(b)1.b.; 119.071(1)(b)2.; and 286.0113(2).

II. Present Situation:

Public Records and Meetings

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.¹ One-hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24, of the State Constitution, provides that:

(a) Every person has the right to inspect or copy any public record 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.

¹ Section 1390, 1391 F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution's public-records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁹

Article I, section 24(b) of the Florida Constitution and s. 286.011, F.S., the Sunshine Law, specify the requirements for open meetings. Open meetings are defined as any meeting of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken. No

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to any public record 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 those records exempted by law or the State Constitution. *See supra* fn. 3.

⁵ Section 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

⁸ Florida Attorney General Opinion 85-62.

⁹ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

resolution, rule, or formal action shall be considered binding unless it is taken or made at an open meeting.¹⁰

Article I, section 24 of the Florida Constitution, chapter 119, F.S., and chapter 286, F.S., all provide different definitions as to who is subject to the open meeting and public records laws. Under article I, Section 24(a) of the Florida Constitution, “any public body, officer, or employee of the state, or persons acting on their behalf” is subject to the public records law. Under article I, Section 24(b), all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, is subject to the open meetings law. Under chapter 119, F.S., any agency¹¹ is subject to the public records laws. Under s. 286.011, F.S., all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision are subject to the open meeting laws.

Only the Legislature is authorized to create exemptions to open government requirements.¹² Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹³ A bill enacting an exemption¹⁴ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁶ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁷ An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An exemption meets the three statutory criteria if it:

¹⁰ Section 286.011, F.S.

¹¹ “Agency” is defined as “any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” Section 119.011(2), F.S.

¹² *Supra* fn. 1.

¹³ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

¹⁴ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁵ *Supra* fn. 1.

¹⁶ Section 119.15, F.S.

¹⁷ Section 119.15(6)(b), F.S.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁸

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁹ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

¹⁸ *Id.*

¹⁹ *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

Agency Procurement

Agency procurements of commodities or contractual services exceeding \$30,000 are governed by statute and rule and require one of the following three types of competitive solicitations to be used, unless otherwise authorized by law:²⁰

1. 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.²¹ The contract must be awarded to the responsible²² and responsive vendor²³ that submits the lowest responsive bid.^{24 25}
2. Request for proposals (RFP): An agency may use a RFP when it determines in writing that it is not practicable for it to specifically define 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.²⁶ Unlike the ITB process, the contract need not be awarded to the lowest priced vendor; rather, the award shall 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.²⁷
3. 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.^{28 29} After ranking the replies received in response to the ITN, the agency must select, based on the rankings, one or more 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.³⁰

Legislative intent expressed in Chapter 287, Florida Statutes, establishes several findings related to the competitive procurement process, including:³¹

- Fair and open competition is a basic tenet of public procurement.
- Open competition reduces the appearance and opportunity for favoritism.

²⁰ Section 287.057, F.S.

²¹ Section 287.012(16), F.S.

²² 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.

²³ "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.

²⁴ Section 287.057(1), F.S.

²⁵ "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.

²⁶ Sections 287.012(22) and 287.057(2), F.S.

²⁷ Section 287.057(2), F.S.

²⁸ Sections 287.012(17) and 287.057(3), F.S.

²⁹ "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.

³⁰ Section 287.057(3), F.S.

³¹ Section 287.001, F.S.

- It is essential that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained.

Exemptions Under Review

Current law provides a general public-records exemption for sealed bids or proposals received by an agency pursuant to an ITB or RFP. The sealed bids or proposals are exempt from public-records requirements until the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier.³²

In 2006, the Legislature expanded the public-records exemption to provide that, if an agency rejects all bids or proposals submitted in response to an ITB or RFP, and concurrently provides notice of its intent to reissue the ITB or RFP, then the rejected bids or proposals remain exempt from public-records requirements until the agency:

- Provides notice of a decision of intended decision concerning the reissued ITB or RFP; or
- Withdraws the reissued ITB or RFP.³³

The Legislature further expanded the public-records exemption to provide that a competitive sealed reply in response to an ITN 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 reply is opened, whichever occurs earlier.³⁴ The rejected sealed replies remain exempt from public-records requirements if the agency:

- Rejects all competitive sealed replies;
- Concurrently provides notice of its intent to reissue the ITN; and,
- Reissues the ITN within 90 days after the notice of intent to reissue.

The exemption expires when the agency provides notice of a decision or intended decision concerning the reissued ITN or until the agency withdraws the reissued ITN. A competitive sealed reply is not exempt for longer than 12 months after the initial agency notice rejecting all replies.³⁵

Pursuant to the Open Government Sunset Review Act, the public-records exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.³⁶

Current law also provides a general public-meetings exemption for those meetings at which a negotiation with a vendor is conducted pursuant to an ITN.³⁷ A complete recording must be made of the exempt meeting. In addition, 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 reply is opened, whichever occurs earlier. If the agency rejects all sealed replies, the recording remains exempt until the agency provides notice of a decision or intended decision concerning the reissued ITN or until the agency withdraws the reissued ITN. A

³² Section 119.071(1)(b)1.a., F.S.

³³ Chapter 2006-284, L.O.F., codified as s. 119.071(1)(b)1.b., F.S.

³⁴ Chapter 2006-284, L.O.F., codified as s. 119.071(1)(b)2.a., F.S.

³⁵ Section 119.071(1)(b)2.b., F.S.

³⁶ Sections 119.071(1)(b)1.b. and 2.c., F.S.

³⁷ Chapter 2006-284, L.O.F., codified as s. 286.0113(2)(a), F.S.

recording is not exempt from public-records requirements for longer than 12 months after the initial agency notice rejecting all replies.³⁸

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.³⁹

Governmental Oversight and Accountability Committee's Open Government Sunset Reviews

As part of the Open Government Sunset Review process, the professional staff of the Governmental Oversight and Accountability Committee held meetings with affected persons tasked with applying the public-records and public-meetings exemption.

Based upon its review of these public-records and –meetings exemptions under the Open Government Sunset Review Act, the professional staff of the Governmental Oversight and Accountability Committee recommend that the Legislature retain the exemptions established in ss. 119.071(1)(b)1.b., 119.071(1)(b)2., and 286.0113(2), F.S., that relate to competitive solicitations. Senate professional staff conclude that the exemptions are necessary to protect the confidential business information of proprietors responding to competitive solicitations from governmental entities.

III. Effect of Proposed Changes:

The bill reenacts, expands, and reorganizes the public-records exemptions for competitive solicitations.

First, the bill removes references to ITBs, RFPs, and ITNs, by creating a definition for “competitive solicitation.” “Competitive solicitation” is defined to mean “the process of requesting and receiving sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.” By creating a definition for “competitive solicitation” and removing references to chapter 287, F.S., local governments are able to use the public-records exemption associated with ITNs.

Current law protects sealed bids or proposals until a decision or intended decision is made or within 10 days after bid- or proposal-opening. In addition, sealed replies are protected until a decision or intended decision is made or until 20 days after the final competitive sealed reply is opened. Based upon discussions with impacted parties, the bill creates consistency by providing that all sealed bids, proposals, or replies are exempt until notice of an intended decision or until 30 days after opening the bids, proposals, or replies. Also, the bill provides that all bids, proposals, or replies may not remain exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies. Current law only applies to responses to an ITN.

The bill also reenacts, expands, and reorganizes the public-meetings exemption for competitive solicitations.

³⁸ Section 286.0113(2)(b), F.S.

³⁹ Section 286.0113(2)(c), F.S.

The bill creates a definition for “competitive solicitation” identical to the one provided for the public-records exemptions. Creating a definition of “competitive solicitation” and removing references to chapter 287, F.S., allows local governments to use the public-meetings exemption associated with ITNs.

The public-meetings exemption is expanded to include any portion of a meeting at which a vendor makes an oral presentation or a vendor answers questions as part of a competitive solicitation. It is further expanded to include any portion of a team⁴⁰ meeting at which negotiation strategies are discussed.

The bill expands the public-records exemption for recordings of exempt meetings to comport with the public-records exemption for sealed bids, proposals, or replies. It extends the public-records exemption from 20 days to 30 days. It also expands the public-records exemption by including those records presented by a vendor at a closed meeting.

Because the bill expands the current public-records and –meetings exemptions, it extends the repeal date for those exemptions to October 2, 2016. It also provides a public necessity statement as required by the State Constitution.⁴¹

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains and expands existing public-records and –meetings exemptions. This bill complies with the requirement of s. 24(c), Art. I of the State Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill expands exemptions, it contains statement of public necessity for the expansion and is subject to a two-thirds vote of each house of the Legislature for enactment as required by 24(c), Art. I of the State Constitution.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁴⁰ The bill defines “team” to mean a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.

⁴¹ Section 24(c), Art. I of the State Constitution.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The exemptions 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 an insignificant fiscal impact on state and local governments due to costs associated with the requirement to make a complete recording of an exempt meeting.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Interested persons have expressed concern that use of the term “agency” in the public-meetings exemption could exclude local governments from using the public-meetings exemption. However, s. 286.011, F.S., which provides public-meetings requirements, uses the term agency as follows:

... any state agency or authority or ... any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution ...

As such, it appears that use of the term “agency” as part of the public-meetings exemption would indicate application to state and local entities.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.