

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 Committee on Community Affairs

BILL: SB 1240

INTRODUCER: Senator Margolis

SUBJECT: Public Records/Personal Financial Statement/Contract Bidding

DATE: March 24, 2014

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Stearns | Yeatman | CA | Favorable |
| 2. | | | GO | |
| 3. | | | RC | |

I. Summary:

SB 1240 revises an exemption from public records requirements for financial statements that a governmental entity or agency requires a person to submit in order to respond to a competitive solicitation or as a term or condition of a contract.

The bill is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2019, unless reenacted by the Legislature.

II. Present Situation:

Public Records and Meetings Requirements

The Florida Constitution specifies requirements for public access to government records and meetings. It provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.² The Florida Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.³

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶ The Sunshine Law⁷ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

Only the Legislature may create an exemption to public records or public meetings requirements.⁹ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

Exemptions are subject to the Open Government Sunset Review Act,¹³ which prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ It requires the automatic repeal of such exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁵

⁵ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁶ Section 119.07(1)(a), F.S.

⁷ Section 286.011, F.S.

⁸ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Art. III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c).

¹³ Section 119.15, F.S.

¹⁴ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁵ Section 119.15(3), F.S.

Public Records Exemption – Competitive Solicitation

Current law defines “competitive solicitation” as the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.¹⁶ Sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt from disclosure requirements until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.¹⁷ If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt from disclosure requirements until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.¹⁸

Any financial statement that an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a proposal for a road or any other public works project is exempt from disclosure requirements.¹⁹

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., to revise an exemption from public records requirements for a financial statement related to a competitive solicitation and submitted to a governmental entity.

The bill expands the exemption to apply to any governmental entity, rather than solely agencies.

The bill also applies the exemption to any “person” rather than only “prospective bidders.”

The bill applies the exemption to financial statements submitted in response to a competitive solicitation or other public procurement, or as a term or condition of a contract. The exemption currently only applies to statements submitted “in order to prequalify for bidding or for responding to a proposal for a road or other public works project.”

The bill states that the exemption does not apply to a financial statement submitted by a publicly traded corporation or nonprofit organization.

The bill states that the Open Government Sunset Review Act applies and the exemption shall stand repealed on October 2, 2019, unless reenacted by the Legislature.

Section 2 provides a statement of public necessity.

Section 3 provides an effective date of July 1, 2014.

¹⁶ Section 119.071(1)(b)1, F.S.

¹⁷ Section 119.071(1)(b)2, F.S.

¹⁸ Section 119.071(1)(b)3, F.S.

¹⁹ Section 119.071(1)(c), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a current public record exemption, thus it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption, thus it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to the financial statements of persons responding to a competitive solicitation or public procurement. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill exempts financial statements submitted to governmental entities under certain circumstances from the public records laws, which may encourage more private parties to respond to competitive solicitations or other public procurements.

C. Government Sector Impact:

The bill exempts financial statements submitted to governmental entities under certain circumstances from the public records laws, which may encourage more private parties to respond to competitive solicitations or other public procurements. This may lead to a larger pool of potential contractors offering a wider array of contractual terms, which could result in reduced costs for local governments.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071 of the Florida Statutes.

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

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

None.

B. Amendments:

None.