

**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.)

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Prepared By: The Professional Staff of the Committee on Education

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BILL: CS/SB 1396

INTRODUCER: Education Committee and Senator Montford

SUBJECT: Public Records/Public-private Partnerships/State Universities

DATE: March 13, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hand	Klebacha	ED	<b>Fav/CS</b>
2.			GO	
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1396 makes confidential and exempt from disclosure, pursuant to Florida's public records law, certain unsolicited proposals, proprietary confidential business information, and board meetings at which these proposals and information will be discussed, relating to a public-private partnership filed with a state university board of trustees, and provides a statement of public necessity.

The public records and public meeting exemptions are subject to the Open Government Sunset Review Act and shall be repealed on October 2, 2019, unless action is taken by the Legislature to reenact the exemption.

The bill is tied to the passage of SB 900 (Sen. Latvala), and takes effect on the same date as SB 900 (July 1, 2014) or similar legislation, if such legislation is adopted in this legislative session and becomes law.

## II. Present Situation:

### Florida Public Records Requirements

The Constitution of the State of Florida provides that:

[e]very 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.<sup>1</sup>

Under Florida law, “[e]very 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.”<sup>2</sup>

However, the Legislature is authorized to exempt records from such laws that otherwise require accessibility.<sup>3</sup> Such exemptions must be passed by a two-thirds vote of each house, state with specificity the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the law.<sup>4</sup>

### Florida Open Meetings Requirements

The Constitution of the State of Florida provides that:

[a]ll meetings of any collegial public body ... at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public ... except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.<sup>5</sup>

Under Florida law, “[a]ll meetings of any board ... at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.”<sup>6</sup>

However, the Legislature is authorized to exempt meetings from such laws that otherwise require accessibility.<sup>7</sup> Such exemptions must be passed by a two-thirds vote of each house, state with specificity the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the law.<sup>8</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const. The Florida Statutes define the term “public records” as “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(12), F.S.

<sup>2</sup> Section 119.07(1)(a), F.S.

<sup>3</sup> Art. I, s. 24(c), Fla. Const.

<sup>4</sup> *Id.*

<sup>5</sup> Art. I, s. 24(b), Fla. Const.

<sup>6</sup> Section 286.011(2), F.S.

<sup>7</sup> Art. I, s. 24(c), Fla. Const.

<sup>8</sup> *Id.*

## **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>9</sup> provides that an exemption must serve an “identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves.”<sup>10</sup> The exemption must meet one of the following identifiable public purposes:<sup>11</sup>

- 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 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
- 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.

A new public records or open meeting exemption shall be repealed on October 2nd of the fifth year after enactment, unless the Legislature reenacts the exemption.<sup>12</sup>

## **Existing Confidential and Exempt Statutory Provisions**

Three existing statutory provisions that declare information as confidential and exempt from disclosure are provisions relating to trade secrets, proprietary confidential business information, and sealed proposals in a competitive solicitations.

### ***Trade Secret Information***

Trade secret information is confidential and exempt from Florida’s public records laws because it is a felony to disclose such records.<sup>13</sup>

### ***Proprietary Confidential Business Information***

The term “proprietary confidential business information” is defined in statutes relating to the State Board of Administration (SBA) public records exemptions.<sup>14</sup> The definition pertains to the ability of the SBA to effectively administer its real estate investment program.<sup>15</sup> This information

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<sup>9</sup> Section 119.15, F.S.

<sup>10</sup> Section 119.15(6)(b), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Sections 119.15(3), 286.0111, F.S.,

<sup>13</sup> Section 815.045, F.S. As pertaining to trade secret information as defined in s. 812.081, F.S, and and provided for in s. 815.04(3), F.S. *Id.*

<sup>14</sup> Sections 215.4401(3)(a)6.-7., F.S.

<sup>15</sup> Section 215.4401(1), F.S.

is confidential and exempt from disclosure pursuant Florida's open records laws for 10 years after the termination of the alternative investment.<sup>16</sup>

### ***Sealed Proposals In A Competitive Solicitation***

Sealed proposals in a competitive solicitation are exempt from disclosure pursuant to Florida's public records laws.<sup>17</sup> The proposals are exempt until the agency provides notice of an intended decision or until 30 days after opening.<sup>18</sup> If all proposals are rejected, and the agency concurrently provides notice of intent to reissue a competitive solicitation, the proposals remain exempt until the agency provides notice or an intended decision or until the agency withdraws the reissued competitive solicitation, but in no event longer than 12 months after the initial notice rejecting all replies.<sup>19</sup>

Any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation, or at which a vendor answers questions as part of a solicitation, are exempt from Florida's open meeting laws.<sup>20</sup> A complete recording is to be made of any portion of an exempt meeting.<sup>21</sup> The recording is exempt until the agency provides notice or an intended decision or until 30 days after opening.<sup>22</sup> If all proposals are rejected, and the agency concurrently provides notice of intent to reissue a competitive solicitation, the recording remains exempt until the agency provides notice or until the agency withdraws the reissued competitive solicitation, but in no event longer than 12 months after the initial notice rejecting all replies.<sup>23</sup>

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

CS/SB 1396 makes confidential and exempt from disclosure, pursuant to Florida's public records law, certain unsolicited proposals, proprietary confidential business information, and board meetings at which these proposals and information will be discussed, relating to a public-private partnership filed with a state university board of trustees, and provides a statement of public necessity.

The public records and open meetings exemption provisions are subject to the Open Government Sunset Review Act<sup>24</sup> and shall be repealed on October 2, 2019, unless action is taken by the Legislature to reenact the exemption.<sup>25</sup>

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<sup>16</sup> Section 214.4401(3)(b), F.S. An "alternative investment" is an investment by the State Board of Administration in a private equity fund, venture fund, hedge fund, or distress fund or an indirect investment in a portfolio company through an investment manager. Section 215.4401(3)(a)1., F.S.

<sup>17</sup> Section 119.071(1)(b), F.S.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Section 286.0113(2), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Sections 119.15, 286.0111, F.S.

<sup>25</sup> Sections 119.15(3), 286.011, F.S.

### **Unsolicited Proposals**

If the board does not intend to enter into an agreement for the qualifying project, the unsolicited proposal is not confidential or exempt from disclosure. Otherwise, the unsolicited proposal is confidential and exempt from disclosure until:

- Notice of the board's intended decision; or
- No more than ninety (90) days after the board rejects all proposals for the project described in the unsolicited proposal.

### **Proprietary Confidential Business Information**

The bill creates the term "proprietary confidential business information" and makes such information confidential and exempt from disclosure. The bill defines the term to mean information provided by a private entity to the board that:

- Has been designated by a private entity as information that is owned or controlled by the private entity;
- Is intended to be and is treated by the private entity as private and the disclosure of which would harm the business operations of the private entity;
- Has not otherwise been intentionally disclosed by the private entity; and
- Is information concerning:
  - Trade secrets as defined in s. 688.002, F.S.;
  - Financial statements or financing terms;
  - Patent-pending or copyrighted designs;
  - Leasing or real property acquisition plans; or
  - Marketing studies.

### **Board Shade Meetings**

A portion of a board meeting at which an unsolicited proposal or proprietary confidential business information is discussed is confidential and exempt from Florida's open meetings laws.<sup>26</sup> The exempt portion of the meeting must be recorded and transcribed, including the times of commencement and termination of the meeting, all discussions and proceedings, the names of all persons present at any time, and the names of all persons speaking. The exempt portion of the meeting may not be off the record.

### **Statement of Public Necessity**

The bill provides a statement of public necessity for the exemption,<sup>27</sup> which states that:

- If unsolicited proposals are publicly available before the board makes a decision, competitors could determine the creative financing used to fund the projects.

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<sup>26</sup> Section 286.011, F.S., and Art. I, s. 24(b), Fla. Const.

<sup>27</sup> The bill does not exempt solicited proposals from disclosure pursuant to a public records request. The same public purpose for exempting a solicited proposal may also exist for solicited proposals. *Compare*, Section 119.071(1)(b), F.S. (which creates a public records exemption for all sealed bids, proposals or replies in response to a competitive solicitation pursuant to s. 287.057, F.S.).

- If proprietary confidential business information is not made confidential and exempt, it may discourage a private entity from providing an unsolicited proposal to a board in order to avoid having proprietary confidential business information made public.
- Board review of unsolicited proposals or proprietary confidential business information needs to be made confidential and exempt in order to maintain the confidential and exempt status of this information.
- Unsolicited proposals may contain proprietary business information and trade secrets, such as patent-pending designs and financing terms.
- The harm that may result from the release of such information outweighs any public benefit that may be derived from disclosure of the information.

#### **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 public record or public meeting exemption. The bill creates new public record exemptions and, therefore, 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 creates new public record and new public meetings exemptions and, therefore, includes a public necessity statement for both.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 1013.505 of the Florida Statutes, which will be created should SB 900, or a substantially similar bill, become law.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

**CS by Education on March 11, 2014**

The committee substitute differs from SB 1316 in the following ways:

- Creates and defines the term “proprietary confidential business information”; to provide that trade-secret, proprietary, and financial-type information contained within the initial proposal is confidential and exempt from Florida’s public records law; makes the entire initial proposal confidential and exempt for a specified period of time; reduces the time period that an unsolicited proposal is confidential and exempt, when all proposals are rejected, from 12 months to 90 days; and includes provisions authorizing the state university board hold confidential and exempt “shade” meetings to discuss unsolicited proposals and proprietary confidential business information.
- Updates the public necessity statement to address the new provisions.

B. Amendments:

None.