

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 Governmental Oversight and Accountability

BILL: CS/SB 1396

INTRODUCER: Education Committee and Senator Montford

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

DATE: March 25, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hand</u>	<u>Klebacha</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Favorable</u>
3.	<u>_____</u>	<u>_____</u>	<u>RC</u>	<u>_____</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

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The public records and public meeting exemptions are subject to the Open Government Sunset Review Act and shall be repealed on October 2, 2019, unless action is taken by the Legislature to reenact the exemption. Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

The bill is tied to the passage of CS/SB 900 and takes effect on the same date as CS/SB 900 or similar legislation 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.¹

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.”²

However, the Legislature is authorized to exempt records from such laws that otherwise require accessibility.³ 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.⁴

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.⁵

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.”⁶

However, the Legislature is authorized to exempt meetings from such laws that otherwise require accessibility.⁷ 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.⁸

¹ 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.

² Section 119.07(1)(a), F.S.

³ Art. I, s. 24(c), Fla. Const.

⁴ *Id.*

⁵ Art. I, s. 24(b), Fla. Const.

⁶ Section 286.011(2), F.S.

⁷ Art. I, s. 24(c), Fla. Const.

⁸ *Id.*

Open Government Sunset Review Act

The Open Government Sunset Review Act⁹ 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.”¹⁰ The exemption must meet one of the following identifiable public purposes:¹¹

- 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.¹²

Senate Bill 900 (2014)

CS/SB 1396 is the public records exemption bill for CS/SB 900. CS/SB 900 creates a public-private partnership process for state universities. CS/SB 900 authorizes state university boards of trustees (board) to enter into public-private partnerships (P3s) for specified qualifying projects if the board determines the project is in the public’s best interest.

The board may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into an agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities.¹³

If the board receives an unsolicited proposal and intends to enter into a P3 agreement for the project, the board must publish a notice in a newspaper of general circulation at least once a week for two weeks stating that the board has received a proposal and will accept other proposals. The board may not accept any proposals after 120 days after the initial publication.

After the notification period has expired, the board must rank the proposals received in order of preference. If negotiations with the first ranked firm are unsuccessful, the board may begin

⁹ Section 119.15, F.S.

¹⁰ Section 119.15(6)(b), F.S.

¹¹ *Id.*

¹² Sections 119.15(3), 286.0111, F.S.,

¹³ Section 1007.07(a), F.S., authorizes university boards of trustees to acquire real and personal property as well as engage in contracts.

negotiations with the second ranked firm. The board may reject all proposals at any point in the process.

Public Record and Public Meeting Exemptions

Current law does not provide a public record exemption for unsolicited proposals. However, sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt¹⁴ from public record 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.¹⁵ 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 until the agency provides notice of its intended decision or 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.¹⁶

Current law does not provide a public meeting exemption for meetings during which an unsolicited proposal is discussed. However, public meetings in which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation are exempt from public meeting requirements.¹⁷ A complete recording of the closed meeting must be made; no portion of the exempt meeting may be held off the record.¹⁸

The recording of, and any records presented at, the exempt meeting are exempt from public record 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 occurs earlier.¹⁹ If the agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the exempt meeting remain exempt from public record 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.²⁰ A recording and any records presented at an exempt meeting are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, and replies.²¹

¹⁴ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

¹⁵ Section 119.071(1)(b), F.S.

¹⁶ *Id.*

¹⁷ Section 286.0113(2)(b), F.S.

¹⁸ Section 286.0113(2)(c), F.S.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

III. Effect of Proposed Changes:

Unsolicited Proposals

CS/SB 1396 provides that unsolicited proposals received by the board are confidential and exempt²² from disclosure until the board ranks the unsolicited proposals and provides notice of its intended decision.

CS/SB 1396 also provides that unsolicited proposals are confidential and exempt until 90 days after the board rejects all unsolicited proposals, or 90 days after the board decides not to enter into an agreement. Proprietary confidential business records continue to be confidential and exempt from public disclosure even after the rest of the unsolicited proposal is made public.

Proprietary Confidential Business Information

CS/SB 1396 defines “proprietary confidential business information” as information provided by a private entity to a state university 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 Meetings

This bill provides that portions of a board meeting at which unsolicited proposals are discussed are exempt from Florida’s open meetings laws.²³ 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. Transcripts containing confidential business records are confidential and exempt.

²² There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (see *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (see Attorney General Opinion 85-62, August 1, 1985).

²³ Section 286.011, F.S., and Art. I, s. 24(b), Fla. Const.

Statement of Public Necessity

The bill provides a statement of public necessity for the exemption,²⁴ 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.
- 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.

The public records and open meetings exemption provisions 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.

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.

²⁴ 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.).

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:

This bill does not state that confidential business records continue to be confidential and exempt after a board has ranked the unsolicited proposals it has received and provided notice of its intended decision.

This bill makes proprietary confidential business information and transcripts of the board discussion confidential and exempt from public disclosure, but does not provide any conditions for those records to be released or reviewed.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 1013.505(14) of the Florida Statutes, which will be created should CS/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 1396 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.