

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 Fiscal Policy

BILL: CS/SB 126

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Evers

SUBJECT: Public Records and Public Meetings/Public-private Partnerships

DATE: February 23, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cochran</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Fav/CS
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 126, which is linked to the passage of CS/SB 124, creates an exemption from public record and public meeting requirements for unsolicited proposals for public-private partnership (P3) projects for public facilities and infrastructure.

This bill requires a two-thirds vote by both chambers for passage.

The bill will go into effect when CS/SB 124 becomes a law.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that every individual has a right of access to public records which are made or received in connection with official public business unless the records are exempt. This right applies to records of the legislative, executive, and judicial branches.¹ The Florida Constitution also requires all meetings of a collegial public body of the executive branch or any local government at which official acts are taken or public business is discussed to be open and noticed to the public.²

¹ Article I, s. 24(a), FLA. CONST.

² Article I, s. 24(b), FLA. CONST.

Florida law implements the constitutional right of access to records and meetings by specifying conditions under which qualifying entities must provide public access to government records and meetings. The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record³ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.⁴ The Sunshine Law requires all meetings of a 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.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and 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. A bill enacting an exemption may not contain other substantive provisions⁷ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁸

Open Government Sunset Review Act

The Open Government Sunset Review Act requires a newly created or expanded public records or open meetings exemptions to be repealed on October 2 of the fifth year after enactment, unless reviewed and reenacted by the Legislature.⁹ It further provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves.¹⁰

An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;

³ Section 119.011(12), F.S., defines "public record" 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.

⁴ Section 119.07(1)(a), F.S.

⁵ Section 286.011(1), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Article III, s. 4(e), FLA. CONST.

⁶ Article I, s. 24(c), FLA. CONST. 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 Bd. 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, then 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 Op. Att'y Gen, Fla. 85-62, August 1, 1985.

⁷ The bill may contain multiple exemptions that relate to one subject.

⁸ Article I, s. 24(c), FLA. CONST.

⁹ Section 119.15(3), F.S.

¹⁰ Section 119.15(6)(b), F.S.

- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt; or
- It protects trade or business secrets.¹¹

During the review process specified questions are required be considered and the Legislature must carefully question the purpose and necessity of reenacting the exemption.¹²

If in reenacting an exemption the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹³ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided otherwise by law.¹⁴

Public-Private Partnerships

Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects. Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for use by the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.¹⁵

Section 287.05712, F.S., governs the procurement process for P3s for public purpose projects. It authorizes a responsible public entity to enter into a P3 for a specified qualifying project if the responsible public entity determines the project is in the public's best interest.¹⁶

A "responsible public entity" is defined as a county, municipality, school board, or any other political subdivision of the state; a public body politic and corporate; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.¹⁷

A "qualifying project" is defined as:

- A facility or project that serves a public purpose, including any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity;

¹¹ *Id.*

¹² Section 119.15(6)(a), F.S.

¹³ Article I, s. 24(c), FLA. CONST.

¹⁴ Section 119.15(7), F.S.

¹⁵ United States Department of Transportation, The Federal Highway Administration, Innovative Program Delivery, *P3 Defined*, available at <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on February 17, 2016).

¹⁶ Section 287.05712(4)(d), F.S.

¹⁷ Section 287.05712(1)(j), F.S.

- An improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector;
- A water, wastewater, or surface water management facility or other related infrastructure; or
- For projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects.¹⁸

Procurement Procedures

Responsible public entities may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into a comprehensive agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities.

Unsolicited proposals from private entities must include certain material and information, unless waived by the responsible public entity, including:

- A description of the qualifying project, including the conceptual design and schedule for initiation and completion of the qualifying project;
- A description of the private entity's general plans for financing the qualifying project, including the sources of the funds and identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity; and
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology and circumstances for changes to the user fees, lease payments, and other service payments over time.¹⁹

If the responsible public entity receives an unsolicited proposal and intends to enter into a P3 agreement for the qualifying project, the responsible public entity must publish a notice in the Florida Administrative Register (FAR) and a newspaper of general circulation at least once a week for two weeks stating the entity has received a proposal and will accept other proposals. The responsible public entity must establish a timeframe in which to accept other proposals that must be at least 21 days, but not more than 120 days, after the initial date of publication.²⁰

After the notification period has expired, the responsible public entity must rank the proposals received in order of preference. If negotiations with the first ranked firm are unsuccessful, the responsible public entity may begin negotiations with the second ranked firm. The responsible public entity may reject all proposals at any point in the process.²¹

Public Record and Public Meeting Exemptions

Current law does not provide a public record exemption for unsolicited proposals. However, the competitive solicitation has a public record exemption. Competitive solicitation is the process of

¹⁸ Section 287.05712(1)(i), F.S.

¹⁹ Section 287.05712(5), F.S.

²⁰ Section 287.05712(4)(b), F.S.

²¹ Section 287.05712(6)(c), F.S.

requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.²²

Sealed bids, proposals, or replies received by an agency are exempt from public record requirements until the agency provides notice of its intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier. If an agency rejects all bids, proposals, or replies and provides notice to reissue the competitive solicitation, everything will remain exempt until the agency provides notice of its 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.²³

Current law does not provide a public meeting exemption for meetings during which an unsolicited proposal is discussed. However, a negotiation meeting during the competitive solicitation process where a vendor makes an oral presentation or answers questions is exempt from public meeting requirements.²⁴ A complete recording of the meeting must be made and no portion of the exempt meeting may be held off the record.²⁵

The exempt meeting's records are exempt from public record requirements until the agency provides notice of its intended decision or until 30 days after opening the bids, proposals, or final replies, whichever occurs earlier. If the agency rejects all bids, proposals, or replies and provides notice to reissue the competitive solicitation, the exempt meeting's records will remain exempt until the agency provides notice of a decision to reissued competitive solicitation or withdraws the reissued competitive solicitation. An exempt meeting's records are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.²⁶

III. Effect of Proposed Changes:

Section 1 amends s. 287.05712(15), F.S., and transfers and renumbers it as s. 255.065(15), F.S., to create an exemption from the public record and public meeting requirements for unsolicited proposals for P3 projects for public facilities and infrastructure.

The bill provides unsolicited proposals held by a responsible public entity are exempt until the responsible public entity provides notice of its intended decision. If the responsible public entity rejects all proposals of a competitive solicitation and provides notice to seek additional proposals, then the unsolicited proposal remains exempt until the responsible public entity provides notice of an intended decision concerning the reissued competitive solicitation or withdraws the reissued competitive solicitation for the project. An unsolicited proposal is not exempt for more than 90 days after the responsible public entity initially rejects all proposals received for the project in the unsolicited proposal.

If the responsible public entity does not issue a competitive solicitation, the unsolicited proposal is not exempt for more than 180 days after it is received by the responsible public entity.

²² Sections 119.071(1)(b)1., and 286.0113(2)(a)1., F.S.

²³ Section 119.071(1)(b), F.S.

²⁴ Section 286.0113(2)(b), F.S.

²⁵ Section 286.0113(2)(c), F.S.

²⁶ *Id.*

The bill creates a public meeting exemption for any portion of a meeting during which the exempt unsolicited proposal is discussed. A recording must be made of the closed portion of the meeting and no portion of the exempt meeting may be held off record. The recording and any records generated during the closed meeting are exempt from public record requirements until the underlying public record exemption expires. The bill does not require a public entity to provide notice to the public that such a meeting will take place.

The public record and public meeting exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

Section 2 provides that the bill is effective on the same date that CS/SB 124 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because counties and municipalities may incur additional costs relating to redacting information made exempt by the bill and the training necessary to comply with the new requirements. However, an exemption may apply based on the insignificant fiscal impact that is anticipated to be incurred.

B. Public Records/Open Meetings Issues:

This bill creates new public record and public meeting exemptions. Therefore the following constitutional requirements apply.

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 and public meeting exemptions; 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 creates new public record and public meeting exemptions and 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 public necessity statement provides that unsolicited proposals

should be made temporarily exempt in order to encourage private entities to submit proposals and prevent competitors from gaining an unfair advantage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may result in a minimal fiscal impact on local governments that receive unsolicited P3 proposals because staff responsible for complying with public record requests may require training related to the public record exemption. Local governments may incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, may be absorbed, as they are part of the day-to-day responsibilities of the local government. In addition, local governments may incur minimal fiscal costs associated with recording that portion of a closed meeting during which an unsolicited proposal that is exempt is discussed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 119.071, F.S., provides that all responses to a competitive solicitation become public upon the earlier of a notice of intended decision is published or 30 days after the sealed bid, proposal, or final reply has been opened. The bill does not provide such a requirement, thus treating competitive solicitations and unsolicited proposals differently.

VIII. Statutes Affected:

This bill substantially amends section 287.05712 of the Florida Statutes and transfers and renumbers it as section 255.065 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.)

CS by Governmental Oversight and Accountability on February 1, 2016:
The CS inserts the linked bill’s number (124) into the bill.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.
