

**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 Governmental Oversight and Accountability

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BILL: CS/SB 196

INTRODUCER: Transportation Committee and Senator Hutson

SUBJECT: Public Records/State-funded Infrastructure Bank

DATE: January 8, 2016      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Eichin	TR	<b>Fav/CS</b>
2.	Kim	McVaney	GO	<b>Pre-meeting</b>
3.			RC	

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

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 196 creates a new exemption from the public records inspection and access requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S., for certain financial information held by the Florida Department of Transportation (FDOT). Specifically, the bill exempts any financial statement or other financial information of a private entity required by the FDOT as part of an application process for assistance from the State-funded Infrastructure Bank (SIB). The exemption does not apply to records of a private applicant in default of a SIB loan.

The bill provides for repeal of the exemption on October 2, 2021, unless reviewed and reenacted by the legislature. It also provides a statement of public necessity as required by the State Constitution.

Because the 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 final passage.

**II. Present Situation:**

**Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

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<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” 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 “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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</sup> Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.<sup>14</sup>

### **Open Government Sunset Review Act**

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>15</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>16</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:<sup>17</sup>

- 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>18</sup> 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 otherwise provided for by law.<sup>19</sup>

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<sup>13</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>14</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed; however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(a), F.S.

<sup>18</sup> FLA. CONST., art. I, s. 24(c).

<sup>19</sup> Section 119.15(7), F.S.

## State-funded Infrastructure Bank

The 2000 Legislature created the SIB within the FDOT to provide loans and credit enhancements for use in constructing and improving transportation facilities.<sup>20</sup> Government units and private entities may apply to the SIB for assistance. As outstanding obligations are repaid to the SIB, those repayments are made available for future lending on other eligible SIB projects. All proceeds are invested by the State Treasurer in accordance with established investment guidelines.<sup>21</sup>

The SIB consists of two separate escrow accounts established with the Department of Financial Services, one federally-funded and one state-funded. Projects eligible for assistance from the former account include those meeting all of the requirements of Title 23, U.S.C.,<sup>22</sup> capital projects defined in s. 5302 of Title 49, U.S.C.,<sup>23</sup> and any other projects relating to surface transportation that the U.S.D.O.T. Secretary determines to be appropriate.<sup>24</sup>

For assistance from the state-funded account, a project must:

- Be on the State Highway System;
- Provide for increased mobility on the state's transportation system; or
- Provide intermodal connectivity with airports, seaports, rail facilities, and other transportation terminals for the movement of people and goods.<sup>25</sup>

Additionally, projects identified under the Transportation Regional Incentive Program are eligible for assistance from the state-funded account. The FDOT is authorized to match up to 50% of the cost for projects that, at a minimum:

- Serve national, statewide, or regional functions and function as part of an integrated regional transportation system;
- Are identified in the capital improvements element of a comprehensive plan and are in compliance with local government plan policies relative to corridor management;
- Are consistent with the Strategic Intermodal System Plan developed under s. 339.64, F.S.; and
- Have a commitment for local, regional, or private financial matching funds as a percentage of the overall project cost.<sup>26</sup>

Emergency loans for damages incurred to public-use seaports, airports, and other transit and intermodal facilities with an area that is part of an official state declaration of emergency are also authorized under specified conditions.<sup>27</sup>

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<sup>20</sup> Section 339.55, F.S.

<sup>21</sup> See the FDOT's website for further information describing the SIB, its history, and its capitalization: <http://www.dot.state.fl.us/officeofcomptroller/PFO/sibintro.shtm>.

<sup>22</sup> See 23 U.S.C. s. 119 (2014). Generally, projects on the National Highway System.

<sup>23</sup> Generally, public transportation projects.

<sup>24</sup> 23 U.S.C. s. 610 (2012).

<sup>25</sup> Section 339.55(2)(a), F.S.

<sup>26</sup> Section 339.55(2)(b) and see s. 339.2819, F.S.

<sup>27</sup> Section 339.55(2)(c), F.S.

Applicants for assistance from either account must submit first to the FDOT a Letter of Interest (LOI) to ensure a potential SIB project meets eligibility, financial, and production criteria. Once the FDOT determines a given LOI is acceptable, the FDOT determines an interest rate for the application based on current market conditions, financial strength of the borrower, term, and risk of the loan. Only then is an applicant invited to complete an application form.<sup>28</sup>

As examples, some of the financial information items required in an LOI are a proposed financial plan, including details of the plan of finance sufficient in detail to assist in an assessment of creditworthiness (financial statements, operating revenues, and financial projections), details of the sources and uses of all funds, and a description of revenue sources pledged to repay the SIB loan.

Examples of financial information items required in a SIB loan application include funding sources, information regarding any anticipated bond issue or other debt instrument, loan term and amount, and primary and secondary repayment sources.

### III. Effect of Proposed Changes:

The bill creates a public records exemption for any financial statement or other financial information of a *private* entity required by the FDOT as part of an application to the SIB, provides for inapplicability of the exemption under certain conditions, and includes a public necessity statement.<sup>29</sup>

Section 1 creates subsection (10) of s. 339.55, F.S., to make exempt from the state's public records laws any financial statement or other financial information required of a private entity by the FDOT as part of an application process for assistance from the SIB. The exemption ceases if a private entity recipient of a SIB loan subsequently goes into default.

The bill provides a statement of public necessity as required by the State Constitution, stating disclosure of the specified information:

- Could harm a private entity by giving the private entity's competitors insights into its financial status and business plan, putting the private entity at a competitive disadvantage.
- Could create the opportunity for theft, identity theft, fraud, and other illegal activity, jeopardizing the financial security of the private entity and placing it at risk for substantial financial harm.

The bill further states:

- Private entities may be unwilling to submit an application to the SIB for a loan without the exemption, which unwillingness could limit the FDOT's opportunities for cost-effective or strategic solutions for constructing and improving transportation facilities.
- The harm to a private entity in disclosing confidential<sup>30</sup> financial information significantly outweighs any public benefit derived from disclosure.

<sup>28</sup> See the FDOT's website for the LOI and application forms: <http://www.dot.state.fl.us/officeofcomptroller/PFO/sib-loi%20application%20and%20awards.shtm>.

<sup>29</sup> The right of the public to inspect or copy the financial information of a government-unit applicant for a SIB loan is unchanged by the bill.

<sup>30</sup> See Technical Deficiencies analysis section below.

The exemption is subject to the OGSR Act and will stand repealed on October 2, 2021, unless reviewed and reenacted by the Legislature.

The bill takes effect July 1, 2016.

#### **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. This bill creates a public record exemption for any financial statement or other financial information of a private entity required by the FDOT as part of an application for a loan from the SIB; 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. This bill creates a new public record exemption and includes a public necessity statement.

The public necessity statement should support the exemption; however, in this instance, the exemption appears to be broader than the purpose described in the public necessity statement. The public necessity statement (on lines 33 and 55 of the bill) provides that financial statements or financial information required “as part of an application” to the state infrastructure bank be exempt. This suggests that it is the information submitted on the application form and supporting documents. The actual exemption appears to be much broader in that it includes information not only submitted with application form but information submitted throughout the “application process” (see line 21 of the bill). To meet constitutional requirements, the exemption should be sufficiently justified by the 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 breadth of the exemption is unclear as the bill does not define ‘financial information.’

The bill creates a public record exemption for the financial statement or other financial information of a private entity SIB applicant, which exemption ceases if the private entity goes into default. The Legislature may consider narrowing the exemption by permitting all financial information be made public once a loan is granted.

The exemption may be overly broad in that the exemption provides that the entirety of any financial statement as well as any other financial information of a private company applying for a public loan be made exempt from public records law. While the public necessity statement attempts to justify the exemption for financial information submitted to the FDOT, the public necessity statement does not appear to address the exemption for nonfinancial information contained in a financial statement.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The specified private entity financial information is exempt from public disclosure, unless the private entity goes into default.

C. Government Sector Impact:

The FDOT may experience insignificant administrative expenses in implementing the exemption, which expenses are expected to be absorbed within existing resources.

**VI. Technical Deficiencies:**

It is unclear from the bill how financial statements and financial information differ. If the intent is to protect financial information, the Legislature may consider limiting the exemption to financial information, regardless of whether it is contained in the financial statement. In any case, the Legislature should consider defining the terms “financial information” and “financial statement” for clarity.

The bill provides that the specified information is exempt, but does not deem the information to be confidential, as well. Use of the word “confidential” in the public necessity statement (on line 50) may create confusion. To avoid confusion, the legislature may consider changing the word “confidential” on line 50 to “sensitive,” as is reflected on line 38.

The public necessity statement provides that the exemption is necessary because disclosure of financial information could lead to theft, identity theft, fraud or other illegal activity of the business. It is unclear how a business can be the victim of identity theft.

**VII. Related Issues:**

The value of providing public access to the financial information only after a private entity recipient goes into default is unclear.

**VIII. Statutes Affected:**

This bill substantially amends section 339.55 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 Transportation on November 4, 2015:**

The CS makes a technical change to reference the “application process,” rather than the “application,” as relevant financial information is required in the LOI as part of the application process.

- B. **Amendments:**

None.