

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: SPB 7030

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Competitive Solicitation of Negotiation Strategies

DATE: November 16, 2015 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	McVaney		Pre-meeting
2.				
3.				

I. Summary:

SPB 7030 continues the public records and public meetings exemptions for competitive solicitations used by governmental entities by removing the October 2, 2016, repeal date in each law.

Currently, section 119.071(1)(b), F.S., provides that sealed responses to a competitive solicitation are exempt from public inspection until an intended agency decision is noticed or 30 days after the responses are unsealed. Sealed responses to a competitive solicitation may be exempt under certain circumstances if a competitive solicitation is withdrawn and reissued; however, such records remain exempt for no longer than 12 months after the governmental entity rejected the responses to the initial competitive solicitation.

Currently, a governmental entity's negotiation team's strategy meetings and its team meetings with vendors may be closed to the public, pursuant to section 286.0113(2), F.S. Transcripts of these meetings and any records presented during such meetings are exempt from public inspection. All meeting records become public when the governmental entity notices its intended decision or 30 days after the governmental entity unseals the vendors' responses. If a competitive solicitation is withdrawn and reissued, the meeting records remain exempt under certain circumstances; however, the exemption expires 12 months after the governmental entity rejects the vendors' responses to the initial competitive solicitation.

Both the public records and meetings exemptions are currently scheduled to repeal on October 2, 2016.

Since the bill does not expand or create an exemption to the public records or public meetings laws, the bill requires a majority vote of each chamber for passage.

The bill takes effect on October 1, 2016.

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.¹ This applies to the official business 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.²

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ 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.¹¹ A statutory

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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 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.”

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

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

An exemption may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ 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.¹⁴

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁵ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁶ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts or special districts.¹⁷

The Florida Statutes also provide that governmental meetings must be open to the public. Section 286.011, F.S., which is also known as the ‘Government in the Sunshine Law,’¹⁸ or the ‘Sunshine Law’¹⁹ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.²⁰ The board or commission must provide the public reasonable notice of such meetings.²¹ A failure to abide by open meetings requirements will invalidate any resolution, rule or formal action adopted at a meeting.²² The minutes of a board or commission meeting also must be made available to the public.²³ A public

¹² *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.

¹³ 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). 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).

¹⁵ FLA. CONST., art. I, s. 24(b).

¹⁶ FLA. CONST., art. I, s. 24(b).

¹⁷ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that 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 formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁸ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁹ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

²⁰ Section 286.011(1)-(2), F.S.

²¹ Section 268.011(1), F.S.

²² Section 286.011(1), F.S.

²³ Section 286.011(2), F.S.

officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

The Legislature may create an exemption to open meetings requirements.²⁵ An exemption must pass by a two-thirds vote of the House and the Senate.²⁶ 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.²⁷ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁸

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records or open meetings 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 exemption.²⁹ 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.³⁰ 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:³¹

- 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?

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ FLA. CONST., art. I, s. 24(c).

²⁷ FLA. CONST., art. I, s. 24(c).

²⁸ *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.

²⁹ 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. Section 286.0111, F.S., and s. 119.15, F.S., provide that the OGSR provisions found in s. 119.15, F.S., apply to the open meetings requirements located in s. 286.011, 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).

³⁰ Section 119.15(3), F.S.

³¹ Section 119.15(6)(a), F.S.

- 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.³² 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 public records will remain exempt unless otherwise provided for by law.³³

Exemption Under Review: Competitive Solicitations Public Records and Public Meetings Exemptions

A state or local government (governmental entity) may procure goods or services through competitive solicitations. A competitive solicitation is the process of requesting and receiving sealed bids, proposals or replies in a competitive manner.³⁴ A governmental entity may issue different types of competitive solicitations, depending upon whether it is subject to state procurement laws or local ordinances. For example, a state level agency will issue an invitation to bid, a requests for proposals or an invitations to negotiate depending on the type of procurement.³⁵ Vendors may respond to the competitive solicitation by sending the state agency a sealed bid, proposal or reply. Depending on the type of competitive solicitation and the nature of the procurement, a lengthy process of evaluating responses and negotiations may ensue.

Competitive Solicitation Public Records Exemption

Public records exemptions related to competitive solicitations date back to 1985, and have been expanded or revised since then.³⁶ Currently, a vendor's sealed bids, proposals and replies are exempt from public records until the governmental entity provides a notice of its intended decision. An intended decision may include a situation when a team makes a determination of what constitutes the best vendor response, but the final decision is made by another entity, such as a board or an agency head, or when a final decision made at a later date.

The public records exemption also is in effect until 30 days after the governmental entity opens a vendor's final, sealed bid, proposal or reply. This scenario may include a situation when a governmental entity has opened the vendors' responses and the governmental entity evaluates the responses and makes an award. Negotiations can also continue to go forward after a governmental entity reviews the final sealed responses.

³² FLA. CONST., art. I, s. 24(c).

³³ Section 119.15(7), F.S.

³⁴ Section 119.071(1)(b)1., F.S. and s. 286.0113(2)(a), F.S.

³⁵ Section 284.012(16), F.S. provides that an invitation to bid is "a written or electronically posted solicitation for competitive sealed bids." A request for proposals is "a written or electronically posted solicitation for competitive sealed proposals," pursuant to s. 287.012(23), F.S. Section 284.012(17), F.S., provides that an invitation to negotiate is a "written or electronically posted solicitation for competitive sealed replies to select one or more vendors with which to commence negotiations for the procurement of commodities or contractual services."

³⁶ Ch.1985-44, Laws of Fla.

In either case, the exemption ceases the earlier of when the notice of intended decision is published or when 30 days have lapsed since the response was unsealed.³⁷

After issuing a competitive solicitation and reviewing all the final responses, a governmental entity may also decide to reject all responses and reissue the solicitation. In that case, the sealed responses received during the initial competitive solicitation continue to remain exempt until one of the following events occur:

- The governmental entity provides a notice of intended decisions on the reissued competitive solicitation;
- The governmental entity withdraws the reissued competitive solicitation; or
- 12 months have lapsed since the governmental entity rejected all responses to its initial competitive solicitation.³⁸

Competitive Solicitations Public Meetings Exemption

The public meetings exemption for competitive solicitations was first enacted by Ch. 2006-284, Laws of Florida. Currently, the public meetings exemption provides that portions of competitive solicitation meetings are exempt under the following circumstances: during negotiations, when a vendor gives an oral presentation, or when a vendor answers a question.³⁹

In addition, any portion of a team meeting during which the governmental entity discusses its negotiation strategies are closed to the public.⁴⁰ A team is a group of people established by an agency for the purpose of negotiating for the agency during a competitive solicitation.⁴¹

In any of the above situations, the meeting must be recorded and no portion of the meeting may be off the record.⁴² Records presented at an exempt meeting and the recording of the meeting itself are exempt until the agency notices the intended decision or until 30 days after unsealing the final responses, whichever is earlier.⁴³

In the event that a governmental entity rejects all of the responses and reissues a competitive solicitation, the recording of the meeting and any records presented at an exempt meeting will continue to remain exempt. The exemption expires when any of the following events occur:

- A notice of intended decision for the reissued competitive solicitation is published;
- The agency withdraws the reissued competitive solicitation; or
- 12 months has passed since the initial competitive solicitation was issued.⁴⁴

Both the public records and meetings exemptions will sunset on October 2, 2016.

³⁷ Section 119.071(1)(b)2., F.S.

³⁸ Section 119.071(1)(b)2., F.S.

³⁹ Section 286.0113(2)(b)1., F.S.

⁴⁰ Section 286.0113(2)(b)2., F.S.

⁴¹ Section 286.0113(2)(a)2., F.S.

⁴² Section 287.0113(2)(c)1., F.S.

⁴³ Section 286.0113(2)(c)1., and 2., F.S.

⁴⁴ Section 286.0113(2)(c)3., F.S.

Review Findings and Recommendations

Senate and House professional staff met with state agencies, local government representatives and some vendors in accordance with the OGSR of the two exemptions.⁴⁵ State agencies, local government representatives, and some vendors agreed that the exemptions were necessary and beneficial for competitive solicitations and that the exemptions should be continued. Public records and meeting exemptions are beneficial for several reasons, some of which are:

- A vendor's competitors are not privy to a vendor's proposals,
- The exemptions result in more competition during negotiations, and thus a better value resulting from the procurement for the governmental entity,
- A governmental entity may require time to coordinate its responses especially when team members come from different agencies, and
- When clarification of terms or finalization of necessary documentation is still in progress.

Some agencies were concerned that the exemption periods were not long enough because information became public before negotiations were finalized. This may occur when there are a large number of vendor responses or the responses are highly technical and voluminous. Agencies also differed on what triggers the 30-day window before records are subject to public inspection.

Senate Governmental Operations and Accountability professional staff sent an email to state agencies requesting recommendations for amendments, but none were received.⁴⁶ The Florida Department of Law Enforcement and the Department of Agriculture and Consumer Services (DACS) affirmatively recommended that the exemptions be continued. DACS included the following explanation in its response:

The advantage of these exemptions to the state occurs when agencies are allowed to keep information that could benefit the state in negotiations confidential, including competitor's offers and responses, during the evaluation and negotiation process. This process puts the state's contract and project managers as well as the certified negotiators on a level playing field with vendors and their competitors. It also creates a level playing in the competitive solicitation process among the vendors and helps prevent

⁴⁵ Senate and House staff met with the following agencies and organizations during the OGSR review process: Department of Transportation (July 17, 2015); Department of Environmental Protection (July 17, 2015); Department of Management Services (July 23, 2015); Department of Financial Services (August 13, 2015); Florida Transportation Builders Association (September 9, 2015); Southern Strategies and IBM (September 15, 2015); and the Florida League of Cities and Florida Association of Counties (September 21, 2015).

⁴⁶ The letter, dated September 28, 2015, was emailed to the following agencies: Department of Business and Professional Regulation; Department of Children and Families; Department of Citrus; Department of Corrections; Department of Economic Opportunity; Department of Education; Department of Elder Affairs; Department of Environmental Protection; Fish and Wildlife Conservation Commission; Department of Health; Department of Juvenile Justice; Department of Management Services; Department of Military Affairs; Department of State; Department of Transportation; Agency for Health Care Administration; Agency for Persons with Disabilities; Office of the Attorney General Department of Legal Affairs; Chief Financial Officer; Department of Agriculture and Consumer Services; Department of Motor Vehicles; Department of Law Enforcement; Department of Revenue; Department of Veterans' Affairs; State Board of Administration; and Commission on Offender Review. The letter is on file with the Senate Committee on Governmental Oversight and Accountability.

vendors from gaining unfair advantages over other competitors... There is no harm to the general public with the exemptions contained in these statutes.⁴⁷

III. Effect of Proposed Changes:

The bill removes the scheduled repeal date of October 2, 2016, in both the public records exemption law and the public meetings exemption law. Effectively, the bill permits the public records and public meetings exemptions relating to agency competitive solicitations to continue as they currently exist.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

The bill does not expand the current exemptions, and therefore public necessity statements are not required. Since there is no expansion of the exemption, a simple majority vote is sufficient for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. Currently, agencies use the exemptions, and it is unlikely that the continuation of the exemptions will alter the private sector's business operations.

C. Government Sector Impact:

Indeterminate. Currently, agencies use the exemptions, and it is unlikely that the continuation of the exemptions will alter the agencies' operations.

⁴⁷ The email from Grace P. Lovett, Director of Legal Affairs, DACS, dated October 8, 2015, is on file with the Senate Committee on Governmental Oversight and Accountability.

D. Technical Deficiencies:

None.

VI. Related Issues:

None.

VII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.071(1)(b) and 286.0113(2).

VIII. 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.