

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 Transportation

BILL: SPB 7004

INTRODUCER: For consideration by the Transportation Committee

SUBJECT: OGSR/Financial Information/Guarantor of a Private Entity Applicant

DATE: January 27, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---|
| 1. | Price | Vickers | | Submitted and Reported Favorably |

I. Summary:

SPB 7004 proposes to expand an existing public records 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, under current law, the financial information of a private entity applicant for a loan or credit enhancement from the State-funded Infrastructure Bank (SIB) within the FDOT, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel, is exempt from the public records inspection and access requirements.

The bill would expand the exemption to apply to the financial information of a private entity applicant's guarantor.

The current exemption does not apply to the financial information of a private applicant in default on a SIB loan. Likewise, the expanded exemption would not apply to the financial information of an applicant's guarantor in default on a SIB loan.

The bill would provide the exemptions are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the proposed bill expands the current exemption, a public necessity statement and passage by a two-thirds vote of each house is required.

The bill would take effect July 1, 2021.

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 provide 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:

[I]t 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 open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

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 Legislature 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” 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 *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

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹² 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 under certain circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (“OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR 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 is necessary.¹⁶ 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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.
¹² 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).

¹³ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 section 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ 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 for by law.²²

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.²³ 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.²⁴

The SIB consists of two separate escrow accounts, one federally-funded and one state-funded. Projects eligible for assistance from the former account include those which meet all federal requirements under the Transportation Equity Act for the 21st Century and are eligible for assistance under Title 23, U.S.C.,²⁵ or capital projects as defined in s. 5302 of Title 49, U.S.C.²⁶ and other applicable federal guidelines.²⁷

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

- Be on the State Highway System; or
- 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.²⁸

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;

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- 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?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Section 339.55, F.S.

²⁴ See the FDOT's website for further information describing the SIB, its history, and its capitalization: <https://www.fdot.gov/comptroller/pfo/sibintro.shtm> (last visited December 9, 2020).

²⁵ See 23 U.S.C. s. 119. Generally, projects on the National Highway System.

²⁶ Generally, public transportation projects.

²⁷ 23 U.S.C. s. 610.

²⁸ Section 339.55(2)(a), F.S.

- 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.²⁹

Emergency loans for damages incurred to public-use seaports, airports, and other transit and intermodal facilities within an area that is part of an official state declaration of emergency are also authorized under specified conditions.³⁰

A public or private entity seeking financial assistance from the SIB is required to submit an application,³¹ based on published advertisement periods via the FDOT's on-line advertised process, which the FDOT reviews to ensure any potential project meets eligibility, financial, and production criteria.³² If the criteria are met, the FDOT determines an "indicative interest rate for the application based on current market conditions, financial strength of the borrower, term, and risk of loan."³³

Examples of financial information items required in a SIB loan application include, but are not limited to, providing details of the proposed finance plan, funding sources, information regarding any anticipated bond issue or other debt instrument, loan term and amount, and primary and secondary repayment sources.

Open Government Sunset Review of the Public Records Exemption for Financial Information of a Private Entity submitted to the FDOT as Part of the Application Process for a Loan or Credit Enhancement from the SIB

The current public records exemption³⁴ was enacted in 2016³⁵ and, as noted, provides that the financial information of a private entity applicant for a loan or credit enhancement from the SIB, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel, is exempt from the public records inspection and access requirements. The term "financial information" means any private entity applicant's:

- Business plan;
- Pro forma statement;³⁶
- Account balance;
- Operating income or revenue;
- Asset value; or

²⁹ Section 339.55(2)(b) and see s. 339.2819, F.S.

³⁰ Section 339.55(2)(c), F.S.

³¹ To review an application form, see FDOT, *SIB Application and Awards*, available at <https://www.fdot.gov/comptroller/pfo/sib-application-and-awards.shtm> (last visited December 10, 2020).

³² See the FDOT's *SIB Guidelines for Federal/State* available at [Microsoft Word - SIB - Guidelines Federal-State 07.12.18 Final \(windows.net\)](#) (last visited December 9, 2020).

³³ FDOT, "State Infrastructure Bank," available at [State Infrastructure Bank \(fdot.gov\)](#) (last visited December 9, 2020).

³⁴ Section 339.55(10), F.S.

³⁵ Ch. 2016-38, L.O.F.

³⁶ Pro forma statements are financial statements that estimate a firm's future financial position based on the analysis of current trends and assumptions and are used to prepare future scenarios, business plans or estimates of required cash for financing proposals. The Law Dictionary, *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, available at <http://thelawdictionary.org/pro-forma-statement/> (Last visited December 10, 2020).

- Debt.

The exemption ceases if the private entity goes into default.³⁷

Consistent with Art. I, s. 24(c) of the State Constitution, the 2016 law included a public necessity statement for a newly created public records exemption, stating that 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, fraud, and other illegal activity, jeopardizing the financial security of the private entity and placing it at risk for substantial financial harm.
- Could expose a private person who is required to provide his or her personal financial information to FDOT to identity theft or other criminal activity.

The 2016 law further stated:

- 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 public benefit derived from having more private entities apply for SIB assistance outweighs the public benefit derived from accessing a private entity's financial information.

The existing public records exemption for the financial information of a private entity SIB applicant stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature.

In preparation for the required review, committee staff surveyed the FDOT with respect to the existing exemption. As described by the FDOT:

For any private entity borrower, FDOT has required customary financial statements and information regarding historical and projected collections of revenues and the value of any assets that are proposed to be pledged as collateral for repayment of the loan, together with information regarding any other liens, existing or proposed, that attach to any collateral to be pledged to FDOT. This may extend to revenues or assets of the private borrower that were not originally proposed by the borrower as a source of repayment or collateral for the requested loan. *Depending on the strength of the private borrower's financial position and the value of available collateral, FDOT may require an additional third party guaranty of repayment. Financial information required of a private borrower, or private guarantor, may include tax returns and financial account information.* The definition of "financial information" contained in s. 339.55(10), "any business plan, pro forma statement, account balance, operating income or revenue, asset value, or debt of the applicant"

³⁷ 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.

describes information that FDOT typically requires to be furnished by private borrowers.³⁸

The FDOT additionally advises that all financial information is not always provided with the application, and not all loans are closed within a year, so applicants *and their guarantors* may have to provide updated information as negotiation for SIB assistance continues. Further, the original collateral may change, in which case new supporting financial information is required. However, the current exemption applies only to the private entity applicant's financial information and does not apply to the financial information of an applicant's guarantor.³⁹

The FDOT recommends that the Legislature retain the current exemption for the financial information of a private entity SIB applicant and, in addition, the FDOT recommends expanding the exemption to apply to the financial information of a private entity SIB applicant's guarantor.

Based upon a review of this public records exemption under the Open Government Sunset Review Act, as well as survey responses from, discussions with, and recommendations of the FDOT, the professional staff of the Senate Transportation Committee recommends that the Legislature retain the existing public records exemption for the financial information of a private entity SIB applicant established in s. 338.55(10), F.S., and expand the exemption to apply to the financial information of a private entity SIB applicant's guarantor.

III. Effect of Proposed Changes:

SPB 7004 is based on an Open Government Sunset Review of a public records exemption for the financial information of a private entity applicant for a loan or credit enhancement from the State-funded Infrastructure Bank (SIB) within the FDOT, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel.

Section 1 of the bill would retain the existing public records exemption established in s. 339.55(10), F.S., for the financial information of a private entity SIB applicant, and expand the exemption to apply to the financial information of a private entity SIB applicant's guarantor. The existing exemption does not apply to financial information of an applicant who is in default on a SIB loan, and would not apply to the financial information of an applicant's guarantor who is in default on a SIB loan.

The bill would subject the exemptions to the Open Government Sunset Review Act and provide the exemptions stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

³⁸ Emphasis added. See the FDOT's Open Government Sunset Review Questionnaire Response by email to committee staff, September 10, 2020. (On file in the Senate Transportation Committee.) Between 2012 and just prior to enactment of the current exemption in 2016, based on available records, the FDOT advises it received approximately seven requests for financial information provided by a private entity SIB applicant to the FDOT. After enactment on July 1, 2016, through October 28, 2020, the FDOT received approximately 22 requests. During both periods of time, the requesting entities included public involvement advocates, development companies, governmental bodies, private citizens, and the media.

³⁹ See the FDOT's email to committee staff, November 19, 2020. (On file in the Senate Transportation Committee.)

Section 2 contains Legislative findings that:

- It is a public necessity that financial information of the guarantor of a SIB applicant required as part of the application process for a loan or credit enhancement from the SIB be protected.
- Disclosure of such information could harm a guarantor in the marketplace by giving the guarantor's competitors insights into its financial status and business plan, thereby putting the guarantor at a competitive disadvantage; and could create the opportunity for theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the guarantor and placing it at risk for substantial financial harm.
- Without the exemption, some guarantors might be unwilling to provide guarantees for SIB applicants, and this unwillingness could limit the ability of private entity applicants to apply for SIB assistance which could, in turn, limit opportunities the FDOT might otherwise have to offer SIB assistance to private entities who could propose cost-effective or strategic solutions for construction and improving transportation facilities.
- The benefit to the public of increased opportunities for the provision of such facilities by SIB applicants, facilitated by applicant guarantors, outweighs any public benefit that may be derived from the disclosure of a guarantor's financial information.

The bill would take effect on July 1, 2021.

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 bill creating or expanding an exemption to the public records requirements. This proposed bill expands the existing public records exemption for the financial information of a private entity SIB applicant to apply to the financial information of a SIB applicant's guarantor; thus, a two-thirds vote for final passage would be required.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public records or public meeting exemption. The bill would expand an existing public records exemption and includes a public necessity statement in support thereof. The statement to a large extent mirrors that which was contained in the 2016 legislation creating the existing exemption applicable to SIB applicants. The exemption applied to applicant guarantors appears to be no broader than necessary to accomplish the stated purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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 would substantially amend the following section of the Florida Statutes: 339.55.

IX. 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.