

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 Community Affairs

BILL: SPB 7050

INTRODUCER: For Consideration by the Community Affairs Committee

SUBJECT: OGSR/Unsolicited Proposals

DATE: March 1, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Hackett</u>	<u>Ryon</u>	_____	CA Submitted as Comm. Bill/Fav
1. _____	_____	_____	_____

I. Summary:

SPB 7050 amends s. 255.065, F.S., to save from repeal the public records and public meeting exemptions relating to unsolicited proposals submitted by a private entity to a public entity seeking to establish a public-private partnership (P3).

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 255.065, F.S., is scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal to continue the exempt status of unsolicited P3 proposals.

The bill takes effect on October 1, 2021.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. 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.”

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.”

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

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Competitive Solicitations and the Public Records Act

Section 119.071(1)(b), F.S., exempts from public disclosure sealed responses to a competitive solicitation.¹⁶ Vendors’ sealed responses are exempt until a governmental entity notices its intended decision or 30 days after the governmental entity unseals the responses. 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 rejects the responses to the initial competitive solicitation.

Meetings where negotiations, presentations, and discussions concerning a competitive solicitation are held may be closed to the public, pursuant to s. 286.0113(2), F.S. Transcripts of these meetings and any records presented during such meetings are exempt from public disclosure. All meeting records become public when the governmental entity notices its intended decision or 30 days after the governmental entity unseals the vendors’ responses.

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁷ (the act) prescribes a legislative review process for newly created or substantially amended¹⁸ public records or open meetings exemptions, with specified exceptions.¹⁹ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²⁰

¹² See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ “Competitive solicitation” is defined to mean the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.

¹⁷ Section 119.15, F.S.

¹⁸ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁹ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

²⁰ Section 119.15(3), F.S.

The act 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.²¹

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 governmental program, and administration would be significantly impaired without the exemption;²²
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²³ or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²⁴

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:²⁵

- 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 exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁶ If the exemption is continued without substantive changes or if the exemption is continued and 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.²⁷

Public-private Partnerships – Section 255.065, F.S.

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 the agreements, the skills and

²¹ Section 119.15(6)(b), F.S.

²² Section 119.15(6)(b)1., F.S.

²³ Section 119.15(6)(b)2., F.S.

²⁴ Section 119.15(6)(b)3., F.S.

²⁵ Section 119.15(6)(a), F.S.

²⁶ *See generally* s. 119.15, F.S.

²⁷ Section 119.15(7), F.S.

assets of each sector (public and private) are shared in delivering a service or facility for the use of the public. In addition to the sharing of resources, each party shares in the risk and reward potential in the delivery of the service and/or facility. Numerous Florida Statutes encourage and provide guidance for P3 projects including those for services and facilities specific to transportation,²⁸ housing,²⁹ and education³⁰.

Chapter 2013-223, L.O.F., created s. 287.05712, F.S., to authorize the use of public-private partnerships by local governments. The law also established the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to study the new P3 process outlined in law and make recommendations for the Legislature's consideration for purposes of creating a uniform process for establishing public-private partnerships.³¹ Chapters 2016-153 and 2016-154, L.O.F., utilized the task force analysis to create the current provisions of s. 255.065, F.S.

Section 255.065, F.S., grants responsible public entities (RPEs) (e.g., counties, municipalities, school districts and special districts)³² the authority to engage in P3 projects for the development of a wide range of public-use facilities or projects that serve a public purpose. Examples of qualifying projects include those for mass transit, vehicle parking, airports or seaports, educational facilities and courthouse or city hall public sector buildings or complexes.³³ The public-private partnerships law establishes requirements to which RPEs must adhere, including procedures for reviewing and approving proposals and public records and public meetings exemptions related to any unsolicited proposals submitted.

Procurement Procedures³⁴

A responsible public entity (RPE) may receive unsolicited proposals or may solicit proposals for a qualifying public-private project. A reasonable application fee may be established to cover an RPE's costs of evaluating unsolicited proposal submissions.³⁵ If the RPE does not evaluate the unsolicited proposal, the RPE must return the application fee.

If the RPE intends to enter into a comprehensive agreement for a project as a result of an unsolicited proposal, the public entity must publish notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks stating that the public entity has received a proposal and will accept other proposals for the same project.

²⁸ See s. 334.30, F.S., on public-private transportation facilities.

²⁹ See s. 420.0003(3)(b), F.S., on the state housing strategy.

³⁰ See s. 1013.35, F.S., on school district educational facilities plans.

³¹ The task force held 10 meetings to study the law, understand how governmental entities around the world have implemented public-private partnerships, and to hear from interested parties and stakeholders.

³² Section 255.065(1)(j), F.S., defines "responsible public entity" to mean a county, municipality, school district, special district, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

³³ See s. 255.065(1)(i)1.-4., F.S.

³⁴ See s. 255.065(3), F.S.

³⁵ Section 255.06(3)(a)3., F.S., allows an RPE to request additional review funds if the initial application fee does not cover the costs to evaluate an unsolicited proposal.

The timeframe within which the public entity accepts proposals is determined on a project-by-project basis based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time within which other proposals may be received. Certain benchmark timeframe parameters are, however, specified: receipt of other proposals must be for at least 21 days, but no more than 120 days, after the initial date of publication.³⁶

Project Qualification and Approval³⁷

In the case of an unsolicited proposal, after the public notification period has expired, the RPE ranks the proposals received in order of preference. The RPE may then begin negotiations for a comprehensive agreement with the highest-ranked firm.³⁸ Before approving a comprehensive agreement, the RPE must determine that the proposed project:

- Is in the public's best interest.
- Is for a facility that is owned by the RPE or for a facility for which ownership will be conveyed to the RPE.
- Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the comprehensive agreement by the RPE.
- Has adequate safeguards in place to ensure that the RPE or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes.
- Will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the amounts financed.

Public Records and Public Meetings Exemptions – Section 255.065(15), F.S.

Similar to the competitive solicitation governance in the Public Records Act, pursuant to s. 255.065(15)(b), F.S., an unsolicited proposal received by a RPE is exempt from the inspection and copying provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until such time as the RPE provides notice of an intended decision for a qualifying project. If the RPE rejects all proposals submitted pursuant to a competitive solicitation for a qualifying project and such entity concurrently provides notice of its intent to seek additional proposals for such project, the unsolicited proposal remains exempt until the RPE provides notice of an intended decision concerning the reissued competitive solicitation for the qualifying project or until the responsible public entity withdraws the reissued competitive solicitation for such project.

An unsolicited proposal is exempt for no longer than 90 days after the initial notice by the RPE rejecting all proposals. If the responsible public entity does not issue a competitive solicitation for a qualifying project, the unsolicited proposal ceases to be exempt 180 days after receipt of the unsolicited proposal by such entity.³⁹

³⁶ Section 255.065(3)(b), F.S.

³⁷ See ss. 255.065(4)-(5), F.S.

³⁸ Section 225.065(5)(c), F.S., includes provisions for the RPE to consider subsequent-ranked firms or reject all proposers if negotiations results are unsatisfactory.

³⁹ These provisions echo the 2014 task force recommendation to consider establishing an exemption from public records requirements for proprietary and confidential and trade secret information provided in P3 proposals. The task force also recommended such an exemption be temporary, with the proposal becoming publicly accessible after a period of time.

In addition, s. 255.065(15)(d)1., F.S., provides that any portion of a meeting of a RPE during which an unsolicited proposal that is exempt is discussed is exempt from the public meetings governance found in s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. A complete recording must be made of any portion of an exempt meeting. No portion of the exempt meeting may be held off the record. The recording of, and any records generated during, the exempt meeting are exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until such time as the RPE provides notice of an intended decision for a qualifying project or 180 days after receipt of the unsolicited proposal by the RPE if such entity does not issue a competitive solicitation for the project.

Staff Review of Exemption under Review

The Senate Committee on Community Affairs and the House Oversight, Transparency & Public Management Subcommittee disseminated a questionnaire to local governments surveying their experiences with the s. 255.065, F.S., P3 process since its adoption in 2016.⁴⁰ Ultimately, 16 local governments provided responses to the questionnaires.⁴¹

Responding local governments that actually engaged in s. 255.065, F.S., P3s roughly split between those recommending reenacting the exemptions as is and those recommending reenacting the exemptions with certain changes.⁴² No respondents recommended repealing the exemptions. One local government cited litigation surrounding unsolicited P3 proposals under s. 255.065, F.S.⁴³ Additionally, Miami-Dade County and Seminole County have local administrative codes that supplement the statutory P3 process in their jurisdictions.⁴⁴

Examples of suggested potential changes include extending the 180 day time limit that an unsolicited proposal remains exempt from public records requirements to give local governments more time to evaluate and review submissions. There was also mention of difficulty in creating a notice for other similar proposals based on an unsolicited proposal which complies with the

⁴⁰ Senate Committee on Community Affairs, *Open Government Sunset Review Questionnaire: Information related to unsolicited proposals for a public-private partnership* (Sep. 8, 2020) (on file with the Senate Committee on Community Affairs). The Florida League of Cities and the Florida Association of Counties assisted in the dissemination of these questionnaires to their respective memberships.

⁴¹ Local governments included the following counties: Broward, Indian River, Miami-Dade, Monroe, Pasco, St. John's, Seminole; cities: Clarke Shores, Hialeah, Jacksonville Beach, Ocean Ridge, Pinellas Park, South Miami, Southwest Ranches, Venice; and special districts: Seminole Improvement District. Questionnaire on file with the Senate Committee on Community Affairs.

⁴² There were four "as is" recommendations, four "with changes" recommendations, one "as is" that clarified they were not "averse to considering changes," and two that did not answer the recommendations queries. Five respondents signified having no experience with P3s and therefore did not opine on reenactment.

⁴³ See *AECOM Technical Services, Inc. v. Broward County, Florida*, No. CACE-19-025964 (Fla. 17th Cir. Ct., Broward County, filed December 19, 2019). The complaint contends that because the unsolicited proposal was not timely considered or accepted within 180 days, it should not be a public record. An Agreed Order to reschedule an April 6, 2020, Final Hearing was granted on March 20, 2020, which effectively suspends the case at the complaint stage.

⁴⁴ See Section 2-8.2.6, Public-private partnerships; unsolicited proposals, Code of Ordinances, Miami-Dade County; Section 3.56, Guidelines for Public/Private Partnerships, Unsolicited Proposals and Evaluation Process, Seminole County Administrative Code.

public records exemption but also generates commensurate and comparable scope and design submissions from additional entities.

III. Effect of Proposed Changes:

The bill amends s. 255.065, F.S., to save from repeal the current public records and public meeting exemptions relating to unsolicited proposals submitted by a private entity to a public entity seeking to establish a public-private partnership. This information will continue to be exempt from public disclosure beyond October 2, 2021.

The bill takes effect on October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not appear to require municipalities or counties to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of municipalities or counties to raise revenue.

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 records exemption. If an 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. The bill does not create or expand a public records exemption; therefore, it does not require a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, the bill does not require a public necessity statement.

Breadth of Exemption

Article I, s. 24(c), of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The public records exemption appears to be a reasonable measure to prevent release of proprietary or trade secret information provided in unsolicited P3 proposals. Because the exemptions are temporary, proposals become publically accessible after a period of time.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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 amends section 255.065 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

B. Amendments:

None.