

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: CS/SB 320

INTRODUCER: Transportation Committee and Senator Wright

SUBJECT: Public Records/Prospective Bidders/Department of Transportation

DATE: February 5, 2024 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Vickers</u>	<u>TR</u>	<u>Fav/CS</u>
2.	<u>Limones-Borja</u>	<u>McVaney</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 320 makes confidential and exempt from public inspection and copying requirements certain financial information required by the Florida Department of Transportation (FDOT) for prequalification purposes from entities that seek to qualify to bid on FDOT construction projects.

This exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2029, unless reviewed and reenacted by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution.

The bill creates a new public records exemption and, therefore, requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill may have a minimal fiscal impact to FDOT relating to the workload necessary for the redaction of records in responding to public records requests.

The bill takes effect July 1, 2024.

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, section 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, chapter 119, F.S., known as the Public Records Act, provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

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

Section 119.011(12), F.S., defines “public records” to include:

[a]ll 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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

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

record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

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.⁹ 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.¹⁰

General exemptions from the public records requirements are contained in the Public Records Act.¹¹ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹²

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

⁷ Section 119.07(1)(a), F.S.

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 *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).

¹¹ *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).

¹² *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).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S.

¹⁷ 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.

¹⁸ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ 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.²⁰ An exemption serves an identifiable purpose if the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption *and* it meets one of the following purposes:

- 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;²¹
- 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;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

Florida Department of Transportation Contractor Prequalification for Bidding

Contractor Certificate of Qualification

Section 337.14(1), F.S., requires contractors desiring to bid on any Florida Department of Transportation (FDOT) construction contract in excess of \$250,000 to be certified by FDOT. Each application for a certificate of qualification must be accompanied by the contractor's latest audited annual financial statements. If the application or the annual financial statement shows the

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?
- 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

contractor's financial condition more than four months prior to the date when FDOT receives the application, the contractor must also submit audited interim financial statements and an updated application.²⁷

An applying contractor desiring to bid exclusively for the performance of construction contracts with proposed budget estimates of less than \$2 million may submit reviewed annual or reviewed interim financial statements prepared by a certified public accountant, instead of audited, certified financial statements. FDOT may waive these requirements for projects having a contract price of \$500,000 or less if FDOT determines that the project is of a noncritical nature and the waiver will not endanger public health, safety, or property.²⁸

FDOT's rules provide that financial statements submitted in the qualification to bid process must include the following:

- A balance sheet;
- An income statement, including separate totals for construction revenues, and all revenues earned during the period covered;
- A statement of retained earnings or changes in stockholders' equity;
- A statement of cash flows;
- A consolidating or combining balance sheet, when required;
- Notes to financial statements;
- For projects over \$1 million with the exception of Emergency Debris Removal only contracts, the opinion of a Certified Public Accountant;²⁹
- For projects over \$250,000 but under \$1 million, a review report prepared by a Certified Public Accountant;³⁰ and
- Upon written request, any additional financial information necessary for the Department to verify the financial adequacy of the applicant as presented in their financial statements.³¹

Public Records Exemptions

Currently, Florida law provides that any financial statement that an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a proposal for a road or any other public works project is exempt from public record requirements.³²

²⁷ Section 337.14(1), F.S., provides that the interim financial statements must cover the period from the end date of the annual statement and must show the financial condition of the applying contractor no more than four months prior to the date FDOT receives the interim statement; but, upon request of the applicant, an application and accompanying annual or interim financial statement received by the FDOT within 15 days after either four-month period is considered timely.

²⁸ *Id.*

²⁹ However, s. 337.14, F.S., allows an applying contractor to submit reviewed financial statements, rather than audited financial statements, if the contractor desires to bid exclusively for the performance of construction contracts with proposed budget estimates of less than \$2 million.

³⁰ *Id.*

³¹ Rule 14-22.002(2), F.A.C.

³² Section 119.07(1)(c), F.S.

Florida law further provides that the following documents, required when a contractor applies to qualify to bid on a FDOT construction contract in excess of \$250,000, are confidential and exempt¹⁹ from public record requirements:³³

- Audited, certified financial statements prepared in accordance with generally accepted accounting principles and auditing standards by a licensed certified public accountant;
- Interim audited certified financial statements;
- Reviewed annual financial statements; or
- Reviewed interim financial statements.³⁴

Current law does not exempt from public disclosure any additional financial information submitted to FDOT that is necessary to verify the financial adequacy of a prospective bidder of a FDOT construction, road, or public works project.

III. Effect of Proposed Changes:

Section 1 amends s. 337.14, F.S., creating an exemption for any information required by FDOT which would reveal the revenue, profit, loss, expenses, gross receipts, taxes paid, or capital investment of any applying contractor. This information is made confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. This provision is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2029, unless reviewed and reenacted by the Legislature.

Section 2 provides a public necessity statement, as required by the State Constitution. The public necessity statement provides that it is a public necessity that any financial information required by FDOT for prequalification purposes, including information that would reveal the revenue, profit, loss, expenses, gross receipts, taxes paid, or capital investment from any applying contractor, be made exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution. In the prequalification process, an applying contractor will provide financial statements to FDOT, and FDOT may request additional financial information in order to verify the financial adequacy of the prospective bidder. These records may contain sensitive information related to an applying contractor's financial condition. The risk of potential disclosure of sensitive financial information defeats the purpose of protections already afforded to financial statements and may have a chilling effect on entities desiring to prequalify or maintain prequalification. The chilling effect may result in a limited pool of prequalified bidders, thus negatively impacting FDOT's ability to receive the best value for projects.

Additionally, protecting this financial information from public disclosure will prevent such information from being used by competitors to gain an unfair advantage against other bidders on the project. Lastly, protecting this information from disclosure promotes the free provision of such information to the department by removing a prospective bidder's concern for attendant risks in doing so. As a result, this exemption promotes the state's interest in ensuring that prospective bidders on transportation projects possess the necessary financial resources to complete such projects, many of which involve immense costs and may be complex and of long duration.

³³ Section 337.14(1), F.S.

³⁴ *Id.*

Section 3 provides that the bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. 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 state tax shared with counties and municipalities.

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 bill expands creates a public records exemption; therefore, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill includes a public necessity statement related to the exemption created in the bill.

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 bill exempts potentially sensitive financial information required by FDOT from contractors wishing to prequalify to bid on FDOT projects. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

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:

The bill may have a minimal fiscal impact on the FDOT related to the workload necessary for the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 337.14 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.)**CS by Transportation on January 23, 2024.**

The committee substitute limits the public records exemption to specified financial information requested by FDOT and revises the public necessity statement.

B. Amendments:

None.