

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: SB 320

INTRODUCER: Senator Wright

SUBJECT: Public Records/Prospective Bidders for a Road or Other Public Works

DATE: January 22, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Vickers	TR	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 320 expands an existing general exemption from public record inspection and copying requirements for any financial statement required by any agency from a prospective bidder responding to a proposal for a road or public works project. The bill expands this exemption to include other financial information required by any department’s administrative rule of a prospective bidder responding to a proposal for any road or any other public works project.

The expanded public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2029, unless reviewed and reenacted by the Legislature.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 also amends an existing public records exemption for information required, by statute, from entities wishing to qualify to bid on Florida Department of Transportation (FDOT) construction projects. The bill expands the exemption to include any information required by FDOT administrative rule by an applying contractor.

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

The bill expands existing public records exemptions and, therefore, requires a two-thirds vote of the members present and voting for final passage.

The bill may have a minimal fiscal impact to agency’s 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

Financial Statements Required by an Agency

Section 119.071, F.S., provides general exemptions from the inspection and copying of public records. Section 119.071(1)(c), F.S., provides a general exemption for any financial statement that an agency requires a prospective bidder to submit in order to prequalify for bidding or responding to a proposal for a road or any other public works project.

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.

Information Required by Florida Department of Transportation for Bid 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 be certified by FDOT. FDOT rules regarding the certification of contractors must include requirements regarding equipment, experience, financial resources, and organizational personnel.²⁷ Included in s. 337.14(1), F.S., is the requirement that the applying contractor submit to FDOT audited, certified financial statements. Section 337.14(1), F.S., provides that the information required by s. 337.14(1), F.S., is confidential and exempt from s. 119.07(1), F.S., relating to public records.

III. Effect of Proposed Changes:

Section 1 amends s. 119.071(1)(c), F.S., providing that in addition to any financial statements currently exempted, other financial information required by any department's administrative rules, which an agency requires a prospective bidder to submit in order to prequalify for bidding or responding to a proposal for a road or any other public works project is 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 saved from repeal through reenactment by the Legislature.

Section 2 amends s. 337.14(1), F.S., providing that any information required by FDOT administrative rule by an applying contractor is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution as provided in s. 119.071(1)(c), F.S. This section of the bill *does not* contain a statement that this provision is subject to the Open Government Sunset Review Act.

Section 3 provides a public necessity statement, as required by the State Constitution. The public necessity statement provides that the Legislature finds that it is a public necessity that the financial information required by any department's administrative rule which prospective bidders are required to submit in order to prequalify for bidding or in response to a proposal for any public works project be made exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. These records may contain confidential information related to bidders' financial details and work product which may be used by competitors to gain an unfair advantage against other bidders of public works projects. Subjecting such records to public records requirements may discourage otherwise qualified bidders from placing bids on vital public works projects.

Section 4 provides that the bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁷ See Rule 14-22, F.A.C.

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 two existing public records exemptions; 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. This bill creates public records exemptions. The bill includes a public necessity statement related to the changes in section 1 of the bill. However, the bill does not contain the required public necessity statement related to changes made in section 2 of 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 expands an existing public record exemption to exempt, in addition to financial statements, other financial information required by any department's administrative rule an agency requires from a prospective bidder for a road or public works project. The bill also expands an exemption for specified information required from a contractor wishing to be qualified as a FDOT contractor, to include for any information required by FDOT rule by an applying contractor. These public records exemptions may be broader than necessary to accomplish their stated purposes. For example, exempting any information required by FDOT rule by an applying contractor may exempt the applying contractor's entire application.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Article II s. 3 of the State Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Article I s. 24 of the state constitution authorizes the Legislature, by general law, to create public records exemptions. Since the bill exempts from public records laws information required by agency rule, but not specified in statute, it could be argued that the bill violates the separation of powers by delegating the authority to create public records exemptions to the executive branch.

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 to agency's relating to the workload necessary for the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

The bill refers to financial information required by any department's administrative rules. The term "department" is not defined for purposes of ch. 119, F.S. Instead, ch. 119, F.S., defines and uses the term "agency." It may be advisable to amend the bill to change "department" to "agency."

Neither the bill, nor ch. 119, F.S., define the term "financial information." Therefore, it is difficult to determine what is meant by that term that will now be exempt from public disclosure.

VII. Related Issues:

The bill expands an existing public records exemption for financial information required any department for prospective bidders for road or any other public works project. The information required by any agency is likely contained in the administrative rules of multiple agencies.

The bill does not provide s. 337.14, F.S., is subject to the Open Government Sunset Review Act. Additionally, the bill does not appear contain a public necessity statement for section 2 of the bill.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.071 and 337.14.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
