

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 126

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Evers

SUBJECT: Public Records and Public Meetings/Public-private Partnerships

DATE: February 3, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|------------------|
| 1. | <u>Cochran</u> | <u>Yeatman</u> | <u>CA</u> | Favorable |
| 2. | <u>Kim</u> | <u>McVaney</u> | <u>GO</u> | Fav/CS |
| 3. | _____ | _____ | <u>FP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 126, which is linked to the passage of CS/SB 124, creates an exemption from public record and public meeting requirements for unsolicited proposals for public-private partnership (P3) projects for public facilities and infrastructure.

This bill requires a two-thirds vote by both chambers for passage. This bill will go into effect when CS/SB 124 becomes a law.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exemption provided for by the Constitution.³

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b).

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

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.¹¹ 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.¹²

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.¹³

⁴ Chapter 119, F.S.

⁵ 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 "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." The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, 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 or to take formal legislative action, must be reasonably open to the public.

⁸ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. 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). 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).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ 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.

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

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;¹⁴
- 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;¹⁵ or
- It protects trade or business secrets.¹⁶

The OGSR also requires specified questions to be considered during the review process.¹⁷ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁸ 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.¹⁹

Public-Private Partnerships

Section 287.05712, F.S., governs the procurement process for public-private partnerships (P3s) for public purpose projects. It authorizes a responsible public entity²⁰ to enter into a P3 for

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ 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?

¹⁸ FLA. CONST., art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

²⁰ Section 287.05712(1)(j), F.S., defines "responsible public entity" as a county, municipality, school board, or any other political subdivision of the state; a public body politic and corporate; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.

specified qualifying projects²¹ if the responsible public entity determines the project is in the public's best interest.²²

Responsible public entities may receive unsolicited proposals or may solicit proposals for qualifying projects and may, thereafter, enter into an agreement with a private entity for the building, upgrading, operation, ownership, or financing of facilities. Unsolicited proposals from private entities must be accompanied by the following material and information, unless waived by the responsible public entity:²³

- A description of the qualifying project, including the conceptual design of the facilities or a conceptual plan for the provision of services, and a schedule for the initiation and completion of the qualifying project.
- A description of the method by which the private entity proposes to secure any necessary property interests that are required for the qualifying project.
- A description of the private entity's general plans for financing the qualifying project, including the sources of the private entity's funds and identification of any dedicated revenue source or proposed debt or equity investment on behalf of the private entity.
- The name and address of the person who may be contacted for further information concerning the proposal.
- The proposed user fees, lease payments, or other service payments over the term of a comprehensive agreement, and the methodology and circumstances for changes to the user fees, lease payments, and other service payments over time.
- Any additional material or information the responsible public entity reasonably requests.

If the responsible public entity receives an unsolicited proposal and intends to enter into a P3 agreement for the project, the responsible public entity must publish a notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks stating the entity has received a proposal and will accept other proposals.²⁴ The responsible public entity must establish a timeframe in which to accept other proposals.²⁵

After the notification period has expired, the responsible public entity must rank the proposals received in order of preference.²⁶ If negotiations with the first ranked firm are unsuccessful, the

²¹ Section 287.05712(1)(i), F.S., defines the term "qualifying project" as a facility or project that serves a public purpose, including, but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity; an improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector; a water, wastewater, or surface water management facility or other related infrastructure; or for projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects.

²² Section 287.05712(4)(d), F.S.

²³ Section 287.05712(5), F.S.

²⁴ Section 287.05712(4)(b), F.S.

²⁵ *Id.*

²⁶ Section 287.05712(6)(c), F.S.

responsible public entity may begin negotiations with the second ranked firm.²⁷ The responsible public entity may reject all proposals at any point in the process.²⁸

Public Record and Public Meeting Exemptions

Current law does not provide a public record exemption for unsolicited proposals. However, sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt²⁹ from public record requirements until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.³⁰ If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt until the agency provides notice of its intended decision or withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.³¹

Current law does not provide a public meeting exemption for meetings during which an unsolicited proposal is discussed. However, public meetings in which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation are exempt from public meeting requirements.³² A complete recording of the closed meeting must be made and no portion of the exempt meeting may be held off the record.³³

The recording of, and any records presented at, the exempt meeting are exempt from public record requirements until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever occurs earlier.³⁴ If the agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the exempt meeting remain exempt from public record requirements until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation.³⁵ A recording and any records presented at an

²⁷ *Id.*

²⁸ *Id.*

²⁹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

³⁰ Section 119.071(1)(b), F.S.

³¹ *Id.*

³² Section 286.0113(2)(b), F.S.

³³ Section 286.0113(2)(c), F.S.

³⁴ *Id.*

³⁵ *Id.*

exempt meeting are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.³⁶

III. Effect of Proposed Changes:

Section 1 amends s. 287.05712(15), F.S., and transfers and renumbers it as s. 255.065(15), F.S., to create an exemption from public record and public meeting requirements for unsolicited proposals for P3 projects for public facilities and infrastructure.

Under the bill, unsolicited proposals held by a responsible public entity are exempt until the responsible public entity provides notice of its intended decision. If the responsible public entity rejects all proposals and concurrently provides notice of its intent to seek additional proposals, the unsolicited proposal remains exempt until such time that the responsible public entity provides notice of an intended decision concerning the reissued competitive solicitation or until the responsible public entity withdraws the reissued competitive solicitation for the project. An unsolicited proposal is not exempt for more than 90 days after the responsible public entity initially rejects all proposals received for the project described in the unsolicited proposal.

If the responsible public entity does not issue a competitive solicitation, the unsolicited proposal is not exempt for more than 180 days after it is received by the responsible public entity.

The bill creates a public meeting exemption for any portion of a meeting during which the exempt unsolicited proposal is discussed. The bill does not require a public entity to provide notice to the public that the meeting will take place. A recording must be made of the closed portion of the meeting. The recording, and any records generated during the closed meeting, are exempt from public record requirements until such time as the underlying public record exemption expires.

The public record and public meeting exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

Section 2 states the bill becomes effective on the same date that CS/SB 124 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The county/municipality mandates provision of Art. VII, section 18, of the State Constitution may apply because counties and municipalities may incur additional costs relating to redacting information made exempt from public access under this bill and the training necessary to comply with the new requirements. However, an exemption may apply based on the limited fiscal impact that is anticipated to be incurred.

³⁶ *Id.*

B. Public Records/Open Meetings Issues:

This bill creates new public record and public meeting exemptions. Therefore the following constitutional requirements apply.

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 public record or public meeting exemption. The bill creates new public record and public meeting exemptions; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new public record and public meeting exemptions; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The public necessity statement provides that unsolicited proposals should be made temporarily exempt in order to encourage private entities to submit proposals and prevent competitors from gaining an unfair advantage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may result in a minimal fiscal impact on local governments that receive unsolicited P3 proposals because staff responsible for complying with public record requests could require training related to the public record exemption. Local governments may incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, may be absorbed, as they are part of the day-to-day responsibilities of the local government. In addition, local governments may incur minimal fiscal costs associated with recording that portion of a closed meeting during which an unsolicited proposal that is exempt is discussed.

VI. Technical Deficiencies:

The bill creates public record and public meeting exemptions for unsolicited proposals for P3 projects that expire after a certain event occurs or a period of time expires. It is possible that none of those triggers will occur for some P3 projects. For example, the substantive bill, CS/SB 124, contemplates that the responsible public entity may never evaluate the unsolicited proposal (line 249-251), and it is not clear that a project that was never evaluated would be made public. Compare this to the current public records exemption for competitive solicitations, which provides that all responses to a competitive solicitation become public after a notice of intended decision is published or 30 days after the sealed bid, proposal or final reply has been opened.³⁷ In addition, in a competitive solicitation, a bid, proposal or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids.³⁸

The bill currently provides that an unsolicited proposal may be considered at the same time that there is a competitive solicitation has been rejected and reissued (lines 36-37). This language appears to contemplate a situation where an unsolicited proposal would result in a competitive solicitation being issued or that an unsolicited proposal could exist at the same time that the competitive solicitation process was ongoing. In this case, the bill could allow the unsolicited proposal to remain exempt from public disclosure even though all of the responses to a competitive solicitation or a reissued competitive solicitation had already become public pursuant to the competitive solicitations public records exemption.

VII. Related Issues:

CS/SB 124 substantially amends the P3 process, however, most of the amendments proposed in CS/SB 124 do not materially alter the process described above for public records and public meeting purposes. The most noticeable difference between CS/SB 124 and current law is that CS/SB 124 provides that, if a public entity does not evaluate an unsolicited proposal, the public entity must return the application fee. This is materially different from current law because it gives the public entity the option to not evaluate a proposal.

VIII. Statutes Affected:

This bill substantially amends section 287.05712(15) of the Florida Statutes and transfers and renumbers it as section 255.065(15) of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on February 1, 2016:
The CS inserts the linked bill's number (124) into this bill.

³⁷ Section 119.071(1)(b)2., F.S.

³⁸ Section 119.071(1)(b)3., F.S.

B. Amendments:

None.

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