SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 646

SPONSOR: Governmental Oversight and Productivity Committee and Senator Garcia

SUBJECT: Public Records and Meetings

DATE: March 11, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

The bill creates an exemption to the Sunshine Law contained in ch. 286, F.S., that permits procurement evaluation or negotiation teams for local and state agencies or authorities to meet in private to discuss bids, proposals, or replies, or to negotiate contracts. The meeting must be tape recorded or transcribed, and this record must be made a public document, except for those portions that are otherwise exempt or confidential and exempt, at specified times following the meeting.

This bill amends the following section of the Florida Statutes: 286.011.

II. Present Situation:

Public Records and Meetings: The Public Records Law,[1] and the Public Meetings Law[2], also known as the "Sunshine Law" specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. Section 119.011(1), F.S., defines public records as 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. 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.

[1] Chapter 119, F.S.
[2] Section 286.011, F.S.

The Sunshine Law, contained in s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the state constitution at which official acts are to be taken are public meetings open to the public at all times. No resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings. Further, the Sunshine Law has also been held to apply to private entities that are created by law or by public entities, or that act on behalf of a public entity.[3]

Although much of the litigation construing the open government laws has been in the area of public records, the Florida Supreme Court has held that the Public Records Law and the Sunshine Law are to be construed similarly in determining whether a public entity is subject to either chapter's requirements.[4]

Section 119.15, F.S., the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
(b) The exemption is necessary for the effective and efficient administration of a governmental program; or
(c) The exemption affects confidential information concerning an entity.

Further, s. 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Additionally, under s. 119.15(4)(b), F.S., an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the

[3] The term "agency" as used in the Public Records Act includes private entities "acting on behalf of any public agency." Section 119.011(2), F.S.
[4] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So.2d 373 (Fla. 1999).

following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

(a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?

(b) Does the exemption protect information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals? However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted. Or,

(c) Does the exemption protect information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace?

Under s. 119.15(4)(e), F.S., "notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment."

Sunshine Law and Procurement: The courts have held that the Sunshine Law applies to public procurement. In *Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College,*[5] the court ruled that the meetings of a committee appointed by the college's purchasing director to evaluate proposals were required to be held in the sunshine. In *Monroe County v. Pigeon Key Historical Park, Inc.,*[6] the Court held that the Sunshine Law applied to meetings of an advisory committee, which negotiated a lease with the top-ranked proposer and presented the proposed lease to the county commission. Similarly, in *Port Everglades Authority v. International Longshoremen's Association,*[7] the court held that bidder presentations had to be in the sunshine and found that the Port's practice of asking competing presenters to voluntarily excuse themselves from the meetings constituted de facto exclusion in violation of the Sunshine Law.[8] Thus, as stated in a legal commentary, ". . . the Sunshine Law applies broadly to the public procurement process, including evaluation team meetings, vendor presentations, and contract negotiations."[9]

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[5] *Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So.2d 1099 (Fla. 3rd DCA 1997).

[6] *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857 (Fla 3rd DCA 1995).

[7] *Port Everglades Authority v. International Longshoremen's Association*, 652 So.2d 1169 (Fla. 4th DCA 1995).

[8] In both, *Silver Express* and *Port Everglades Authority*, the courts voided the contract entered into by the agencies; however, in *Pigeon Key Historical Park*, the court found that the Sunshine Law violations were cured by subsequent public meetings of the county commission where the commission did not perfunctorily ratify the recommendation of the advisory committee.

[9] *Conflicts Between the Sunshine Law and Trade Secret Protection in Public Procurement*, Andy Bertron, The Florida Bar Journal, February 2002.

Trade Secrets: Section 812.081, F.S., defines a "trade secret" as, "the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it." Further, the section provides that a, "'Trade secret' includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof."

Section 815.045, F.S., provides that "trade secrets," as defined above, are made confidential and exempt from the public records law. Further, it is a third degree felony for any person, with intent to deprive an owner of his or her the control of a trade secret, or with intent to appropriate a trade secret to his or her own use or to the use of another, to steal or embezzle an article representing a trade secret or without authority make or cause to be made a copy of an article representing a trade secret.[10] [11]

Although trade secrets are made confidential and exempt by law, there is no provision in law that permits the closing of a procurement evaluation or negotiation team meeting, during which trade secrets may be discussed.

III. Effect of Proposed Changes:

Section 1. The bill amends s. 286.011, F.S., to add a new subsection (9) that permits procurement evaluation or negotiation teams for state agencies or authorities, or for agencies or authorities of counties, municipal corporations, or political subdivisions to meet in private to discuss bids, proposals, or replies if: (1) the subject matter of the meeting is confined to the evaluation of bids, proposals, or replies, or to the negotiation of a contract; (2) the agency or authority gives reasonable public notice of the time and date of the meeting and the names of persons expected to participate; (3) the persons presiding over the meeting announce and document in writing the times of commencement and termination of the meeting, and the names of all persons attending and speaking at the meeting; (4) the discussions and proceedings during the meetings are audibly recorded on tape or recorded by a certified court reporter with no portion of the meeting off the record; and (5) the tape or transcript of the meeting is maintained in the contract file.

The tape or transcript of the meeting, except those portions otherwise made exempt or confidential and exempt by law, becomes a public record at the following times: (1) if the agency or authority is subject to ch. 120, F.S., when the agency or authority issues a decision or intended decision pursuant to s. 120.57(3), F.S.; or (2) if the agency or authority is not subject to ch. 120, F.S., when notice of an administrative or judicial challenge to the procurement is filed or when the agency or authority provides notice of a contract award, rejects all bids, proposals, or replies, or withdraws the solicitation, whichever occurs first.

[10] Section 812.081, F.S.

[11] *See also* s. 815.04, F.S. (providing criminal sanctions for unauthorized disclosure or theft of data, programs, or supporting documentation which is trade secret, as defined in s. 812.081, F.S., or is confidential as provided by law, that resides or exists internally or externally to a computer, computer system, or computer network).

The bill provides that the exemption is subject to the Open Government Sunset Review Act of 1995, and that it stands repealed on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The bill states that closing the evaluation and negotiation procurement meetings is a public necessity because: (1) trade secret information that is made confidential and exempt by law may be disclosed; (2) disclosure of trade secrets and other business information results in competitors gaining an unfair advantage during the procurement process; (3) vendors may hesitate to do business or fully cooperate with agencies and authorities due to the risk of disclosure; and (4) full and effective discussion and negotiation is hampered. Further, the bill provides that the public and private harm in requiring open meetings outweighs the public benefit derived from immediate disclosure, and states that the public's ability to scrutinze and monitor agency action is preserved as recordings of the meetings are made available later in the procurement process.

Section 3. The bill provides that it takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Local governments may incur some costs associated with tape recording or transcribing the public meeting; however, these costs are not mandatory as local governments are not required to close procurement meetings. Rather, the decision to close the meeting is discretionary, and thus, the mandates provision is not implicated.

B. Public Records/Open Meetings Issues:

The bill creates a public meetings exemption for procurement evaluation and negotiation team meetings.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under s. 119.07(1)(a), F.S., the public may inspect public records for no charge.[12] If the member of the public desires copies, he or she may be charged up to 15 cents per duplicated page up to 14 inches by 8.5 inches. For all other copies, the agency may charge the actual cost of duplication.

[12] *See* AGO 75-50 (agency may not require a fee to listen to tape recordings of city commission meetings).

If extensive use of information technology resources or extensive clerical or supervisory assistance is needed, as may be required to redact exempt or confidential and exempt information contained on a tape recording, the public may be charged a special service fee in addition to the actual cost of duplication.[13] The special service fee must be reasonable and must be based on the actual cost incurred for the information technology or labor.

C. Government Sector Impact:

State agencies and authorities will incur expenses associated with tape recording or with hiring a court reporter to transcribe any meetings that the agency or authority chooses to close. It is expected that these costs will be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

[13] Section 119.07(2), F.S.