

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 1318

INTRODUCER: Community Affairs Committee and Senator Evers

SUBJECT: Public Records/Public-private Partnerships

DATE: April 2, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	<b>Fav/CS</b>
2.	Kim	McVaney	GO	<b>Favorable</b>
3.			RC	

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1318 creates public records and public meetings exemptions for materials related to unsolicited proposals and held by a responsible public entity. The bill provides conditions under which the public records exemption will terminate.

The bill provides a definition of “proprietary confidential business information.”

The bill states that the exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reenacted by the Legislature.

The bill provides statements of public necessity for the exemptions.

**II. Present Situation:**

**Public Access**

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records and public meetings to a constitutional level.

Paragraph (a) and (b) of Section 24, Art. I of the State Constitution provide the following:

(a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

### **Public-Private Partnerships and the Unsolicited Proposal Procurement Model**

A public-private partnership (PPP) is a contractual agreement formed between a public agency and a private sector entity that allows for greater private sector participation in the delivery and financing of public building and infrastructure projects.<sup>1</sup> Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public.<sup>2</sup> In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.<sup>3</sup>

Chapter 287, F.S., governs the procurement process for public-private partnerships (P3s) for public purpose projects. Section 287.05712, F.S., authorizes responsible public entities<sup>4</sup> to enter

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<sup>1</sup> See The Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery webpage, available at: <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on March 8, 2014).

<sup>2</sup> See generally The National Council for Public-Private Partnerships webpage, *How PPPs Work*, available at: <http://www.ncppp.org/ppp-basics/7-keys/> (last visited on March 8, 2014).

<sup>3</sup> *Id.*

<sup>4</sup> 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.

into P3s for specified qualifying projects<sup>5</sup> if the public entity determines the project is in the public's best interest.<sup>6</sup>

There are different types of PPPs with varying levels of private sector involvement, one of which is the Unsolicited Proposal Procurement Model (UPPM). The UPPM allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.<sup>7</sup> Generally, the public entity requires a processing or review fee to cover costs for the technical and legal review.<sup>8</sup> A local government's "acceptance" of a proposal results in the publishing of a notice to other prospective proposers for the project.<sup>9</sup> These other proposers have a certain amount of time in which to submit a competing proposal, after which the local government considers and ranks all of the proposals, including the initial proposal that began the process.<sup>10</sup>

Unsolicited proposals from private entities must be accompanied by the following material and information, unless waived by the responsible public entity:<sup>11</sup>

- 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.

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<sup>5</sup> Section 287.05712(1)(i), F.S., defines "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.

<sup>6</sup> Section 287.05712(5), F.S.

<sup>7</sup> See *Innovative Models for the Design, Build, Operation and Financing of Public Infrastructure*, John J. Fumero, at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Section 287.05712(4)(b), F.S.

<sup>10</sup> Section 287.05712(4)(b) and (6)(c), F.S.

<sup>11</sup> Section 287.05712(5), F.S.

The UPPM allows local governments to engage in a PPP without incurring the costs associated with preparation of detailed proposal solicitation documents.<sup>12</sup> Use of the UPPM results in a faster review and procurement process while still allowing for the receipt of competitive project proposals.

### **Public Record Exemption for Records Related to a Competitive Solicitation**

Only the Legislature may create an exemption to public records requirements.<sup>13</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>14</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>15</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>16</sup>

Current law does not provide a public record exemption for unsolicited proposals submitted to responsible public entities. However, sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new

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<sup>12</sup> Fumero at 2.

<sup>13</sup> 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 (see *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (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 2004); and *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 the statutory exemption (see Attorney General Opinion 85-62, August 1, 1985).

<sup>14</sup> FLA. CONST., art. I, s. 24(c).

<sup>15</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>16</sup> FLA. CONST., art. I, s. 24(c).

<sup>17</sup> 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 the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>18</sup> Section 119.071(1)(b), F.S.

<sup>19</sup> *Id.*

exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

### III. Effect of Proposed Changes:

**Section 1** makes an unsolicited proposal received by a responsible public entity confidential and exempt from the public records laws until that responsible public entity receives, opens, and ranks the proposals and provides notice of its intended decision. The bill states that an unsolicited proposal is not confidential and exempt for more than 90 days after the date the responsible public entity rejects all proposals or the date of receipt of a proposal for a project the responsible public entity does not intend to accept.

The bill provides a definition for “proprietary confidential business information” (PCBI). If an unsolicited proposal contains information designated as PCBI by the private entity submitting the unsolicited proposal, that information shall remain confidential and exempt indefinitely.

The bill states that portions of public meetings of a responsible public entity at which information related to an unsolicited proposal is discussed are confidential and exempt from the public meetings laws. The bill requires exempt portions of meetings to be recorded and transcribed. Portions of public meetings which reveal PCBI are confidential and exempt.

The bill states that the subsection is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless saved from repeal by the Legislature.

**Section 2** of the bill provides statements of public necessity for the public records and public meetings exemptions.

**Section 3** provides an effective date of July 1, 2014.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### 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 record or public meeting exemption. The bill creates both a public record exemption and a public meetings exemption for materials related to an unsolicited proposal; 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 both a public record exemption and a public meetings exemption for records related to an unsolicited proposal; thus, it includes public necessity statements.

**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 bill creates a public record exemption limited to the records related to an unsolicited proposal. Furthermore, the bill restricts the timeframe of the exemption to that period most likely to be damaging (and therefore most discouraging) to a private party that might otherwise submit an unsolicited proposal.

The bill also creates a public meetings exemption for portions of a public meeting related to an unsolicited proposal that is confidential and exempt. The exemption only applies to those portions of meetings that are necessary to preserve the confidentiality of the information. Furthermore, the bill requires such portions to be transcribed and recorded, including the times of commencement and termination of the meeting and the names of all persons speaking.

As such, the exemptions do not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

The bill exempts records and meetings related to unsolicited proposals to engage in a PPP, which may encourage more private parties to enter into such agreements.

**C. Government Sector Impact:**

The bill may encourage the formation of more PPPs. One of the primary advantages of PPPs is their tendency to encourage a reduction in the costs of project implementation. Therefore, the bill may reduce the financial burden on the state and local governments.

**VI. Technical Deficiencies:**

The definition of “proprietary confidential business information” includes information that is “intended to be and is treated by the private entity as private and the disclosure of which would harm the business operations of the entity, and has not otherwise been intentionally disclosed.” This standard is subjective in that it relies on the intent and actions of the private entity. It is unclear how a records custodian will be able to discern what records could be released.

This bill may be overly broad in that it states that information “that concerns” several categories of records are proprietary confidential business information.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 287.05712 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 Community Affairs on March 19, 2014:**

- Defines “proprietary confidential business information” (PCBI).
- Provides that an unsolicited proposal is confidential and exempt until the responsible public entity receives, opens, and ranks the proposals and provides notice of its intended decision.
- Provides that an unsolicited proposal is not confidential and exempt for more than 90 days after the date the responsible public entity rejects all proposals or the date of receipt of a proposal for a project which the responsible public entity does not intend to enter into an agreement for. However, if the proposal contains information designated as PCBI by the private party, then that information will remain confidential and exempt indefinitely.
- Provides that portions of meetings at which the information from an unsolicited proposal is discussed are exempt from the public meetings law.
- Provides that the exempt portions of public meetings will nonetheless be transcribed.
- Provides that a portion of a transcript that reveals PCBI is confidential and exempt.
- Provides that the subsection is subject to the OGSR.
- Provides statements of public necessity.

**B. Amendments:**

None.