



The Florida Senate

Interim Project Report 2001-035

November 2000

Committee on Comprehensive Planning, Local and Military Affairs

Senator Lisa Carlton, Chairman

PUBLIC RECORDS EXEMPTION FOR BIDS BY MUNICIPAL UTILITIES

(SECTION 119.07(3)(aa), FLORIDA STATUTES)

SUMMARY

The public records exemption for information and documents associated with bids prepared by municipal utilities, as provided in s. 119.07(3)(aa), F.S., is scheduled for repeal on October 2, 2001, unless reviewed and reenacted by the Legislature following the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Section 119.07(3)(aa), F.S., exempts from public inspection information used directly by a municipally owned utility to prepare bids for the sale, distribution, or use of any service, commodity, or tangible personal property to a customer. The exemption begins when a municipal utility identifies a bid to which it intends to respond, and ceases when the contract for sale, distribution of the service, commodity or tangible personal property is executed or no longer under consideration. The exemption for the actual bid documents ends when the bid is opened by the customer.

The purpose of the exemption is to provide an even playing field whereby municipal utilities can compete with private utilities to provide services and commodities to the public without the private competitor having access to the content of the municipal utilities' bid before such a bid is opened.

It is recommended that the current public records exemption for information and documents associated with municipal utility bids to provide services be reenacted in its current form.

BACKGROUND

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with the right to 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 persons acting on their behalf. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term *public records* has been defined by the Legislature in s. 119.011(1), F.S., to include:

... 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no

broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995- 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. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state 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.

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 of that year, unless the Legislature acts to reenact the exemption.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, 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.

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

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
2. Protects 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; or
3. Protects 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(3)(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. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

Section 119.07(3)(aa), F.S. - Section 119.07(3)(aa), F.S., was enacted in 1996 as Chapter 96-230, Laws of Florida. The section states:

Any data, record, or document used directly or solely by a municipally owned utility to prepare and submit a bid relative to the sale, distribution, or use of any service, commodity, or tangible personal property to any customer or prospective customer shall be exempt from the provisions of subsection (1) and s. 24 (a), Art. I of the State Constitution. This exemption commences when a municipal utility identifies in writing a specific bid to which it intends to respond. This exemption no longer applies when the contract for sale, distribution, or use of the service, commodity, or tangible personal property is executed, a decision is made not to execute such contract, or the project is no longer under active consideration. The exemption in this paragraph includes the bid documents actually furnished in response to the request for bids. However, the exemption for the bid documents submitted no longer applies after the bids are opened by the customer or prospective customer. This paragraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2001, unless reviewed and saved from repeal through reenactment by the Legislature.

The stated public purpose served by the public records exemption is to allow municipal utilities to compete fairly with private competitors in responding to invitations to bid and similar solicitations for services, commodities or tangible property. In addition, the Legislature made the specific finding in Section 2 of Chapter 96-230, Laws of Florida,:

...that opening the confidential records, bids, and related documents for public inspection after the contract is executed or a decision is made not to execute the contract allows sufficient public access to satisfy the requirements of law and the State Constitution.

As provided by its terms and the Open Government Sunset Review Act of 1995 , s. 119.07(3)(aa), F.S., is subject to repeal on October 2, 2001 unless reviewed following the criteria of s. 119.15, F.S., and retained by the Legislature.

METHODOLOGY

Staff reviewed relevant statutory provisions and legislative history, surveyed 31 municipal utilities and contacted other interested entities and stakeholder groups. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act, s. 119.15, F.S.

FINDINGS

Regulation of Municipally-owned utilities-

While the Public Service Commission (PSC) is charged with general regulatory and administrative responsibility for most utilities in the state, municipally-owned utilities are subject to a more limited regulatory jurisdiction by the PSC than investor-owned utilities. With respect to the generation and sale of electricity and natural gas, the term “public utility” as used in s. 366.02, F.S., is defined to specifically exclude municipalities or municipal agencies. However, an “electric utility” is defined pursuant to s. 366.02(2), F.S., to include any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns or operates an electric transmission system in Florida.

Similarly, “natural gas utility” is defined pursuant to s. 366.04(3)(c), F.S., to include municipalities which supply natural gas or manufactured gas to the public.

With respect to municipal electric utilities, the PSC prescribes a rate structure, approves territorial agreements for service areas between rural electric cooperatives, municipal electric utilities and other utilities, requires a uniform systems of accounts and requires electric power conservation and reliability within a coordinated grid. In the case of municipal natural gas utilities, the PSC has the authority to resolve territorial disputes among natural gas utilities.

Section 366.093(3), F.S., contains a public records exemption for public utility records received by the PSC which are shown to be proprietary confidential business information. Proprietary confidential business information is defined to include:

Information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person’s or company’s business operations, and has not been disclosed unless disclosed pursuant to statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

- (a) Trade secrets.
- (b) Internal auditing controls and reports of internal auditors.
- (c) Security measures, systems, or procedures.
- (d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
- (e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.
- (f) Employee personnel information unrelated to compensation duties, qualifications, or responsibilities.

Municipally-owned electric and natural gas facilities are not covered by this public records exemption because they are specifically excluded from the definition of public utility.

In contrast to information that is considered proprietary confidential business information held by a private utility, the records of utilities owned by municipalities and other units of local government are subject to the Public Records Law unless the records are specifically made exempt by law.

Similarly, the statutes governing the provision of other public services regulated by the PSC contain similar exemptions from the public records act for confidential business information. For example, s. 364.183(3), F.S., relating to telecommunications companies and s. 367.156(3), F.S., relating to water and wastewater utilities.

Prior to the enactment of s. 119.07(3)(aa), F.S., municipal utilities who bid to provide utility service to a customer in competition with a private utility were put at a competitive disadvantage because the private bidder would request the public utilities' bid documents, and then use this information to underbid them. According to individuals involved in developing the exemption, the primary beneficiaries of the exemption were municipal electric utilities; however, other types of municipal utilities such as water and sewer utilities and municipal telecommunications companies can use the exemption.

Survey Results

A survey was prepared by staff and mailed to all of the municipal electric utilities in Florida. Approximately a third of these utilities responded to the survey. The survey asks the respondent whether their utility prepares

and submits bids for the sale and/or distribution of utility service in competition with private utilities and includes questions regarding the extent to which the exemption protects information of a confidential nature concerning municipally owned utilities the disclosure of which would injure the entities in the marketplace. In addition, the survey asks how records subject to the exemption are maintained and whether the utility has received requests for the exempt records.

Of the municipal electric utilities that responded to the survey, only 20% of the respondents stated that their utility either submits bids for the sale of utility service in competition with private utilities or intends to submit bids in the future. Only one of the respondents, Gainesville Regional Utilities (GRU) answered that it periodically submits bids in competition with private utilities for the provision of wholesale electric, natural gas, internet service, and high speed transmission service. While GRU has not received specific requests for bid documents, it does receive 150-200 requests annually for other utility records, including business plans, strategic plans, product and pricing development and customer lists.

In contrast, one survey respondent inappropriately used the public records exemption to keep confidential bidder's responses to a request for proposal sent by the utility for a contractor to build a power plant for several municipal utilities. Under the exemption, bid documents submitted to the utility by an outside contractor are not confidential because the bid was not prepared by the utility in association with a bid to offer services to any customer or prospective customer.

While the majority of the survey respondents do not currently use the public records exemption for information used by a municipally owned utility to prepare a bid relative to the sale, distribution or use of any service to any customer, all of the respondents were in favor of retaining the public records exemption. Several of the utilities described the protection afforded by the public records exemption as follows:

The exemption protects both competitors and consumers in the wholesale electric power market. ...Thus, for example, a municipal utility that is bidding on a power supply project has the ability to formulate and furnish its bid under the same conditions as a non-governmental competitor. Consumers are protected because the bid process is not subverted. If a non-governmental competitor has the ability to review the governmental competitors bid prior to its submission, the non-governmental competitor thus has the ability to slightly underbid

the governmental competitor and thereby win the bid. This effectively frustrates the purpose of the bidding process and denies to the consumer, to whom the bid is furnished, the benefits of the bidding process. The non-governmental competitor does not in this situation have to make its best bid; it only has to make a bid better than the governmental competitor.

Several of the responding municipal utilities suggested that the exemption should be broadened to include other documents and information related to the business plan of the utility including strategic plans, product and pricing development, market studies and development, products development and customer research and lists. These utilities reported that they frequently receive requests from competitors for this information.

Answers to Questions Posed by the Open Government Sunset Act –

To satisfy the criteria of the Open Government Sunset Act, a public records exemption must satisfy three levels of review. First, an exemption should be maintained only if the exemption is necessary for the effective and efficient administration of a governmental program, the exemption affects confidential information concerning an entity or the exempted record is of a sensitive, personal nature concerning individuals. In the case of the public records exemption for the bids of municipal utilities, the exemption could be characterized as necessary for the effective administration of a governmental program. Without the exemption, municipal utilities cannot compete effectively with private utilities in bidding for services, commodities or tangible personal property. If maintained by a private utility, this type of information is treated as confidential under statutes regulating public utilities subject to the Public Service Commission's jurisdiction.

Second, Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions.

First, what specific records or meetings are affected by the exemption?

Records affected by the exemption include any data, record or document used directly by a municipally owned utility to prepare a bid for the sale, distribution or use of any service commodity, or tangible personal property to any customer. The exemption no longer applies after the bids are opened by the customer or prospective customer.

Second, whom does the exemption uniquely affect, as opposed to the general public?

The exemption affects municipal utilities and their competitors and customers. The primary beneficiaries of accessing the bid information prior to the enactment of the public records exemption were private utilities who were bidding for the same service or commodity as the municipally owned utility. Specifically, the private utility could use the bid documents to underbid the municipal utility. Because private utilities are not subject to the public records act, their bid documents are proprietary and not subject to disclosure to competitors or the public.

Third, what is the identifiable public purpose or goal of the exemption?

The exemption provided by s. 119.07(3)(aa), F.S., allows municipally owned utilities to compete fairly with private utilities in responding to invitations to bid and other similar solicitations for services, commodities or tangible personal property.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

The information contained in the exempted records are open for public inspection when the contract for sale, distribution, or use of the service, commodity, or tangible personal property is executed, a decision is made not to execute the contract, or the project is no longer under consideration. The bid documents furnished in response to the request for proposal are subject to public inspection after the customer or prospective customer opens the bids.

And finally, to satisfy the criteria of the Open Government Sunset Review Act, an exemption may be maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves. The public records exemption for bids by municipal utilities serves the public purpose of allowing municipal utilities to compete on a level playing field with private utilities in responding to invitations to bid for the provision of services, commodities, or tangible personal property by the municipal utility to a customer. The exemption is narrowly drawn to limit the duration of the exemption so that the exemption expires when the bids are opened by the customer or potential customer, a decision is made not to execute a contract to provide the service or commodity, or the project is no longer under consideration. Accordingly, members of the

public, competitors and others ultimately have access to the information used by the municipal utility to prepare and submit a bid.

Other types of strategic business information of municipal utilities such as strategic plans, business plans, and customer lists remains subject to public inspection under the public records act while the same type of information is proprietary if maintained by a private utility. While this may create a competitive disadvantage for municipal utilities, the limited use of s. 119.07(3)(aa), F.S., by municipal electric utilities seems to indicate that an expansion of the exemption is unnecessary.

RECOMMENDATIONS

Staff recommends that the exemption in s. 119.07(3)(aa), F.S., be retained and reenacted for any data, record or document used by a municipally owned utility to prepare and submit bids related to the sale, distribution or use of any service, commodity, or tangible personal property to any customer or prospective customer. In addition, staff recommends that the exemption not be broadened to include other types of business information maintained and used by the municipal utility.

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

Committee on Comprehensive Planning, Local and Military Affairs, 404 South Monroe Street, Tallahassee, FL 32399-1100, (850) 487-5167 SunCom 277-5167

MEMBER OVERSIGHT

N/A