



# The Florida Senate

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Committee on Environmental Preservation and Conservation

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## **OPEN GOVERNMENT SUNSET REVIEW OF SECTION 253.034(6), F.S., DEPARTMENT OF ENVIRONMENTAL PROTECTION, SALE OF SURPLUS LANDS**

### **Issue Description**

The Open Government Sunset Review Act (s. 119.15, F.S.), establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed unless reenacted by the Legislature.

Section 253.034(6)(g)1.a., F.S., states:

“A written valuation of land determined to be surplus pursuant to this subsection and s. 253.82, and related documents used to form the valuation or which pertain to the valuation, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until 2 weeks before the contract or agreement regarding the purchase, exchange, or disposal of the surplus land is first considered for approval by the board.<sup>1</sup> Notwithstanding the exemption provided under this subparagraph, the division may disclose appraisals, valuations, or valuation information regarding surplus land during negotiations for the sale or exchange of the land, during the marketing effort or bidding process associated with the sale, disposal, or exchange of the land to facilitate closure of such effort or process, when the passage of time has made the conclusions of value invalid, or when negotiations or marketing efforts concerning the land are concluded.”

### **Background**

#### **Public Records**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892. One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24 of the State Constitution, provides that:

- (a) Every person has 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, 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.

In addition to the State Constitution, the Public Records Act, which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

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<sup>1</sup> The terms “board” or “trustees” mean the Governor and Cabinet sitting as the Board of Trustees of Internal Improvement Trust Fund.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to mean:<sup>2</sup>

...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, which are used to perpetuate, communicate, or formalize knowledge. All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.

Only the Legislature is authorized to create exemptions to open government requirements.<sup>3</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. 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, although it may contain multiple exemptions that relate to one subject.

There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.

The Open Government Sunset Review Act (act)<sup>4</sup> provides for the systematic review of exemptions from the Public Records Act or the Public Meetings Law. The Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives, by June 1<sup>st</sup> of each year, the language and statutory citation of each exemption scheduled for repeal the following year. The cycle for review of an exemption ends on October 2<sup>nd</sup> of the fifth year following enactment.

An exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. The three statutory criteria are:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- The exemption protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.

The act also requires consideration of the following:

- What specific records or meetings are affected by this exemption?
- Who 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?

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<sup>2</sup> Section 119.011(11), F.S.

<sup>3</sup> Article I, s. 24(c) of the State Constitution.

<sup>4</sup> Section 119.15, F.S.

- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another. The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

...notwithstanding s. 768.28 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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

### **Surplusing of State-Owned Lands**

Section 253.034(6), F.S., provides that the Board of Trustees of the Internal Improvement Trust Fund determine which state-owned lands can be surplused. For conservation lands,<sup>5</sup> the Trustees must determine that lands are no longer needed for conservation purposes and can dispose of them with an affirmative vote of three of the four Trustees. For all other lands, the Trustees can determine that they are no longer needed by the state and can dispose of them with an affirmative vote of three of four Trustees. Further provisions of this subsection detail: requirements for reviewing state-owned lands to determine if they should be surplused; reporting requirements; role of the Acquisition and Restoration Council in reviewing surplus requests; and permitted use of funds received due the surplusing of property.

Section 253.034(6)(g), F.S., contains provisions that detail the method to be used when determining the value and sales price of surplus lands. Responsibility for implementation of these provisions falls to the Division of State Lands, within the Department of Environmental Protection. The division must consider the appraised value of the property, or if the property is valued at less than \$100,000, must consider a comparable sales analysis or a broker's opinion of value and the price paid by the state to originally acquire the lands. In determining the value of lands, the statute directs that any written valuation and related documents used to form the valuation or which pertain to the valuation are confidential and exempt from the public records laws.

### ***Statement of Public Necessity***

In Ch. 2004-35, L.O.F., the Legislature provided the following statement of public necessity for the exemption to the public records and public meetings laws:

*The Legislature finds that temporarily preserving the confidentiality of a written valuation of state-owned land determined by the Board of Trustees of the Internal Improvement Trust Fund to be surplus land under s. 253.034(6), Florida Statutes, and related documents used to form the valuation or which pertain to the valuation, is a public necessity. The Legislature finds that making such written valuation and documents related to the valuation confidential and exempt from public records requirements until 2 weeks before the contract or agreement regarding the purchase, exchange, or disposal of surplus land is first considered for approval by the board helps ensure the maximum return to the state from the disposition of surplus lands. The Legislature finds*

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<sup>5</sup> In part, conservation lands mean lands that are currently managed for conservation, outdoor resource-based recreation, or archaeological or historic preservation, except those lands that were acquired solely to facilitate the acquisition of other conservation lands. (For complete definition see s. 253.034(2)(c), F.S.)

*that public access to this information prior to the designated termination of the exemption would impede development of agreements that maximize returns to the state by providing persons interested in buying or trading for surplus land an unfair advantage during the negotiation or bidding processes to sell, exchange, or dispose of the land. The exemption from public records requirements created by this act for information regarding the valuation of state-owned land determined to be surplus will help to ensure that real estate transactions involving such land are conducted “at arm’s length.”*

## Findings and/or Conclusions

### Methodology

The professional staff of the Senate Committee on Environmental Preservation and Conservation worked with the professional staff of the House Committee on State Affairs to prepare and conduct a survey to determine the history and implementation of the exemption. Among the questions asked were:

- How many times has the Division of State Lands utilized the public record exemption?
- What types of information are considered “related documents used to form the valuation or which pertain to the valuation” of surplus lands?
- Has the Division exercised its right to disclose the information?
- What changes to the exemption does the Division recommend?

In addition to the survey, professional staff used follow-up interviews with administrators within the Division of State Lands. Finally, the professional staff elicited input from the First Amendment Foundation.

### Findings

Section 119.15(6)(a), F.S., requires that as a part of the review process, the Legislature must consider the following:

#### ***What specific records or meetings are affected by the exemption?***

Documents in the agent file that show the appraised value or contain appraisal information, including but not limited to the agent negotiation strategy, and correspondence with the appraiser regarding value. The appraiser’s work files, including but not limited to the appraisal review reports; collections of sales data considered potentially comparable; and interview notes with market participants such as buyers, sellers, brokers and zoning and land use officials relative to a property’s potential highest and best economic use if sold in the private sector.

#### ***Who does the exemption uniquely affect, as opposed to the general public?***

Any parties seeking to acquire surplus lands from the state.

#### ***What is the identifiable public purpose or goal of the exemption?***

As provided by the Legislature in the 2004 legislation creating the exemption, temporarily preserving the confidentiality of a written valuation of state-owned land determined to be surplus land and related documents used to form the valuation or which pertain to the valuation, is a public necessity. That making such written valuation and documents related to the valuation confidential and exempt helps ensure the maximum return to the state from the disposition of surplus lands. Further, that public access to this information prior to the designated termination of the exemption would impede development of agreements that maximize returns to the state by providing those interested in buying or trading for surplus land an unfair advantage during the negotiation or bidding processes. Finally, the exemption will help to ensure that real estate transactions involving such land are conducted “at arm’s length.”

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

No

*Is the record or meeting protected by another exemption?*

No

*Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?*

There is a similar exemption in s. 259.041(7)(e), F.S., which applies when the state is determining the value to be used when “acquiring” lands. However, because there is a difference between “suplusing” and “acquiring,” it would not be appropriate to merge them.

Embodied within this exemption is a provision that provides for its expiration two weeks before a contract or agreement “regarding purchase, exchange, or disposal of the surplus land is first considered for approval by the board.” Additionally, the division also may disclose the confidential and exempt information “during negotiations for the sale or exchange of the land, during the marketing effort or bidding process associated with the sale, disposal, or exchange of the land to facilitate closure of such effort or process, when the passage of time has made the conclusions of value invalid, or when negotiations or marketing efforts concerning the land are concluded.” The division reports that appraisal information is routinely given to applicants in order to assure them that they are getting the right value for their expenditures. However, the information is only given after the transaction has been completed or the Trustees have approved the sale. It is also necessary to disclose the appraisal information when there is an exchange and the applicant is required to make up the difference between the value of the property and the state’s property during an exchange.

Finally, pursuant to s. 253.111(3), F.S., the division is required, within 45 days of noticing that a surplus sale is going to occur, to disclose to any local government that provides a certified resolution that indicates they intend to purchase the property, the appraised value of the land. This is required because the local government is entitled to purchase the property at appraised value.

Since the creation of the exemption, the division has prepared a total of 125 appraisals. In almost all cases, the prospective purchasers have been private parties; therefore, the exemption has been invoked. The division reports that on average, a majority of the surplus land is sold for more than the appraised value.

According to the division, repeal of the exemption would make it difficult to sell the surplus property for more than appraised value.

#### ***First Amendment Foundation Comments***

The foundation has reviewed the exemption and recommended it be narrowed. The foundation’s primary concern is with the provision of the exemption that permits disclosure of the appraisal records during the marketing effort or bidding process when the conclusions of the appraisal have been determined to no longer be of value. They indicate that it is unclear as to when the records may become available because the terminology is vague. For example, they ask when and how are the conclusions of value no longer considered valid? Likewise, when or how is it determined that negotiations and marketing efforts are concluded? As a result, the foundation believes public boards could then keep the information confidential until the final decision is made. The foundation recommends that the exemption be modified to more clearly define a specific point in time that all records would become available for public review; their suggestion is 30 days prior to the transaction being considered by the board.

Section 119.15(6)(b), F.S., requires that, once reviewed, an exemption may be revised or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves. As a result of the findings concerning the application of the exemption, professional staff finds the following:

1. The exemption allows the state to effectively and efficiently administer the program because it protects information critical to ensuring that state lands are sold for fair market value thus serving an important public purpose of protecting state resources.
2. The exemption is sufficiently narrow in that it protects specific types of documents for specific purposes. In addition, the provisions that allow for disclosure of the protected information provide the ability to evaluate the transactions once completed in an open manner.

## Options and/or Recommendations

Professional staff has reviewed the exemption in s. 253.034(6)(g)1.a., F.S., pursuant to the Open Government Sunset Review Act, and finds that the exemption from the public records law meets the statutory criteria for reenactment. The exemption viewed against the open government sunset review criteria, protects information of a sensitive nature concerning economic transactions important to the state and thus allows for the program to be effectively implemented.

Regarding the First Amendment Foundation's opinion, the professional staff recommends that the appropriate committee elicit testimony from the division and the foundation during their deliberations concerning the reenactment of this exemption.