

# 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: SB 382

SPONSOR: Committee on Comprehensive Planning, Local & Military Affairs

SUBJECT: Public Records/Sealed Bids

DATE: January 29, 2001      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

Section 119.07(3)(aa), Florida Statutes, provides a public records act exemption for information and documents associated with bids prepared by municipal utilities for the sale, distribution, or use of any service, commodity or tangible personal property to a customer. The exemption is scheduled for repeal on October 2, 2001, unless reviewed and reenacted by the Legislature. This bill amends section 119.07(3)(aa) of the Florida Statutes, to remove the language scheduling the exemption for repeal.

**II. Present Situation:**

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F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years.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fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of that year, unless the Legislature acts to reenact the exemption.

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?

Finally, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. 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.

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 customer or prospective customer opens the bids. 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.

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 customer or prospective customer opens the bids.

*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 customer opens the bids 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 remain 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.

### **III. Effect of Proposed Changes:**

The PCB would have the effect of reenacting the public records exemption for bids by municipal utilities set forth in s. 119.07(3)(aa), F.S.

### **IV. Constitutional Issues:**

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

None.

#### **B. Public Records/Open Meetings Issues:**

The purpose of the PCB is to reenact s. 119.07(3)(aa), F.S., following legislative review of the public records exemption as required by the Open Government Sunset Review Act of 1995.

#### **C. Trust Funds Restrictions:**

None.

### **V. Economic Impact and Fiscal Note:**

#### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The public records exemption for information and documents associated with bids prepared by municipal utilities has the effect of precluding competing private utilities from accessing information that the municipal utility uses to prepare its bid for the sale of any service to a customer.

**C. Government Sector Impact:**

Municipal utilities would benefit from the reenactment of the public records exemption for bids by municipal utilities by allowing these utilities to compete on the same terms as private utilities in responding to bids for the services of the utility.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.