

**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 Governmental Oversight and Accountability Committee

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**BILL:** PCS/SB 1826 (903284)

**INTRODUCER:** Governmental Oversight and Accountability

**SUBJECT:** OGSR/Business Damages

**DATE:** March 16, 2009      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Murphy</u>	<u>Yeatman</u>	<u>CA</u>	<b>Favorable</b>
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This bill saves from repeal an exemption from public records requirements for certain business information that is provided by the owner of a business to a governmental condemning authority as part of an offer of business damages in an eminent domain proceeding. The owner must request in writing that the information be held exempt. This exemption is subject to review pursuant to the Open Government Sunset Review Act<sup>1</sup>. This bill also reorganizes the exemption, makes clarifying changes, and removes superfluous language.

This bill does not substantially amend s. 73.0155, F.S. by expanding the protection of any records. Therefore, this bill does not require a two-thirds vote.

This bill repeals s. 73.0155(5), F.S., which provides that the exemption will expire unless reviewed and reenacted by the Legislature.

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<sup>1</sup> Section 119.15, F.S.

## II. Present Situation:

### Public Records

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 to a constitutional level. Section 24(a), Art. I, of the State Constitution, provides that:

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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record<sup>2</sup> must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. 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 “intended to perpetuate, communicate, or formalize knowledge.”<sup>3</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>4</sup> Unless specifically exempted, all agency<sup>5</sup> records are to be available for public inspection.

Only the Legislature is authorized to create exemptions to open government requirements.<sup>6</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

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<sup>2</sup> Section 119.011(1), F.S., defines “public record” to include “all documents, papers, letters, maps, books, tapes, photographs, film, 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.”

<sup>3</sup> *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>5</sup> Section 119.011(2), F.S., defines “agency” as “... any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>6</sup> Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.<sup>7</sup> A bill enacting an exemption<sup>8</sup> may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.<sup>9</sup>

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.<sup>10</sup> If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>11</sup>

### **Open Government Sunset Review Act (s. 119.15, F.S.)**

The Open Government Sunset Review Act 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 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.

The act states that an exemption may be created, expanded, or maintained only if: (1) it serves an identifiable public purpose; and, (2) if it is not broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three statutory purposes 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 purposes are:

- If 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.
- If the exemption 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.
- If 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 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.

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<sup>7</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>8</sup> Section 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

<sup>10</sup> Attorney General Opinion 85-62, August 1, 1985.

<sup>11</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.<sup>12</sup> The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., expressly provides 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. 119.01(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, 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 of \$1,000. Any person who willfully and knowingly violates the provisions of s. 119.105, F.S., relating to the release of exempt and confidential information contained in police reports, commits a third degree felony, punishable by potential imprisonment not to exceed five years, or a fine of not more than \$5,000 or both.

### **Eminent Domain Negotiations**

Eminent domain is the power of a condemning authority or governmental entity to take private property for public use. Because the exercise of eminent domain is contrary to the basic right to own property, safeguards for the property owner have been included in both the State of Florida and the United States Constitutions.<sup>13</sup>

To encourage presuit settlement and to minimize litigation costs in eminent domain proceedings, the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel of property regarding the amount of compensation to be paid for the entire parcel. The process begins with the condemning authority making a written offer of compensation and notifying the property owner of the necessity for the parcel, the nature of the project, the availability of an appraisal report, and the owner's rights and responsibilities under law. The owner must be given at least 30 days to respond to the offer, during which time the condemning authority may not file a condemnation proceeding for the parcel identified.<sup>14</sup>

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<sup>12</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>13</sup> Article X, s. 6 of the Florida Constitution; 5th Amendment of the United States Constitution.

<sup>14</sup> Section 73.015(1)(a)-(b), F.S.

## Business Damages

Business owners may also be compensated for any probable damages that result from “right of way” takings *where less than the entire property* is sought to be appropriated. Business damages can arise from various sources, including lost parking spaces for customers or alterations to the traffic flow of the customer parking lot. If the business qualifies for business damages and intends to make claim to such damages, the business owner must submit to the condemning authority a good faith written offer to settle any claim. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damages. The business owner must also submit to the condemning authority copies of “business records” that substantiate the good faith offer to settle business damages. The term “business records” includes, but is not limited to:

copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss returns for the 5 years proceeding notification on the property to be acquired, and other records relied upon by the business owner that substantiate business damage claim.<sup>15</sup>

Section 73.0155, F.S., specifies that business records submitted by a business owner to a governmental authority as part of an offer to settle business damages are confidential and exempt from the open provisions: 1) if disclosure of the records “would be likely to cause substantial harm to the competitive position of the person providing” the business records; and, 2) if the person providing the records requests in writing that the information be held exempt. Prior to 2004, upon request these business records were given an “exempt” status only. An agency is not prohibited from disclosing information classified as “exempt” in all circumstances. Due to the statutory revisions of 2004, business records given in business damage claims and given a public records exemption are now deemed confidential and exempt. This distinction provides that business information may not be released to anyone other than the persons or entities designated in statute.

Failure to submit a business damage offer within 180 days from receipt of notice, without a good faith justification, requires the court to strike any business damage claim.<sup>16</sup> Businesses in existence for less than five years or affected merely by a temporary disruption without any taking of property are not entitled to claims of business damages.

## Related Public Records Exemption

Florida law also provides a public records exemption for records held by a state executive branch agency<sup>17</sup> seeking to acquire real property by purchase through the exercise of the power of eminent domain.<sup>18</sup> The exempt records include “all appraisals, other reports relating to value, offers, and counteroffers.” The exemption is operative until a valid option contract is executed or

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<sup>15</sup> Section 73.015(2)(c)2, F.S.

<sup>16</sup> Section 73.015(2)(c), F.S.

<sup>17</sup> Sections 125.355, 166.045, and 1013.14, F.S., provide comparable exemptions for counties, municipalities, and educational boards acquiring property for public purposes.

<sup>18</sup> Section 119.0711, F.S.

a written offer to sell has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, the exemption expires at the conclusion of the condemnation litigation of the property. The exemption does not apply to a record which was made a part of a court file and which is not specifically closed by order of the court.<sup>19</sup> Professional committee staff found no reported case law on the question of whether the term “other reports relating to value” includes business records provided by a business to a condemning authority to be used to establish value for business damages. Additionally, while this exemption expires at the time of acceptance, the exemption for business records provided in claims of business damages does not expire. Therefore, this exemption is not being reviewed as part of this report as there is no case law or reasonable overlap to justify merging the exemption for business records provided in claims of business damages with this exemption.

### **Open Government Sunset Review of s. 73.0155, F.S. (Senate Interim Report 2009-206)**

To assist in the agency sunset review process on which this bill is based, the Florida Senate Committee on Community Affairs created report number 2009-206, titled “Open Government Sunset Review of Section 73.0155, F.S., Business Information Provided by a Business Owner to a Governmental Condemning Authority for the Purpose of Making an Offer of Business Damages.” The report concluded that the business information often used by a governmental condemning authority in evaluating a business’ offer are not typically accessible to the public and that disclosure of such information would provide competitor businesses with previously inaccessible insights into the financial status and operations of the business, thereby potentially injuring the business in the marketplace. Therefore, the report recommended retention of this exemption.

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

The bill removes the repeal date, thereby reenacting the public record exemption for business information submitted to a governmental condemning authority as part of an offer to settle business damages. It also reorganizes the exemption, makes clarifying changes, and removes superfluous language.

#### **Section Directory**

Section 1 amends s. 73.0155, F.S., to reenact and to clarify the public record exemption for business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages.

Section 2 provides an effective date of October 1, 2009.

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

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

None.

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<sup>19</sup> Section 119.0714(1), F.S.

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

The bill retains an existing public records exemption. The bill complies with the requirement of Article I, Section 24 of the State Constitution that the Legislature address public records exemptions in legislation separate from substantive law changes.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

To the extent that the public records exemption for business information submitted with an eminent domain business-damage offer helps to facilitate negotiations between a business and a governmental condemning authority, the exemption may promote the settlement of and payment for such damages to the business earlier in the property-acquisition process. To the extent that the public records exemption prevents competitors of a business from gaining access to sensitive financial data, the exemption may help reduce the risk to a business of injury in the marketplace.

**C. Government Sector Impact:**

To the extent that the public records exemption for business information submitted with an eminent domain business-damage offer promotes the submission of accurate information, it may help a governmental condemning authority to correctly value the offer and to ultimately pay an amount that matches the actual business damages. In addition, to the extent that the public records exemption promotes settlements early in the property-acquisition process and before the action proceeds to trial, it may help the authority avoid some costs associated with litigation, thereby reducing the overall costs associated with the acquisition of property for public purposes.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**PCS (903284) by Governmental Oversight and Accountability on March 16, 2009:**  
The proposed committee substitute makes no substantive changes to the prior version of the bill. Rather, the proposed committee substitute reorganizes the exemption, makes clarifying changes, and removes superfluous language.

- B. **Amendments:**

None.