



Oversight, Transparency & Public Management Subcommittee

Thursday, December 12, 2019
9:30 AM – 12:00 PM
Morris Hall (17 HOB)

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Oversight, Transparency & Public Management Subcommittee

Start Date and Time: Thursday, December 12, 2019 09:30 am

End Date and Time: Thursday, December 12, 2019 12:00 pm

Location: Morris Hall (17 HOB)

Duration: 2.50 hrs

Consideration of the following bill(s):

HB 101 Public Construction by Andrade

HB 441 Public Procurement of Services by DiCeglie

HB 491 Disposition of Surplus Funds by Candidates by Payne

Consideration of the following proposed committee bill(s):

PCB OTM 20-05 -- OGSR/Human Trafficking Victims

PCB OTM 20-06 -- OGSR/Residential Facilities Serving Victims of Sexual Exploitation

PCB OTM 20-07 -- OGSR/Body Camera Recordings

NOTICE FINALIZED on 12/05/2019 4:13PM by Jones.Brenda

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 101 Public Construction
SPONSOR(S): Andrade and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 246

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N	Brackett	Anstead
2) Oversight, Transparency & Public Management Subcommittee		Villa	Smith
3) Commerce Committee			

SUMMARY ANALYSIS

Retainage is a common construction practice that allows a portion of an agreed upon contract price to be withheld until the work is substantially complete to assure that a contractor or subcontractor will complete the construction project.

Current law sets limits on how much retainage can be withheld on state and local government contracts. For construction contracts with the state *for \$200,000 or less*, the state may withhold up to ten percent of a payment to a contractor. For construction contracts with the state or local governments that are for *more than \$200,000*, the maximum amount that may be retained in a payment is:

- Ten percent of a payment to a contractor before half of the work is completed;
- Five percent of a payment to a contractor after half of the work is completed; and
- Ten percent of a payment to a contractor for the entire project, if the government entity is a municipality with a population of 25,000 or less or a county with a population of 100,000 or less.

The bill changes the limits on retainage permitted to be withheld on state and local government contracts.

For contracts more than \$200,000, the bill reduces the maximum amount that may be retained:

- *From ten percent* before half of the work is complete, *and five percent* after half of the work is complete
 - *To five percent* for the entire project; and
- *From ten percent* for the entire project if the government entity is a municipality with a population of 25,000 or less or a county with a population of 100,000 or less
 - *To five percent* for the entire project.

The bill repeals:

- The ability of a contractor to make a request the government entity release up to half of the retained amount after half of the project is completed; and
- The ability of a contractor to withhold more than five percent of each progress payment to his or her subcontractors after half of a project for a government entity is completed.

For contracts less than \$200,000, the bill reduces the amount that the state may retain from a progress payment to a contractor *from ten percent to five percent*.

The provisions of the bill do not apply to FDOT construction projects authorized by ch. 337, F.S., or any contract for construction services entered into, pending approval, or advertised by a government entity, on or before October 1, 2020.

The bill may have a fiscal impact on state government and local governments. See Fiscal Comments.

The bill provides for an effective date of October 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Construction Contractors

Construction contractors are certified or registered by the Construction Industry Licensing Board (CILB) housed within the Department of Business and Professional Regulation (DBPR). The CILB consists of 18 members who are appointed by the Governor and confirmed by the Senate.¹ Certified construction contractors are licensed and regulated by the CILB and can practice statewide. Registered contractors are those that choose to practice only within the specific locality where they have chosen to apply for licensure and may only practice within that locality.²

Retainage

Payments for construction services are usually made incrementally as progress is made. Retainage is a construction practice whereby a project owner withholds a certain percentage of a payment from the contractor who in turn withholds a certain percentage from the subcontractors until the project is completed. The retained funds are generally paid out when the project is completed.³

The purpose of retainage is provide leverage for the property owner and the contractor to ensure the project is completed in a timely fashion. Retainage also serves as a safeguard against possible overpayment to a contractor or subcontractor when the estimated percentage of project completion, used for periodic progress payments, exceeds the actual percentage completed.⁴

Florida Retainage Rates for Construction Contracts with Government Entities

Section 218.72, F.S., defines a “local government entity” to mean a county or municipal government, school board, school district, authority, special taxing district, other political subdivision, or any office, board, bureau, commission, department, branch, division, or institution thereof.

Section 255.072, F.S., defines a “public entity” to mean the state, or any office, board, bureau, commission, department, branch, division, or institution thereof, but the term does not include a local government entity as defined above.

Current law provides that for any construction service contract with a local government entity or a public entity (government entities) that is worth more than \$200,000:

- the maximum amount that a government entity may withhold from a progress payment to a contractor is ten percent, until half of the project is completed.
- the maximum amount that a government entity may withhold from a progress payment to a contractor is reduced to five percent, after half of the project is completed.

However, a municipality with a population of 25,000 or less and a county with a population of 100,000 or less may withhold ten percent until the project is completed.⁵

¹ S. 489.107, F.S.

² See generally s. 489.105, F.S.

³ OPPAGA, *Inflexibility in Contracting and Retainage Practices Could Hurt Construction Industry*, p. 1 (Dec. 2000) <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0026rpt.pdf> (last visited on Oct. 20, 2019).

⁴ *Id.*; Bausman, Dennis C., *Retainage Practice In The Construction Industry*, Foundation of the American Subcontractors Association, Inc., p. 1 (Nov. 2004) <https://www.asacolorado.com/images/stories/documents/legislation/retainageclemsonstudy.pdf> (last visited on Oct. 20, 2019).

⁵ Ss. 218.735 & 255.078, F.S.

After half of the project is completed, a contractor may request the government entity to release up to half of the retained amount. The government entity must release the requested amount unless the amount is subject to a dispute.⁶

After a contractor completes a project, he or she may submit a request to the government entity for all remaining retained funds. The government entity must release the funds unless there is a good faith dispute that the contractor has not completed an item or items on the government entity's list of items required to complete the project. If there is a good faith dispute, the government entity may withhold an amount not to exceed 150% of the cost to complete the item or items.⁷

When a contractor receives payment from a government entity for work or materials provided by a subcontractor, the contractor must provide the payment to the subcontractor within 10 days of receiving the payment. However, after half of a project with a government entity is completed, a contractor may withhold more than five percent of each progress payment to a subcontractor even though the government entity may not retain more than five percent of each payment to a contractor for work and materials provided by the contractor and his or her subcontractors.⁸

A contractor may withhold more than five percent of each payment based on the contractor's assessment of a subcontractor's past performance, the likelihood that such performance will continue, and the contractor's ability to rely on other safeguards such as a performance bond. If a contractor elects to retain more than five percent, the contractor must notify the subcontractor in writing of his or her determination to withhold more than five percent and the reasons for making that determination, and the contractor may not request the release of such retained funds from the government entity.⁹

For contracts for construction services with the state that are for \$200,000 or less, current law requires the Department of Management Services (DMS) to establish rules that allow the state to retain up to ten percent of each payment made to the contractor. In order to comply, DMS enacted Rule 60D-5.0041, F.A.C., which provides that for public works contracts with the state that are worth more than \$100,000 but not more than \$200,000, a state agency may request DMS to exempt the requirement for a performance and payment bond as long as the state agency retains ten percent of each payment made to the contractor. If the contractor defaults, the agency will use the retained payments to pay any claims of unpaid bills made by laborers, materialmen, and subcontractors.¹⁰

Chapter 337, F.S., provides that when the Department of Transportation (DOT) uses flexible start and finish times for construction projects, DOT may retain ten percent when a contractor fails to timely commence work or falls behind at any time prior to completion of the contract.¹¹

Additional Requirements for Construction Contracts with Government Entities

Current law requires a contractor who contracts with the state, a local government, or another public authority to construct a public building or complete some other public works project that is worth more than \$200,000 to obtain a payment bond with an authorized surety insurer equal to the contract price, and a performance bond with an authorized surety insurer. In lieu of a bond, a contractor may file an alternative form of security in the form of cash, a money order, a certified check, a cashier's check, or an irrevocable letter of credit.¹²

A performance bond issued by a surety guarantees that the contractor or surety will complete the work required under the bonded contract.¹³ A payment bond issued by a surety guarantees that the

⁶ Ss. 218.735 & 255.078, F.S.

⁷ Ss. 218.735 & 255.077, F.S.

⁸ Ss. 218.735, 255.073, & 255.078, F.S.

⁹ Ss. 218.735 & 255.078, F.S.

¹⁰ S. 255.05(1)(f), F.S.; Rule. 60D-5.0041, F.A.C.

¹¹ S. 337.015(5), F.S.

¹² S. 255.05(1), (7), F.S.

¹³ *American Home Assurance Co. v. Larkin General Hospital, Ltd.*, 593 So. 2d 195, 198 (Fla. 1992).

contractor or surety will pay the subcontractors, suppliers, and materialmen associated with the construction project.¹⁴

Before beginning work, a contractor must execute and record both bonds in the public records of the county where the improvement is located and provide a certified copy of the bonds to the public body commissioning the project. A contractor cannot receive payment until the contractor has provided a certified copy of the bonds.¹⁵

OPPAGA Study of Retainage in December 2000

During the 2000 Legislative Session, the Legislature directed the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to conduct a study to evaluate retainage and other construction practices to determine if Florida construction law needed to be revised.¹⁶ At the time, the only contracts that had a statutory cap on retainage were contracts with the state that were worth \$200,000 or less, which was set at ten percent.¹⁷

OPPAGA determined that putting a statutory cap on the amount a property owner could retain could become unfavorable to contractors and subcontractors because property owners and contractors may:

- Seek to protect their property by using alternate forms of leverage that are less favorable than the current system of retainage;
- Be less willing to take the risk associated with working with a new contractor or subcontractor; and
- Not allow an existing contractor or subcontractor to take on a project of an increased size.¹⁸

Proponents for lower retainage rates argue that requiring a performance bond is a reasonable substitute for retainage because a performance bond ensures the contractor will complete the project to the property owner's satisfaction, and will screen out contractors who are unable to perform a project.¹⁹

OPPAGA found that a performance bond was not a reasonable substitute for retainage because retainage served as an incentive for a contractor or subcontractor to complete their work in a timely fashion, and a performance bond only guarantees that a project will eventually be completed if a contractor defaults.²⁰

OPPAGA also found that a greater portion of risk associated with contracting had shifted from the contractor to the subcontractor. If a subcontractor performed work on a construction project, there could be delays, entirely outside of the subcontractor's control, which prevented the subcontractor from receiving retained money. This could result in the subcontractor waiting for an unreasonable amount of time to receive payment for work the subcontractor completed.²¹

OPPAGA indicated that subcontractors could try to mitigate this risk by planning for these funds not being immediately available or requiring that retained funds be placed in an interest bearing account.²²

However, proponents for lower retainage rates argue that this reduces competition because smaller subcontractors cannot compete for projects because even though they might be capable of doing a project, they do not have the funds to plan for a high percentage of their earned money being retained. Proponents for lower retainage rates also argue that high retainage rates increase the cost of

¹⁴ *Everett Painting Company, Inc. v. Padula & Wadsworth Construction, Inc.*, 856 So. 2d 1059, 1062 (Fla. 4th DCA 2003).

¹⁵ S. 255.05(1), F.S.

¹⁶ OPPAGA *supra* note 3, at 1; Ch. 2000-372, Laws of Florida.

¹⁷ *See generally* Ch. 255, F.S. (2000).

¹⁸ OPPAGA *supra* note 3, at 3.

¹⁹ Bausman *supra* note 4, at 10.

²⁰ OPPAGA *supra* note 3, at 4.

²¹ OPPAGA *supra* note 3, at 2.

²² *Id.* at 2 and 7.

construction projects because contractors and subcontractors are required to charge more in order to ensure they can finance a project.²³

After the OPPAGA study was completed, the 2005 Legislature passed and the Governor signed into law the current rate of retainage for government entities. The maximum amount a government entity could retain from a progress payment was set at ten percent because that was the industry norm at that time.²⁴

Retainage Rates for Other States

According to the American Subcontractors Association, 43 states specify the maximum retainage percentage that the government may withhold from a payment to a contractor.²⁵ At least ten states, including Florida, Pennsylvania, and Georgia, cap the retainage percentage at ten percent.²⁶ At least twenty states, including North Carolina, New York, and Virginia, cap the retainage percentage at five percent.²⁷ South Carolina caps the retainage percentage rate at 3.5 percent.²⁸

Retainage Rate for the Federal Government

Federal law requires the federal government to pay a contractor the full amount of a progress payment. Retainage is not used without cause. However, a contracting officer may withhold a percentage of payment based on the officer's assessment of a contractor's past performance and the likelihood such performance will continue. If the officer determines a contractor has not made satisfactory progress, then the officer may retain a maximum of 10 percent of a payment or payments.²⁹

Effect of the Bill

The bill reduces the amount that a government entity may retain from a progress payment to a contractor for contracts worth *more than \$200,000*:

- *from ten percent*, when less than 50 percent of the project is complete, *and five percent*, when 50 percent or more of the project is complete,
- *to five percent* for the entire project.

The bill reduces the amount that the state may retain from a progress payment to a contractor, for contracts worth \$200,000 or less, *from ten percent to five percent*.

The bill reduces the amount that a municipality with a population of 25,000 or less and a county with a population of 100,000 or less may retain from a progress payment to a contractor, for contracts worth more than \$200,000, *from ten percent to five percent*.

The bill repeals:

- The ability of a contractor to request the government entity to release up to half of the retained amount after half of the project is completed; and
- The ability of a contractor to withhold more than five percent of each progress payment to his or her subcontractors after half of a project with a government entity is completed.

The bill specifies that the provisions do not apply to:

- DOT construction contracts authorized under ch. 337, F.S.; and

²³Bausman *supra* note 4, at 6.

²⁴ See House Analysis of 2005 House Bill 509 (April 22, 2005).

²⁵ American Subcontractors Association, Inc., *Retainage Law in the 50 States*, <https://www.keglerbrown.com/content/uploads/2018/09/Retainage-Law-in-the-50-States-2018.pdf> (last visited Nov. 13, 2019).

²⁶ *Id.*; 62 Pa. Cons. Stat. § 3921(a); Ga. Code Ann. § 13-10-80(b)(2)(A).

²⁷ *Id.*; N.C. Gen. Stat. § 143-134.1(b1); N.Y. State. Fin. Law § 9-139(f) (New York caps the retainage rate at 5% if the contractor obtains a performance bond); Va. Code Ann. § 2.2-4301 & 4333.

²⁸ *Id.*; S.C. Code Ann. § 11-35-3030(4).

²⁹ 48 C.F.R. § 32.103.

- Any contract for construction services entered into, pending approval, or advertised by a government entity, on or before October 1, 2020.

B. SECTION DIRECTORY:

- Section 1. Amends s. 218.735, F.S., relating to public construction retainage.
- Section 2. Amends s. 255.05, F.S., relating to public construction retainage.
- Section 3. Amends s. 255.077, F.S., amending a cross-reference.
- Section 4. Amends 255.078, F.S., relating to public construction retainage.
- Section 5. Provides that the bill does not apply to certain public construction contracts.
- Section 6. Provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill may result in contractors and subcontractors who provide services in the construction of public projects for the state and local governments receiving more money in progress payments, which could result in more competition for public works projects and lower costs for the state and local governments.

According to DMS, there is no expected financial impact on the state because construction projects under \$100,000 would still require the state to retain 5% and DMS will still require contractors to obtain a performance bond for construction projects over \$100,000.³⁰

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

³⁰ Florida Department of Management Services, Agency Analysis of 2020 House Bill 101, p. 4 (Oct. 5, 2020).
STORAGE NAME: h0101b.OTM
DATE: 12/5/2019

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled

2 An act relating to public construction; amending s.
3 218.735, F.S.; revising the amount of retainage that
4 certain local government entities and contractors may
5 withhold from progress payments for any construction
6 services contract; conforming a provision to changes
7 made by the act; amending s. 255.05, F.S.; revising
8 requirements for Department of Management Services
9 rules governing certain contracts; amending s.
10 255.077, F.S.; conforming a cross-reference; amending
11 s. 255.078, F.S.; revising the amounts of retainage
12 that certain public entities and contractors may
13 withhold from progress payments for any construction
14 services contract; conforming a provision to changes
15 made by the act; providing applicability; providing an
16 effective date.

17
18 Be It Enacted by the Legislature of the State of Florida:

19
20 Section 1. Paragraph (i) of subsection (7) and subsection
21 (8) of section 218.735, Florida Statutes, are amended to read:
22 218.735 Timely payment for purchases of construction
23 services.—

24 (7) Each contract for construction services between a
25 local governmental entity and a contractor must provide for the

26 development of a single list of items required to render
27 complete, satisfactory, and acceptable the construction services
28 purchased by the local governmental entity.

29 (i) If a local governmental entity fails to comply with
30 its responsibilities to develop the list required under
31 paragraph (a) or paragraph (b) within the time limitations
32 provided in paragraph (a), the contractor may submit a payment
33 request for all remaining retainage withheld by the local
34 governmental entity pursuant to this section; and payment of any
35 remaining undisputed contract amount, less any amount withheld
36 pursuant to the contract for incomplete or uncorrected work,
37 must be paid within 20 business days after receipt of a proper
38 invoice or payment request. If the local governmental entity has
39 provided written notice to the contractor specifying the failure
40 of the contractor to meet contract requirements in the
41 development of the list of items to be completed, the local
42 governmental entity need not pay or process any payment request
43 for retainage if the contractor has, in whole or in part, failed
44 to cooperate with the local governmental entity in the
45 development of the list or to perform its contractual
46 responsibilities, if any, with regard to the development of the
47 list or if paragraph (8) (c) ~~(8) (f)~~ applies.

48 (8) (a) With regard to any contract for construction
49 services, a local governmental entity may withhold from each
50 progress payment made to the contractor an amount not exceeding

51 5 ~~10~~ percent of the payment as retainage until ~~50~~-percent
52 completion of such services.

53 ~~(b) After 50-percent completion of the construction~~
54 ~~services purchased pursuant to the contract, the local~~
55 ~~governmental entity must reduce to 5 percent the amount of~~
56 ~~retainage withheld from each subsequent progress payment made to~~
57 ~~the contractor. For purposes of this subsection, the term "50-~~
58 ~~percent completion" has the meaning set forth in the contract~~
59 ~~between the local governmental entity and the contractor or, if~~
60 ~~not defined in the contract, the point at which the local~~
61 ~~governmental entity has expended 50 percent of the total cost of~~
62 ~~the construction services purchased as identified in the~~
63 ~~contract together with all costs associated with existing change~~
64 ~~orders and other additions or modifications to the construction~~
65 ~~services provided for in the contract. However, notwithstanding~~
66 ~~this subsection, a municipality having a population of 25,000 or~~
67 ~~fewer, or a county having a population of 100,000 or fewer, may~~
68 ~~withhold retainage in an amount not exceeding 5 ~~10~~ percent of~~
69 ~~each progress payment made to the contractor until final~~
70 ~~completion and acceptance of the project by the local~~
71 ~~governmental entity.~~

72 ~~(c) After 50-percent completion of the construction~~
73 ~~services purchased pursuant to the contract, the contractor may~~
74 ~~elect to withhold retainage from payments to its subcontractors~~
75 ~~at a rate higher than 5 percent. The specific amount to be~~

76 ~~withheld must be determined on a case-by-case basis and must be~~
77 ~~based on the contractor's assessment of the subcontractor's past~~
78 ~~performance, the likelihood that such performance will continue,~~
79 ~~and the contractor's ability to rely on other safeguards. The~~
80 ~~contractor shall notify the subcontractor, in writing, of its~~
81 ~~determination to withhold more than 5 percent of the progress~~
82 ~~payment and the reasons for making that determination, and the~~
83 ~~contractor may not request the release of such retained funds~~
84 ~~from the local governmental entity.~~

85 ~~(d) After 50 percent completion of the construction~~
86 ~~services purchased pursuant to the contract, the contractor may~~
87 ~~present to the local governmental entity a payment request for~~
88 ~~up to one half of the retainage held by the local governmental~~
89 ~~entity. The local governmental entity shall promptly make~~
90 ~~payment to the contractor, unless the local governmental entity~~
91 ~~has grounds, pursuant to paragraph (f), for withholding the~~
92 ~~payment of retainage. If the local governmental entity makes~~
93 ~~payment of retainage to the contractor under this paragraph~~
94 ~~which is attributable to the labor, services, or materials~~
95 ~~supplied by one or more subcontractors or suppliers, the~~
96 ~~contractor shall timely remit payment of such retainage to those~~
97 ~~subcontractors and suppliers.~~

98 (b)(e) This section does not prohibit a local governmental
99 entity from withholding retainage at a rate less than 5 ~~10~~
100 percent of each progress payment, from incrementally reducing

101 the rate of retainage pursuant to a schedule provided for in the
102 contract, or from releasing at any point all or a portion of any
103 retainage withheld by the local governmental entity which is
104 attributable to the labor, services, or materials supplied by
105 the contractor or by one or more subcontractors or suppliers. If
106 a local governmental entity makes any payment of retainage to
107 the contractor which is attributable to the labor, services, or
108 materials supplied by one or more subcontractors or suppliers,
109 the contractor must ~~shall~~ timely remit payment of such retainage
110 to those subcontractors and suppliers.

111 (c) ~~(f)~~ This section does not require the local
112 governmental entity to pay or release any amounts that are the
113 subject of a good faith dispute, the subject of a claim brought
114 pursuant to s. 255.05, or otherwise the subject of a claim or
115 demand by the local governmental entity or contractor.

116 (d) ~~(g)~~ The time limitations set forth in this section for
117 payment of payment requests apply to any payment request for
118 retainage made pursuant to this section.

119 (e) ~~(h)~~ Paragraph (a) does ~~Paragraphs (a) - (d) do~~ not apply
120 to construction services purchased by a local governmental
121 entity which are paid for, in whole or in part, with federal
122 funds and are subject to federal grantor laws and regulations or
123 requirements that are contrary to any provision of the Local
124 Government Prompt Payment Act.

125 (f) ~~(i)~~ This subsection does not apply to any construction

126 services purchased by a local governmental entity if the total
 127 cost of the construction services purchased as identified in the
 128 contract is \$200,000 or less.

129 Section 2. Paragraph (f) of subsection (1) of section
 130 255.05, Florida Statutes, is amended to read:

131 255.05 Bond of contractor constructing public buildings;
 132 form; action by claimants.—

133 (1) A person entering into a formal contract with the
 134 state or any county, city, or political subdivision thereof, or
 135 other public authority or private entity, for the construction
 136 of a public building, for the prosecution and completion of a
 137 public work, or for repairs upon a public building or public
 138 work shall be required, before commencing the work or before
 139 recommencing the work after a default or abandonment, to execute
 140 and record in the public records of the county where the
 141 improvement is located, a payment and performance bond with a
 142 surety insurer authorized to do business in this state as
 143 surety. A public entity may not require a contractor to secure a
 144 surety bond under this section from a specific agent or bonding
 145 company.

146 (f) The Department of Management Services shall adopt
 147 rules with respect to all contracts for \$200,000 or less, to
 148 provide:

149 1. Procedures for retaining up to 5 ~~10~~ percent of each
 150 request for payment submitted by a contractor and procedures for

151 determining disbursements from the amount retained on a pro rata
 152 basis to laborers, materialmen, and subcontractors, as defined
 153 in s. 713.01.

154 2. Procedures for requiring certification from laborers,
 155 materialmen, and subcontractors, as defined in s. 713.01, before
 156 final payment to the contractor that such laborers, materialmen,
 157 and subcontractors have no claims against the contractor
 158 resulting from the completion of the work provided for in the
 159 contract.

160
 161 The state is not liable to any laborer, materialman, or
 162 subcontractor for any amounts greater than the pro rata share as
 163 determined under this section.

164 Section 3. Subsection (8) of section 255.077, Florida
 165 Statutes, is amended to read:

166 255.077 Project closeout and payment of retainage.—

167 (8) If a public entity fails to comply with its
 168 responsibilities to develop the list required under subsection
 169 (1) or subsection (2), as defined in the contract, within the
 170 time limitations provided in subsection (1), the contractor may
 171 submit a payment request for all remaining retainage withheld by
 172 the public entity pursuant to s. 255.078. The public entity need
 173 not pay or process any payment request for retainage if the
 174 contractor has, in whole or in part, failed to cooperate with
 175 the public entity in the development of the list or failed to

176 perform its contractual responsibilities, if any, with regard to
177 the development of the list or if s. 255.078(3) ~~s. 255.078(6)~~
178 applies.

179 Section 4. Section 255.078, Florida Statutes, is amended,
180 to read:

181 255.078 Public construction retainage.—

182 (1) With regard to any contract for construction services,
183 a public entity may withhold from each progress payment made to
184 the contractor an amount not exceeding 5 ~~10~~ percent of the
185 payment as retainage ~~until 50-percent completion of such~~
186 ~~services.~~

187 ~~(2) After 50-percent completion of the construction~~
188 ~~services purchased pursuant to the contract, the public entity~~
189 ~~must reduce to 5 percent the amount of retainage withheld from~~
190 ~~each subsequent progress payment made to the contractor. For~~
191 ~~purposes of this section, the term "50-percent completion" has~~
192 ~~the meaning set forth in the contract between the public entity~~
193 ~~and the contractor or, if not defined in the contract, the point~~
194 ~~at which the public entity has expended 50 percent of the total~~
195 ~~cost of the construction services purchased as identified in the~~
196 ~~contract together with all costs associated with existing change~~
197 ~~orders and other additions or modifications to the construction~~
198 ~~services provided for in the contract.~~

199 ~~(3) After 50-percent completion of the construction~~
200 ~~services purchased pursuant to the contract, the contractor may~~

201 ~~elect to withhold retainage from payments to its subcontractors~~
202 ~~at a rate higher than 5 percent. The specific amount to be~~
203 ~~withheld must be determined on a case-by-case basis and must be~~
204 ~~based on the contractor's assessment of the subcontractor's past~~
205 ~~performance, the likelihood that such performance will continue,~~
206 ~~and the contractor's ability to rely on other safeguards. The~~
207 ~~contractor shall notify the subcontractor, in writing, of its~~
208 ~~determination to withhold more than 5 percent of the progress~~
209 ~~payment and the reasons for making that determination, and the~~
210 ~~contractor may not request the release of such retained funds~~
211 ~~from the public entity.~~

212 ~~(4) After 50-percent completion of the construction~~
213 ~~services purchased pursuant to the contract, the contractor may~~
214 ~~present to the public entity a payment request for up to one-~~
215 ~~half of the retainage held by the public entity. The public~~
216 ~~entity shall promptly make payment to the contractor, unless the~~
217 ~~public entity has grounds, pursuant to subsection (6), for~~
218 ~~withholding the payment of retainage. If the public entity makes~~
219 ~~payment of retainage to the contractor under this subsection~~
220 ~~which is attributable to the labor, services, or materials~~
221 ~~supplied by one or more subcontractors or suppliers, the~~
222 ~~contractor shall timely remit payment of such retainage to those~~
223 ~~subcontractors and suppliers.~~

224 ~~(2)-(5) Neither This section and ner s. 255.077 do not~~
225 ~~prohibit prohibits a public entity from withholding retainage at~~

226 a rate less than 5 ~~10~~ percent of each progress payment, from
227 incrementally reducing the rate of retainage pursuant to a
228 schedule provided for in the contract, or from releasing at any
229 point all or a portion of any retainage withheld by the public
230 entity which is attributable to the labor, services, or
231 materials supplied by the contractor or by one or more
232 subcontractors or suppliers. If a public entity makes any
233 payment of retainage to the contractor which is attributable to
234 the labor, services, or materials supplied by one or more
235 subcontractors or suppliers, the contractor must ~~shall~~ timely
236 remit payment of such retainage to those subcontractors and
237 suppliers.

238 (3) ~~(6)~~ ~~Neither~~ This section and ~~nor~~ s. 255.077 do not
239 require ~~requires~~ the public entity to pay or release any amounts
240 that are the subject of a good faith dispute, the subject of a
241 claim brought pursuant to s. 255.05, or otherwise the subject of
242 a claim or demand by the public entity or contractor.

243 (4) ~~(7)~~ The same time limits for payment of a payment
244 request apply regardless of whether the payment request is for,
245 or includes, retainage.

246 (5) ~~(8)~~ Subsection (1) does ~~Subsections (1) - (4) do~~ not
247 apply to construction services purchased by a public entity
248 which are paid for, in whole or in part, with federal funds and
249 are subject to federal grantor laws and regulations or
250 requirements that are contrary to any provision of the Florida

251 Prompt Payment Act.

252 ~~(6)-(9)~~ This section does not apply to any construction
 253 services purchased by a public entity if the total cost of the
 254 construction services purchased as identified in the contract is
 255 \$200,000 or less.

256 Section 5. (1) This act does not apply to any contract
 257 for construction services which is entered into or is pending
 258 approval by a public entity, as defined in s. 255.072, Florida
 259 Statutes, or by a local governmental entity, as defined in s.
 260 218.72, Florida Statutes, or to any construction services
 261 project advertised for bid by the public entity or local
 262 governmental entity, on or before October 1, 2020.

263 (2) The amendments made to ss. 255.05 and 255.078, Florida
 264 Statutes, by this act do not apply to contracts executed under
 265 chapter 337, Florida Statutes.

266 Section 6. This act shall take effect October 1, 2020.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 441 Public Procurement of Services

SPONSOR(S): DiCeglie

TIED BILLS: **IDEN./SIM. BILLS:** SB 506

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee		Toliver	Smith
2) Government Operations & Technology Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA), which requires state and local government agencies to procure the "professional services" of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

The CCNA establishes a three-phase process for procuring professional services. During Phase 1, state and local agencies must publicly announce each occasion when professional services will be purchased for certain projects and consultants must be certified by the agency as qualified to provide the services. During Phase 2, an agency must evaluate the qualifications and past performance of interested consultants and conduct discussions with at least three consultants regarding their qualifications, approach to the project, and ability to furnish the required services. During Phase 3, the competitive negotiation phase, an agency must negotiate compensation with each consultant in order of rank, beginning with the highest ranked, until an agreement is reached.

The CCNA explicitly states that it does not prohibit a continuing contract between a firm and an agency. A continuing contract is a contract for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for several projects. A continuing contract may be for a fixed term or with no time limitation, however it must provide a termination clause. The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another. The estimated construction cost of each project in a continuing contract may not exceed \$2 million, or in the case of study activities, the fee for professional services for each study may not exceed \$200,000.

The bill amends the CCNA to increase the maximum limit for contracting with a firm, construction management entity, or program management entity using a continuing contract from an estimated per-project construction cost of \$2 million to \$5 million. The bill also increases the maximum limit for procuring a study using a continuing contract from \$200,000 per study to \$500,000. The bill requires that these maximum limits be adjusted by the Department of Management Services annually by rule based on the Construction Cost Index, an index created by the Engineering News-Record, a private sector publication. The adjustment must be made by July 1 of each year, beginning in 2021, using the most recent month for which data is available.

The bill might have a positive fiscal impact on state and local government expenditures. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act,¹ which requires federal agencies to use a qualifications-based selection process for architectural, engineering, and associated services, such as mapping and surveying. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price. According to the National Society of Professional Engineers, 46 states and numerous localities have implemented a qualifications-based selection process similar to the process outlined in the Brooks Act for procuring design services.²

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),³ which is modeled after the Brooks Act. The CCNA requires state⁴ and local government agencies to procure the "professional services" of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process.⁵

CCNA Procurement Process

The CCNA establishes a three-phase process for procuring professional services:

- Phase 1 – Public announcement and qualification.
- Phase 2 – Competitive selection.
- Phase 3 – Competitive negotiation.

During Phase 1, the public announcement and qualification phase, state and local agencies must publicly announce each occasion when professional services will be purchased for one of the following:

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000; or
- A planning or study activity, when the fee for professional services exceeds \$35,000.⁶

The public notice must include a general description of the project and indicate how interested firms or individuals (consultants) may apply for consideration.⁷

A consultant who wishes to provide professional services to an agency must first be certified by the agency as qualified to provide the needed services pursuant to law and the agency's regulations.⁸ In determining whether a consultant is qualified, the agency must consider the capabilities, adequacy of personnel, past record, and experience of the consultant as well as whether the consultant is a certified minority business enterprise.⁹ Each agency must encourage consultants desiring to provide professional services to the agency to annually submit statements of qualifications and performance data.¹⁰

¹ Public Law 92-582, 86 Stat. 1278 (1972).

² *Qualifications-Based Selection of Engineering Services*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, <https://www.nspe.org/resources/issues-and-advocacy/action-issues/qualifications-based-selection-engineering-services> (last visited November 26, 2019).

³ Chapter 73-19, L.O.F., codified as s. 287.055, F.S.

⁴ The Department of Management Services (DMS) is the agency for state government solely and exclusively authorized and empowered to administer and perform the CCNA procurement process respecting all projects for which the funds necessary are appropriated to DMS, irrespective of whether such projects are intended for the use and benefit of DMS or any other agency of government. Section 287.055(7), F.S.

⁵ Section 287.055, F.S.

⁶ Section 287.055(3)(a)1., F.S.

⁷ *Id.*

⁸ Section 287.055(3)(c), F.S.

⁹ Section 287.055(3)(d), F.S.

¹⁰ Section 287.055(3)(b), F.S.

During Phase 2, the competitive selection phase, an agency must evaluate the qualifications and past performance of interested consultants and conduct discussions with at least three consultants regarding their qualifications, approach to the project, and ability to furnish the required services.¹¹ The agency must then select at least three consultants, ranked in order of preference, that it considers the most highly qualified to perform the required services. In determining whether a consultant is qualified, the agency must consider such factors as the ability of professional personnel; whether a consultant is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the consultant; and the volume of work previously awarded to each consultant by the agency, with the object of effecting an equitable distribution of contracts among qualified consultants, provided such distribution does not violate the principle of selecting the most highly qualified consultants. During this phase, the CCNA prohibits the agency from requesting, accepting, or considering proposals for the compensation to be paid.¹²

During Phase 3, the competitive negotiation phase, an agency must first negotiate compensation with the highest ranked consultant. If the agency is unable to negotiate a satisfactory contract with that consultant at a price the agency determines to be fair, competitive, and reasonable, negotiations with the consultant must be formally terminated. The agency must then negotiate with the remaining ranked consultants, in order of rank, and follow the same process until an agreement is reached. If the agency is unable to negotiate a satisfactory contract with any of the ranked consultants, the agency must select additional consultants, ranked in the order of competence and qualification without regard to price, and continue negotiations until an agreement is reached.¹³ Once the agency terminates negotiations with a consultant at any point in the process, the agency may not resume negotiations with that consultant for that particular project.

Continuing Contracts under the CCNA

The CCNA explicitly states that it does not prohibit a continuing contract¹⁴ between a firm and an agency.¹⁵ A continuing contract is a contract for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for several projects.¹⁶ A continuing contract may be for a fixed term or with no time limitation, however it must provide a termination clause.¹⁷ The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another.¹⁸

The estimated construction cost of each project in a continuing contract may not exceed \$2 million, or in the case of study activities, the fee for professional services for each study may not exceed \$200,000.¹⁹ The maximum per-project and per-study limits were put in place by the Legislature in 1988 and have been increased twice since.²⁰ In 1988, the maximum per-project and per-study limits were \$500,000 and \$25,000 respectively.²¹ In 2002, the limits were increased to \$1 million and \$50,000²² and in 2009, the date of the last revision, to \$2 million and \$200,000.²³

Construction and Program Management Entities

¹¹ Section 287.055(4)(a), F.S.

¹² The CCNA did not prohibit discussion of compensation in the initial vendor selection phase until 1988, when the Legislature enacted a provision that allows consideration of compensation to occur only during the negotiation phase. Chapter 88-108, L.O.F.

¹³ Section 287.055(5), F.S.

¹⁴ Section 287.055(2)(g), F.S.

¹⁵ Section 287.055(4)(d), F.S.

¹⁶ Section 287.055(2)(g), F.S.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Section 287.055(2)(g), F.S.

²⁰ Chapter 88-108, L.O.F.

²¹ *Id.*

²² Chapter 2002-20, L.O.F.

²³ Chapter 2009-227, L.O.F.

Current law allows governmental entities²⁴ to contract with a construction management entity or a program management entity.²⁵ A construction management entity is responsible for construction project scheduling and coordination in both preconstruction and construction phases and is generally responsible for the successful, timely, and economical completion of a construction project.²⁶ A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.²⁷ Both construction and program management entities must be procured pursuant to the CCNA and must consist of or contract with licensed or registered professionals for the specific fields or areas of construction.²⁸ The governmental entity procuring the services of a construction management or program management entity may choose to enter into a continuing contract²⁹ pursuant to the CCNA.³⁰

Engineering News-Record Construction Cost Index

The Engineering News-Record (ENR) is a weekly private-sector publication that describes itself as providing “the engineering and construction news, analysis, commentary and data that construction industry professionals need to do their job more effectively.”³¹ As a service to its readers, the ENR publishes, monthly, a Construction Cost index (CCI) and Building Cost index (BCI).³² The CCI and BCI serve to inform those in the engineering profession and construction industry about general construction costs across the United States.³³ The indices have a material component that incorporates the actual cost of construction materials, and a labor component incorporating the actual cost of labor.³⁴ The ENR states that the CCI “can be used where labor costs are a high proportion of total costs,” whereas the BCI is “more applicable to structures.”³⁵

Effect of the Bill

The bill amends the CCNA to increase the maximum limit for contracting with a firm, construction management entity, or program management entity using a continuing contract from an estimated per-project construction cost of \$2 million to \$5 million. The bill also increases the maximum limit for procuring a study using a continuing contract from \$200,000 per study to \$500,000. The bill requires that these maximum limits be adjusted by the Department of Management Services annually by rule based on the ENR’s CCI. The adjustment must be made by July 1 of each year, beginning in 2021, using the most recent month for which data is available.

B. SECTION DIRECTORY:

Section 1 amends s. 255.103, F.S., relating to construction management or program management entities.

Section 2 amends s. 287.055, F.S., relating to the Consultants’ Competitive Negotiation Act.

Section 3 provides an effective date of July 1, 2020.

²⁴ The term governmental entity is defined to mean a county, municipality, school district, special district as defined in chapter 189, or political subdivision of the state. Section 255.103(1), F.S.

²⁵ Section 255.103, F.S.

²⁶ Section 255.103(2), F.S.

²⁷ Section 255.103(3), F.S.

²⁸ Section 255.103, F.S.

²⁹ A continuing contract, for purposes of procuring a construction or program management entity, is defined to mean a contract for work during a defined period on construction projects described by type which may or may not be identified at the time of entering into the contract. Section 255.103(4), F.S.

³⁰ Section 255.103(4), F.S.

³¹ *About Us*, ENGINEERING NEWS-RECORD, <https://www.enr.com/aboutus> (last visited Nov. 26, 2019).

³² *Construction Economics*, ENGINEERING NEWS-RECORD, <https://www.enr.com/economics> (last visited Nov. 26, 2019).

³³ *Id.*

³⁴ *Using ENR Indexes*, ENGINEERING NEWS-RECORD, <https://www.enr.com/economics/faq> (last visited Nov. 26, 2019).

³⁵ *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on private sector businesses that provide professional services, as defined in the CCNA, or that provide construction management or project management services by allowing those entities to enter into larger contracts for projects and studies under a continuing contract. Specifically, it would save those entities the cost and time of having to go through the CCNA procurement process for projects or studies which exceed the current statutory threshold.

D. FISCAL COMMENTS:

The bill may have a positive fiscal impact on state and local government expenditures by allowing the state or local government to enter into larger continuing contracts under the CCNA, thereby possibly reducing the amount of money and time expended on procuring services on a per-project and per-study basis.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires that the Department of Management Services (DMS) adopt a rule to adjust, on an annual basis, the statutory maximum dollar amounts for continuing contracts procured under the CCNA based on the Engineering News-Record's Construction Cost Index. The bill does not confer rulemaking authority, however DMS has sufficient rulemaking authority in ss. 287.032(2) and 287.042(12), F.S., to promulgate the rule.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

HB 441

2020

1 A bill to be entitled
2 An act relating to the public procurement of services;
3 amending s. 255.103, F.S.; revising the maximum dollar
4 amount for continuing contracts for construction
5 projects; amending s. 287.055, F.S.; redefining the
6 term "continuing contract" to increase certain maximum
7 dollar amounts for professional architectural,
8 engineering, landscape architectural, and surveying
9 and mapping services; requiring the Department of
10 Management Services to annually adjust by rule the
11 statutory caps for continuing contracts; providing an
12 effective date.

13
14 Be It Enacted by the Legislature of the State of Florida:

15
16 Section 1. Subsection (4) of section 255.103, Florida
17 Statutes, is amended to read:

18 255.103 Construction management or program management
19 entities.—

20 (4) A governmental entity's authority under subsections
21 (2) and (3) includes entering into a continuing contract for
22 construction projects, pursuant to the process provided in s.
23 287.055, in which the estimated construction cost of each
24 individual project under the contract does not exceed \$5
25 million, or the dollar amount as adjusted pursuant to s.

26 | 287.055(7)(b) ~~\$2 million~~. For purposes of this subsection, the
 27 | term "continuing contract" means a contract with a construction
 28 | management or program management entity for work during a
 29 | defined period on construction projects described by type which
 30 | may or may not be identified at the time of entering into the
 31 | contract.

32 | Section 2. Paragraph (g) of subsection (2) and subsection
 33 | (7) of section 287.055, Florida Statutes, are amended to read:

34 | 287.055 Acquisition of professional architectural,
 35 | engineering, landscape architectural, or surveying and mapping
 36 | services; definitions; procedures; contingent fees prohibited;
 37 | penalties.—

38 | (2) DEFINITIONS.—For purposes of this section:

39 | (g) A "continuing contract" is a contract for professional
 40 | services entered into in accordance with all the procedures of
 41 | this act between an agency and a firm whereby the firm provides
 42 | professional services to the agency for projects in which the
 43 | estimated construction cost of each individual project under the
 44 | contract does not exceed \$5 million, or the dollar amount as
 45 | adjusted pursuant to paragraph (7)(b); ~~\$2 million,~~ for study
 46 | activity if the fee for professional services for each
 47 | individual study under the contract does not exceed \$500,000, or
 48 | the dollar amount as adjusted pursuant to paragraph (7)(b);
 49 | ~~\$200,000,~~ or for work of a specified nature as outlined in the
 50 | contract required by the agency, with the contract being for a

51 fixed term or with no time limitation except that the contract
52 must provide a termination clause. Firms providing professional
53 services under continuing contracts are ~~shall~~ not be required to
54 bid against one another.

55 (7) AUTHORITY AND DUTIES OF DEPARTMENT OF MANAGEMENT
56 SERVICES.—

57 (a) Notwithstanding any other provision of this section,
58 the Department of Management Services shall be the agency of
59 state government which is solely and exclusively authorized and
60 empowered to administer and perform the functions described in
61 subsections (3), (4), and (5) respecting all projects for which
62 the funds necessary to complete same are appropriated to the
63 Department of Management Services, irrespective of whether such
64 projects are intended for the use and benefit of the Department
65 of Management Services or any other agency of government.
66 However, nothing herein shall be construed to be in derogation
67 of any authority conferred on the Department of Management
68 Services by other express provisions of law. Additionally, any
69 agency of government may, with the approval of the Department of
70 Management Services, delegate to the Department of Management
71 Services authority to administer and perform the functions
72 described in subsections (3), (4), and (5). Under the terms of
73 the delegation, the agency may reserve its right to accept or
74 reject a proposed contract.

75 (b) The Department of Management Services shall by rule

HB 441

2020

76 | adjust the statutory maximum dollar amounts for continuing
77 | contracts established under paragraph (2)(g) and s. 255.103(4)
78 | based on the Engineering News-Record's Construction Cost Index.
79 | The adjustment shall be made July 1 of each year, beginning in
80 | 2021, using the most recent month for which data are available
81 | at the time of the adjustment.

82 | Section 3. This act shall take effect July 1, 2020.

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

1 Committee/Subcommittee hearing bill: Oversight, Transparency &
 2 Public Management Subcommittee

3 Representative DiCeglie offered the following:

4

5 **Amendment (with title amendment)**

6 Remove everything after the enacting clause and insert:

7 Section 1. Subsection (4) of section 255.103, Florida
 8 Statutes, is amended to read:

9 255.103 Construction management or program management
 10 entities.—

11 (4) A governmental entity's authority under subsections
 12 (2) and (3) includes entering into a continuing contract for
 13 construction projects, pursuant to the process provided in s.
 14 287.055, in which the estimated construction cost of each
 15 individual project under the contract does not exceed \$5 million
 16 ~~\$2 million~~. For purposes of this subsection, the term

Amendment No.

17 "continuing contract" means a contract with a construction
18 management or program management entity for work during a
19 defined period on construction projects described by type which
20 may or may not be identified at the time of entering into the
21 contract.

22 Section 2. Paragraph (g) of subsection (2) of section
23 287.055, Florida Statutes, is amended to read:

24 287.055 Acquisition of professional architectural,
25 engineering, landscape architectural, or surveying and mapping
26 services; definitions; procedures; contingent fees prohibited;
27 penalties.—

28 (2) DEFINITIONS.—For purposes of this section:

29 (g) A "continuing contract" is a contract for professional
30 services entered into in accordance with all the procedures of
31 this act between an agency and a firm whereby the firm provides
32 professional services to the agency for projects in which the
33 estimated construction cost of each individual project under the
34 contract does not exceed \$5 million, ~~\$2 million~~, for study
35 activity if the fee for professional services for each
36 individual study under the contract does not exceed \$500,000,
37 ~~\$200,000~~, or for work of a specified nature as outlined in the
38 contract required by the agency, with the contract being for a
39 fixed term or with no time limitation except that the contract
40 must provide a termination clause. Firms providing professional

Amendment No.

41 services under continuing contracts shall not be required to bid
42 against one another.

43 Section 3. This act shall take effect July 1, 2020.

44

45 -----

46

T I T L E A M E N D M E N T

47

Remove everything before the enacting clause and insert:

48

An act relating to the public procurement of services; amending

49

s. 255.103, F.S.; revising the maximum dollar amount for

50

continuing contracts for construction projects; amending s.

51

287.055, F.S.; redefining the term "continuing contract" to

52

increase certain maximum dollar amounts for professional

53

architectural, engineering, landscape architectural, and

54

surveying and mapping services; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 491 Disposition of Surplus Funds by Candidates

SPONSOR(S): Payne

TIED BILLS: **IDEN./SIM. BILLS:** SB 814

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee		Toliver	Smith
2) Public Integrity & Ethics Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

A candidate who withdraws his or her candidacy, becomes unopposed in an election, or is eliminated or elected to office must dispose of surplus funds in his or her campaign account within 90 days and file a termination report reflecting the disposition of all remaining funds. The candidate or former candidate, as the case may be, may dispose of his or her funds by four authorized methods:

- Return funds pro rata to each contributor;
- Donate the funds to a charitable organization or organizations that meet the requirements of s. 501(c)(3) of the Internal Revenue Code;
- Rebate up to \$25,000 to the candidate's political party or an affiliated party committee; or
- Deposit funds to the state, in the case of a candidate for state office, or to a local political subdivision, in the case of a candidate for local office.

A successful candidate has the additional option to transfer a certain amount of the surplus funds to an office account to be used for "legitimate expenses in connection with the candidate's public office."

The bill provides that if the surplus funds are disposed of by donation to a charitable organization the candidate may not be employed by the same charitable organization.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A candidate who withdraws his or her candidacy, becomes unopposed, is eliminated, or elected to office must dispose of surplus funds in his or her campaign account within 90 days and file a termination report reflecting the disposition of all remaining funds.¹ Florida law generally provides former candidates with four options for disposing of surplus funds:

- Return funds pro rata to each contributor;
- Donate the funds to a charitable organization or organizations that meet the requirements of s. 501(c)(3) of the Internal Revenue Code;
- Rebate up to \$25,000 to the candidate's political party or an affiliated party committee; or
- Deposit funds to the General Revenue Fund, in the case of a candidate for state office, or to a local political subdivision general fund, in the case of a candidate for local office.²

Before disposing of surplus funds, a candidate may expend funds from his or her campaign account to:

- Purchase "thank you" advertising for up to 75 days;
- Pay for items obligated before the candidate withdrew, became unopposed, or was eliminated or elected; and
- Pay for necessary expenses to close down the campaign office and prepare final reports.³

A successful candidate has the additional option to transfer a certain amount of the surplus funds to an office account, to be used for "legitimate expenses in connection with the candidate's public office."⁴ Candidates receiving public campaign financing must return all excess funds to the State General Revenue Fund after paying for any items for which the campaign was liable before withdrawing, becoming unopposed, or being eliminated or elected.⁵

A candidate who fails to dispose of funds in his or her campaign account in the manner provided by law commits a misdemeanor of the first degree.⁶ A person convicted of a misdemeanor of the first degree may be sentenced to a maximum term of imprisonment not to exceed 1 year and a fine not to exceed \$1,000.⁷

Effect of the Bill

The bill provides that if the surplus funds are disposed of by donation to a charitable organization the candidate may not be employed by the same charitable organization.

B. SECTION DIRECTORY:

Section 1 amends s. 106.141, F.S., relating to the disposition of surplus funds by candidates.

Section 2 provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

¹ Section 106.141, F.S.

² Section 106.141(4), F.S.

³ Section 106.11(5), F.S.; *see also* Division of Elections, Candidate & Campaign Treasurer Handbook, available at <https://dos.myflorida.com/media/699202/candidate-and-campaign-treasurer-handbook-2018.pdf> (last visited November 25, 2019).

⁴ Section 106.141(5), F.S.

⁵ Section 106.141(4)(b), F.S.

⁶ Section 106.141(11), F.S.

⁷ Sections 775.082-775.083, F.S.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Art. VII, s. 18 of the Florida Constitution as it is a law concerning elections.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to the disposition of surplus funds by
 3 candidates; amending s. 106.141, F.S.; prohibiting a
 4 candidate from donating surplus funds to a charitable
 5 organization that employs the candidate; providing an
 6 effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Paragraph (a) of subsection (4) of section
 11 106.141, Florida Statutes, is amended to read:

12 106.141 Disposition of surplus funds by candidates.—

13 (4) (a) Except as provided in paragraph (b), any candidate
 14 required to dispose of funds pursuant to this section shall, at
 15 the option of the candidate, dispose of such funds by any of the
 16 following means, or any combination thereof:

17 1. Return pro rata to each contributor the funds that have
 18 not been spent or obligated.

19 2. Donate the funds that have not been spent or obligated
 20 to a charitable organization or organizations that meet the
 21 qualifications of s. 501(c) (3) of the Internal Revenue Code,
 22 except that the candidate may not be employed by the charitable
 23 organization to which he or she donates the funds.

24 3. Give not more than \$25,000 of the funds that have not
 25 been spent or obligated to the affiliated party committee or

26 | political party of which such candidate is a member.

27 | 4. Give the funds that have not been spent or obligated:

28 | a. In the case of a candidate for state office, to the
29 | state, to be deposited in either the Election Campaign Financing
30 | Trust Fund or the General Revenue Fund, as designated by the
31 | candidate; or

32 | b. In the case of a candidate for an office of a political
33 | subdivision, to such political subdivision, to be deposited in
34 | the general fund thereof.

35 | Section 2. This act shall take effect July 1, 2020.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTM 20-05 OGSR/Human Trafficking Victims

SPONSOR(S): Oversight, Transparency & Public Management Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee		Toliver	Smith

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Human trafficking is the “transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person.” An estimated 40.6 million persons were the victims of human trafficking in 2016, with one in four victims being children. Florida law allows a victim of human trafficking to petition a court for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed while the person was a victim of human trafficking. The offense must be related to the human trafficking scheme of which the person was a victim or must have been at the direction of an operator of the scheme. The expunction of a criminal history record is the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order.

Current law provides a public record exemption for the following criminal intelligence and criminal investigative information:

- Any information that reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services;
- Any information that reveals the identity of the victim of the crime of child abuse;
- Any information that may reveal the identity of a person who is a victim of any sexual offense;
- Any information that may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity; and
- A photograph, videotape, or image of any part of the body of a victim of a crime of certain sexual offenses, including human trafficking involving commercial sexual activity.

Additionally, a separate but related public record exemption provides that criminal intelligence and criminal investigative information that reveals or may reveal the identity of a victim of human trafficking whose criminal history has been expunged or ordered expunged is also confidential and exempt from public records requirements. The information contained in both exemptions may be shared by a law enforcement agency:

- In the furtherance of its official duties and responsibilities;
- To another governmental agency in the furtherance of its official duties and responsibilities; or
- For print, publication, or broadcast if the law enforcement agency determines that release would assist in locating or identifying a person the agency believes to be missing or endangered. The information provided should be limited to information needed to identify or locate the victim.

The bill saves from repeal the public record exemptions, which will repeal on October 2, 2020, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb05.OTM

DATE: 12/5/2019

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

Human Trafficking

Human trafficking⁵ is a form of modern-day slavery, which involves the exploitation of persons for commercial sex or forced labor.⁶ An estimated 40.6 million persons were the victims of human trafficking in 2016, with one in four victims being children.⁷ Human traffickers use various techniques to instill fear in victims and to keep them enslaved⁸ including the use of "violence, threats, deception, [and] debt bondage."⁹ Some traffickers keep their victims under lock and key.¹⁰ However, the most frequently used practices are less obvious techniques that include isolating victims from the public and family members; confiscating passports, visas, or other identification documents; using or threatening to use violence toward victims or their families; telling victims that they will be imprisoned or deported for immigration violations if they contact authorities; and controlling the victims' funds by holding the money ostensibly for safekeeping.¹¹ It is estimated that human trafficking "generates \$150 billion dollars in illegal profits a year."¹²

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Article I, s. 24(c), FLA. CONST.

⁵ The term "human trafficking" is defined to mean the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. Section 787.06(2)(d), F.S.

⁶ Section 787.06(1)(a), F.S.

⁷ *Forced labour, modern slavery and human trafficking*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited Nov. 27, 2019).

⁸ Section 787.06(1)(c), F.S.

⁹ *The Facts*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/facts> (last visited Dec. 3, 2019).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Profits and Poverty: The Economics of Forced Labour*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm (last visited Nov. 27, 2019).

Expunction of Human Trafficking Records

In 2013, the Legislature created a process to allow a victim of human trafficking to petition a court for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed while the person was a victim of human trafficking. The offense must be related to the human trafficking scheme of which the person was a victim or must have been at the direction of an operator of the scheme.¹³ The expunction of a criminal history record is the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order. Any criminal history record that is ordered expunged must be physically destroyed or obliterated by any criminal justice agency having custody of such record, except that any criminal history record in the custody of the Florida Department of Law Enforcement (FDLE) must be retained.¹⁴

Public Record Exemption under Review

Current law provides a public record exemption for criminal intelligence¹⁵ and criminal investigative information¹⁶ that includes:

- Any information that reveals the identity of the victim of the crime of child abuse;¹⁷
- Any information that may reveal the identity of a person who is a victim of any sexual offense;¹⁸
- A photograph, videotape, or image of any part of the body of a victim of a crime of certain sexual offenses.¹⁹

In 2015, the Legislature passed HB 467 (2015) which expanded the exemption to include:

- Any information that reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services;²⁰
- Any information that may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity;²¹ and
- A photograph, videotape, or image of any part of the body of a victim of a crime of human trafficking involving commercial sexual activity.²²

Additionally, HB 467 (2015) provided that criminal intelligence and criminal investigative information that reveals or may reveal the identity of a victim of human trafficking whose criminal history has been expunged or ordered expunged is also confidential and exempt from public records requirements.²³

The criminal intelligence and criminal investigative information is confidential and exempt²⁴ from public records requirements. However, it may be shared by a law enforcement agency:²⁵

¹³ Chapter 2013-99, L.O.F.; codified as s. 943.0583, F.S.

¹⁴ Section 943.045(16), F.S.

¹⁵ The term “criminal intelligence information” is defined to mean information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Section 119.011(3)(a), F.S.

¹⁶ The term “criminal investigative information” is defined to mean information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Section 119.011(3)(b), F.S.

¹⁷ See ch. 827, F.S.

¹⁸ See chs. 794, 796, 800, 827, and 847, F.S.

¹⁹ See s. 810.145, F.S., and chs. 794, 796, 800, 827, and 847, F.S.

²⁰ See s. 787.06(3)(a), F.S.

²¹ See ss. 787.06(3)(b), (d), (f), and (g), F.S.

²² *Id.*

²³ Section 943.0583(11), F.S.

²⁴ There is a difference between records the Legislature designates 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 statute. (See Attorney General Opinion 85-62, Aug. 1, 1985).

- In the furtherance of its official duties and responsibilities;
- To another governmental agency in the furtherance of its official duties and responsibilities; or
- For print, publication, or broadcast if the law enforcement agency determines that release would assist in locating or identifying a person the agency believes to be missing or endangered. The information provided should be limited to information needed to identify or locate the victim.²⁶

The 2015 public necessity statement²⁷ for the exemption provides that:

The Legislature finds that it is important to strengthen the protections afforded victims of human trafficking for labor who are minors and victims of human trafficking for commercial sexual activity, regardless of age, in order to ensure their privacy and to prevent their revictimization by making such information confidential and exempt. The identity of these victims is information of a sensitive personal nature. As such, this exemption serves to minimize the trauma to victims because the release of such information would compound the tragedy already visited upon their lives and would be defamatory to or cause unwarranted damage to the good name or reputation of the victims. Protecting the release of identifying information of such victims protects them from further embarrassment, harassment, or injury. The Legislature also finds that it is a public necessity that information in the investigative or intelligence records related to a criminal history record ordered expunged under s. 943.0583, Florida Statutes, which would or could reasonably be expected to reveal the identity of a person who is a victim of human trafficking whose criminal history record has been ordered expunged under s. 943.0583, Florida Statutes, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Persons who are victims of human trafficking and who have been charged with crimes allegedly committed at the behest of their traffickers are themselves victims of crimes. Such victims face barriers to employment and other life opportunities as long as these criminal charges remain on record and accessible to potential employers and others.²⁸

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2020, unless reenacted by the Legislature.

During the 2019 interim, subcommittee staff sent a questionnaire to the Department of Law Enforcement (FDLE), the Department of Juvenile Justice, as well as to each sheriff's office and each police department to gather information concerning the implementation of the exemptions.²⁹ Of the respondents who acknowledged that they possess public records covered by the exemptions, a large majority believed that the exemptions should be reenacted without changes.³⁰ FDLE in its response indicated that the exempt information has been released for broadcast in the form of Amber Alerts.³¹ Additionally, FDLE stated that according to its records 59 people have met the criteria to have their criminal history record expunged under the human trafficking victim expunction provision.³² Most

²⁵ The term "criminal justice agency" is defined to mean any law enforcement agency, court, or prosecutor; any other agency charged by law with criminal law enforcement duties; any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties; or the Department of Corrections. Section 119.011(4), F.S.

²⁶ Sections 119.071(2)(h)2. and 943.0583(11)(b), F.S.

²⁷ Article I, s. 24(c), FLA. CONST., requires each public record exemption "state with specificity the public necessity justifying the exemption."

²⁸ Chapter 2015-146, L.O.F.

²⁹ Open Government Sunset Review Questionnaire, responses on file with the Oversight, Transparency & Public Management Subcommittee.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

respondents indicated that they believed the exemptions had accomplished their purpose of protecting victims of human trafficking by preventing revictimization and minimizing the trauma to those persons.³³

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemptions thereby reenacting the public record exemptions for certain criminal intelligence and criminal investigative information.

B. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to save from repeal the public record exemption for certain criminal intelligence and criminal investigative information related to victims of various crimes.

Section 2 amends s. 943.0583, F.S., to save from repeal the public record exemption for certain criminal intelligence and criminal investigative information that reveals or may reveal the identity of a victim of human trafficking whose criminal history has been expunged or ordered expunged.

Section 3 provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

³³ *Id.*

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not confer rulemaking authority on an agency nor require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 119.071, F.S., which
 4 provides an exemption from public records requirements
 5 for certain criminal intelligence and criminal
 6 investigative information that reveals the identity of
 7 a victim of certain human trafficking offenses;
 8 removing the scheduled repeal of the exemption;
 9 amending s. 943.0583, F.S., which provides an
 10 exemption from public records requirements for
 11 criminal intelligence and criminal investigative
 12 information revealing the identity of a victim of
 13 human trafficking whose criminal history record has
 14 been ordered expunged; removing the scheduled repeal
 15 of the exemption; providing an effective date.

16
 17 Be It Enacted by the Legislature of the State of Florida:

18
 19 Section 1. Paragraph (h) of subsection (2) of section
 20 119.071, Florida Statutes, is amended to read:

21 119.071 General exemptions from inspection or copying of
 22 public records.—

23 (2) AGENCY INVESTIGATIONS.—

24 (h)1. The following criminal intelligence information or
 25 criminal investigative information is confidential and exempt

26 | from s. 119.07(1) and s. 24(a), Art. I of the State
27 | Constitution:

28 | a. Any information that reveals the identity of the victim
29 | of the crime of child abuse as defined by chapter 827 or that
30 | reveals the identity of a person under the age of 18 who is the
31 | victim of the crime of human trafficking proscribed in s.
32 | 787.06(3) (a).

33 | b. Any information that may reveal the identity of a
34 | person who is a victim of any sexual offense, including a sexual
35 | offense proscribed in s. 787.06(3) (b), (d), (f), or (g), chapter
36 | 794, chapter 796, chapter 800, chapter 827, or chapter 847.

37 | c. A photograph, videotape, or image of any part of the
38 | body of the victim of a sexual offense prohibited under s.
39 | 787.06(3) (b), (d), (f), or (g), chapter 794, chapter 796,
40 | chapter 800, s. 810.145, chapter 827, or chapter 847, regardless
41 | of whether the photograph, videotape, or image identifies the
42 | victim.

43 | 2. Criminal investigative information and criminal
44 | intelligence information made confidential and exempt under this
45 | paragraph may be disclosed by a law enforcement agency:

46 | a. In the furtherance of its official duties and
47 | responsibilities.

48 | b. For print, publication, or broadcast if the law
49 | enforcement agency determines that such release would assist in
50 | locating or identifying a person that such agency believes to be

51 missing or endangered. The information provided should be
 52 limited to that needed to identify or locate the victim and not
 53 include the sexual nature of the offense committed against the
 54 person.

55 c. To another governmental agency in the furtherance of
 56 its official duties and responsibilities.

57 3. This exemption applies to such confidential and exempt
 58 criminal intelligence information or criminal investigative
 59 information held by a law enforcement agency before, on, or
 60 after the effective date of the exemption.

61 ~~4. This paragraph is subject to the Open Government Sunset~~
 62 ~~Review Act in accordance with s. 119.15, and shall stand~~
 63 ~~repealed on October 2, 2020, unless reviewed and saved from~~
 64 ~~repeal through reenactment by the Legislature.~~

65 Section 2. Paragraph (d) of subsection (11) of section
 66 943.0583, Florida Statutes, is amended to read:

67 943.0583 Human trafficking victim expunction.—

68 (11)

69 ~~(d) This subsection is subject to the Open Government~~
 70 ~~Sunset Review Act in accordance with s. 119.15 and shall stand~~
 71 ~~repealed on October 2, 2020, unless reviewed and saved from~~
 72 ~~repeal through reenactment by the Legislature.~~

73 Section 3. This act shall take effect October 1, 2020.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTM 20-06 OGSR/Residential Facilities Serving Victims of Sexual Exploitation

SPONSOR(S): Oversight, Transparency & Public Management Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee		Toliver	Smith

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Human trafficking is the “transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person.” An estimated 40.6 million persons were the victims of human trafficking in 2016, with one in four victims being children.

Safe houses and safe foster homes are certified by the Department of Children and Families to care for sexually exploited children. Safe houses and safe foster homes must provide “a safe, separate, and therapeutic environment tailored to the needs of commercially sexually exploited children who have endured significant trauma and are not eligible for relief under the federal Trafficking Victims Protection Act.” Safe houses and safe foster homes must also provide a variety of services to aid sexually exploited children, such as victim-witness and family counseling, behavioral health care, and substance abuse screening.

Current law provides public record exemptions for information about the location of safe houses, safe foster homes, other residential facilities serving child victims of sexual exploitation, and residential facilities serving adult victims of human trafficking involving commercial sexual activity. However, the information may be provided to any agency in order to maintain health and safety standards and to address emergency situations.

The bill saves from repeal the public record exemptions, which will repeal on October 2, 2020, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

Human Trafficking

Human trafficking⁵ is a form of modern-day slavery, which involves the exploitation of persons for commercial sex or forced labor.⁶ An estimated 40.6 million persons were the victims of human trafficking in 2016, with one in four victims being children.⁷ Human traffickers use various techniques to instill fear in victims and to keep them enslaved⁸ including the use of "violence, threats, deception, [and] debt bondage."⁹ Some traffickers keep their victims under lock and key.¹⁰ However, the most frequently used practices are less obvious techniques that include isolating victims from the public and family members; confiscating passports, visas, or other identification documents; using or threatening to use violence toward victims or their families; telling victims that they will be imprisoned or deported for immigration violations if they contact authorities; and controlling the victims' funds by holding the money

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Article I, s. 24(c), FLA. CONST.

⁵ The term "human trafficking" is defined to mean the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. Section 787.06(2)(d), F.S.

⁶ Section 787.06(1)(a), F.S.

⁷ *Forced labour, modern slavery and human trafficking*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited Nov. 27, 2019).

⁸ Section 787.06(1)(c), F.S.

⁹ *The Facts*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/facts> (last visited Dec. 3, 2019).

¹⁰ *Id.*

ostensibly for safekeeping.¹¹ It is estimated that human trafficking “generates \$150 billion dollars in illegal profits a year.”¹²

Residential Treatment for Victims of Human Trafficking

Safe Houses

A “safe house” is a group residential placement certified by the Department of Children and Families (DCF) to care for sexually exploited children.¹³ Safe houses must provide “a safe, separate, and therapeutic environment tailored to the needs of commercially sexually exploited children who have endured significant trauma and are not eligible for relief and benefits under the federal Trafficking Victims Protection Act.”¹⁴ To that end, each safe house must use strength-based and trauma informed approaches to care, serve exclusively one sex, group child victims by age or maturity level, and care for child victims in a manner that separates them from children with other needs.¹⁵ Safe houses must have staff members who are awake and on duty 24 hours a day.¹⁶ A safe house serving children who have been sexually exploited must provide a variety of services such as victim-witness and family counseling, behavioral health care, and substance abuse screening.¹⁷ Safe houses are inspected by DCF prior to certification and annually thereafter.¹⁸

Safe Foster Homes

A “safe foster home” is a family foster home¹⁹ certified by DCF to care for sexually exploited children.²⁰ The state requires safe foster homes provide the same services and meet the same requirements as safe houses, except the requirement to have staff awake and on duty 24 hours a day does not apply.²¹

Additional Residential Facilities

Traditional residential facilities serve both children and adults who are victims of sexual exploitation. If these facilities serve adults, they cannot be designated safe houses or safe foster homes.²²

Public Record Exemption under Review

In 2015, the Legislature created public record exemptions for information about the location of safe houses, safe foster homes, residential facilities serving victims of commercial sexual exploitation, and residential facilities serving adult victims of human trafficking.²³ Specifically, the information regarding the location of these facilities held by an agency is confidential and exempt²⁴ from public records requirements.²⁵ However, the confidential and exempt information may be provided to any agency as necessary to maintain health and safety standards and to address emergency situations in the

¹¹ *Id.*

¹² *Profits and Poverty: The Economics of Forced Labour*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm (last visited Nov. 27, 2019).

¹³ Section 409.1678(1)(b), F.S.

¹⁴ Section 409.1678(2)(a), F.S.

¹⁵ Section 409.1678(2)(c), F.S. Safe houses also must hold a license as a residential child-caring agency as defined in s. 409.175, F.S.

¹⁶ *Id.*

¹⁷ Section 409.1678(2)(d), F.S.

¹⁸ Section 409.1678(2)(f), F.S.

¹⁹ Section 409.1678(2)(c), F.S. Safe foster homes also must hold a license as a family foster home as defined in s. 409.175, F.S.

²⁰ Section 409.1678(1)(a), F.S.

²¹ Section 409.1678(2)(c), F.S.

²² Section 409.1678(1)(a) and (b), F.S. The definitions of “safe foster home” and “safe house” are specifically restricted to “sexually exploited children.”

²³ Chapter 2015-147, L.O.F., codified as ss. 409.1678(6) and 787.06(9), F.S.

²⁴ There is a difference between records the Legislature designates 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 statute. (*See* Attorney General Opinion 85-62, Aug. 1, 1985).

²⁵ *See* ss. 409.1678(6) and 787.06(9), F.S.

residential facility.²⁶ The public record exemptions do not apply to facilities licensed by the Agency for Health Care Administration.²⁷

The 2015 public necessity statement²⁸ for the exemptions provides that:

Safe houses, safe foster homes, and other residential facilities serving victims of sexual exploitation . . . or adult victims of human trafficking involving commercial sexual activity, are intended as refuges for sexually exploited victims from those who exploited them. If the individuals who victimized these people were able to learn the location of such facilities, they may attempt to contact their victims, exploit their vulnerabilities, and return them to the situations in which they were victimized. Even without the return of these victims to their former situations, additional contact with those who victimized them would have the effect of continuing their victimization and inhibiting their recoveries. Additionally, knowledge about the location of safe houses, safe foster homes, and other residential facilities serving victims of sexual exploitation . . . or adult victims of human trafficking involving commercial sexual activity, could enable other individuals to locate and attempt to victimize the residents.²⁹

During the 2019 interim, subcommittee staff met with staff from DCF and the Department of Legal Affairs (DLA) to discuss the exemptions as part of the review process. DCF, the entity which certifies safe houses and safe foster homes, stated that as of 2019 there were seven safe houses and 28 safe foster homes operating in the state. DCF and DLA staff indicated that they have not received any complaints concerning the exemptions nor did they encounter issues in implementing the exemptions. Neither agency was aware of any litigation involving the exemptions. DCF and DLA recommended the exemptions be reenacted as is.

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemptions, thereby maintaining the exemptions for information about the location of safe houses, safe foster homes, other residential facilities serving child victims of commercial sexual exploitation, and residential facilities serving adult victims of human trafficking involving commercial sexual activity.

B. SECTION DIRECTORY:

Section 1 amends s. 409.1678, F.S., to save from repeal the public record exemption for information related to the location of safe houses and safe foster homes.

Section 2 amends s. 787.06, F.S., to save from repeal the public record exemption for information related to the location of a residential facility offering services for adult victims of human trafficking.

Section 3 provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

²⁶ Sections 409.1678(6)(b) and 787.06(9)(b), F.S.

²⁷ Sections 409.1678(6)(c) and 787.06(9)(c), F.S.

²⁸ Article I, s. 24(c), FLA. CONST., requires each public record exemption “state with specificity the public necessity justifying the exemption.”

²⁹ Chapter 2015-147, L.O.F.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not confer rulemaking authority nor does it require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 409.1678, F.S., which
 4 provides an exemption from public records requirements
 5 for information about the location of safe houses,
 6 safe foster homes, and other residential facilities
 7 serving victims of sexual exploitation; removing the
 8 scheduled repeal of the exemption; amending s. 787.06,
 9 F.S., which provides an exemption from public records
 10 requirements for information about the location of
 11 residential facilities serving adult victims of human
 12 trafficking involving commercial sexual activity;
 13 removing the scheduled repeal of the exemption;
 14 providing an effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:
 17

18 Section 1. Paragraph (d) of subsection (6) of section
 19 409.1678, Florida Statutes, is amended to read:

20 409.1678 Specialized residential options for children who
 21 are victims of commercial sexual exploitation.—

22 (6) LOCATION INFORMATION.—

23 ~~(d) This subsection is subject to the Open Government~~
 24 ~~Sunset Review Act in accordance with s. 119.15 and shall stand~~
 25 ~~repealed on October 2, 2020, unless reviewed and saved from~~

PCB OTM 20-06

ORIGINAL

2020

26 | ~~repeal through reenactment by the Legislature.~~

27 | Section 2. Paragraph (d) of subsection (10) of section
28 | 787.06, Florida Statutes, is amended to read:

29 | 787.06 Human trafficking.—

30 | (10)

31 | ~~(d) This subsection is subject to the Open Government~~
32 | ~~Sunset Review Act in accordance with s. 119.15 and shall stand~~
33 | ~~repealed on October 2, 2020, unless reviewed and saved from~~
34 | ~~repeal through reenactment by the Legislature.~~

35 | Section 3. This act shall take effect October 1, 2020.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTM 20-07 OGSR/Body Camera Recordings
SPONSOR(S): Oversight, Transparency & Public Management Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee		Toliver	Smith

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

A body camera is a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities. Current law provides that a body camera recording, or a portion thereof, is confidential and exempt from public record disclosure, if the recording is taken:

- Within the interior of a private residence;
- Within the interior of a facility that offers health care, mental health care, or social services; or
- In a place that a reasonable person would expect to be private.

Law enforcement agencies may disclose a confidential and exempt body camera recording, or a portion thereof, in furtherance of its official duties and responsibilities or to another governmental agency. However, law enforcement agencies must disclose a confidential and exempt body camera recording, or a portion thereof, as follows:

- To a person recorded by a body camera; however, a law enforcement agency may disclose only those portions that are relevant to the person's presence in the recording;
- To a personal representative of a person recorded by a body camera; however, a law enforcement agency may disclose only those portions that are relevant to the represented person's presence in the recording;
- To a person not depicted in a body camera recording if the recording depicts a place in which the person lawfully resided, dwelled, or lodged at the time of the recording; however, a law enforcement agency may disclose only those portions that record the interior of such a place;
- Pursuant to a court order.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2020, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

Law Enforcement Body Cameras

A body camera is a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities.⁵ According to results from the 2018 Criminal Justice Agency Profile Survey compiled by the Florida Department of Law Enforcement (FLDE) there are 102 police departments, 23 sheriffs' offices, and one state attorney's office using body cameras.⁶

Public Record Exemption under Review

In 2015, the Legislature created a public record exemption that makes a body camera recording, or a portion thereof, confidential and exempt⁷ from public record disclosure, if the recording is taken:

- Within the interior of a private residence;
- Within the interior of a facility that offers health care, mental health care, or social services; or

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Article I, s. 24(c), FLA. CONST.

⁵ Section 119.071(2)(l)1.a., F.S.

⁶ *Criminal Justice Agency Profile Survey Results*, FLORIDA DEPARTMENT OF LAW ENFORCEMENT, <http://www.fdle.state.fl.us/CJSTC/Publications/CJAP/CJAP.aspx> (last visited Nov. 27, 2019).

⁷ There is a difference between records the Legislature designates 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 statute. (*See Attorney General Opinion 85-62*, Aug. 1, 1985).

- In a place that a reasonable person would expect to be private.⁸

However, there are certain instances in which a confidential and exempt body camera recording can be disclosed. Law enforcement agencies may disclose a recording, or a portion thereof, in furtherance of its official duties and responsibilities or disclose a recording to another governmental agency in furtherance of that agency's official duties and responsibilities.⁹ A body camera recording must be disclosed by a law enforcement agency:

- To a person recorded by a body camera; however, a law enforcement agency may disclose only those portions that are relevant to the person's presence in the recording;
- To a personal representative of a person recorded by a body camera; however, a law enforcement agency may disclose only those portions that are relevant to the represented person's presence in the recording;
- To a person not depicted in a body camera recording if the recording depicts a place in which the person lawfully resided, dwelled, or lodged at the time of the recording; however, a law enforcement agency may disclose only those portions that record the interior of such a place;
- Pursuant to a court order.¹⁰

In determining whether to disclose a body camera recording, a court must consider whether:

- Disclosure is necessary to advance a compelling interest;
- The recording contains information that is otherwise exempt or confidential and exempt under the law;
- The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party;
- Disclosure would reveal information regarding a person that is of a highly sensitive personal nature;
- Disclosure may harm the reputation or jeopardize the safety of a person depicted in the recording;
- Confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
- The recording could be redacted to protect privacy interests; and
- There is good cause to disclose all or portions of a recording.¹¹

Law enforcement agencies are required to maintain body camera recording data for a minimum of 90 days.¹² In any proceeding to determine the disclosure of a body camera recording, the law enforcement agency that made the recording must be given reasonable notice of the hearing and an opportunity to participate.¹³

The 2015 public necessity statement for the exemption provides that:

Body cameras preserve information that has the potential to assist both law enforcement officers' and the public's ability to review the circumstances surrounding an event in which law enforcement intervention occurs. . . However, the Legislature also finds that, in certain instances, audio and video recorded by body cameras is significantly more likely to capture highly sensitive personal information than other types of law enforcement recordings or documents. The Legislature finds that public disclosure of these recordings could have an undesirable chilling effect. People who know they are being recorded by a body camera may be unwilling to cooperate fully with law enforcement officers if they know that a body camera recording can be made publicly available to anyone else. People may also be less likely to call a law enforcement agency for services

⁸ Section 119.071(2)(1)2., F.S.

⁹ Section 119.071(2)(1)3., F.S.

¹⁰ Section 119.071(2)(1)4., F.S.

¹¹ Section 119.071(2)(1)4.d.(I), F.S.

¹² Section 119.071(2)(1)5., F.S.

¹³ Section 119.071(2)(1)4.d.(II), F.S.

if their sensitive personal information or the circumstances that necessitate a law enforcement agency's involvement are subject to public dissemination as a body camera recording.¹⁴

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2020, unless it is reviewed and saved from repeal through reenactment by the Legislature.

During the 2019 interim, subcommittee staff sent a questionnaire to sheriffs' offices and police departments around the state requesting various information on their experience with the public record exemption under review.¹⁵ The majority of respondents indicated that they have not had any issues with the exemption and would prefer that the exemption be reenacted without changes.¹⁶ No respondent indicated that their office or department would prefer for the exemption to repeal.¹⁷

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for body camera recordings or portions thereof.

B. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to save from repeal the public record exemption for body camera recordings.

Section 2 provides an effective date of October 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹⁴ Chapter 2015-41, L.O.F.

¹⁵ Open Government Sunset Review Questionnaire, responses on file with the Oversight, Transparency & Public Management Subcommittee.

¹⁶ *Id.*

¹⁷ *Id.*

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not confer rulemaking authority on an agency nor require the promulgation of rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to a review under the Open Government
 3 Sunset Review Act; amending s. 119.071, F.S., which
 4 provides an exemption from public records requirements
 5 for body camera recordings obtained by law enforcement
 6 officers under certain circumstances; revising
 7 provisions for consistency; removing the scheduled
 8 repeal of the exemption; providing an effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Paragraph (1) of subsection (2) of section
 13 119.071, Florida Statutes, is amended to read:

14 119.071 General exemptions from inspection or copying of
 15 public records.—

16 (2) AGENCY INVESTIGATIONS.—

17 (1)1. As used in this paragraph, the term:

18 a. "Body camera" means a portable electronic recording
 19 device that is worn on a law enforcement officer's body and that
 20 records audio and video data in the course of the officer
 21 performing his or her official duties and responsibilities.

22 b. "Law enforcement officer" has the same meaning as
 23 provided in s. 943.10.

24 c. "Personal representative" means a parent, a court-
 25 appointed guardian, an attorney, or an agent of, or a person

26 holding a power of attorney for, a person recorded by a body
 27 camera. If a person depicted in the recording is deceased, the
 28 term also means the personal representative of the estate of the
 29 deceased person; the deceased person's surviving spouse, parent,
 30 or adult child; the deceased person's attorney or agent; or the
 31 parent or guardian of a surviving minor child of the deceased.
 32 An agent must possess written authorization of the recorded
 33 person to act on his or her behalf.

34 2. A body camera recording, or a portion thereof, is
 35 confidential and exempt from s. 119.07(1) and s. 24(a), Art. I
 36 of the State Constitution if the recording:

- 37 a. Is taken within the interior of a private residence;
- 38 b. Is taken within the interior of a facility that offers
 39 health care, mental health care, or social services; or
- 40 c. Is taken in a place that a reasonable person would
 41 expect to be private.

42 3. Notwithstanding subparagraph 2., a body camera
 43 recording, or a portion thereof, may be disclosed by a law
 44 enforcement agency:

- 45 a. In furtherance of its official duties and
 46 responsibilities; or
- 47 b. To another governmental agency in the furtherance of
 48 its official duties and responsibilities.

49 4. Notwithstanding subparagraph 2., a body camera
 50 recording, or a portion thereof, shall be disclosed by a law

51 enforcement agency:

52 a. To a person recorded by a body camera; however, a law
53 enforcement agency may disclose only those portions that are
54 relevant to the person's presence in the recording;

55 b. To the personal representative of a person recorded by
56 a body camera; however, a law enforcement agency may disclose
57 only those portions that are relevant to the represented
58 person's presence in the recording;

59 c. To a person not depicted in a body camera recording if
60 the recording depicts a place in which the person lawfully
61 resided, dwelled, or lodged at the time of the recording;
62 however, a law enforcement agency may disclose only those
63 portions that record the interior of such a place.

64 d. Pursuant to a court order.

65 (I) In addition to any other grounds the court may
66 consider in determining whether to order that a body camera
67 recording be disclosed, the court shall consider whether:

68 (A) Disclosure is necessary to advance a compelling
69 interest;

70 (B) The recording contains information that is otherwise
71 exempt or confidential and exempt under the law;

72 (C) The person requesting disclosure is seeking to obtain
73 evidence to determine legal issues in a case in which the person
74 is a party;

75 (D) Disclosure would reveal information regarding a person

76 | that is of a highly sensitive personal nature;

77 | (E) Disclosure may harm the reputation or jeopardize the
78 | safety of a person depicted in the recording;

79 | (F) Confidentiality is necessary to prevent a serious and
80 | imminent threat to the fair, impartial, and orderly
81 | administration of justice;

82 | (G) The recording could be redacted to protect privacy
83 | interests; and

84 | (H) There is good cause to disclose all or portions of a
85 | recording.

86 | (II) In any proceeding regarding the disclosure of a body
87 | camera recording, the law enforcement agency that made the
88 | recording shall be given reasonable notice of hearings and shall
89 | be given an opportunity to participate.

90 | 5. A law enforcement agency must retain a body camera
91 | recording for at least 90 days.

92 | 6. The exemption provided in subparagraph 2. applies
93 | retroactively.

94 | 7. This exemption does not supersede any other public
95 | records exemption that existed before or is created after the
96 | effective date of this exemption. Those portions of a recording
97 | which are protected from disclosure by another public records
98 | exemption shall continue to be exempt or confidential and
99 | exempt.

100 | ~~8. This paragraph is subject to the Open Government Sunset~~

PCB OTM 20-07

ORIGINAL

2020

101 | ~~Review Act in accordance with s. 119.15 and shall stand repealed~~
102 | ~~on October 2, 2020, unless reviewed and saved from repeal~~
103 | ~~through reenactment by the Legislature.~~

104 | Section 2. This act shall take effect October 1, 2020.