

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GAP 09-01
Condemning Authority

OGSR Business Information Provided to a Governmental

SPONSOR(S): Governmental Affairs Policy Committee

TIED BILLS:

IDEN./SIM. BILLS: SB 1826

| | REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--------------|---------------------------------------|---------------|----------------|-----------------------|
| Orig. Comm.: | Governmental Affairs Policy Committee | 10 Y, 0 N | Williamson | Williamson |
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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.

Business owners may be compensated for any probable damages that result from "right of way" takings where less than the entire property is sought to be appropriated. If the business qualifies for business damages and intends to make claim to such damages, the business owner must submit to the governmental condemning authority a good faith written offer to settle any claim. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damages. The business owner also must submit to the condemning authority copies of business records that substantiate the good faith offer to settle business damages.

Current law provides a public record exemption for business information submitted by a business owner to a governmental condemning authority as part of an offer to settle business damages. The owner must request in writing that the information be held exempt.

The bill reenacts the public record exemption, which will repeal on October 2, 2009, if this bill does not become law. It also reorganizes the section, makes clarifying changes, and removes superfluous language.

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

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ 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.

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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.

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.² 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 created³ then a public necessity statement and a two-thirds vote for passage are not required.

Eminent Domain Negotiations

Eminent Domain is the power of a condemning authority or governmental entity to take private property for public use. Because the exercise of eminent domain is contrary to the basic right to own property,

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

safeguards for the property owner have been included in both the Florida and United States Constitutions.⁴

To encourage presuit settlement and minimize litigation costs in eminent domain proceedings, the condemning authority “must attempt to negotiate in good faith with the fee owner of the parcel”⁵ of property regarding the amount of compensation to be paid for the entire parcel. The process begins with the condemning authority making a written offer of compensation and notifying the property owner of the necessity for the parcel, the nature of the project, the availability of an appraisal report, and the owner’s rights and responsibilities under law. The owner has at least 30 days to respond to the offer, during which time the condemning authority may not file a condemnation proceeding for the parcel identified.⁶

Business Damages

Business owners may be compensated for any probable damages that result from “right of way” takings where less than the entire property is sought to be appropriated. Business damages can arise from various sources, including lost parking spaces for customers or alterations to the traffic flow of the customer parking lot. If the business qualifies for business damages and intends to make claim to such damages, the business owner must submit to the condemning authority a good faith written offer to settle any claim. The business damage offer must include an explanation of the nature, extent, and monetary amount of such damages.⁷

The business owner also must submit to the condemning authority copies of business records⁸ that substantiate the good faith offer to settle business damages. Failure to submit a business damage offer within 180 days from receipt of notice, without a good faith justification, requires the court to strike any business damage claim.⁹ Businesses in existence for less than five years or effected merely by a temporary disruption without any taking of property are not entitled to claims of business damages.

Public Record Exemption under Review

Business information submitted by a business owner to a governmental condemning authority as part of an offer to settle business damages are confidential and exempt¹⁰ from public records requirements if the owner requests in writing that the information be held exempt. Confidential and exempt business information includes:

- Federal and state tax returns or tax information.
- Balance sheets, profit-and-loss statements, cash-flow statements, inventory records, or customer lists or number of customers for a business operating on the parcel to be acquired.
- A franchise, distributorship, or lease agreement of which the business operating on the parcel to be acquired is the subject.
- Materials that relate to methods of manufacture or production, potential or actual trade secrets, or patentable material.¹¹

⁴ Section 6, Art. X of the State Constitution; 5th Amendment of the United States Constitution.

⁵ Section 73.015(1), F.S.

⁶ Section 73.015 (1)(a) and (b), F.S.

⁷ Section 73.015(2), F.S.

⁸ Section 73.015(2)(c)2., F.S., provides that “business records” include, but are not limited to, “copies of federal income tax returns, federal income tax withholding statements, federal miscellaneous income tax statements, state sales tax returns, balance sheets, profit and loss statements, and state corporate income tax returns for the 5 years preceding notification which are attributable to the business operation on the property to be acquired, and other records relied upon by the business owner that substantiate the business damage claim.”

⁹ Section 73.015(2)(c), F.S.

¹⁰ There is a difference between records the Legislature designates as 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 the statutory exemption. (*See Attorney General Opinion 85-62*, August 1, 1985)

¹¹ Section 73.0155(1)(a) – (e), F.S.

In addition, "other sensitive or proprietary information" related to the business operating on the parcel to be acquired is confidential and exempt from public records requirements if the business owner attests in writing that the:

- Information is being relied upon to substantiate a claim for business damages;
- Information has not otherwise been publicly disclosed;
- Information cannot be readily obtained by the public using alternative means;
- Information is used by the business to protect or further a business advantage over those who do not know or use the information; and
- Disclosure of the information would injure the business in the marketplace.¹²

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2009, unless reenacted by the Legislature.

Related Public Record Exemptions

Current law also provides a public record exemption for records held by a state agency¹³ seeking to acquire real property by purchase through the exercise of the power of eminent domain.¹⁴ The exempt records include "all appraisals, other reports relating to value, offers, and counteroffers." The exemption applies until execution of a valid option contract or written offer to sell that has been conditionally accepted by the agency, at which time the exemption expires. If a valid option contract is not executed, or if a written offer to sell is not conditionally accepted by the agency, the exemption expires at the conclusion of the condemnation litigation of the property. While this exemption expires at the time of acceptance, the exemption for business records provided in claims of business damages does not expire.

EFFECT OF BILL

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

B. SECTION DIRECTORY:

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

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

¹² Section 73.0155(1)(f), F.S.

¹³ Sections 125.355, 166.045, and 1013.14, F.S., provide comparable exemptions for counties, municipalities, and educational boards acquiring property for public purposes.

¹⁴ Section 119.0711, F.S.

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The exemption may promote the settlement of and payment for business damages to the business earlier in the property- acquisition process.

D. FISCAL COMMENTS:

The public record exemption may help a governmental condemning authority correctly value the offer and ultimately pay an amount that matches the actual business damages. In addition, the exemption may help the authority avoid some costs associated with litigation and thereby reduce the overall costs associated with the acquisition of property for public transportation projects.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.