

STATEMENT OF THE FREEDOM OF INFORMATION COMMISSION IN OPPOSITION TO RAISED BILL 7148, An Act Concerning An Exemption From The Freedom Of Information Act For Records Related To Ongoing State Contract Negotiations

The purpose of this bill is to establish a temporary exemption for responses to requests for proposals or bid solicitations and related records from disclosure under the FOI Act. Under the bill, such records would only be exempt until a contract is executed or negotiations for the award of the contract have ended. While the FOI Commission does not object to the concept of the bill, it is opposed to the language of the bill, as drafted.

The FOI Commission is cognizant of the need to temporarily withhold proposal and bidding records from disclosure while negotiations are ongoing. However, the FOI Act's primary purpose is to foster disclosure of public records. Thus, the FOI Commission takes issue with the second sentence of RB 7148 because it is not consistent with such purpose.

The second sentence of the bill states: “[p]rior to the disclosure of any such response, record or file, the chief officer of such public agency shall certify that the public interest in the disclosure of such response, record or file outweighs the public interest in the confidentiality of such response, record or file.” Thus, even after a contract has been executed or negotiations have ended, the bill requires the chief officer of the agency to certify that the public interest in disclosure outweighs the public interest in confidentiality BEFORE DISCLOSURE can occur. The bill creates a presumption that the records should be withheld, thereby making confidentiality, rather than disclosure, the priority. This is totally the wrong approach, particularly in this era of significant contracting reform that follows an era of contracting abuses.

In 2005, the FOI Commission worked with the state Department of Administrative Services, to address this same issue and agreed upon language that appeared in Raised Bill 6666, An Act Protecting the Integrity of the Procurement Process. That bill placed the proper emphasis on disclosure rather than confidentiality. It provided an exemption to disclosure of:

Responses to any procurement requests for proposals by a public agency and any records or files made in connection with a contract award process by any public agency until the contract is awarded or until negotiations for the award of such contract have ended, whichever occurs first, provided the chief officer of such public agency certifies that the public interest in disclosure of such information is outweighed by the public interest in confidentiality of such information.

The underscored language mandates that, BEFORE WITHHOLDING public records, the chief officer of the agency must certify that the public interest in confidentiality outweighs the public interest in disclosure, thereby shifting the balance in favor of openness rather than confidentiality. Phrased in this way, a proper balance is struck, in a manner consistent with the purpose of the FOI Act.

If the legislature favors a temporal exemption for proposal and bidding records, the FOI Commission respectfully urges the rejection of the language contained in this bill and the adoption of the language referenced from RB 6666 (in the 2005 legislative session).

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