

1989

Session Law 89-021

Florida Senate & House of Representatives

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**S 107 GENERAL BILL/CS/1ST ENG by Transportation;
Transportation (Identical H 1728)**
Construction Contracts/D.O.T. (OPEN GOVERNMENT SUNSET REVIEW)
repeals provision which provides exemption from public records requirements
provided for price proposals submitted to D.O.T.; amends provisions which pro-
vide exemptions from public records requirements for information required for
certification of qualification of bidders & for official cost estimates, identities of
potential bidders, & bid analysis, etc. Repeals 337.105(3); amends 337.14., 168. Ef-
fective Date: 10/01/89.

01/13/89 SENATE Prefiled
02/13/89 SENATE Referred to Transportation
02/20/89 SENATE On Committee agenda—Transportation, 03/08/89, 9:00
am, Room-C
03/08/89 SENATE Comm. Report: CS by Transportation, placed on Calendar
04/04/89 SENATE Introduced, referred to Transportation -SJ 16; Comm. Re-
port: CS by Transportation, placed on Calendar -SJ 60; CS
read first time -SJ 61
04/11/89 SENATE Placed on Special Order Calendar -SJ 116
04/18/89 SENATE Placed on Special Order Calendar -SJ 173; CS passed;
YEAS 39 NAYS 0 -SJ 178
04/25/89 HOUSE In Messages
04/27/89 HOUSE Received, placed on Calendar -HJ 277; Substituted for HB
1728 -HJ 279; Read second time; Amendments adopted;
Read third time; CS passed as amended; YEAS 110
NAYS 0 -HJ 279
04/28/89 SENATE In Messages
05/09/89 SENATE Concurred; CS passed as amended; YEAS 38 NAYS 0
-SJ 279
05/09/89 Ordered engrossed, then enrolled -SJ 279
05/16/89 Signed by Officers and presented to Governor -SJ 378
05/23/89 Approved by Governor; Chapter No. 89-21 -SJ 414

NOTES: Above bill history from Division of Legislative Information's *FINAL LEGISLATIVE BILL INFORMATION, 1989 SESSIONS*. Staff Analyses for bills amended beyond final committee action may not be in accordance with the enacted law. Journal page numbers (HJ & SJ) refer to daily Journals and may not be the same as final bound Journals.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1. <u>Gargiulo</u>	<u>Gargiulo</u>	1. <u>TR</u>	<u>FAV/CS</u>
2. _____	_____	2. _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT: Open Government Sunset Review
Public Records Exemptions/
Department of Transportation

BILL NO. AND SPONSOR:
CS/SB 107 by
Committee on Transportation

I. SUMMARY:

A. Present Situation:

Section 337.105(3), F.S., provides that any price proposal submitted by a consultant in response to a request for proposals, is exempt from the provisions of s. 119.07(1), F.S., until a consultant is selected and a contract is signed or until the proposals are no longer under active consideration. Price proposals are requested only during the negotiation process pursuant to s. 287.055, F.S., which authorizes the department to request, accept, and consider proposals for compensation only during competitive negotiations. Currently, the department negotiates the scope of the project and the man-hours to complete that scope with the firm the department considers the most qualified. Only after the scope and man-hours have been agreed to does the department request that the consultant submit a price proposal for the work requested and then negotiate a final price. All of these negotiations take place in meetings that are open to the public.

All contractors bidding on state transportation projects in excess of \$250,000 are required by s. 337.14, F.S., to complete an application for qualification which includes a complete financial statement, as well as information on accounts receivable, accounts payable, and outstanding notes. The contractor must also provide information on production capacity, the experience of personnel, all jobs in progress, and on any legal actions against the firm or its principals. This information provides a detailed profile of the business. The application is used by the department to determine the type and size of project on which the contractor may bid, to investigate contract crime, and to obtain information for legal actions. These applications are exempt from the public records law.

Section 337.168, F.S., exempts the department's official estimate, the bidders list and the list of recipients of project plans and specifications, and the department's bid analysis and monitoring system from the public records provisions of s. 119.07(1).

The official estimate is prepared by the Estimates Office as the department's estimate of the cost to construct a project and is used by the department's awards committee to evaluate the contractors' bids on the project and to determine if the low bid should be accepted or rejected. After the contract for the project has been executed, the official estimate is no longer confidential.

The bidders list, which is a list of those prequalified contractors who request or obtain bid documents for a project, and the list of all entities or persons who purchase copies of the plans and specifications, are prepared by the Contracts Administration Office and are confidential only for the three working days prior to the deadline for receiving bids (this deadline occurs on the day of the bid letting). Copies of

these lists are available any time prior to that deadline. Because the department's deadline for obtaining bid documents is 24 hours prior to the deadline for receiving bids, the effectiveness of the exemption is limited to two working days.

The bid analysis and monitoring system currently used by the department is the Bid Analysis and Management System (BAMS) which is owned by the American Association of State Highway and Transportation Officials and is provided to the department through a licensing agreement. The system is used by the department's Market Analysis Office to perform bid analysis for purposes of detecting bid rigging or other forms of contractor fraud, antitrust violations, or collusion. The public records exemption in s. 337.168(3), F.S., protects the system, the system documentation, the input, computer processes and programs, electronic data files, and the output. The source documents from which data are collected remain as public records unless otherwise exempted by law. The system software is also exempted from the public records law by s. 119.07(3)(r), F.S., which exempts data processing software which is obtained by the state under a licensing agreement and which is a trade secret. However, this exemption does not include the input, or the output data of the system.

B. Effect of Proposed Changes:

Section 337.105, F.S., is amended to allow the repeal, pursuant to the Open Government Sunset Review Act, of subsection (3), which provides that a consultant price proposal submitted in response to a request for proposals is exempt from the public records law.

Subsection (1) of s. 337.14, F.S., is amended to revive and reenact the provision which requires that the department maintain the confidentiality of information which a contractor furnishes to the department pursuant to the requirements of the section. The section is also amended to provide for future legislative review and repeal pursuant to the Open Government Sunset Review Act.

Section 337.168, F.S., is amended to revive and reenact the public records law exemptions for the department's official cost estimates, the bidders list and list of recipients of plans and specifications, and the bid analysis and monitoring system. The section is also amended to provide for future legislative review and repeal of the exemptions pursuant to the Open Government Sunset Review Act.

Subsection (2) of s. 337.168, F.S., is further amended to clarify that the bidders list and list of recipients of plans and specifications are exempt for two working days prior to the deadline for obtaining bid packages, plans, or specifications, until the bid letting. This change would assure that the effectiveness of the exemption is maintained for two working days in the event that the department moves the deadline for obtaining bid packages from 24 hours prior to the bid letting to a point earlier in time.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None

B. Government:

The cost to continue the public records exemption for these records is negligible. The most significant costs are the security system in the Contracts Administration Office, the file cabinets with secure locks in the Contracts Administration Office and the Estimates Office, and the cost of computer security for the estimating system and the bid analysis and monitoring system.

REVISED: _____

BILL NO. CS/SB 107

DATE: March 8, 1989

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III. COMMENTS:

None

IV. AMENDMENTS:

None.

STORAGE NAME: h1728-f.go
DATE: June 5, 1989

**HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENTAL OPERATIONS
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1728 (PCB GO 89-7) (CS/SB 107 passed)

RELATING TO: Confidentiality of Price Proposals, Qualifications, Estimates, Bidder Identity, and Bid Analysis Monitoring System

SPONSOR(S): Committee on Governmental Operations and Martin

EFFECTIVE DATE: October 1, 1989

DATE BECAME LAW: May 23, 1989

CHAPTER #: 89-21, Laws of Florida

COMPANION BILL(S): CS/SB 107 (similar)

OTHER COMMITTEES OF REFERENCE: (1)

(2)

I. SHORT SUMMARY:

Section 337.105(3), Florida Statutes, provides that price proposals submitted by consultants to the Department of Transportation (DOT) in response to a request for proposals are exempt from the public records law until a contract is signed or until the proposals are no longer under active consideration. The exemption prevents consultants from accessing price proposals submitted by other consultants and adjusting their own proposals to reflect a figure that is less than their competitors. This bill repeals the exemption in s. 337.105(3), Florida Statutes, because a 1988 amendment to s. 287.055(4)(b), Florida Statutes, which governs competitive selection of contractual services, repealed the exemption by implication.

Section 337.14(1), Florida Statutes, provides that a contractor's application for qualification to bid on a transportation project valued at more than \$250,000 is exempt from the public records law. The exemption protects sensitive personal and financial information which must be submitted by contractors seeking qualification. This bill reenacts the exemption in s. 337.14(1), Florida Statutes.

Sections 337.168(1), (2), and (3), Florida Statutes, respectively exempt from the public records law DOT's official estimate of a project's cost; lists of bidders and recipients of bid packages; and DOT's bid analysis monitoring system. These exemptions are part of DOT's effort to eliminate contract crime. Section 337.168(1), Florida Statutes, encourages competitive bidding among contractors by

prohibiting access to DOT's cost estimate until a contract is executed or a project is no longer under active consideration. Section 337.168(2), Florida Statutes, inhibits bid rigging by preventing access to the list of bidders for the three working days that precede a bid deadline. Section 337.168(3), Florida Statutes, curbs contract crime by exempting from public disclosure the bid analysis monitoring system--a computer based methodology used to detect contract crime patterns.

This bill reenacts the exemptions in ss. 337.168(1), and (3), Florida Statutes, which cover DOT's official estimate and the bid analysis monitoring system. It also reenacts and modifies the exemption in s. 337.168(2), Florida Statutes--which currently protects the bidder list from public disclosure for the three working days that precede a bid deadline--so that the names of those who have requested or obtained bid information will be exempt from the public records law for the period which begins two working days prior to the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid.

A. INTRODUCTION:

Public policy in Florida has greatly favored public access to governmental records and meetings. In fact, the "Sunshine State" has been a national leader in the area of open government. The law embodying the public's right of access to records is codified at s. 119.01, Florida Statutes:

It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.

This provision is mandatory and any public official with custody of a nonexempt public record is required to disclose it to any member of the public. Records are exempt from public disclosure pursuant to chapter 119, Florida Statutes, only if it is provided by law that the public records are confidential or are expressly exempted from disclosure by general or special law. Exemptions are found in s. 119.07(3), Florida Statutes, and in various special acts. The provision requiring meetings to be public does not identify specific exemptions within that section, but various exemptions are included throughout the statutes.

In 1984, the Legislature enacted the Open Government Sunset Review Act to prevent the erosion of Florida's open government policy caused by unjustified exemptions to the Act. As amended by chapter 85-301, Laws of Florida, the Act provides specific criteria for the evaluation of exemptions subject to repeal. The law provides for a two-pronged test. First, it requires consideration of four factors:

- What specific records or meetings are affected by the exemption?

- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Second, the law requires that the exemption will be maintained only if it serves an identifiable purpose. An identifiable public purpose is served when the exemption meets one of the following purposes and such purpose is considered significant enough to override the strong public policy of open government. To qualify as meeting a public purpose, an exemption must:

- allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; or
- protect information of a sensitive personal nature concerning individuals if its release would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals, or its release would jeopardize the safety of such individuals; or
- protect information of a confidential nature concerning entities which include formulas, patterns, devices, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it if its disclosure would injure the affected entity in the marketplace.

The review included in this report examines the following exemption(s):

- s. 337.105(3), Florida Statutes
- s. 337.14(1), Florida Statutes
- ss. 337.168(1),(2), and (3), Florida Statutes

B. PRESENT SITUATION:

In the case of each exemption discussed in this staff analysis, DOT responded to a questionnaire in which it outlined its justifications for the exemption's reenactment or repeal.

337.105(3) - Exemption of Price Proposals

In 1970 the Legislature enacted s. 337.105(3), Florida Statutes (chapter 70-64, Laws of Florida), which requires that DOT find that a professional consultant is qualified to render a service before it enters into a contract with a consultant for his services. Section 337.105(3), Florida Statutes, was amended in

1984 (chapter 84-309, Laws of Florida) to include a public records exemption which provides that price proposals submitted to DOT by a consultant in response to a request for proposals are confidential and exempt from s. 119.07(1), Florida Statutes, until a contract is signed or a proposal is no longer under active consideration.

DOT indicated that the exemption allows it to more effectively and efficiently let contracts with consultants. Consultants are more willing to file a price proposal, a document identifying salaries, overhead, profit margins, etc., when they know that the information contained in the proposal cannot be accessed by another consultant who may then adjust his proposal to reflect a lesser price. The exemption thus allows DOT to rely on price as a factor when determining which consultant is awarded a contract. DOT further added that, though the exemption makes easier the administration of its consultant program, it can no longer rely on the exemption because it was repealed by implication during the 1988 Regular Session when s. 287.055(4)(b), Florida Statutes, was amended. Section 287.055(4)(b), Florida Statutes, 1988 Supplement, which is a part of the "Consultants' Competitive Negotiation Act," states that price proposals may only be requested during competitive negotiations, which are not exempt from the public records law. The Committee on Governmental Operations therefore recommends that the exemption in s. 337.105(3), Florida Statutes, be repealed.

337.14(1) - Exemption of Contractor Qualifications

In 1978 the Legislature enacted s. 337.14, Florida Statutes, which provided a public record exemption for information obtained by DOT when granting certifications to contractors (chapter 78-316, Laws of Florida). Section 337.14(1), Florida Statutes, was amended in 1987 (chapter 87-100, Laws of Florida) to require only those firms or persons desiring to bid on contracts in excess of \$250,000 to submit applications for certification. The exemption under review, s. 337.14(1), Florida Statutes, provides that contractors bidding on projects in excess of \$250,000 must comply with DOT rules which address requirements with respect to equipment, past record, experience, financial resources, and personnel.

DOT explained that the exemption provides for the effective administration of its contractor qualification program. DOT requests personal as well as financial information from contractors as a means of determining their fitness and ability to complete a project. Specific information requested includes a complete financial statement; a status report on accounts receivable, accounts payable, and outstanding notes; a listing of all jobs in progress; a listing of any legal action against the firm or its principals for fraud, bribery, collusion, conspiracy, material misrepresentation, or violation of antitrust laws; and a report of the firm's production capacity and personnel makeup. The information is used by DOT to determine the type and size of projects on which contractors may bid. DOT stated that

contractors would be unwilling to provide this sensitive personal information if they felt competitors could access it and use it to their advantage. Contractors who were asked about the necessity for the exemption stated that if competitors could access this information they would likely use it to undermine the business reputation of other contractors. The Committee on Governmental Operations therefore recommends that the exemption in s. 337.14(1), Florida Statutes, be reenacted.

337.168(1) - Exemption of Official Estimate

The 1983 Legislature enacted a comprehensive law aimed at preventing contract crime in DOT's competitive bidding process (chapter 83-4, Laws of Florida). Included in the law was a section which provided a public records exemption for any document or electronic file which would reveal DOT's official cost estimate of a project (s. 5, chapter 83-4, Laws of Florida). The exemption in s. 337.168(1), Florida Statutes, provides that DOT's official estimate of a project is exempt from the public records law until a contract is executed or the project is no longer under active consideration.

DOT explained that the exemption prevents contractors from submitting bids without researching the complexity of a project. Without the exemption, some contractors might fail to complete a project because their bids would be based on the official estimate rather than on an independent attempt to compute contract costs. DOT added that the exemption also provides for more effective administration of DOT's bid letting program by encouraging competitive bidding. If the official estimate were not covered by the exemption, some contractors would simply rely on it as a basis for their bid rather than submit a competitive bid based on research. The Committee on Governmental Operations therefore recommends that the exemption in s. 337.168(1), Florida Statutes, be reenacted.

337.168(2) - Exemption of Bidder List

Section 5, chapter 83-4, Laws of Florida, which was enacted by the Legislature in 1983, also contained a public records exemption for the list of potential bidders on DOT construction projects. The exemption in s. 337.168(2), Florida Statutes, provides that the lists of contractors who request or obtain bid packages, plans, or specifications are confidential for the three working days which precede the deadline for accepting bids.

DOT stated that this exemption is designed to prevent bid rigging. A contractor can rig a bid through collusion with other bidders only if he knows who all the other bidders are on a particular project. He can then contact the other bidders, and they can agree among themselves who will submit the lowest bid. DOT explained that the current exemption provides some protection against bid rigging because it prevents a contractor from accessing bids received during the three working days prior to the bid deadline, and so raises some doubt about whether a

complete list of bidders is available.

During the course of the review of this exemption, staff met with representatives from the Florida Transportation Builders' Association, the Asphalt Contractors Association, the Florida Concrete & Products Association, and the Florida Limerock & Aggregate Institute, and talked with a prime contractor and a contractor classified as a disadvantaged business enterprise (DBE). Without exception, these parties indicated that access to the bidder list is crucial to their involvement in the bidding process. The contractor and supplier associations indicated that their members need access to the list of qualified bidders so that they can provide the price information that prime contractors need to incorporate into their bids--such as the dollar figure a subcontractor would charge to perform a certain job or the price a supplier would charge for certain materials. Both the prime contractor and the DBE contractor indicated that access to the list facilitates communications between these two groups and makes easier the prime contractor's job of allocating a certain amount of work on a project to a DBE contractor. See s. 337.125, Florida Statutes. When reviewing this exemption, staff examined the ways in which other states have wrestled with the conflicting goals of assisting DBE contractors in obtaining work, which requires access to the bidder list; and preventing contract crime, which is best thwarted by prohibiting access to the bidder list. In staff's opinion, none of the legislative solutions used in other states strikes a better balance between these conflicting goals than does Florida's.

DOT further added that problems relating to bid letting procedures warrant a modification to the existing exemption. Under DOT's administrative rules, an individual may protest the letting of a particular project up to the day before the letting of the contract for that project. A party may also pick up a bid package as late as the day before the letting. Because an individual may file a protest the day before the letting, a project that is the subject of a protest may not be let on time because DOT cannot resolve the protest in time to hold the letting the next day. To remedy this situation, DOT has proposed promulgating a new administrative rule which will move back the deadline for requesting bid information as well as the deadline for filing a protest, but will not result in a longer period of confidentiality of the bidder list. Accordingly, DOT proposes, and industry officials agree, that the language of the current exemption should be modified so that names of those who have requested bid information will be exempt for the period which begins two working days prior to the deadline for obtaining bid packages and ends with the letting of the bid. The Committee on Governmental Operations therefore recommends that the exemption in s. 337.168(2), Florida Statutes, be reenacted and modified so that the list of those who have requested or obtained bid information will be exempt from the public records law for the period which begins two working days prior to the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid.

337.168(3) - Exemption of Bid Analysis and Monitoring System

The third public records exemption enacted by the 1983 Legislature as part of DOT's crime prevention package relates to DOT's bid analysis and monitoring system (BAMS) (s. 5, chapter 83-4, Laws of Florida). Section 337.168(3), Florida Statutes, provides that DOT's BAMS is exempt from the public records law. The BAMS is owned by the American Association of State Highway and Transportation Officials and provided to DOT through a lease agreement which prohibits public disclosure of the system.

DOT stated that the BAMS is used by its Market Analysis Office to detect bid rigging and other forms of contractor fraud and collusion. The public records exemption protects the system, the system documentation, the input, computer processes and programs, electronic data files, and output. It does not protect the actual source documents from which data is collected. Thus all data used by the system is available to the public, but the computer program and methodology are not. BAMS software is also exempt from the public records law under s. 119.07(3)(r), Florida Statutes, which prohibits public disclosure of data processing software obtained by the state under a licensing agreement. The BAMS exemption allows DOT to more effectively prevent contract crime. As DOT stated, public disclosure of BAMS would violate DOT's licensing agreement and would render the program less effective in the prevention of contract crime. Allowing contractors access to the system would provide them with an opportunity to circumvent it. The Committee on Governmental Operations therefore recommends that the exemption in s. 337.168(3), Florida Statutes, be reenacted.

C. EFFECT OF PROPOSED CHANGES:

This bill would repeal the public records exemption provided by s. 337.105(3), Florida Statutes, effective October 1, 1989, providing that price proposals are exempt from the public records law until a contract is signed or proposals are no longer under active consideration. This bill would revive and readopt the public records exemptions provided by ss. 337.14(1) and 337.168(3), Florida Statutes, effective October 1, 1989, providing that a contractor's application for qualification to bid and the BAMS are exempt from the public records law. This bill would also revive and readopt the public records exemption provided by s. 337.168(1), Florida Statutes, effective October 1, 1989, providing that the official estimate of a project's cost is exempt from the public records law until a contract has been executed or the project is no longer under active consideration. This bill would revive, readopt, and modify the public records exemption provided by s. 337.168(2), Florida Statutes, effective October 1, 1989, providing that any document revealing the identity of persons who request or obtain bid information is exempt from the public records law for the period which begins two working days prior to the deadline for obtaining bid packages, plans, or specifications, and ends with the letting of

the bid. This bill also makes the exemptions subject to review in ten years under the Open Government Sunset Review Act.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Repeals the public records exemption found in s. 337.105(3), Florida Statutes, relating to price proposals submitted to DOT.

Section 2 -- Reenacts the public records exemption found in s. 337.14(1), Florida Statutes, relating to applications for qualification to bid submitted by contractors.

Section 3 -- Reenacts the public records exemptions found in ss. 337.168(1) and (3), Florida Statutes, relating to the official cost estimate and the bid analysis monitoring system. Reenacts and modifies the public records exemption found in s. 337.168(2), Florida Statutes, relating to bidder lists, so that any document revealing the identity of persons requesting or receiving bid information is exempt from the public records law for the period which begins two working days prior to the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid.

Section 4 -- Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring or First Year Start-Up Effects:

Not applicable.

2. Recurring or Annualized Continuation Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

4. Appropriations Consequences:

Not applicable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring or First Year Start-Up Effects:

Not applicable.

2. Recurring or Annualized Continuation Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Not applicable.

2. Direct Private Sector Benefits:

Not applicable.

3. Effects on Competition, Private Enterprise, and Employment Markets:

Not applicable.

D. FISCAL COMMENTS:

Not applicable.

III. LONG RANGE CONSEQUENCES:

Not applicable.

IV. COMMENTS:

This bill is consistent with the Governmental Operations Committee's mission statement, which directs the Committee to "[r]eview exemptions to public record and public meeting laws pursuant to the Open Government Sunset Review Act to determine whether the continued existence of each exemption is compelled by justifications strong enough to override Florida's strong public policy of open government."

V. SIGNATURES:

SUBSTANTIVE COMMITTEE:

Prepared by:

Diane Carr
Diane Carr

Staff Director:

Barry Kling
Barry Kling

SECOND COMMITTEE OF REFERENCE:

Prepared by:

Staff Director:

STORAGE NAME: h1728-f.go

DATE: June 5, 1989

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APPROPRIATIONS:

Prepared by:

Staff Director:
