

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: SB 1940

INTRODUCER: Senators Galvano and Benacquisto

SUBJECT: Public Records and Public Meetings

DATE: February 28, 2018

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Brown</u>	<u>Phelps</u>	<u>RC</u>	Favorable

I. Summary:

SB 1940 creates public records and public meetings exemptions for certain information related to school safety.

Specifically, the bill provides the following exemptions:

- As part of the School Safety Awareness Program, the bill makes confidential and exempt from disclosure the identity of a party making a report of suspicious activity which is held by the Department of Law Enforcement, a law enforcement agency, or school officials;
- The bill makes exempt from disclosure a portion of a meeting of the Marjory Stoneman Douglas High School Public Safety Commission (Commission) at which exempt or confidential and exempt information is discussed; and
- The bill makes exempt from disclosure any information held by a law enforcement agency, school district, or charter school which would identify whether a particular individual has been appointed as a safe-school officer.

The bill provides the required statements of public necessity.

The Open Government Sunset Review in the bill provides that the exemption will stand repealed October 2, 2023, unless reviewed and saved from repeal before that date.

The bill requires a two-thirds vote for passage as it creates new public records exemptions.

The bill takes effect on the same date that SB 7026 or similar legislation takes effect, if the legislation is adopted in the same legislative session or during an extension of the session.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ s. 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹³

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law”¹⁷ or the “Sunshine Law,”¹⁸ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status, or which operates in a manner that unreasonably restricts the public’s access to the facility.²¹ Minutes of a public meeting must be promptly recorded and open to public inspection.²² Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).

¹⁴ FLA. CONST., art. I, s. 24(b).

¹⁵ *Id.*

¹⁶ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

²¹ Section 286.011(6), F.S.

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.²⁵ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.²⁶ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.²⁸ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.²⁹ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.³⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;³¹
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;³² or
- It protects trade or business secrets.³³

The OGSR also requires specified questions to be considered during the review process.³⁴ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ *Id.*

²⁷ *See supra* note 11.

²⁸ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1., F.S.

³² Section 119.15(6)(b)2., F.S.

³³ Section 119.15(6)(b)3., F.S.

³⁴ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
If so, how?
5. Is the record or meeting protected by another exemption?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.³⁵ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.³⁶

The Marjory Stoneman Douglas High School Public Safety Act

The Marjory Stoneman Douglas High School Public Safety Act (Act) contains a number of provisions designed to enhance public school safety and prevent further incidents of mass violence. The Act revises various provisions of the School Safety Awareness Program to facilitate reporting to the school and to law enforcement authorities of suspicious behavior pursuant to a newly-created mobile suspicious activity tool.

The Act also establishes the Marjory Stoneman Douglas High School Public Safety Commission. As part of its duties, the Commission will review information and evidence from the incident of mass violence that took place at the Marjory Stoneman Douglas High School, and make recommendations for system improvements.

The Act also expands the role of safe-school officers to enable a person to participate in the Florida Sheriff's Marshall Program and become certified as a law enforcement officer. Upon certification, a safe-school officer will be able to carry a concealed weapon onto school grounds.

III. Effect of Proposed Changes:

This bill creates public records and public meetings exemptions for certain information related to school safety.

Specifically, the bill provides the following exemptions:

- As part of the School Safety Awareness Program, the bill makes confidential and exempt from disclosure the identity of a party making a report of suspicious activity held by the Department of Law Enforcement, a law enforcement agency, or school officials;
- The bill makes exempt from disclosure a portion of a meeting of the Marjory Stoneman Douglas High School Public Safety Commission at which exempt or confidential and exempt information is discussed; and
- The bill makes exempt from disclosure any information held by a law enforcement agency, school district, or charter school which would identify whether a particular individual has been appointed as a safe-school officer.

The bill provides the required statements of public necessity. As justification for the exemptions:

- Regarding the identity of a person reporting suspicious activity, the exemption could encourage the person to make a report that could lead to intervention before an incident of mass violence occurs.

6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

³⁵ FLA. CONST., art. I, s. 24(c).

³⁶ Section 119.15(7), F.S.

- Regarding Marjory Stoneman Douglas High School Public Safety Commission meetings, to ensure the effective and efficient administration of the Commission and make meaningful recommendations for system improvements, the Commission must be able to receive information it receives as part of its investigation including exempt or confidential and exempt information and without the exemption, the exemptions that apply to those records received by the Commission would be negated.
- Regarding the identity of a person as a safe-school officer, the exemption is needed to maximize the effectiveness of safe-school officers who are authorized to carry a concealed weapon, disclosure of which could compromise the ability of the safe-school officer to adequately respond to an active assailant situation.

The Open Government Sunset Review in the bill provides that the exemption will stand repealed October 2, 2023, unless reviewed and saved from repeal before that date.

The bill requires a two-thirds vote for passage as it creates new public records exemptions.

The bill takes effect on the same date that SB 7026 or similar legislation takes effect, if the legislation is adopted in the same legislative session or during an extension of the session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for public records exemptions to pass.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. Regarding the identity of a person reporting suspicious activity, the exemption will encourage a person to report, which could lead to intervention before an incident of mass violence occurs. Regarding Marjory Stoneman Douglas High School Public Safety Commission meetings, to fulfill its mission, the Commission must be able to discuss information it receives as part of its investigation including exempt or confidential and exempt information, without which the exemptions that apply to those records received by the Commission would be negated. Finally, the exemption is necessary to protect the identity of a person as a safe-school officer, to maximize his or her effectiveness in adequately responding to an active assailant situation.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created or expanded public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts from disclosure the identity of reporting persons and safe-school officers, and information that already has exempt or confidential and exempt status which is received by the Commission. Therefore, this bill appears to be no broader than necessary to accomplish the public necessity for these public records exemptions.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The department, a law enforcement agency, or a school board may have a nominal but indeterminate fiscal impact implementing this act.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill substantially amends s. 943.082, 943.687, and 1006.12 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
