

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 Governmental Oversight and Accountability

BILL: SB 988

INTRODUCER: Senator Perry

SUBJECT: Public Records/ First Responder Network Authority/Nationwide Public Safety
Broadband Network

DATE: January 22, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|-----------------|-----------|--------------------|
| 1. | <u>Brown</u> | <u>Caldwell</u> | <u>GO</u> | <u>Pre-meeting</u> |
| 2. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 988 creates a public records exemption for specified information provided by the First Responder Network Authority (FirstNet) or the Nationwide Public Safety Broadband Network by a person or entity who is with FirstNet or who contracts with FirstNet.

Specifically, the bill makes confidential and exempt from public disclosure the following information:

- Information regarding the design, development, construction, deployment, and operation of network facilities;
- Network coverage, including geographical maps indicating actual or proposed locations of network infrastructure or facilities;
- Features, functions, and capabilities of network infrastructure and facilities;
- Features, functions, and capabilities of network services provided to first responders and other network users; and
- Security, including cybersecurity, of the design, construction, and operation of the network and associated services and products.

In the required public necessity statement, the bill provides as justification for the exemption that the information contains proprietary business information about communication service providers. Specifically, disclosure of this information would adversely affect the business interests and network security of these providers and their networks. Additionally, the public necessity statement provides that without the exemption, competitors could appropriate the information in such a way as to impede full and fair competition, therefore disadvantaging consumers of communications services who provide services pursuant to the authority.

The provisions of this bill are subject to the Open Government Sunset Review Act and are scheduled for repeal October 2, 2023, unless the Legislature saves the exemption from repeal and reenacts it before that date.

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

it 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 of Representatives 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 FLA. CONST., art. I, s. 24(a).

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 Section 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 FLA. CONST., art. I, s. 24(c).

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

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 Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵ 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.¹⁶ 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;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to 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 Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ 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 provided for by law.²²

First Responder Network Authority (FirstNet)

The federal Middle Class Tax Relief and Job Creation Act of 2012²³ created the First Responder Network Authority (FirstNet) as an independent authority within the Department of Commerce. FirstNet is designed to provide emergency responders with a nationwide, high-speed, broadband network dedicated to public safety.²⁴ FirstNet begins operation in 2018.

The First Responder Network Authority's public-private partnership with AT&T provides first responders with immediate access to mission-critical capabilities over the FirstNet network. This includes priority and preemption features that give first responders their own 'fast lane' on the public safety network to communicate and share information during emergencies, large events or other situations when commercial networks could become congested. FirstNet is the only broadband network to provide ruthless preemption for public safety.²⁵

FirstNet's enabling federal legislation²⁶ requires each Governor to determine whether to:

- Opt-in, meaning to participate in the deployment of the nationwide, interoperable network as proposed by the FirstNet State Plan, or
- Opt-out, meaning to conduct its own deployment of a radio access network, responsible for deploying, maintaining, operating, and improving a Radio Access Network that interoperates with the FirstNet network.²⁷

Public safety agencies who elect to opt-in are eligible to sign contracts with FirstNet, which provide first responders immediate access to AT&T's commercial network on a priority basis, with preemptive access provided within the year. Additionally, AT&T will install the FirstNet Radio Access Network at no cost to opt-in jurisdictions.²⁸

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

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Public Law 112-96--Feb. 22, 2012.

²⁴ FirstNet, available at: <https://www.firstnet.gov/> (last visited Jan. 12, 2018).

²⁵ *Id.*

²⁶ 47 U.S.C. s. 1442(e)(2).

²⁷ *Id.*

²⁸ FloridaNet, *FirstNet hits 50% 'opt-in' threshold as Indiana makes announcement*, available at: <http://www.floridanet.gov/news> (last visited Jan. 16, 2018).

FirstNet in Florida

The Florida Governor established the FloridaNet Executive Committee to oversee the decision-making process for the state regarding FirstNet. Since mid-year 2013, the executive committee has met periodically to discuss various aspects of FirstNet.²⁹ On September 28, 2017, FirstNet provided the State Plan to the State of Florida, which required a 90-day response by the Governor to elect to opt-in or opt-out.³⁰ On December 28, 2017, the 90th day, Florida elected to opt-in to the FirstNet deployment plan³¹, joining 49 other states, the District of Columbia and 4 U.S. territories.³² On January 19, 2018, the Northern Mariana Islands became the fifth and final territory to opt-in, bringing FirstNet participation to 100 percent.³³

III. Effect of Proposed Changes:

This bill creates a public records exemption for certain information provided by the First Responder Network Authority (FirstNet) or the Nationwide Public Safety Broadband Network by a person or entity who is with the authority or who contracts with the authority.

Specifically, the bill makes confidential and exempt from public disclosure the following information:

- Information regarding the design, development, construction, deployment, and operation of network facilities;
- Network coverage, including geographical maps indicating actual or proposed locations of network infrastructure or facilities;
- Features, functions, and capabilities of network infrastructure and facilities;
- Features, functions, and capabilities of network services provided to first responders and other network users; and
- Security, including cybersecurity, of the design, construction, and operation of the network and associated services and products.

In the required public necessity statement, the bill provides as justification for the exemption that the information contains proprietary business information about communication service providers who provide services pursuant to the authority. Specifically, disclosure of this information would adversely affect the business interests and network security of these providers and their networks. Additionally, the public necessity statement provides that without the exemption, competitors could appropriate the information in such a way as to impede full and fair competition, therefore disadvantaging consumers of communications services as they relate to FirstNet.

²⁹ FirstNet, *Archived Discussions*, available at: <http://www.floridanet.gov/archived-discussions> (last visited Jan. 17, 2018).

³⁰ FloridaNet, *Florida's Public Safety Broadband Network*, available at: <http://www.floridanet.gov/events> (last visited Jan. 17, 2018).

³¹ Governor Rick Scott's letter to FirstNet provides, in part: "This letter serves as notice...that Florida has decided to participate in the deployment of the nationwide, interoperable broadband network as proposed in the FirstNet State Plan... I believe this is in the best interest for Florida taxpayers." Letter from Governor Rick Scott to Mike Poth, Chief Executive Officer with First Responder Network Authority (Dec. 28, 2017).

³² FirstNet, *State Plans Dashboard*, available at: <https://firstnet.gov/news> (last visited Jan. 17, 2018).

³³ FirstNet, *State Plans Dashboard*, available at: <https://firstnet.gov/news/northern-mariana-islands-transform-communications-public-safety> (last visited Jan. 22, 2018).

The provisions of this bill are subject to the Open Government Sunset Review Act and are scheduled for repeal October 2, 2023, unless the Legislature saves the exemption from repeal and reenacts it before that date.

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 a public records exemption to pass.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill makes confidential and exempt certain information obtained by persons from, or who enter into contract with FirstNet. Information protected by the exemption includes information on design, development, construction, deployment, and operation of network facilities; network coverage, including geographical maps; and security, including cybersecurity on the network and associated services and products. The public necessity statement for the exemption provides that the exemption is needed to protect proprietary business information and preserve full and fair competition in the communication services industry. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates an undesignated section of law.

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.