

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 7008

INTRODUCER: Judiciary Committee

SUBJECT: OGSR/Security Breach Information/Department of Legal Affairs

DATE: February 18, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Stallard</u>	<u>Cibula</u>		JU Submitted as Committee Bill
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7008 amends s. 501.171, F.S. to save from repeal to continue the public records exemption for information received by the Department of Legal Affairs following and during the investigation of a security breach. The bill is based on an Open Government Sunset Review of the public records exemption. The exemption is scheduled for repeal on October 2, 2019.

The exemption was enacted initially as a companion bill to the Florida Information Protection Act of 2014, which requires covered entities to take reasonable steps to protect and secure personal information held in electronic form, such as social security numbers, driver license numbers, and medical information. However, if unauthorized access to the information of at least 500 people nonetheless occurs, the Act requires the covered entity involved to notify the Department.

The exemption serves to protect sensitive personal, corporate, and governmental information, as well as to ensure the integrity of an investigation of a security breach. Accordingly, allowing the exemption to be repealed could cause the:

- Premature release of confidential information that would jeopardize a related investigation;
- Publication of sensitive personal information, in turn causing identity theft or financial harm;
- or
- Disclosure of a computer forensic report that reveals vulnerabilities in a covered entity's data security, thus making the entity vulnerable to future data breaches.

The bill removes the scheduled repeal date to continue the public records exemption for information received by the Department of Legal Affairs.

The bill takes effect October 1, 2019.

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

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ 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.⁴

The Public Records Act contains general exemptions that apply across agencies. Agency- or program-specific exemptions are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

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

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); *see also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

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).

under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹² and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹³

When creating or expanding a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁴ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁵

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁸ The Act 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 to meet such public purpose.¹⁹

The Florida Information Protection Act of 2014 and the Related Exemption

In 2014, the Legislature enacted the Florida Information Protection Act, which expressly requires private and governmental “covered entities”²⁰ to take reasonable steps to secure electronically

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Id.*

¹² The bill may, however, contain multiple exemptions that relate to one subject.

¹³ FLA. CONST., art. I, s. 24(c)

¹⁴ 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁷ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ “Covered entity” means “a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information.” For purposes of the notice requirements set forth in the Act, the term includes governmental entities.

held personal information and to report larger security breaches that compromise this information. One aspect of the reporting requirement involves notifying the Department of Legal Affairs. A related bill made the information contained in the notification or obtained through a related investigation confidential and exempt from this state's public records laws.²¹

Florida Information Protection Act of 2014

The Florida Information Protection Act requires covered entities to notify the Department of Legal Affairs and affected individuals in the event of a breach of data security involving access to the personal information of at least 500 individuals.

A breach of security is defined as an unauthorized access of data in electronic form containing personal information. Personal information includes a person's name in combination with:

- A social security number;
- A driver license or identification card number, passport number, military identification number or other similar number issued on a government document used to verify identity;
- A financial account number or credit or debit card number in combination with a required security or access code or password necessary to gain access to a person's financial account;
- Certain medical information; or
- A person's health insurance policy number or subscriber identification number or similar identifier identification.

Personal information also includes a username or e-mail address in combination with a password or security question and answer that permits access to an online account.

Confidential and Exempt Information

Under the public records exemption related to the Act, certain information received by the Department of Legal Affairs related to a security breach is confidential and exempt from this state's public records requirements. The exempt information includes that received by the department in a notification required by the Act or through an investigation by the department or a law enforcement agency. As explained below, some information is exempt only until an investigation is completed or ceases to be active.

While an investigation is active, the department may disclose confidential and exempt information for any of the following reasons:

- In furtherance of its official duties and responsibilities.
- For print, publication, or broadcast if the department determines that the release would assist in notifying the public or in locating or identifying a person that the department believes to have been a victim of the breach or improper disposal of customer records. However, this does not justify disclosing confidential and exempt information if that information is covered by another public records exemption, is personal information or a computer forensic report, would reveal weaknesses in a covered entity's data security, or would disclose a covered entity's proprietary information.
- To another governmental agency in the furtherance of the department's official duties and responsibilities.

²¹ See SB 1526 (2014 Reg. Session).

After the completion of an investigation or once the investigation is no longer active, the following information must remain confidential and exempt from public records requirements:

- All information to which another public records exemption applies;
- Personal information;
- A computer forensic report;
- Information that would reveal weaknesses in a covered entity's data security; and
- Information that would disclose a covered entity's proprietary information.

Proprietary information means information that:

- Is owned or controlled by the covered entity.
- Is intended to be private and is treated by the covered entity as private because disclosure would harm the entity or its business operations.
- Has not been disclosed except as required by law or a private agreement that the information will not be released to the public.
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department.

Proprietary information also includes trade secrets or competitive interests, which, if disclosed, would impair the competitive business of the covered entity that is the subject of the information.

Open Government Sunset Review

Because the exemption relates to security-breach information received by the Department of Legal Affairs, staff sent a survey to the department to learn of its experience in interpreting and applying the exemption. From the completed survey and follow-up conversations, staff learned the following.

The department has received an estimated 685 security-breach notifications since the law took effect on July 1, 2014. Of the notifications, nearly 90 percent came from private organizations.

The department has investigated each notification that it received. By way of the notifications and ensuing investigations, the department has received various types of information, including:

- A description of the type of attack or compromise that caused a breach;
- A description of the location of an attack within an IT enterprise;
- An explanation of the means of stopping an attack;
- The number of Florida residents affected by a breach;
- Services being offered to affected consumers;
- Customer lists;
- Patient data;
- Forensic reports relating to a covered entity's data security and IT vulnerabilities;
- Trade secrets; and
- Internal policies and procedures.

Most of this information obtained by the department is not generally available to the public—it would be available only if the department releases it on one of the bases enumerated in the

exemption statute. However, some general information is available publicly through technology blogs, news articles, and consumer advocacy websites.

Since July 1, 2014, the department has received more than 30 requests for records relating to security breaches. The department has never released these records during an active investigation and has not needed to. However, on three or four occasions, the department has released information after an investigation when the information requested was no longer confidential and exempt.

Under the statute, some types of information remain confidential and exempt even after an investigation is completed or ceases to be active. This information includes all information to which another public records exemption applies, personal information, and information that would reveal weaknesses in a covered entity's data security. The department has not released any information of these types even after an investigation was complete or ceased to be active.

III. Effect of Proposed Changes:

The bill continues the current public records exemption relating to information received by the Department of Legal Affairs following a data-security breach of a covered entity by deleting its scheduled repeal date. The exemption is scheduled for repeal on October 2, 2019.

The exemption protects from public disclosure information received by the Department of Legal Affairs through a notification of a data security breach from a covered entity or through an investigation of a breach by the department or a law enforcement agency.

Chapter 2014-190, Laws of Fla., included a public necessity statement that provided rationale for the exemption. This rationale recognized that the premature release of information being used in an active investigation of a data breach could frustrate the investigation and impair the ability of the Department of Legal Affairs as well as allow for sensitive information such as social security numbers to be gathered. It also noted that release of computer forensics could reveal weaknesses in security that could compromise future security.

The bill removes the scheduled repeal of the public records exemption. By removing the scheduled repeal of the exemption, the exemption is no longer subject to a review under the Open Government Sunset Review Act.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue. Likewise, it does not reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:***Vote Requirement***

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect information received by the Department of Legal Affairs following and during the investigation of a security breach. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

The bill, by preserving the public records exemption, will continue to protect sensitive personal and data-security information from public disclosure or from premature public disclosure. Allowing the exemption to sunset would appear to increase the risk of identity theft or the divulgence of a covered entity's data-security vulnerabilities.

The private sector will continue to be subject to the cost, to the extent imposed, associated with an agency making redactions in response to the public records request.

C. Government Sector Impact:

By preserving the public records exemption, which protects governmental entities' data-security weaknesses from public disclosure, it appears likely that the government will continue to experience a decreased risk of potentially costly data breaches.

Governmental entities will continue to incur costs related to the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 501.171, 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.