

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 Infrastructure and Security

BILL: SPB 7032

INTRODUCER: The Infrastructure and Security Committee

SUBJECT: OGSR/Emergency Planning Assistance/Division of Emergency Management

DATE: February 13, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Miller	Miller		IS Submitted as Comm. Bill/Fav

I. Summary:

SPB 7032 removes the scheduled repeal of the public records exemption for any information provided by individuals and businesses to the Division of Emergency Management for the purposes of being provided assistance with emergency planning, thus continuing the exemption from disclosure requirements under the public records laws.

The proposed bill takes effect on 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

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:

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.

[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

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

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

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.

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

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 section 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:

- 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 the information contained in the records or discussed in the meeting be readily obtained by alternative means?
If so, how?
- Is the record or meeting protected by another exemption?
- 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.

Emergency Preparedness Plans for Individuals and Businesses

The Florida Division of Emergency Management (FDEM), established in the Executive Office of the Governor,²³ is the state's emergency management agency. The State Emergency Management Act directs the FDEM to oversee and manage emergency preparedness, response, recovery and mitigation programs in Florida.²⁴ Among the FDEM's statutorily required duties is the requirement to institute a multifaceted public educational campaign on emergency preparedness.²⁵ The campaign must promote the personal responsibility of individual citizens to be self-sufficient for up to 72 hours following a natural or manmade disaster.²⁶ In 2006, the FDEM launched its "Get a Plan" campaign to encourage individuals, families, and businesses to develop disaster plans in preparation for and in response to natural or manmade disasters.

The "Get a Plan" campaign includes an online preparedness tool to allow individuals, families, and businesses to create an emergency plan tailored to the specific needs of the user.²⁷ The tool allows users to establish a profile with a user name and password to access the online tool at their convenience to adjust or update any aspect of their emergency response plan. Users may also create an emergency plan without saving a profile.

Emergency plans may include sensitive information such as alternative locations for families to meet or business relocation in the event of building damage; business contacts, including suppliers and employees; backup suppliers for key materials and services depended upon by businesses; and important software, records, and documents a business needs to operate.

Since July 2014, 2,774 users have created a profile on the "Get a Plan" website and 55,186 emergency plans have been created. Of the total plans created, 51,612 plans were created by users who chose not to save a profile and 3,574 plans were created by users who created a profile. One profile can contain both a family plan as well as a business plan.²⁸

Open Government Sunset Review of the Public Record Exemption for Emergency Planning Information

In 2014, the Legislature created s. 252.905, F.S., to exempt from the public record requirements information furnished by a person or business to the FDEM for the purpose of being provided assistance with emergency planning.²⁹ Under this exemption, information input by individuals and businesses in an emergency plan on FDEM's "Get a Plan" website is exempt from disclosure requirements under public records law. This public record exemption would also apply to any future FDEM programs or applications created to assist individuals and businesses with emergency planning.

²³ Section 14.2016, F.S.

²⁴ Section 252.31, F.S.

²⁵ Section 252.35(2)(i), F.S.

²⁶ Id.

²⁷ FDEM's "Get a Plan" online emergency preparedness tool available at: <https://apps.floridadisaster.org/getaplan/> (last visited January 8, 2019).

²⁸ E-mail correspondence with FDEM staff. August 29, 2018, on file with the Committee on Infrastructure and Security.

²⁹ Ch. 2014-188, L.O.F.

In creating the exemption, the Legislature found that exempting information furnished by a person or business to the FDEM for the purpose of being provided assistance with emergency planning is a public necessity. The Legislature recognized emergency plans may contain sensitive information for individuals, families and businesses, and without the exemption, the effective and efficient administration of the FDEM's public awareness program would be significantly impaired. The Legislature further found that the potential disclosure of sensitive information has served as a disincentive for creating a disaster plan, and the harm that may result from the release of personal or business information obtained by the FDEM outweighs any public benefit that may be derived from disclosure of the information.³⁰

Section 252.905, F.S., is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

Based upon a review of this public records exemption under the Open Government Sunset Review Act and discussions with the FDEM, the professional staff of the Senate Infrastructure and Security Committee recommends that the Legislature retain the public records exemption established in s. 252.905, F.S.

III. Effect of Proposed Changes:

The proposed bill is based on an Open Government Sunset Review of a public records exemption for information furnished by a person or business to the Florida Division of Emergency Management for the purpose of being provided assistance with emergency planning. The justification upon which the public records exemption is based remains valid. The proposed bill reenacts the exemption.

The proposed bill amends s. 252.905, F.S., to delete the scheduled repeal of the current public records exemption for individual and business emergency planning information held by the FDEM. If the proposed bill passes, these records will continue to be exempt from public disclosure.

The proposed bill requires a majority vote for passage.

The proposed bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

³⁰ s. 2, ch. 2014-188, L.O.F.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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 proposed bill substantially amends section 252.905 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.