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| **Tab 2** | **SB 1900** by **Boyd**; (Similar to CS/H 01297) Cybersecurity |

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| 257954 | D | S | RCS | GO, Boyd | Delete everything after | 03/31 11:33 AM |

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| **Tab 3** | **CS/SB 1382** by **CA, Perry**; (Similar to CS/H 00667) Building Inspections |

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| 741580 | A | S | RCS | GO, Perry | Delete L.214: | 03/31 11:33 AM |

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| **Tab 4** | **SB 1624** by **Albritton**; (Similar to CS/H 01103) Special District Accountability |

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| **Tab 5** | **CS/SB 1788** by **CA, Boyd**; (Similar to CS/CS/H 01059) Construction Permits |

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| 914314 | A | S | RCS | GO, Boyd | Delete L.188 - 191: | 03/31 11:33 AM |

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| **Tab 6** | **SB 7002** by **HP**; OGSR/Trade Secrets/Department of Health |

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| **Tab 7** | **SB 7004** by **TR**; (Similar to H 07037) OGSR/Financial Information/Guarantor of a Private Entity Applicant |

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| 151034 | D | S | RCS | GO, Harrell | Delete everything after | 03/31 11:33 AM |

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| **Tab 8** | **SB 7006** by **EN**; OGSR/Trade Secrets/Department of Environmental Protection |

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| **Tab 9** | **SB 7008** by **EN**; OGSR/Trade Secrets/Department of Environmental Protection |

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| 359162 | A | S | RCS | GO, Brodeur | Delete L.19 - 23: | 03/31 11:33 AM |

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| **Tab 10** | **SB 7010** by **MS**; OGSR/Space Florida |

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| **Tab 11** | **SB 7014** by **BI**; (Similar to H 07049) OGSR/Office of Insurance Regulation |

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| **Tab 12** | **SB 7020** by **CM**; OGSR/County Tourism Promotion Agencies/Florida Tourism Industry Marketing Corporation |

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| **Tab 13** | **SB 7022** by **RI**; OGSR/Proprietary Confidential Business Information |

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| **Tab 14** | **SB 7024** by **RI**; OGSR/Agency Trade Secrets |

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| **Tab 15** | **SB 7026** by **RI**; (Identical to H 07003) OGSR/Florida State Boxing Commission |

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| **Tab 16** | **SB 7028** by **RI**; OGSR/Data Processing Software |

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| **Tab 17** | **SB 7030** by **RI**; OGSR/Trade Secrets/Department of Business and Professional Regulation |

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| **Tab 18** | **SB 7032** by **RI**; OGSR/Prescription Drug Purchase Lists |

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| **Tab 19** | **SB 7034** by **RI**; OGSR/Trade Secrets/Department of Business and Professional Regulation |

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| **Tab 20** | **SB 7036** by **AG**; (Identical to H 07007) OGSR/Department of Agriculture and Consumer Services |

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| **Tab 21** | **SB 7038** by **AG**; OGSR/Division of Fruit and Vegetables/Trade Secrets |

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| **Tab 22** | **SB 7040** by **AG**; OGSR/Department of Agriculture and Consumer Services |

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| **Tab 23** | **SB 7042** by **AG**; OGSR/Trade Secret/Department of Citrus |

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| **Tab 24** | **SB 7044** by **AG**; OGSR/Noncommodity Advertising and Promotional Program Participants/Department of Citrus |

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| **Tab 25** | **SB 7046** by **AG**; OGSR/Trade Secret/Marketing Order/Department of Citrus |

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| **Tab 26** | **SB 7048** by **AG**; OGSR/Manufacturer's Formula/Department of Agriculture and Consumer Services |

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| **Tab 27** | **SB 7050** by **CA**; OGSR/Unsolicited Proposals |

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| **Tab 28** | **SB 7058** by **AG**; OGSR/Dairy Industry Business' Trade Secrets |

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| **Tab 29** | **SB 968** by **Gainer**; (Similar to CS/H 00379) Public Records/Economic Development Agency |

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| 254654 | A | S | RCS | GO, Rodrigues | Delete L.23 - 58: | 03/31 11:33 AM |

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| **Tab 30** | **SB 1314** by **Gruters (CO-INTRODUCERS) Harrell**; (Identical to H 00949) Communicable and Infectious Diseases |

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| **Tab 31** | **SB 1704** by **Broxson**; (Similar to CS/H 01639) Public Records/County Supervisor of Elections |

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| 677486 | D | S | RCS | GO, Broxson | Delete everything after | 03/31 11:33 AM |

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| **Tab 32** | **SB 1760** by **Albritton**; (Similar to H 01353) Personal Protective Equipment |

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| **Tab 33** | **SB 1634** by **Brodeur (CO-INTRODUCERS) Ausley**; (Similar to CS/H 01399) Public Records/Aquaculture/Department of Agriculture and Consumer Services |

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| **Tab 34** | **CS/SB 762** by **CJ, Baxley**; (Similar to H 00683) Public Records/Criminal Conflict and Civil Regional Counsel Offices |

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| **Tab 35** | **SB 1488** by **Stargel**; (Compare to CS/H 01207) Public Records/Members of the Legislature and the Cabinet |

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| 588452 | D | S | RCS | GO, Stargel | Delete everything after | 03/31 11:33 AM |

**The Florida Senate**

# COMMITTEE MEETING EXPANDED AGENDA

**GOVERNMENTAL OVERSIGHT AND ACCOUNTABILITY**
**Senator Rodrigues, Chair**
**Senator Gruters, Vice Chair**

**MEETING DATE:** Wednesday, March 31, 2021
**TIME:** 8:00—10:30 a.m.
**PLACE:** *Mallory Horne Committee Room,* 37 Senate Building

**MEMBERS:** Senator Rodrigues, Chair; Senator Gruters, Vice Chair; Senators Mayfield, Stargel, Stewart, and Torres

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|

PUBLIC TESTIMONY WILL BE RECEIVED FROM ROOM A2 AT THE DONALD L. TUCKER CIVIC CENTER, 505 W PENSACOLA STREET, TALLAHASSEE, FL 32301

| TAB | OFFICE and APPOINTMENT (HOME CITY) | FOR TERM ENDING | COMMITTEE ACTION |
|---|---|---|---|

**Senate Confirmation Hearing:** A public hearing will be held for consideration of the below-named executive appointments to the offices indicated.

**Investment Advisory Council**

| | | | |
|---|---|---|---|
| 1 | Jones, Peter D. (Clearwater) | 12/12/2024 | Recommend Confirm<br>Yeas 5 Nays 0 |
| | Turner, Robb (Palm Beach) | 12/12/2023 | Recommend Confirm<br>Yeas 5 Nays 0 |
| | Neal, Patrick (Bradenton) | 02/01/2024 | Recommend Confirm<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 2 | **SB 1900**<br>Boyd<br>(Similar CS/H 1297) | Cybersecurity; Requiring certain audit plans of an inspector general to include certain information; revising provisions to replace references to information technology security and computer security with references to cybersecurity; providing that certain employees shall be assigned to selected exempt service; creating the Florida Cybersecurity Advisory Council within the Department of Management Services, etc.<br><br>GO 03/31/2021 Fav/CS<br>AEG<br>AP | Fav/CS<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 3 | **CS/SB 1382**<br>Community Affairs / Perry<br>(Similar CS/H 667) | Building Inspections; Requiring that certain counties allow requests for inspections to be submitted electronically; requiring that local enforcement agencies allow requests for inspections to be submitted electronically; authorizing enforcement agencies to perform virtual inspections, etc.<br><br>CA 03/10/2021 Fav/CS<br>GO 03/31/2021 Fav/CS<br>AP | Fav/CS<br>Yeas 5 Nays 0 |
| 4 | **SB 1624**<br>Albritton<br>(Similar CS/H 1103) | Special District Accountability; Requiring certain independent special districts to contract with an independent entity to conduct performance audits; requiring the Office of Program Policy Analysis and Government Accountability to conduct performance audits of certain classifications of independent special districts; requiring the performance audits to be reported by a time certain; requiring that certain data be included in financial audits of special districts, etc.<br><br>CA 03/16/2021 Favorable<br>GO 03/31/2021 Favorable<br>AP | Favorable<br>Yeas 6 Nays 0 |
| 5 | **CS/SB 1788**<br>Community Affairs / Boyd<br>(Similar CS/CS/H 1059) | Construction Permits; Revising the requirements for when a county may request certain information; authorizing all components of a completed application to be submitted electronically or in person; requiring a local enforcement agency to reduce a building permit fee by a specified percentage for failing to meet certain deadlines; requiring a local government or a local building department, respectively, to reduce a building permit fee or master building permit fee, as applicable, by a specified percentage for failing to meet certain deadlines, etc.<br><br>CA 03/10/2021 Fav/CS<br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 5 Nays 0 |
| 6 | **SB 7002**<br>Health Policy | OGSR/Trade Secrets/Department of Health; Amending a provision which provides an exemption from public records requirements for certain trade secrets contained in records, reports, or information submitted to the Department of Health; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 7 | **SB 7004**<br>Transportation<br>(Similar H 7037, Compare H 6099, S 1004) | OGSR/Financial Information/Guarantor of a Private Entity Applicant; Expanding an existing exemption from public records requirements for financial information of a private entity applicant which the Department of Transportation requires as part of a certain application process to include the financial information of the private entity applicant's guarantor; including a private entity applicant's guarantor in an exception to the exemption; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.<br><br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 5 Nays 0 |
| 8 | **SB 7006**<br>Environment and Natural Resources | OGSR/Trade Secrets/Department of Environmental Protection; Amending a provision relating to an exemption from public records requirements for trade secrets contained in information obtained by the Department of Environmental Protection; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 9 | **SB 7008**<br>Environment and Natural Resources | OGSR/Trade Secrets/Department of Environmental Protection; Amending a provision which provides exemptions from public records requirements for trade secrets contained in information obtained by the Department of Environmental Protection; narrowing the exemption to the types or amounts of recovered materials or post-use polymers reported by a recovered materials dealer or pyrolysis facility; removing the scheduled repeals of the exemptions, etc.<br><br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 5 Nays 0 |
| 10 | **SB 7010**<br>Military and Veterans Affairs, Space, and Domestic Security | OGSR/Space Florida; Amending a provision which provides an exemption from public records requirements for records of Space Florida regarding information relating to trade secrets; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 11 | **SB 7014**<br>Banking and Insurance<br>(Similar H 7049) | OGSR/Office of Insurance Regulation; Adding the Office of Insurance Consumer Advocate to the list of entities to which the Office of Insurance Regulation may disclose confidential and exempt information; removing the scheduled repeal of an exemption from public records requirements for certain proprietary business information and information that is confidential and held by the Office of Insurance Regulation, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 12 | **SB 7020**<br>Commerce and Tourism | OGSR/County Tourism Promotion Agencies/Florida Tourism Industry Marketing Corporation; Amending a provision which provides an exemption from public records requirements for trade secrets held by county tourism promotion agencies; amending a provision which provides an exemption from public records requirements for the identity of a person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation and for certain trade secrets; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 6 Nays 0 |
| 13 | **SB 7022**<br>Regulated Industries | OGSR/Proprietary Confidential Business Information; Amending a provision which provides an exemption from public records requirements for proprietary confidential business information submitted by a voice communications services provider to the E911 Board, the Division of Telecommunications within the Department of Management Services, or the Department of Revenue; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 14 | **SB 7024**<br>Regulated Industries | OGSR/Agency Trade Secrets; Amending a provision abrogating the scheduled repeal of a public records exemption for data, programs, or supporting documentation that is a trade secret held by an agency and which resides or exists internal or external to a computer, a computer system, a computer network, or an electronic device, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 15 | **SB 7026**<br>Regulated Industries<br>(Identical H 7003) | OGSR/Florida State Boxing Commission; Amending a provision relating to an exemption from public records requirements for proprietary confidential business information obtained through an audit of a promoter's books and records or provided by a promoter to the Florida State Boxing Commission; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 16 | **SB 7028**<br>Regulated Industries | OGSR/Data Processing Software; Amending a provision relating to an exemption from public records requirements for certain data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret and agency-produced data processing software that is sensitive; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 17 | **SB 7030**<br>Regulated Industries | OGSR/Trade Secrets/Department of Business and Professional Regulation; Amending a provision which relates to an exemption from public records requirements for trade secrets contained in certain information submitted to the Department of Business and Professional Regulation as required by specified provisions relating to medical gas; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 18 | **SB 7032**<br>Regulated Industries | OGSR/Prescription Drug Purchase Lists; Amending a provision which provides an exemption from public records requirements for trade secrets contained in certain prescription drug purchase lists submitted to the Department of Business and Professional Regulation; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 19 | **SB 7034**<br>Regulated Industries | OGSR/Trade Secrets/Department of Business and Professional Regulation; Amending a provision which relates to an exemption from public records requirements for trade secrets contained within complaints or pursuant to an investigation of such complaints obtained by the Department of Business and Professional Regulation, which are submitted by permittees relating to the manufacture, repackaging, or distribution of a drug or for a permit or product registration or for the renewal of such permit or product registration; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 20 | **SB 7036**<br>Agriculture<br>(Identical H 7007) | OGSR/Department of Agriculture and Consumer Services; Amending a provision which provides an exemption from public records requirements for criminal or civil intelligence or investigative information or any other information held by the Department of Agriculture and Consumer Services as part of an examination or investigation with another state or federal regulatory, administrative, or criminal justice agency; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 21 | **SB 7038**<br>Agriculture | OGSR/Division of Fruit and Vegetables/Trade Secrets; Amending a provision which provides an exemption from public records requirements for information related to trade secrets held by the Division of Fruit and Vegetables of the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 22 | **SB 7040**<br>Agriculture | OGSR/Department of Agriculture and Consumer Services; Amending a provision which provides an exemption from public records requirements for trade secret information of a person subject to a marketing order held by the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 23 | **SB 7042**<br>Agriculture | OGSR/Trade Secret/Department of Citrus; Amending a provision which provides a public records exemption for trade secret information provided to the Department of Citrus; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 24 | **SB 7044**<br>Agriculture | OGSR/Noncommodity Advertising and Promotional Program Participants/Department of Citrus; Amending a provision which provides an exemption from public records requirements for the trade secret information of noncommodity advertising and promotional program participants held by the Department of Citrus; deleting the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 25 | **SB 7046**<br>Agriculture | OGSR/Trade Secret/Marketing Order/Department of Citrus; Amending a provision which provides an exemption from public records requirements for the trade secret information of a person subject to a marketing order held by the Department of Citrus; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 26 | **SB 7048**<br>Agriculture | OGSR/Manufacturer's Formula/Department of Agriculture and Consumer Services; Amending a provision which provides an exemption from public records requirements for a manufacturer's formula filed with the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 27 | **SB 7050**<br>Community Affairs | OGSR/Unsolicited Proposals; Amending a provision which provides exemptions from public records and public meetings requirements for unsolicited proposals received by a responsible public entity and portions of meetings at which such proposals are discussed; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 28 | **SB 7058**<br>Agriculture | OGSR/Dairy Industry Business' Trade Secrets; Amending a provision which provides an exemption from public records requirements for a dairy industry business' trade secrets held by the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption, etc.<br><br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 29 | **SB 968**<br>Gainer<br>(Similar CS/H 379) | Public Records/Economic Development Agency; Providing an exemption from public records requirements for certain information held by an economic development agency; providing that such information may be released in an aggregated and anonymized format; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.<br><br>CM 03/09/2021 Favorable<br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 6 Nays 0 |
| 30 | **SB 1314**<br>Gruters<br>(Similar H 963, S 1422, Identical H 949) | Communicable and Infectious Diseases; Providing a presumption to specified workers that an impairment of health caused by an infectious disease happened in the line of duty; requiring certain vaccines or immunizations to be approved by the United States Food and Drug Administration, etc.<br><br>GO 03/31/2021 Favorable<br>CA<br>AP | Favorable<br>Yeas 5 Nays 0 |
| 31 | **SB 1704**<br>Broxson<br>(Similar CS/H 1639) | Public Records/County Supervisor of Elections; Expanding a public records exemption for portions of records containing network schematics, hardware and software configurations, or encryption to include those records held by a county supervisor of elections; providing for retroactive application; providing a statement of public necessity, etc.<br><br>EE 03/16/2021 Favorable<br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 6 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 32 | **SB 1760**<br>Albritton<br>(Similar H 1353, Compare H 7047, S 2006) | Personal Protective Equipment; Requiring the Division of Emergency Management to complete an inventory of personal protective equipment; requiring the division to take certain action to ensure the availability of personal protective equipment during a declared emergency caused by an infectious or communicable disease; requiring that such equipment be available for purchase at a certain cost by specified persons and entities; prohibiting such equipment from being resold at certain prices, etc.<br><br>MS 03/16/2021 Favorable<br>GO 03/31/2021 Favorable<br>AP | Favorable<br>Yeas 6 Nays 0 |
| 33 | **SB 1634**<br>Brodeur<br>(Similar CS/H 1399) | Public Records/Aquaculture/Department of Agriculture and Consumer Services; Providing a public records exemption for certain aquaculture records held by the Department of Agriculture and Consumer Services; providing that the records may be disclosed to other governmental entities under certain circumstances; providing for retroactive application of the exemption; providing for future legislative review and repeal under the Open Government Sunset Review Act; providing a statement of public necessity, etc.<br><br>AG 03/10/2021 Favorable<br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |
| 34 | **CS/SB 762**<br>Criminal Justice / Baxley<br>(Similar H 683) | Public Records/Criminal Conflict and Civil Regional Counsel Offices; Authorizing the issuance of confidential registration certificates and license plates or decals under a fictitious name to criminal conflict and civil regional counsel offices to conduct specified activities; expanding a public records exemption to include all records pertaining to a registration application submitted by any office of criminal conflict and civil regional counsel; providing for future legislative review and repeal; providing a statement of public necessity, etc.<br><br>CJ 03/23/2021 Fav/CS<br>GO 03/31/2021 Favorable<br>RC | Favorable<br>Yeas 5 Nays 0 |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 35 | **SB 1488**<br>Stargel<br>(Compare CS/H 1207) | Public Records/Members of the Legislature and the Cabinet; Providing an exemption from public records requirements for certain identifying and location information of current members of the Legislature and the Cabinet, and the children and spouses of such legislators and officers; creating a criminal penalty for any person who knowingly and maliciously publishes or disseminates protected identifying information with the intent to intimidate, hinder, or interrupt current legislators and officers; providing a statement of public necessity, etc.<br><br>EE 03/16/2021 Favorable<br>GO 03/31/2021 Fav/CS<br>RC | Fav/CS<br>Yeas 5 Nays 1 |

Other Related Meeting Documents

STATE BOARD OF ADMINISTRATION
OF FLORIDA

1801 HERMITAGE BOULEVARD, SUITE 100
TALLAHASSEE, FLORIDA 32308
(850) 488-4406

POST OFFICE BOX 13300
32317-3300

RON DESANTIS
GOVERNOR
CHAIR

JIMMY PATRONIS
CHIEF FINANCIAL OFFICER

ASHLEY MOODY
ATTORNEY GENERAL

ASHBEL C. WILLIAMS
EXECUTIVE DIRECTOR &
CHIEF INVESTMENT OFFICER

EXECUTIVE OFFICE
2021 FEB 22 PM 1:57
TALLAHASSEE, FLORIDA

February 17, 2021

Division of Elections
Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399

RE: Investment Advisory Council Appointment – Peter Jones

To Whom It May Concern:

Mr. Peter Jones has been reappointed by the Trustees of the State Board of Administration to serve on the Investment Advisory Council. Attached please find the December 15, 2020 Cabinet transcript reflecting approval of his appointment. Mr. Jones's term will be December 15, 2020 through December 12, 2024.

Please let me know if any additional information is required. I can be reached at (850) 413-1254.

Sincerely,

John Kutz Wanski
Manager of External Affairs

Attachment

A black and white copy of this document is not official.

1280

# STATE OF FLORIDA
# DEPARTMENT OF STATE

## Division of Elections

I, Laurel M. Lee, Secretary of State,
do hereby certify that

***Peter D. Jones***

is duly appointed a member of the

**Investment Advisory Council**

for a term beginning on the Fifteenth day of December, A.D., 2020, until the Twelfth day of December, A.D., 2024 and is subject to be confirmed by the Senate during the next regular session of the Legislature.

*Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the Ninth day of March, A.D. 2021.*

Laurel M. Lee

Secretary of State

DSDE 99 (3/03)

If photocopied or chemically altered, the word "VOID" will appear.
"State of Florida" appears in small letters across the face of this 8½ x 11" document.
The original document has a reflective line mark in paper. Hold at an angle to view when checking.

# CERTIFICATION

RECEIVED
DEPARTMENT OF STATE
2021 FEB 17 AM 11:38
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

**STATE OF FLORIDA**
**COUNTY OF** PINELLAS

Before me, the undersigned Notary Public of Florida, personally appeared _____,
who, after being duty sworn, say: (1) that he/she has carefully and personally prepared or read the answers to the foregoing questions; (2) that the information contained in said answers is complete and true; and (3) that he/she will, as an appointee, fully support the Constitutions of the United States and of the State of Florida.

Peter O. Jones
Signature of Applicant-Affiant

Sworn to and subscribed before me this 16 day of February, 2021.

Courtney L Cochran
Signature of Notary Public-State of Florida

COURTNEY LEE COCHRAN
Notary Public - State of Florida
Commission # HH 076484
My Comm. Expires Jan 3, 2025
Bonded through National Notary Assn.

Courtney L Cochran
(Print, Type, or Stamp Commissioned Name of Notary Public)

My commission expires: 3 January, 2025

Personally Known ☐ **OR** Produced Identification ☒

Type of Identification Produced Fl Driver's License

(seal)

# OATH OF OFFICE

(Art. II. § 5(b), Fla. Const.)

RECEIVED
DEPARTMENT OF STATE
2021 MAR -8 AM 9:53
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

**STATE OF FLORIDA**

**County of** PINELLAS

I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the State, and that I will well and faithfully perform the duties of

INVESTMENT ADVISORY COUNCIL OF THE STATE BOARD OF ADMINISTRATION
(Title of Office)

on which I am now about to enter, so help me God.

**[NOTE: If you affirm, you may omit the words "so help me God." *See* § 92.52, Fla. Stat.]**

Peter D. Jones
*Signature*

*Sworn to and subscribed before me by means of* ✓ *physical presence or* ___ *online notarization, this* 2 *day of* March, 2021.

NOTARY PUBLIC

Miguel Gonzalez
State of Florida
My Commission Expires 12/17/2024
Commission No. HH 73612

*Signature of Officer Administering Oath or of Notary Public*

Miguel Gonzalez
*Print, Type, or Stamp Commissioned Name of Notary Public*

*Personally Known* ☐ ***OR*** *Produced Identification* ☑

*Type of Identification Produced* FL-Drivers License

---

# ACCEPTANCE

**I accept the office listed in the above Oath of Office.**

Mailing Address: ☒ Home ☐ Office

308 MAGNOLIA DR
Street or Post Office Box

CLEARWATER, FL 33756
City, State, Zip Code

PETER D. JONES
**Print Name**

Peter D. Jones
**Signature**

**DS-DE 56 (Rev. 02/20)**

STATE BOARD OF ADMINISTRATION
OF FLORIDA

1801 HERMITAGE BOULEVARD, SUITE 100
TALLAHASSEE, FLORIDA 32308
(850) 488-4406

POST OFFICE BOX 13300
32317-3300

RON DESANTIS
GOVERNOR
CHAIR

JIMMY PATRONIS
CHIEF FINANCIAL OFFICER

ASHLEY MOODY
ATTORNEY GENERAL

ASHBEL C. WILLIAMS
EXECUTIVE DIRECTOR &
CHIEF INVESTMENT OFFICER

RECEIVED
DEPARTMENT OF STATE
2021 FEB 22 PM 1:57
DIVISION OF ELECTIONS
TALLAHASSEE, FLORIDA

February 17, 2021

Division of Elections
Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399

RE: Investment Advisory Council Appointment – Robb Turner

To Whom It May Concern:

Mr. Robb Turner has been appointed by the Trustees of the State Board of Administration to serve on the Investment Advisory Council. Attached please find the December 15, 2020 Cabinet transcript reflecting approval of his appointment. Mr. Turner's term will be December 15, 2020 through December 12, 2023.

Please let me know if any additional information is required. I can be reached at (850) 413-1254.

Sincerely,

John Kuczwański
Manager of External Affairs

Attachment

A black and white copy of this document is not official.

1280

# STATE OF FLORIDA
# DEPARTMENT OF STATE

## Division of Elections

I, Laurel M. Lee, Secretary of State,
do hereby certify that

***Robb E. Turner***

is duly appointed a member of the

**Investment Advisory Council**

for a term beginning on the Fifteenth day of December, A.D., 2020, until the Twelfth day of December, A.D., 2023 and is subject to be confirmed by the Senate during the next regular session of the Legislature.

*Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the Fourth day of March, A.D., 2021.*

Laurel M. Lee

Secretary of State

DSDE 99 (3/03)

If photocopied or digitally altered the word "VOID" will appear.
"State of Florida" appears in small letters across the face of this document.
8½ x 14 Document
The original document has a reflective line mark in paper. Hold at an angle to view when checking.

RECEIVED
DEPARTMENT OF STATE
2021 MAR -3 AM 11:50
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

# CERTIFICATION

**STATE OF FLORIDA**
**COUNTY OF** Palm Beach

Before me, the undersigned Notary Public of Florida, personally appeared Robb E. Turner, who, after being duty sworn, say: (1) that he/she has carefully and personally prepared or read the answers to the foregoing questions; (2) that the information contained in said answers is complete and true; and (3) that he/she will, as an appointee, fully support the Constitutions of the United States and of the State of Florida.

Robb E. Turner
Signature of Applicant-Affiant

Sworn to and subscribed before me this 2nd day of March, 2021.

Signature of Notary Public-State of Florida

BRENDA THEROFF
Notary Public-State of Florida
Commission # GG 342650
My Commission Expires
August 03, 2023

Brenda Theroff
(Print, Type, or Stamp Commissioned Name of Notary Public)

My commission expires: August 3 2023

Personally Known ☒ **OR** Produced Identification ☐

Type of Identification Produced N/A

(seal)
BRENDA THEROFF
Notary Public-State of Florida
Commission # GG 342650
My Commission Expires
August 03, 2023

# OATH OF OFFICE

(Art. II. § 5(b), Fla. Const.)

RECEIVED
DEPARTMENT OF STATE
2021 MAR -3 AM 11:50
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

**STATE OF FLORIDA**

**County of** Palm Beach

I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the State, and that I will well and faithfully perform the duties of

Investment Advisory Council Member
(Title of Office)

on which I am now about to enter, so help me God.

**[NOTE: If you affirm, you may omit the words "so help me God." *See* § 92.52, Fla. Stat.]**

Robb E. Turner
*Signature*

*Sworn to and subscribed before me by means of* ✓ *physical presence or* ___ *online notarization, this* 2nd *day of* March, 2021.

BRENDA THEROFF
Notary Public-State of Florida
Commission # GG 342650
My Commission Expires
August 03, 2023

*Signature of Officer Administering Oath or of Notary Public*

Brenda Theroff
*Print, Type, or Stamp Commissioned Name of Notary Public*

*Personally Known* ☒ ***OR*** *Produced Identification* ☐

*Type of Identification Produced* N/A

# ACCEPTANCE

**I accept the office listed in the above Oath of Office.**

Mailing Address: ☐ Home ☒ Office

218 Royal Palm Way #308
Street or Post Office Box

Palm Beach, FL 33480
City, State, Zip Code

Robb E. Turner
**Print Name**

Robb E. Turner
**Signature**

**DS-DE 56 (Rev. 02/20)**

STATE BOARD OF ADMINISTRATION
OF FLORIDA

1801 HERMITAGE BOULEVARD, SUITE 100
TALLAHASSEE, FLORIDA 32308
(850) 488-4406

POST OFFICE BOX 13300
32317-3300

RON DESANTIS
GOVERNOR
CHAIR

JIMMY PATRONIS
CHIEF FINANCIAL OFFICER

ASHLEY MOODY
ATTORNEY GENERAL

ASHBEL C. WILLIAMS
EXECUTIVE DIRECTOR &
CHIEF INVESTMENT OFFICER

RECEIVED
DEPARTMENT OF STATE
2021 FEB 22 PM 1:57
DIVISION OF ELECTIONS

February 17, 2021

Division of Elections
Department of State
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399

RE: Investment Advisory Council Appointment – Pat Neal

To Whom It May Concern:

Mr. Pat Neal has been appointed by the Trustees of the State Board of Administration to serve on the Investment Advisory Council. Attached please find the May 28, 2020 Cabinet transcript reflecting approval of his appointment. Mr. Neal's term will be May 28, 2020 through February 1, 2024.

Please let me know if any additional information is required. I can be reached at (850) 413-1254.

Sincerely,

John Kuczwanski
Manager of External Affairs

Attachment

A black and white copy of this document is not official.

1280

5

# STATE OF FLORIDA
# DEPARTMENT OF STATE

## Division of Elections

I, Laurel M. Lee, Secretary of State,
do hereby certify that

***Patrick K. Neal***

is duly appointed a member of the

**Investment Advisory Council**

for a term beginning on the Twenty-Eighth day of May, A.D., 2020, until the First day of February, A.D., 2024 and is subject to be confirmed by the Senate during the next regular session of the Legislature.

*Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the Second day of March, A.D., 2021.*

Secretary of State

DSDE 99 (3/03)

If photocopied or chemically altered, the word "VOID" will appear.
"State of Florida" appears in small letters across the face of this 8½ x 11" document.
The original document has a reflective line mark in paper. Hold at an angle to view when checking.

**CERTIFICATION**

RECEIVED
DEPARTMENT OF STATE
2021 FEB 22 AM 10:35
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

**STATE OF FLORIDA**
**COUNTY OF** _____

Before me, the undersigned Notary Public of Florida, personally appeared

_____,

who, after being duty sworn, say: (1) that he/she has carefully and personally prepared or read the answers to the foregoing questions; (2) that the information contained in said answers is complete and true; and (3) that he/she will, as an appointee, fully support the Constitutions of the United States and of the State of Florida.

_____
Signature of Applicant-Affiant

Sworn to and subscribed before me this 19th day of February, 20 21.

_____
Signature of Notary Public-State of Florida
**Priscilla G. Heim**

PRISCILLA G. HEIM
Notary Public State of Florida
Commission # GG 052165
My Comm. Expires Mar 27, 2021
Bonded through National Notary Assn.

_____
(Print, Type, or Stamp Commissioned Name of Notary Public)

PRISCILLA G. HEIM
Notary Public - State of Florida
Commission # GG 052165
My Comm. Expires Mar 27, 2021
Bonded through National Notary Assn.

My commission expires: 3/27/2021

Personally Known ☑ **OR** Produced Identification ☐

Type of Identification Produced _____

(seal)

# OATH OF OFFICE

**(Art. II. § 5(b), Fla. Const.)**

RECEIVED
DEPARTMENT OF STATE
2021 MAR -1 AM 11:20
DEPARTMENT OF STATE
DIVISION OF ELECTIONS

**STATE OF FLORIDA**

**County of** Sarasota

I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the State, and that I will well and faithfully perform the duties of

Member, Investment Advisor Council of State Board of Administration

(Title of Office)

on which I am now about to enter, so help me God.

**[NOTE: If you affirm, you may omit the words "so help me God." *See* § 92.52, Fla. Stat.]**

*Signature*

*Sworn to and subscribed before me by means of* ✓ *physical presence or* ___ *online notarization, this* 26 *day of* February, 2021

*Signature of Officer Administering Oath or of Notary Public*

Priscilla G. Heim

*Print, Type, or Stamp Commissioned Name of Notary Public*

PRISCILLA G. HEIM
Notary Public - State of Florida
Commission # GG 052165
My Comm. Expires Mar 27, 2021
Bonded through National Notary Assn.

*Personally Known* ☒ ***OR*** *Produced Identification* ☐

*Type of Identification Produced* _____

---

# ACCEPTANCE

**I accept the office listed in the above Oath of Office.**

Mailing Address: ☐ Home ☑ Office

5800 Lakewood Ranch Blvd
Street or Post Office Box

Sarasota, FL 34240
City, State, Zip Code

Patrick K Neal
**Print Name**

**Signature**

**DS-DE 56 (Rev. 02/20)**

**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: | CS/SB 1900 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Senator Boyd |
| SUBJECT: | Cybersecurity |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Candelaria | McVaney | GO | **Fav/CS** |
| 2. | | | AEG | |
| 3. | | | AP | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 1900 expands the duties and responsibilities of the Florida Digital Service (FDS) relating to the state's cybersecurity governance framework.

The bill defines "cybersecurity" to mean the protection afforded to an automated information system in order to attain the applicable objectives of preserving the confidentiality, integrity, and availability of data, information, and information technology resources.

The bill requires that a cybersecurity audit plan be included in the long-term and annual audit plan that agency inspectors general are required to complete.

The bill designates the FDS as the lead entity responsible for assessing state agency cybersecurity risks and determining appropriate security measures to combat such risks. The bill creates, and amends current, cybersecurity related duties and responsibilities of the Department of Management Services (DMS). The bill also expands the responsibilities of each state agency head in relation to cybersecurity.

The bill creates the Florida Cybersecurity Advisory Council (Council) within the DMS. The purpose of the Council is to assist the state in protecting the state's information technology resources from cyber threats and incidents, and to assist the FDS in implementing best cybersecurity practices. The bill outlines membership requirements of the Council, term requirements of each member, and duties and responsibilities of the Council as a whole.

Beginning June 30, 2022, and annually thereafter, the Council is required to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives outlining any recommendations considered necessary by the Council to address cybersecurity.

The bill makes conforming changes across several provisions by replacing all versions of the term "information technology security" with the term "cybersecurity."

The bill takes effect July 1, 2021.

## II. Present Situation:

### Agency Inspectors General

An office of the inspector general (Office) is established in each state agency to provide a central point for coordination of, and responsibility for, activities that promote accountability, integrity, and efficiency in government.[1] The Office within each agency is responsible for advising in the development of performance measures, standards, and procedures for the evaluation of state agency programs. The Office is also required to assess the reliability and validity of information provided by the state agency on performance measures and standards and must make recommendations for improvement when necessary.

In carrying out the auditing duties and responsibilities, each inspector general should review and evaluate internal controls necessary to ensure the fiscal accountability of the state agency. The inspector general will conduct financial, compliance, electronic data processing, and performance audits of the agency and prepare audit reports of the findings. At the conclusion of an audit, the inspector general will submit preliminary findings and recommendations to the person responsible for supervision of the program function or operational unit who can respond to any adverse findings within 20 working days after receipt of the preliminary findings. The inspector general will submit the final report to the agency head, the Auditor General and, for state agencies under the Governor, the Chief Inspector General. The inspector general shall develop long-term and annual audit plans based on the findings of the risk assessment. The plan, where appropriate, should include post-audit samplings of payments and accounts. The plan should show the individual audits to be conducted during each year and related resources to be devoted to the respective audits. A copy of the approved plan shall be submitted to the Auditor General.[2]

### National Institute for Standards and Technology Cybersecurity Framework

The National Institute for Standards and Technology Cybersecurity (NIST) is a non-regulatory federal agency housed within the U.S. Department of Commerce. NIST is charged with providing a prioritized, flexible, repeatable, performance-based, and cost effective framework that helps owners and operators of critical infrastructure identify, assess, and manage cyber risk. While the framework was developed with critical infrastructure in mind, it can be used by

[1] Section 20.055(2), F.S.
[2] *Id.*

organizations in any sector of the economy or society.[3] The framework is designed to complement, and not replace, an organization's own unique approach to cybersecurity risk management. As such, there are a variety of ways to use the framework and the decision about how to apply it is left to the implementing organization. Overall, the framework provides an outline of best practices that helps organizations decide where to focus resources for cybersecurity protection.[4]

**The Information Technology Act**

The Information Technology Act (Act) establishes that the Department of Management Services (DMS) is responsible for establishing standards and processes consistent with generally accepted best practices for information technology (IT) security, including cybersecurity, and adopting rules that safeguard an agency's data, information, and IT resources to mitigate risks.[5] The DMS is required to designate an employee of the Florida Digital Service (FDS) as the state chief information security officer, who must have experience and expertise in security and risk management for communications and IT resources.

The DMS is required, by February 1 of each year, to develop a statewide IT security strategic plan that includes security goals and objectives for the strategic issues of IT security policy, risk management, training, and disaster recovery planning. Further, the DMS is required to develop and publish for use by state agencies an information technology security framework that includes specific guidelines and processes.[6]

The DMS, in collaboration with the Cybercrime Office of the Department of Law Enforcement, provides training for state agency information security managers and computer security incident response team members that contains training on IT security.[7] The DMS is required to develop and publish for use by state agencies an IT security framework. The Act requires each state agency to designate an information security manager to administer the IT security program of the state agency. This designation must be provided annually in writing to the DMS.[8]

**Florida Digital Service**

The FDS has been created within the DMS to propose innovative solutions that securely modernize state government, including technology and information services, to achieve value through digital transformation, and to fully support cloud-first policy[9]. The FDS partners with all state agencies to deliver better government services through design and technology. The FDS is responsible for developing an enterprise architecture, project management and oversight standards, and technology policy for the management of the state's IT[10] resources.

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[3] National Institute of Standards and Technology, *Framework for Improving Critical Infrastructure Cybersecurity*, https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf (last visited March 30, 2021).
[4] *Id.*
[5] Section 282.318, F.S.
[6] Section 282.318(3)(b), F.S.
[7] Section 282.318(3)(e), F.S.
[8] *Id.*
[9] Section 282.0051(1), F.S.
[10] Section 282.0041(1), F.S., defines "information technology" to mean equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect,

The Secretary of the DMS is required to designate a state chief information officer, who will administer the FDS. The state chief information officer must have at least five years of experience in the development of IT strategic planning and development or IT policy, and preferably have leadership-level experience in the design, development, and deployment of interoperable software and data solutions. The state chief information officer, on consultation with the Secretary of the DMS, is required to designate a state chief data officer. The chief data officer must be a proven and effective administrator who must have significant and substantive experience in data management, data governance, interoperability, and security.

**Florida Center for Cybersecurity**

Section 1004.444, F.S., creates the Florida Center for Cybersecurity (Cyber Florida).[11] Cyber Florida was created to help the state become a national leader in cybersecurity education, academics, practical research, and community outreach. Established under the auspices of the University of South Florida, Cyber Florida works with all 12 State University System institutions to:

- Assist in the creation of jobs in the state's cybersecurity industry and enhance the existing cybersecurity workforce;
- Act as a cooperative facilitator for state business and higher education communities to share cybersecurity knowledge, resources, and training;
- Seek out partnerships with major military installations to assist, when possible, in homeland cybersecurity defense initiatives; and
- Attract cybersecurity companies to the state with an emphasis on defense, finance, health care, transportation, and utility sectors.[12]

**State Data Center**

The State Data Center (Data Center) within the DMS provides data center services that comply with applicable state and federal laws, regulations, and policies, including all applicable security, privacy, and auditing requirements.[13] The Data Center offers, develops, and supports the services and applications defined in service-level agreements executed with its customer entities. The Data Center enters into service-level agreements with each customer entity to provide the required type and level of service or services.

**Cybercrime Office**

The cybercrime office is created within the Department of Law Enforcement (FDLE). The cybercrime office may investigate violations of state law pertaining to the sexual exploitation of children which are facilitated or connected to the use of any device capable of storing electronic data. The cybercrime office monitors state IT resources and provides analysis on IT security incidents, threats, and breaches as defined in s. 282.0041, F.S. Further, the cybercrime office

receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate information of any kind or form.

[11] Section 1004.444, F.S.

[12] *Id.*

[13] Section 282.201, F.S.

provides security awareness training and information to state agency employees concerning cybersecurity, online sexual exploitation of children, and the responsibility of employees to comply with policies, standards, guidelines, and operating procedures adopted by the FDLE. The cybercrime office consults with the FDS in the adoption of rules relating to the information technology security provisions in s. 282.318, F.S.[14]

**Advisory Council Requirements under Section 20.03, Florida Statutes**

Section 20.03(7), F.S., defines a "council" or "advisory council" to mean a body created by specific statutory enactment and appointed to function on a continuing basis for the study of problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.[15]

## III. Effect of Proposed Changes:

**Section 1** amends s. 20.055, F.S., to require that a specific cybersecurity audit plan be included in the long-term and annual audit plan that agency inspector generals are required to complete.

**Section 2** amends s. 282.0041, F.S., to substitute the term "cybersecurity" for "information technology security" and to define the term "cybersecurity" as:

> The protection afforded to an automated information system in order to attain the applicable objectives of preserving the confidentiality, integrity, and availability of data, information, and information technology resources.

This section repeals the definition of the term "information technology security," which is made obsolete by this bill.

**Sections 3, 4, and 5** amend ss. 282.0051, 282.201, and 282.206, F.S., respectively, relating to the powers and duties of DMS, the state data center, and "cloud-first" policy, to conform to the changes of the bill by replacing all versions of the term "information technology security" with the term "cybersecurity."

**Section 6** amends s. 282.318, F.S., to rename the "Information Technology Security Act" as the "State Cybersecurity Act."

This section designates the DMS, acting through the FDS, as the lead entity responsible for assessing state agency cybersecurity risks and determining appropriate security measures. Thus, the DMS, acting through the FDS, must:

- Establish standards and processes that must be consistent with generally accepted technology best practices, including the National Institute for Standards and Technology (NIST) Cybersecurity Framework, for cybersecurity;
- Adopt rules that mitigate risk, safeguard the state's digital assets and agency data to ensure availability, confidentiality, and integrity and support a centralized security governance;

[14] Section 943.0415, F.S.
[15] Section 20.03(7), F.S.

- Designate an employee of the FDS as the state chief information security officer. The state chief information security officer is responsible for the development, operation, and oversight of cybersecurity for state technology systems. The state chief information security officer must be notified of all confirmed or suspected incidents or threats of state agency IT resources and must report such incidents the state chief information officer;
- Develop, and update annually by February 1, a statewide cybersecurity strategic plan that includes security goals and objectives for cybersecurity, including the identification and mitigation of risk, proactive protections against threats, tactical risk detection, threat reporting, and response and recovery protocols for a cyber incident;
- Develop and publish for use by state agencies a cybersecurity governance that includes guidelines;
- Establish procedures for procuring IT commodities and services that require the commodity or service to meet the NIST Framework;
- Provide training to all state agency technology professionals which develops, assesses, and documents competencies by role and skill level. The training may be provided in collaboration with the Cybercrime Office of the FDLE, a private sector entity, or a state university;
- Operate and maintain a Cybersecurity Operations Center led by the state chief information security officer, which must be primarily virtue and staffed with tactical detection and incident response personnel. The Cybersecurity Operations Center shall serve as a clearinghouse for threat information and will coordinate with the FDLE to support state agencies and their response to any confirmed or suspected cybersecurity incident; and
- Lead an emergency support function, ESF CYBER, under the state comprehensive emergency management plan as described in s. 252.35, F.S.

This section requires each agency head to:

- Establish an agency cybersecurity response team in consultation with the FDS and the FDLE, and must immediately report all confirmed or suspected cybersecurity incidents to the state chief information security officer, or his or her designee;
- Conduct, and update every three years, a comprehensive risk assessment which may be completed by a private sector vendor to determine security threats to the data, information, and IT resources of the agency. If a private sector vendor is used to complete this requirement, it must attest to the validity of the risk assessment findings;
- Implement managerial, operational, and risk assessment remediation plans recommended by the DMS to addresses identified risks to the agency. The FDS must track implementation by state agencies upon development of such remediation plans in coordination with agency inspectors general;
- Ensure that the cybersecurity requirements in both the written specifications for the solicitation, contracts, and service-level agreement of IT and IT resources and services meet the NIST Cybersecurity Framework; and
- Provide cybersecurity awareness training, in collaboration with the Cybercrime Office, a private sector entity, or an institution of the state university system to all state agency employees in the first 30 days after commencing employment.

This section replaces all versions of the term “information technology security” with the term “cybersecurity.”

**Section 7** creates s. 282.319, F.S., establishing the Florida Cybersecurity Advisory Council (Council).

The Council must operate in a manner consistent with s. 20.052, F.S. The purpose of the Council is to assist the state in protecting the state's information technology resources from cyber threats and incidents and to assist the FDS in implementing the best cybersecurity practices, taking into consideration the final recommendations of the Florida Cybersecurity Task Force.

The Council is comprised of the following members:
- The Lieutenant Governor or his or her designee;
- The state chief information officer;
- The state chief information security officer;
- The director of the Division of Emergency Management or his or her designee;
- A representative of the computer crime center of the FDLE, appointed by the executive director of the DMS;
- A representative of the Florida Fusion Center of the FDLE, appointed by the executive director of the DMS;
- The Chief Inspector General;
- A representative from the Public Service Commission;
- Up to two representatives from institutions of higher education located in the state, appointed by the Governor;
- Three representatives from critical infrastructure sectors, one of which must be from a water-treatment facility, appointed by the Governor;
- Four representatives of the private sector with senior level experience in cybersecurity or software engineering from within finance, energy, health care, and transportation sector, appointed by the Governor; and
- Two representatives with expertise on emergency technology with one appointed by the President of the Senate and one appointed by the Speaker of the House of Representatives.

The members serve for a term of four years, with the initial appointments made serving for a term of two years. A vacancy must be filled for the remainder of the unexpired term in the same manner as the initial appointment, and all members of the Council are eligible for reappointment. The Secretary of Management Services, or his or her designee, must serve as the ex officio, nonvoting executive director of the Council. Members of the Council serve without compensation but are entitled to reimbursement for per diem and travel expenses as defined in s. 112.061, F.S.

The Council must meet quarterly to:
- Review existing state agency cybersecurity policies;
- Assess ongoing risks to state agency information technology;
- Recommend a method to notify state agencies of new risks;
- Recommend data breach simulation exercises;
- Examine inconsistencies between state and federal law regarding cybersecurity; and
- Assist the FDS in developing cybersecurity best practices recommendations for state agencies which include recommendations regarding:

- Continuous risk monitoring;
- Password management; and
- Protecting data in legacy and new systems.

The Council must work with the NIST and other federal agencies, private sector businesses, and private cybersecurity experts:

- For critical infrastructure not covered by federal law, to identify which local infrastructure sectors are at greatest risk of cyber attacks and need the most enhanced security measures; and
- To use federal guidance to identify categories of critical infrastructure as critical cyber infrastructure if cyber damage or access could reasonable result in catastrophic consequences.

Beginning June 30, 2022, and annually thereafter, the Council must submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives outlining any recommendations considered necessary by the Council to address cybersecurity.

**Section 8** provides the bill takes effect July 1, 2021.

## 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:

None.

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:

None.

C. Government Sector Impact:

The state may incur an indeterminate fiscal impact providing per diem and travel expenses for members of the newly created Florida Cybersecurity Advisory Council.

The FDS may require additional personnel, and workload, with the operation and maintenance of a Cybersecurity Operations Center, which must be staffed with tactical detection and incident response personnel.

An agency may incur additional costs if it uses a private sector vendor to complete the required risk assessment once every three years.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 20.055, 282.0041, 282.0051, 282.201, 282.206, 282.318, and 282.319.

This bill creates the following sections of the Florida Statutes: 282.319.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS:

- Revises the definition for the term "Cybersecurity;"
- Removes the designation of employees under the chief information security officer as selected exempt service;
- Revises the duties of the chief information security officer from the "development, operation, and management of cybersecurity for state technology systems" to the "development, operations, and oversight of cybersecurity for state technology systems";
- Removes the authority from the Florida Digital Service to intervene in any confirmed or suspected cybersecurity incident of a state agency;

- Removes the requirement that an agency head must provide an asset management report detailing the agency's IT resources to the chief information officer and chief information security officer;
- Removes the requirement that an agency head must conduct a comprehensive risk assessment on an annual basis, and maintains the three-year requirement provided in current law;
- Requires that solicitations, contracts and service level-agreements relating to cybersecurity meet the National Institute of Standards and Technology Cybersecurity Framework;
- Revises the membership of the newly created Florida Cybersecurity Advisory Council; and
- Requires the Council to work with the National Institute of Standards and Technology, federal agencies, private sector businesses, and private cybersecurity experts to identify infrastructure vulnerable to cyber attacks.

B. Amendments:

None.

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

**By** Senator Boyd

21-01791B-21 20211900__

A bill to be entitled

An act relating to cybersecurity; amending s. 20.055, F.S.; requiring certain audit plans of an inspector general to include certain information; amending s. 282.0041, F.S.; revising and providing definitions; amending ss. 282.0051, 282.201, and 282.206, F.S.; revising provisions to replace references to information technology security with cybersecurity; amending s. 282.318, F.S.; revising provisions to replace references to information technology security and computer security with references to cybersecurity; revising a short title; providing that the Department of Management Services, acting through the Florida Digital Service, is the lead entity for the purpose of certain responsibilities; providing and revising requirements for the department, acting through the Florida Digital Service; providing that certain employees shall be assigned to selected exempt service; providing that the state chief information security officer is responsible for state technology systems and must notify the Governor of certain incidents and threats; revising requirements for state agency heads; requiring the department, through the Florida Digital Service, to track the implementation by state agencies of certain plans; creating 282.319, F.S.; creating the Florida Cybersecurity Advisory Council within the Department of Management Services; providing the purpose of the council; requiring the council to provide certain assistance to the Florida



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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Digital Service; providing for the membership of the council; providing for terms of council members; providing that the Secretary of Management Services, or his or her designee, shall serve as the ex officio executive director of the council; providing that members shall serve without compensation but are entitled to reimbursement for per diem and travel expenses; requiring the council to meet at least quarterly for certain purposes; requiring the council to submit an annual report to the Governor and Legislature; amending s. 943.0415, F.S., conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (i) of subsection (6) of section 20.055, Florida Statutes, is amended to read:

20.055 Agency inspectors general.—

(6) In carrying out the auditing duties and responsibilities of this act, each inspector general shall review and evaluate internal controls necessary to ensure the fiscal accountability of the state agency. The inspector general shall conduct financial, compliance, electronic data processing, and performance audits of the agency and prepare audit reports of his or her findings. The scope and assignment of the audits shall be determined by the inspector general; however, the agency head may at any time request the inspector general to perform an audit of a special program, function, or



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organizational unit. The performance of the audit shall be under the direction of the inspector general, except that if the inspector general does not possess the qualifications specified in subsection (4), the director of auditing shall perform the functions listed in this subsection.

(i) The inspector general shall develop long-term and annual audit plans based on the findings of periodic risk assessments. The plan, where appropriate, should include postaudit samplings of payments and accounts. The plan shall show the individual audits to be conducted during each year and related resources to be devoted to the respective audits. The plan shall include a specific cybersecurity audit plan. The Chief Financial Officer, to assist in fulfilling the responsibilities for examining, auditing, and settling accounts, claims, and demands pursuant to s. 17.03(1), and examining, auditing, adjusting, and settling accounts pursuant to s. 17.04, may use audits performed by the inspectors general and internal auditors. For state agencies under the jurisdiction of the Governor, the audit plans shall be submitted to the Chief Inspector General. The plan shall be submitted to the agency head for approval. A copy of the approved plan shall be submitted to the Auditor General.

Section 2. Present subsections (8) through (21) of section 282.0041, Florida Statutes, are redesignated as subsections (9) through (22), respectively, present subsection (22) is amended, and a new subsection (8) is added to that section, to read:

282.0041 Definitions.—As used in this chapter, the term:

(8) "Cybersecurity" means the protection afforded to information technology resources from unauthorized access or





criminal use by ensuring the confidentiality, integrity, and availability of data and information.

~~(22) "Information technology security" means the protection afforded to an automated information system in order to attain the applicable objectives of preserving the integrity, availability, and confidentiality of data, information, and information technology resources.~~

Section 3. Paragraph (j) of subsection (1) of section 282.0051, Florida Statutes, is amended to read:

282.0051 Department of Management Services; Florida Digital Service; powers, duties, and functions.—

(1) The Florida Digital Service has been created within the department to propose innovative solutions that securely modernize state government, including technology and information services, to achieve value through digital transformation and interoperability, and to fully support the cloud-first policy as specified in s. 282.206. The department, through the Florida Digital Service, shall have the following powers, duties, and functions:

(j) Provide operational management and oversight of the state data center established pursuant to s. 282.201, which includes:

1. Implementing industry standards and best practices for the state data center's facilities, operations, maintenance, planning, and management processes.

2. Developing and implementing cost-recovery mechanisms that recover the full direct and indirect cost of services through charges to applicable customer entities. Such cost-recovery mechanisms must comply with applicable state and

federal regulations concerning distribution and use of funds and must ensure that, for any fiscal year, no service or customer entity subsidizes another service or customer entity. The Florida Digital Service may recommend other payment mechanisms to the Executive Office of the Governor, the President of the Senate, and the Speaker of the House of Representatives. Such mechanism may be implemented only if specifically authorized by the Legislature.

3. Developing and implementing appropriate operating guidelines and procedures necessary for the state data center to perform its duties pursuant to s. 282.201. The guidelines and procedures must comply with applicable state and federal laws, regulations, and policies and conform to generally accepted governmental accounting and auditing standards. The guidelines and procedures must include, but need not be limited to:

a. Implementing a consolidated administrative support structure responsible for providing financial management, procurement, transactions involving real or personal property, human resources, and operational support.

b. Implementing an annual reconciliation process to ensure that each customer entity is paying for the full direct and indirect cost of each service as determined by the customer entity's use of each service.

c. Providing rebates that may be credited against future billings to customer entities when revenues exceed costs.

d. Requiring customer entities to validate that sufficient funds exist in the appropriate data processing appropriation category or will be transferred into the appropriate data processing appropriation category before implementation of a





customer entity's request for a change in the type or level of service provided, if such change results in a net increase to the customer entity's cost for that fiscal year.

e. By November 15 of each year, providing to the Office of Policy and Budget in the Executive Office of the Governor and to the chairs of the legislative appropriations committees the projected costs of providing data center services for the following fiscal year.

f. Providing a plan for consideration by the Legislative Budget Commission if the cost of a service is increased for a reason other than a customer entity's request made pursuant to sub-subparagraph d. Such a plan is required only if the service cost increase results in a net increase to a customer entity for that fiscal year.

g. Standardizing and consolidating procurement and contracting practices.

4. In collaboration with the Department of Law Enforcement, developing and implementing a process for detecting, reporting, and responding to cybersecurity ~~information technology security~~ incidents, breaches, and threats.

5. Adopting rules relating to the operation of the state data center, including, but not limited to, budgeting and accounting procedures, cost-recovery methodologies, and operating procedures.

Section 4. Paragraph (g) of subsection (1) of section 282.201, Florida Statutes, is amended to read:

282.201 State data center.—The state data center is established within the department. The provision of data center services must comply with applicable state and federal laws,

regulations, and policies, including all applicable security, privacy, and auditing requirements. The department shall appoint a director of the state data center, preferably an individual who has experience in leading data center facilities and has expertise in cloud-computing management.

(1) STATE DATA CENTER DUTIES.—The state data center shall:

(g) In its procurement process, show preference for cloud-computing solutions that minimize or do not require the purchasing, financing, or leasing of state data center infrastructure, and that meet the needs of customer agencies, that reduce costs, and that meet or exceed the applicable state and federal laws, regulations, and standards for cybersecurity ~~information technology security~~.

Section 5. Subsection (2) of section 282.206, Florida Statutes, is amended to read:

282.206 Cloud-first policy in state agencies.—

(2) In its procurement process, each state agency shall show a preference for cloud-computing solutions that either minimize or do not require the use of state data center infrastructure when cloud-computing solutions meet the needs of the agency, reduce costs, and meet or exceed the applicable state and federal laws, regulations, and standards for cybersecurity ~~information technology security~~.

Section 6. Section 282.318, Florida Statutes, is amended to read:

282.318 Cybersecurity ~~Security of data and information technology~~.—

(1) This section may be cited as the "Florida State Cybersecurity Act." ~~"Information Technology Security Act."~~



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(2) As used in this section, the term "state agency" has the same meaning as provided in s. 282.0041, except that the term includes the Department of Legal Affairs, the Department of Agriculture and Consumer Services, and the Department of Financial Services.

(3) The department, acting through the Florida Digital Service, is the lead entity responsible for establishing standards and processes for assessing state agency cybersecurity risks and determining appropriate security measures. Such standards and processes must be consistent with generally accepted technology best practices, including the National Institute for Standards and Technology Cybersecurity Framework, for cybersecurity. This shall include ~~information technology security, to include cybersecurity, and~~ adopting rules that mitigate risk; safeguard the state's digital assets and agency ~~an agency's~~ data, information, and information technology resources to ensure availability, confidentiality, and integrity; and support a centralized security governance ~~and to mitigate risks~~. The department, acting through the Florida Digital Service, shall also:

(a) Designate an employee of the Florida Digital Service as the state chief information security officer. The state chief information security officer must have experience and expertise in security and risk management for communications and information technology resources. The employees under the direction of the state chief information security officer shall be assigned to selected exempt service. The state chief information security officer is responsible for the development, operation, and management of cybersecurity for state technology



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systems. The state chief information security officer must have a direct communication channel to the Governor, or his or her designee, related to risk assessments, threat monitoring, detection, and response activities of suspected or confirmed cyber incidents or threats.

(b) Develop, and annually update by February 1, a statewide cybersecurity ~~information technology security~~ strategic plan that includes security goals and objectives for cybersecurity, including the identification and mitigation of risk, proactive protections against threats, tactical risk detection, threat reporting, and response and recovery protocols for a cyber incident ~~the strategic issues of information technology security policy, risk management, training, incident management, and disaster recovery planning~~.

(c) Develop and publish for use by state agencies a centralized cybersecurity governance ~~an information technology security framework~~ that, at a minimum, includes guidelines and processes for:

1. Establishing asset management procedures to ensure that an agency's information technology resources are identified and managed consistent with their relative importance to the agency's business objectives.

2. Using a standard risk assessment methodology that includes the identification of an agency's priorities, constraints, risk tolerances, and assumptions necessary to support operational risk decisions.

3. Completing comprehensive risk assessments and cybersecurity ~~information technology security~~ audits, which may be completed by a private sector vendor, and submitting





completed assessments and audits to the department.

4. Identifying protection procedures to manage the protection of an agency's information, data, and information technology resources.

5. Establishing procedures for accessing information and data to ensure the confidentiality, integrity, and availability of such information and data.

6. Detecting threats through proactive monitoring of events, continuous security monitoring, and defined detection processes.

7. Establishing agency cybersecurity ~~computer security~~ incident response teams and describing their responsibilities for responding to cybersecurity ~~information technology security~~ incidents, including breaches of personal information containing confidential or exempt data.

8. Recovering information and data in response to a cybersecurity ~~an information technology security~~ incident. The recovery may include recommended improvements to the agency processes, policies, or guidelines.

9. Establishing a cybersecurity ~~an information technology security~~ incident reporting process that includes procedures and tiered reporting timeframes for notifying the department and the Department of Law Enforcement of cybersecurity ~~information technology security~~ incidents. The tiered reporting timeframes shall be based upon the level of severity of the cybersecurity ~~information technology security~~ incidents being reported.

10. Incorporating information obtained through detection and response activities into the agency's cybersecurity ~~information technology security~~ incident response plans.

11. Developing agency strategic and operational cybersecurity ~~information technology security~~ plans required pursuant to this section.

12. Establishing the managerial, operational, and technical safeguards for protecting state government data and information technology resources that align with the state agency risk management strategy and that protect the confidentiality, integrity, and availability of information and data.

(d) Assist state agencies in complying with this section.

(e) In collaboration with the Cybercrime Office of the Department of Law Enforcement, annually provide training for state agency information security managers and computer security incident response team members that contains training on cybersecurity ~~information technology security~~, including cybersecurity~~,~~ threats, trends, and best practices.

(f) Annually review the strategic and operational cybersecurity ~~information technology security~~ plans of executive branch agencies.

(g) Provide training to all state agency technology professionals which develops, assesses, and documents competencies by role and skill level. The training may be provided in collaboration with the Cybercrime Office of the Department of Law Enforcement, a private sector entity, or a state university.

(h) Operate and maintain a Cybersecurity Operations Center led by the state chief information security officer, which must be primarily virtual and staffed with tactical detection and incident response personnel. The Cybersecurity Operations Center shall serve as a clearinghouse for threat information and will





coordinate with the Department of Law Enforcement to support state agencies and their response to any confirmed or suspected cybersecurity incident.

(i) Lead an emergency support function at the State Emergency Operations Center.

(j) In consultation with the Department of Law Enforcement, have the authority to intervene in any confirmed or suspected cybersecurity incident of a state agency.

(4) Each state agency head shall, at a minimum:

(a) Designate an information security manager to administer the cybersecurity ~~information technology security~~ program of the state agency. This designation must be provided annually in writing to the department by January 1. A state agency's cybersecurity ~~information security~~ manager, for purposes of these information security duties, shall report directly to the agency head. The agency information security manager shall, at a minimum, provide an asset management report detailing the agency's information technology resources to the state chief information officer and chief information security officer annually.

(b) In consultation with the department, through the Florida Digital Service, and the Cybercrime Office of the Department of Law Enforcement, establish an agency cybersecurity ~~computer security incident~~ response team to respond to a cybersecurity ~~an information technology security~~ incident. The agency cybersecurity ~~computer security incident~~ response team shall convene upon notification of a cybersecurity ~~an information technology security~~ incident and must immediately report all confirmed or suspected incidents to the state chief

information security officer, or his or her designee, and comply with all applicable guidelines and processes established pursuant to paragraph (3)(c).

(c) Submit to the department annually by July 31, the state agency's strategic and operational cybersecurity ~~information technology security~~ plans developed pursuant to rules and guidelines established by the department through the Florida Digital Service.

1. The state agency strategic cybersecurity ~~information technology security~~ plan must cover a 3-year period and, at a minimum, define security goals, intermediate objectives, and projected agency costs for the strategic issues of agency information security policy, risk management, security training, security incident response, and disaster recovery. The plan must be based on the statewide cybersecurity ~~information technology security~~ strategic plan created by the department and include performance metrics that can be objectively measured to reflect the status of the state agency's progress in meeting security goals and objectives identified in the agency's strategic information security plan.

2. The state agency operational cybersecurity ~~information technology security~~ plan must include a progress report that objectively measures progress made towards the prior operational cybersecurity ~~information technology security~~ plan and a project plan that includes activities, timelines, and deliverables for security objectives that the state agency will implement during the current fiscal year.

(d) Conduct~~, and update every 3 years,~~ a comprehensive risk assessment annually, which may be completed by a private sector



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vendor, to determine the security threats to the data, information, and information technology resources, including mobile devices and print environments, of the agency. The risk assessment must comply with the risk assessment methodology developed by the department and is confidential and exempt from s. 119.07(1), except that such information shall be available to the Auditor General, the Florida Digital Service within the department, the Cybercrime Office of the Department of Law Enforcement, and, for state agencies under the jurisdiction of the Governor, the Chief Inspector General. If a private sector vendor is used to complete this requirement, it must attest to the validity of the risk assessment findings.

(e) Develop, and periodically update, written internal policies and procedures, which include procedures for reporting cybersecurity ~~information technology security~~ incidents and breaches to the Cybercrime Office of the Department of Law Enforcement and the Florida Digital Service within the department. Such policies and procedures must be consistent with the rules, guidelines, and processes established by the department to ensure the security of the data, information, and information technology resources of the agency. The internal policies and procedures that, if disclosed, could facilitate the unauthorized modification, disclosure, or destruction of data or information technology resources are confidential information and exempt from s. 119.07(1), except that such information shall be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for state agencies under the jurisdiction of the Governor, the Chief Inspector General.



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(f) Implement managerial, operational, and technical safeguards and risk assessment remediation plans recommended by the department to address identified risks to the data, information, and information technology resources of the agency. The department, through the Florida Digital Service, shall track implementation by state agencies upon development of such remediation plans in coordination with agency inspectors general.

(g) Ensure that periodic internal audits and evaluations of the agency's cybersecurity ~~information technology security~~ program for the data, information, and information technology resources of the agency are conducted. The results of such audits and evaluations are confidential information and exempt from s. 119.07(1), except that such information shall be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General.

(h) Ensure that the ~~information technology security and~~ cybersecurity requirements in both the written specifications for the solicitation, contracts, and service-level agreement of information technology and information technology resources and services meet or exceed the applicable state and federal laws, regulations, and standards for ~~information technology security and~~ cybersecurity. Service-level agreements must identify service provider and state agency responsibilities for privacy and security, protection of government data, personnel background screening, and security deliverables with associated frequencies.



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(i) Provide ~~information technology security and~~ cybersecurity awareness training, as approved by the Florida Digital Service, to all state agency employees in the first 30 days after commencing employment concerning cybersecurity ~~information technology security~~ risks and the responsibility of employees to comply with policies, standards, guidelines, and operating procedures adopted by the state agency to reduce those risks. The training may be provided in collaboration with the Cybercrime Office of the Department of Law Enforcement, a private sector entity, or a state university.

(j) Develop a process for detecting, reporting, and responding to threats, breaches, or cybersecurity ~~information technology security~~ incidents which is consistent with the security rules, guidelines, and processes established by the department.

1. All cybersecurity ~~information technology security~~ incidents and breaches must be reported to the Florida Digital Service within the department and the Cybercrime Office of the Department of Law Enforcement and must comply with the notification procedures and reporting timeframes established pursuant to paragraph (3)(c).

2. For cybersecurity ~~information technology security~~ breaches, state agencies shall provide notice in accordance with s. 501.171.

(5) Portions of records held by a state agency which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed cybersecurity ~~information technology security~~ incidents,



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including suspected or confirmed breaches, are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

(b) Information technology resources, which includes:

1. Information relating to the security of the agency's technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

(6) The portions of risk assessments, evaluations, external audits, and other reports of a state agency's cybersecurity ~~information technology security~~ program for the data, information, and information technology resources of the state agency which are held by a state agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution if the disclosure of such portions of records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

(b) Information technology resources, which include:

1. Information relating to the security of the agency's technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or





2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

For purposes of this subsection, "external audit" means an audit that is conducted by an entity other than the state agency that is the subject of the audit.

(7) Those portions of a public meeting as specified in s. 286.011 which would reveal records which are confidential and exempt under subsection (5) or subsection (6) are exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. No exempt portion of an exempt meeting may be off the record. All exempt portions of such meeting shall be recorded and transcribed. Such recordings and transcripts are confidential and exempt from disclosure under s. 119.07(1) and s. 24(a), Art. I of the State Constitution unless a court of competent jurisdiction, after an in camera review, determines that the meeting was not restricted to the discussion of data and information made confidential and exempt by this section. In the event of such a judicial determination, only that portion of the recording and transcript which reveals nonexempt data and information may be disclosed to a third party.

(8) The portions of records made confidential and exempt in subsections (5), (6), and (7) shall be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General. Such portions of records may be made available to a local government, another state agency, or a

federal agency for cybersecurity ~~information technology security~~ purposes or in furtherance of the state agency's official duties.

(9) The exemptions contained in subsections (5), (6), and (7) apply to records held by a state agency before, on, or after the effective date of this exemption.

(10) Subsections (5), (6), and (7) are subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

(11) The department shall adopt rules relating to cybersecurity ~~information technology security~~ and to administer this section.

Section 7. Section 282.319, Florida Statutes, is created to read:

282.319 Florida Cybersecurity Advisory Council.—

(1) The Florida Cybersecurity Advisory Council, an advisory council as defined in s. 20.03(7), is created within the department. Except as otherwise provided in this section, the advisory council shall operate in a manner consistent with s. 20.052.

(2) The purpose of the council is to assist the state in protecting the state's information technology resources from cyber threats and incidents.

(3) The council shall assist the Florida Digital Service in implementing best cybersecurity practices, taking into consideration the final recommendations of the Florida Cybersecurity Task Force.

(4) The council shall be comprised of the following



members:

(a) The Lieutenant Governor or his or her designee.

(b) The state chief information officer.

(c) The state chief information security officer.

(d) The director of the Division of Emergency Management or his or her designee.

(e) A representative of the computer crime center of the Department of Law Enforcement, appointed by the executive director of the department.

(f) A representative of the Florida Fusion Center of the Department of Law Enforcement, appointed by the executive director of the department.

(g) The Chief Inspector General.

(h) Six members of the private sector with experience in cybersecurity mitigation or response, with two appointed by the Governor, two appointed by the President of the Senate, and two appointed by the Speaker of the House of Representatives.

(5) Members shall serve for a term of 4 years; however, for the purpose of providing staggered terms, the initial appointments made by the President of the Senate and the Speaker of the House of Representatives shall be for a term of 2 years. A vacancy shall be filled for the remainder of the unexpired term in the same manner as the initial appointment. All members of the council are eligible for reappointment.

(6) The Secretary of Management Services, or his or her designee, shall serve as the ex officio, nonvoting executive director of the council.

(7) Members of the council shall serve without compensation but are entitled to receive reimbursement for per diem and

travel expenses pursuant to s. 112.061.

(8) The council shall meet at least quarterly to:

(a) Review existing state agency cybersecurity policies.

(b) Assess ongoing risks to state agency information technology.

(c) Recommend a method to notify state agencies of new risks.

(d) Recommend data breach simulation exercises.

(e) Assist the Florida Digital Service in developing cybersecurity best practice recommendations for state agencies which include recommendations regarding:

1. Continuous risk monitoring.

2. Password management.

3. Protecting data in legacy and new systems.

(f) Examine inconsistencies between state and federal law regarding cybersecurity.

(9) Beginning June 30, 2022, and each June 30 thereafter, the council shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives outlining any recommendations considered necessary by the council to address cybersecurity.

Section 8. Section 943.0415, Florida Statutes, is amended to read:

943.0415 Cybercrime Office.—There is created within the Department of Law Enforcement the Cybercrime Office. The office may:

(1) Investigate violations of state law pertaining to the sexual exploitation of children which are facilitated by or connected to the use of any device capable of storing electronic





data.

(2) Monitor state information technology resources and provide analysis on cybersecurity ~~information technology security~~ incidents, threats, and breaches as defined in s. 282.0041.

(3) Investigate violations of state law pertaining to cybersecurity ~~information technology security~~ incidents pursuant to s. 282.0041 and assist in incident response and recovery.

(4) Provide security awareness training and information to state agency employees concerning cybersecurity, online sexual exploitation of children, and security risks, and the responsibility of employees to comply with policies, standards, guidelines, and operating procedures adopted by the department.

(5) Consult with the Florida Digital Service within the Department of Management Services in the adoption of rules relating to the cybersecurity ~~information technology security~~ provisions in s. 282.318.

Section 9. This act shall take effect July 1, 2021.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**
Banking and Insurance, *Chair*
Agriculture
Appropriations Subcommittee on Agriculture, Environment, and General Government
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Criminal Justice
Judiciary

**JOINT COMMITTEE:**
Joint Legislative Auditing Committee

**SENATOR JIM BOYD**
21st District

March 9, 2021

Senator Ray Rodrigues
Committee on Governmental Oversight and Accountability
330 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399

Dear Chairman Rodrigues:

I respectfully request that SB 1900: Cybersecurity, be scheduled for a hearing in the Committee on Governmental Oversight and Accountability at your earliest convenience.

If I may be of assistance to you on this or any other matter, please do not hesitate to contact me.

Thank you for your consideration of this matter.

Best regards,

Jim Boyd

cc: Joe McVaney
Tamra Redig

REPLY TO:
❒ 717 Manatee Avenue West, Bradenton, Florida 34205 (941) 742-6445
❒ 312 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

3/31/21
*Meeting Date*

SB 1900
*Bill Number (if applicable)*

Topic Cybersecurity

*Amendment Barcode (if applicable)*

Name Jorge Chamizo

Job Title Attorney

Address 108 S Monroe Street
*Street*

Phone 850-681-0024

Tallahassee FL 32301
*City* *State* *Zip*

Email jorge@flapartners.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing HP, Inc.

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

257954

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
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The Committee on Governmental Oversight and Accountability (Boyd) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause and insert:

Section 1. Paragraph (i) of subsection (6) of section 20.055, Florida Statutes, is amended to read:

20.055 Agency inspectors general.—

(6) In carrying out the auditing duties and responsibilities of this act, each inspector general shall review and evaluate internal controls necessary to ensure the

fiscal accountability of the state agency. The inspector general shall conduct financial, compliance, electronic data processing, and performance audits of the agency and prepare audit reports of his or her findings. The scope and assignment of the audits shall be determined by the inspector general; however, the agency head may at any time request the inspector general to perform an audit of a special program, function, or organizational unit. The performance of the audit shall be under the direction of the inspector general, except that if the inspector general does not possess the qualifications specified in subsection (4), the director of auditing shall perform the functions listed in this subsection.

(i) The inspector general shall develop long-term and annual audit plans based on the findings of periodic risk assessments. The plan, where appropriate, should include postaudit samplings of payments and accounts. The plan shall show the individual audits to be conducted during each year and related resources to be devoted to the respective audits. <u>The plan shall include a specific cybersecurity audit plan.</u> The Chief Financial Officer, to assist in fulfilling the responsibilities for examining, auditing, and settling accounts, claims, and demands pursuant to s. 17.03(1), and examining, auditing, adjusting, and settling accounts pursuant to s. 17.04, may use audits performed by the inspectors general and internal auditors. For state agencies under the jurisdiction of the Governor, the audit plans shall be submitted to the Chief Inspector General. The plan shall be submitted to the agency head for approval. A copy of the approved plan shall be submitted to the Auditor General.

Section 2. Subsections (8) through (21) of section 282.0041, Florida Statutes, are renumbered as subsections (9) through (22), respectively, present subsection (22) is amended, and a new subsection (8) is added to that section, to read:

282.0041 Definitions.—As used in this chapter, the term:

(8) "Cybersecurity" means the protection afforded to an automated information system in order to attain the applicable objectives of preserving the confidentiality, integrity, and availability of data, information, and information technology resources.

~~(22) "Information technology security" means the protection afforded to an automated information system in order to attain the applicable objectives of preserving the integrity, availability, and confidentiality of data, information, and information technology resources.~~

Section 3. Paragraph (j) of subsection (1) of section 282.0051, Florida Statutes, is amended to read:

282.0051 Department of Management Services; Florida Digital Service; powers, duties, and functions.—

(1) The Florida Digital Service has been created within the department to propose innovative solutions that securely modernize state government, including technology and information services, to achieve value through digital transformation and interoperability, and to fully support the cloud-first policy as specified in s. 282.206. The department, through the Florida Digital Service, shall have the following powers, duties, and functions:

(j) Provide operational management and oversight of the state data center established pursuant to s. 282.201, which

includes:

1. Implementing industry standards and best practices for the state data center's facilities, operations, maintenance, planning, and management processes.

2. Developing and implementing cost-recovery mechanisms that recover the full direct and indirect cost of services through charges to applicable customer entities. Such cost-recovery mechanisms must comply with applicable state and federal regulations concerning distribution and use of funds and must ensure that, for any fiscal year, no service or customer entity subsidizes another service or customer entity. The Florida Digital Service may recommend other payment mechanisms to the Executive Office of the Governor, the President of the Senate, and the Speaker of the House of Representatives. Such mechanism may be implemented only if specifically authorized by the Legislature.

3. Developing and implementing appropriate operating guidelines and procedures necessary for the state data center to perform its duties pursuant to s. 282.201. The guidelines and procedures must comply with applicable state and federal laws, regulations, and policies and conform to generally accepted governmental accounting and auditing standards. The guidelines and procedures must include, but need not be limited to:

a. Implementing a consolidated administrative support structure responsible for providing financial management, procurement, transactions involving real or personal property, human resources, and operational support.

b. Implementing an annual reconciliation process to ensure that each customer entity is paying for the full direct and

indirect cost of each service as determined by the customer entity's use of each service.

c. Providing rebates that may be credited against future billings to customer entities when revenues exceed costs.

d. Requiring customer entities to validate that sufficient funds exist in the appropriate data processing appropriation category or will be transferred into the appropriate data processing appropriation category before implementation of a customer entity's request for a change in the type or level of service provided, if such change results in a net increase to the customer entity's cost for that fiscal year.

e. By November 15 of each year, providing to the Office of Policy and Budget in the Executive Office of the Governor and to the chairs of the legislative appropriations committees the projected costs of providing data center services for the following fiscal year.

f. Providing a plan for consideration by the Legislative Budget Commission if the cost of a service is increased for a reason other than a customer entity's request made pursuant to sub-subparagraph d. Such a plan is required only if the service cost increase results in a net increase to a customer entity for that fiscal year.

g. Standardizing and consolidating procurement and contracting practices.

4. In collaboration with the Department of Law Enforcement, developing and implementing a process for detecting, reporting, and responding to cybersecurity ~~information technology security~~ incidents, breaches, and threats.

5. Adopting rules relating to the operation of the state

data center, including, but not limited to, budgeting and accounting procedures, cost-recovery methodologies, and operating procedures.

Section 4. Paragraph (g) of subsection (1) of section 282.201, Florida Statutes, is amended to read:

282.201 State data center.—The state data center is established within the department. The provision of data center services must comply with applicable state and federal laws, regulations, and policies, including all applicable security, privacy, and auditing requirements. The department shall appoint a director of the state data center, preferably an individual who has experience in leading data center facilities and has expertise in cloud-computing management.

(1) STATE DATA CENTER DUTIES.—The state data center shall:

(g) In its procurement process, show preference for cloud-computing solutions that minimize or do not require the purchasing, financing, or leasing of state data center infrastructure, and that meet the needs of customer agencies, that reduce costs, and that meet or exceed the applicable state and federal laws, regulations, and standards for cybersecurity ~~information technology security~~.

Section 5. Subsection (2) of section 282.206, Florida Statutes, is amended to read:

282.206 Cloud-first policy in state agencies.—

(2) In its procurement process, each state agency shall show a preference for cloud-computing solutions that either minimize or do not require the use of state data center infrastructure when cloud-computing solutions meet the needs of the agency, reduce costs, and meet or exceed the applicable

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state and federal laws, regulations, and standards for cybersecurity ~~information technology security~~.

Section 6. Section 282.318, Florida Statutes, is amended to read:

282.318 Cybersecurity ~~Security of data and information technology~~.—

(1) This section may be cited as the "State Cybersecurity Act." ~~"Information Technology Security Act."~~

(2) As used in this section, the term "state agency" has the same meaning as provided in s. 282.0041, except that the term includes the Department of Legal Affairs, the Department of Agriculture and Consumer Services, and the Department of Financial Services.

(3) The department, acting through the Florida Digital Service, is the lead entity responsible for establishing standards and processes for assessing state agency cybersecurity risks and determining appropriate security measures. Such standards and processes must be consistent with generally accepted technology best practices, including the National Institute for Standards and Technology Cybersecurity Framework, for cybersecurity. The department, acting through the Florida Digital Service, shall adopt ~~information technology security, to include cybersecurity, and adopting~~ rules that mitigate risks; safeguard state agency digital assets, ~~an agency's~~ data, information, and information technology resources to ensure availability, confidentiality, and integrity; and support a security governance framework ~~and to mitigate risks~~. The department, acting through the Florida Digital Service, shall also:

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(a) Designate an employee of the Florida Digital Service as the state chief information security officer. The state chief information security officer must have experience and expertise in security and risk management for communications and information technology resources. The state chief information security officer is responsible for the development, operation, and oversight of cybersecurity for state technology systems. The state chief information security officer shall be notified of all confirmed or suspected incidents or threats of state agency information technology resources and must report such incidents or threats to the state chief information officer and the Governor.

(b) Develop, and annually update by February 1, a statewide cybersecurity ~~information technology security~~ strategic plan that includes security goals and objectives for cybersecurity, including the identification and mitigation of risk, proactive protections against threats, tactical risk detection, threat reporting, and response and recovery protocols for a cyber incident ~~the strategic issues of information technology security policy, risk management, training, incident management, and disaster recovery planning~~.

(c) Develop and publish for use by state agencies a cybersecurity governance ~~an information technology security~~ framework that, at a minimum, includes guidelines and processes for:

1. Establishing asset management procedures to ensure that an agency's information technology resources are identified and managed consistent with their relative importance to the agency's business objectives.

2. Using a standard risk assessment methodology that includes the identification of an agency's priorities, constraints, risk tolerances, and assumptions necessary to support operational risk decisions.

3. Completing comprehensive risk assessments and cybersecurity ~~information technology security~~ audits, which may be completed by a private sector vendor, and submitting completed assessments and audits to the department.

4. Identifying protection procedures to manage the protection of an agency's information, data, and information technology resources.

5. Establishing procedures for accessing information and data to ensure the confidentiality, integrity, and availability of such information and data.

6. Detecting threats through proactive monitoring of events, continuous security monitoring, and defined detection processes.

7. Establishing agency cybersecurity ~~computer security~~ incident response teams and describing their responsibilities for responding to cybersecurity ~~information technology security~~ incidents, including breaches of personal information containing confidential or exempt data.

8. Recovering information and data in response to a cybersecurity ~~an information technology security~~ incident. The recovery may include recommended improvements to the agency processes, policies, or guidelines.

9. Establishing a cybersecurity ~~an information technology security~~ incident reporting process that includes procedures and tiered reporting timeframes for notifying the department and the

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Department of Law Enforcement of cybersecurity ~~information technology security~~ incidents. The tiered reporting timeframes shall be based upon the level of severity of the cybersecurity ~~information technology security~~ incidents being reported.

10. Incorporating information obtained through detection and response activities into the agency's cybersecurity ~~information technology security~~ incident response plans.

11. Developing agency strategic and operational cybersecurity ~~information technology security~~ plans required pursuant to this section.

12. Establishing the managerial, operational, and technical safeguards for protecting state government data and information technology resources that align with the state agency risk management strategy and that protect the confidentiality, integrity, and availability of information and data.

13. Establishing procedures for procuring information technology commodities and services that require the commodity or service to meet the National Institute of Standards and Technology Cybersecurity Framework.

(d) Assist state agencies in complying with this section.

(e) In collaboration with the Cybercrime Office of the Department of Law Enforcement, annually provide training for state agency information security managers and computer security incident response team members that contains training on cybersecurity ~~information technology security~~, including cybersecurity, threats, trends, and best practices.

(f) Annually review the strategic and operational cybersecurity ~~information technology security~~ plans of state ~~executive branch~~ agencies.

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(g) Provide cybersecurity training to all state agency technology professionals that develops, assesses, and documents competencies by role and skill level. The training may be provided in collaboration with the Cybercrime Office of the Department of Law Enforcement, a private sector entity, or an institution of the state university system.

(h) Operate and maintain a Cybersecurity Operations Center led by the state chief information security officer, which must be primarily virtual and staffed with tactical detection and incident response personnel. The Cybersecurity Operations Center shall serve as a clearinghouse for threat information and coordinate with the Department of Law Enforcement to support state agencies and their response to any confirmed or suspected cybersecurity incident.

(i) Lead an Emergency Support Function, ESF CYBER, under the state comprehensive emergency management plan as described in s. 252.35.

(4) Each state agency head shall, at a minimum:

(a) Designate an information security manager to administer the cybersecurity ~~information technology security~~ program of the state agency. This designation must be provided annually in writing to the department by January 1. A state agency's information security manager, for purposes of these information security duties, shall report directly to the agency head.

(b) In consultation with the department, through the Florida Digital Service, and the Cybercrime Office of the Department of Law Enforcement, establish an agency cybersecurity ~~computer security incident~~ response team to respond to a cybersecurity ~~an information technology security~~ incident. The

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agency cybersecurity ~~computer security incident~~ response team shall convene upon notification of a cybersecurity ~~an information technology security~~ incident and must immediately report all confirmed or suspected incidents to the state chief information security officer, or his or her designee, and comply with all applicable guidelines and processes established pursuant to paragraph (3)(c).

(c) Submit to the department annually by July 31, the state agency's strategic and operational cybersecurity ~~information technology security~~ plans developed pursuant to rules and guidelines established by the department, through the Florida Digital Service.

1. The state agency strategic cybersecurity ~~information technology security~~ plan must cover a 3-year period and, at a minimum, define security goals, intermediate objectives, and projected agency costs for the strategic issues of agency information security policy, risk management, security training, security incident response, and disaster recovery. The plan must be based on the statewide cybersecurity ~~information technology security~~ strategic plan created by the department and include performance metrics that can be objectively measured to reflect the status of the state agency's progress in meeting security goals and objectives identified in the agency's strategic information security plan.

2. The state agency operational cybersecurity ~~information technology security~~ plan must include a progress report that objectively measures progress made towards the prior operational cybersecurity ~~information technology security~~ plan and a project plan that includes activities, timelines, and deliverables for

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security objectives that the state agency will implement during the current fiscal year.

(d) Conduct, and update every 3 years, a comprehensive risk assessment, which may be completed by a private sector vendor, to determine the security threats to the data, information, and information technology resources, including mobile devices and print environments, of the agency. The risk assessment must comply with the risk assessment methodology developed by the department and is confidential and exempt from s. 119.07(1), except that such information shall be available to the Auditor General, the Florida Digital Service within the department, the Cybercrime Office of the Department of Law Enforcement, and, for state agencies under the jurisdiction of the Governor, the Chief Inspector General. If a private sector vendor is used to complete a comprehensive risk assessment, it must attest to the validity of the risk assessment findings.

(e) Develop, and periodically update, written internal policies and procedures, which include procedures for reporting cybersecurity ~~information technology security~~ incidents and breaches to the Cybercrime Office of the Department of Law Enforcement and the Florida Digital Service within the department. Such policies and procedures must be consistent with the rules, guidelines, and processes established by the department to ensure the security of the data, information, and information technology resources of the agency. The internal policies and procedures that, if disclosed, could facilitate the unauthorized modification, disclosure, or destruction of data or information technology resources are confidential information and exempt from s. 119.07(1), except that such information shall

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be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for state agencies under the jurisdiction of the Governor, the Chief Inspector General.

(f) Implement managerial, operational, and technical safeguards and risk assessment remediation plans recommended by the department to address identified risks to the data, information, and information technology resources of the agency. The department, through the Florida Digital Service, shall track implementation by state agencies upon development of such remediation plans in coordination with agency inspectors general.

(g) Ensure that periodic internal audits and evaluations of the agency's cybersecurity ~~information technology security~~ program for the data, information, and information technology resources of the agency are conducted. The results of such audits and evaluations are confidential information and exempt from s. 119.07(1), except that such information shall be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General.

(h) Ensure that the ~~information technology security and~~ cybersecurity requirements in both the written specifications for the solicitation, contracts, and service-level agreement of information technology and information technology resources and services meet or exceed the applicable state and federal laws, regulations, and standards for ~~information technology security and~~ cybersecurity, including the National Institute of Standards

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and Technology Cybersecurity Framework. Service-level agreements must identify service provider and state agency responsibilities for privacy and security, protection of government data, personnel background screening, and security deliverables with associated frequencies.

(i) Provide ~~information technology security and~~ cybersecurity awareness training to all state agency employees in the first 30 days after commencing employment concerning cybersecurity ~~information technology security~~ risks and the responsibility of employees to comply with policies, standards, guidelines, and operating procedures adopted by the state agency to reduce those risks. The training may be provided in collaboration with the Cybercrime Office of the Department of Law Enforcement, a private sector entity, or an institution of the state university system.

(j) Develop a process for detecting, reporting, and responding to threats, breaches, or cybersecurity ~~information technology security~~ incidents which is consistent with the security rules, guidelines, and processes established by the department, through the Florida Digital Service.

1. All cybersecurity ~~information technology security~~ incidents and breaches must be reported to the Florida Digital Service within the department and the Cybercrime Office of the Department of Law Enforcement and must comply with the notification procedures and reporting timeframes established pursuant to paragraph (3)(c).

2. For cybersecurity ~~information technology security~~ breaches, state agencies shall provide notice in accordance with s. 501.171.

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(5) Portions of records held by a state agency which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed cybersecurity ~~information technology security~~ incidents, including suspected or confirmed breaches, are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

(b) Information technology resources, which includes:

1. Information relating to the security of the agency's technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

(6) The portions of risk assessments, evaluations, external audits, and other reports of a state agency's cybersecurity ~~information technology security~~ program for the data, information, and information technology resources of the state agency which are held by a state agency are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution if the disclosure of such portions of records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

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(b) Information technology resources, which include:

1. Information relating to the security of the agency's technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

For purposes of this subsection, "external audit" means an audit that is conducted by an entity other than the state agency that is the subject of the audit.

(7) Those portions of a public meeting as specified in s. 286.011 which would reveal records which are confidential and exempt under subsection (5) or subsection (6) are exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. No exempt portion of an exempt meeting may be off the record. All exempt portions of such meeting shall be recorded and transcribed. Such recordings and transcripts are confidential and exempt from disclosure under s. 119.07(1) and s. 24(a), Art. I of the State Constitution unless a court of competent jurisdiction, after an in camera review, determines that the meeting was not restricted to the discussion of data and information made confidential and exempt by this section. In the event of such a judicial determination, only that portion of the recording and transcript which reveals nonexempt data and information may be disclosed to a third party.

(8) The portions of records made confidential and exempt in subsections (5), (6), and (7) shall be available to the Auditor

General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General. Such portions of records may be made available to a local government, another state agency, or a federal agency for cybersecurity ~~information technology security~~ purposes or in furtherance of the state agency's official duties.

(9) The exemptions contained in subsections (5), (6), and (7) apply to records held by a state agency before, on, or after the effective date of this exemption.

(10) Subsections (5), (6), and (7) are subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

(11) The department shall adopt rules relating to cybersecurity ~~information technology security~~ and to administer this section.

Section 7. Section 282.319, Florida Statutes, is created to read:

282.319 Florida Cybersecurity Advisory Council.—

(1) The Florida Cybersecurity Advisory Council, an advisory council as defined in s. 20.03(7), is created within the department. Except as otherwise provided in this section, the advisory council shall operate in a manner consistent with s. 20.052.

(2) The purpose of the council is to assist state agencies in protecting their information technology resources from cyber threats and incidents.

(3) The council shall assist the Florida Digital Service in implementing best cybersecurity practices, taking into consideration the final recommendations of the Florida Cybersecurity Task Force created under chapter 2019-118, Laws of Florida.

(4) The council shall be comprised of the following members:

(a) The Lieutenant Governor or his or her designee.

(b) The state chief information officer.

(c) The state chief information security officer.

(d) The director of the Division of Emergency Management or his or her designee.

(e) A representative of the computer crime center of the Department of Law Enforcement, appointed by the executive director of the department.

(f) A representative of the Florida Fusion Center of the Department of Law Enforcement, appointed by the executive director of the department.

(g) The Chief Inspector General.

(h) A representative from the Public Service Commission.

(i) Up to two representatives from institutions of higher education located in the state, appointed by the Governor.

(j) Three representatives from critical infrastructure sectors, one of which must be from a water-treatment facility, appointed by the Governor.

(k) Four representatives of the private sector with senior level experience in cybersecurity or software engineering from within the finance, energy, health care, and transportation sector, appointed by the Governor.

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(l) Two representatives with expertise on emerging technology with one appointed by the President of the Senate and one appointed by the Speaker of the House of Representatives.

(5) Members shall serve for a term of 4 years; however, for the purpose of providing staggered terms, the initial appointments of members made by the Governor shall be for a term of 2 years. A vacancy shall be filled for the remainder of the unexpired term in the same manner as the initial appointment. All members of the council are eligible for reappointment.

(6) The Secretary of Management Services, or his or her designee, shall serve as the ex officio, nonvoting executive director of the council.

(7) Members of the council shall serve without compensation but are entitled to receive reimbursement for per diem and travel expenses pursuant to s. 112.061.

(8) The council shall meet at least quarterly to:

(a) Review existing state agency cybersecurity policies.

(b) Assess ongoing risks to state agency information technology.

(c) Recommend a reporting and information sharing system to notify state agencies of new risks.

(d) Recommend data breach simulation exercises.

(e) Assist the Florida Digital Service in developing cybersecurity best practice recommendations for state agencies that include recommendations regarding:

1. Continuous risk monitoring.

2. Password management.

3. Protecting data in legacy and new systems.

(f) Examine inconsistencies between state and federal law

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regarding cybersecurity.

(9) The council shall work with the National Institute of Standards and Technology and other federal agencies, private sector businesses, and private cybersecurity experts:

(a) For critical infrastructure not covered by federal law, to identify which local infrastructure sectors are at the greatest risk of cyber attacks and need the most enhanced cybersecurity measures.

(b) To use federal guidance to identify categories of critical infrastructure as critical cyber infrastructure if cyber damage or unauthorized cyber access to the infrastructure could reasonably result in catastrophic consequences.

(10) Beginning June 30, 2022, and each June 30 thereafter, the council shall submit to the President of the Senate and the Speaker of the House of Representatives any legislative recommendations considered necessary by the council to address cybersecurity.

Section 8. This act shall take effect July 1, 2021.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to cybersecurity; An act relating to cybersecurity; amending s. 20.055, F.S.; requiring certain audit plans of an inspector general to include certain information; amending s. 282.0041, F.S.; revising and providing definitions; amending ss.

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282.0051, 282.201, and 282.206, F.S.; revising provisions to replace references to information technology security with cybersecurity; amending s. 282.318, F.S.; revising provisions to replace references to information technology security and computer security with references to cybersecurity; revising a short title; providing that the Department of Management Services, acting through the Florida Digital Service, is the lead entity for the purpose of certain responsibilities; providing and revising requirements for the department, acting through the Florida Digital Service; providing that certain employees shall be assigned to selected exempt service; providing that the state chief information security officer is responsible for state technology systems and shall be notified of certain incidents and threats; revising requirements for state agency heads; requiring the department, through the Florida Digital Service, to track the implementation by state agencies of certain plans; creating 282.319, F.S.; creating the Florida Cybersecurity Advisory Council within the Department of Management Services; providing the purpose of the council; requiring the council to provide certain assistance to the Florida Digital Service; providing for the membership of the council; providing for terms of council members; providing that the Secretary of Management Services, or his or her designee, shall serve as the ex officio executive director of the council; providing that members shall

serve without compensation but are entitled to reimbursement for per diem and travel expenses; requiring the council to meet at least quarterly for certain purposes; requiring the council to work with certain entities to identify certain local infrastructure sectors and critical cyber infrastructure; requiring the council to submit an annual report to the Legislature; providing an effective date.

**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: | CS/CS/SB 1382 |
| INTRODUCER: | Governmental Oversight and Accountability Committee; Community Affairs Committee and Senator Perry |
| SUBJECT: | Building Inspections |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Hackett | Ryon | CA | **Fav/CS** |
| 2. | Ponder | McVaney | GO | **Fav/CS** |
| 3. | | | AP | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/CS/SB 1382 requires local building code enforcement agencies to allow requests for inspections to be submitted electronically. Such requests for inspections may also be submitted in person in a non-electronic format at the building official's discretion.

The bill defines the term "virtual inspection" and provides that any government entity with the authority to enforce the Florida Building Code may perform virtual inspections, except for certain structural inspections, at their own discretion.

The bill requires a local enforcement agency to refund 10 percent of the permit and inspection fees to a permit holder who fails an inspection if the inspector or building official fails to provide a reason based on compliance with code or ordinance for why the work failed inspection within 3 business days after the inspection. If any permit and inspection fees are refunded, the Department of Business and Professional Regulation surcharges must be recalculated to reflect the refund.

The bill provides that the act fulfills an important state interest.

The bill will have an indeterminate fiscal impact. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Florida Building Code

Part IV of ch. 553, F.S., is known as the "Florida Building Codes Act" (Building Code). The purpose and intent of the Building Code is to provide a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state building code. The Building Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.[1]

The Florida Building Commission (Commission), housed within the Department of Business and Professional Regulation (DBPR), implements the Building Code. The Commission reviews several International Codes published by the International Code Council, the National Electric Code, and other nationally adopted model codes to determine if the Building Code needs to be updated and adopts an updated Building Code every three years.

#### *Building Code Administrators, Inspectors, and Plans Examiners*

Building officials, inspectors, and plans examiners are regulated by the Building Code Administrators and Inspectors Board (BCAIB) within DBPR. A building code administrator, otherwise known as a building official, is a local government employee or a person contracted by a local government who supervises building code activities, including plans review, enforcement, and inspection.[2] A building code inspector (inspector) is a local government employee or a person contracted by a local government who inspects construction that requires permits to determine compliance with building codes and state accessibility laws.[3]

#### *Building Code Enforcement*

Local governments have the power to inspect all buildings, structures, and facilities within their jurisdiction in protection of the public's health, safety, and welfare.[4] Every local government must enforce the Building Code and issue building permits.[5] A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity.[6] State agencies may also enforce the Building Code if current law specifically authorizes them to do so, unless they have delegated responsibility to another public entity.[7]

It is unlawful for a person, firm, or corporation to construct, erect, alter, repair, secure, or demolish any building without first obtaining a permit from the local government or from such persons as may, by resolution or regulation, be directed to issue such permit, upon the payment of reasonable fees as set forth in a schedule of fees adopted by the enforcing agency.[8]

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[1] *See* Section 553.72(1), F.S.
[2] Section 468.603(2), F.S.
[3] Section 468.603(4), F.S.
[4] Section 553.72, F.S.
[5] Sections 125.01(1)(bb), 125.56(1), & 553.80(1), F.S.
[6] Section 468.603(2), F.S; S. 202 of the Seventh edition of the Florida Building Code.
[7] Section 553.80(1), F.S.
[8] *See* sections 125.56(4)(a) & 553.79(1), F.S.

To obtain a permit, an applicant must complete an application for the proposed work on the form furnished by the government entity.[9] A local enforcement agency[10] must allow applicants to submit permit applications electronically to the local enforcement agency, which must provide accepted methods of electronic submission. Accepted methods of electronic submission include, but are not limited to email, fill-in form available online, or third party submission software.[11]

If a building official or plans reviewer denies a permit application or revokes a building permit, the building official or plans reviewer must give the permit applicant a reason for denying or revoking the permit. The reason must be based on compliance with the Building Code or a local ordinance. Failing to provide a reason for denying or revoking a building permit, which is based on compliance with the Building Code or a local ordinance, is grounds for discipline against the building official or plans reviewer's license.[12]

**Building Inspections**

Any construction work that requires a building permit also requires plans and inspections to ensure the work complies with the Building Code. The Building Code requires certain building, electrical, plumbing, mechanical, and gas inspections. Construction work may not be done beyond a certain point until it passes an inspection.

In addition to the inspections required by the Building Code, a building official may require other inspections of any construction work to ascertain compliance with the provisions of the Building Code and other laws that are enforced by the government entity.[13]

***Inspection Fees***

Each government entity may provide a schedule of reasonable fees in order to defer the costs of inspection and enforcement of the Building Code. The basis for a local government's fee structure must relate to the level of service provided by the local government. Fees charged must be consistently applied. Each local government must post its permit and inspection fee schedule on its website.[14]

A local government's permit and inspection fees must be used solely for carrying out that local government entity's responsibilities in enforcing the Building Code. This includes:[15]

- The direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing;
- Building Code enforcement;
- Fire inspections associated with new construction; and

[9] Section 713.135, F.S.
[10] A local enforcement agency is an agency of local government, a local school board, a community college board of trustees, or a university board of trustees in the State University System with jurisdiction to make inspections of buildings and to enforce the Building Code. Section. 553.71(5), F.S.
[11] Sections 125.56(4)(b) and 553.79(1)(b), F.S.
[12] *Id*.
[13] Section 110.3.10, Seventh Edition of the Florida Building Code (Building).
[14] Sections 125.56(2), 166.222, 553.79(1), and 553.80(7), F.S.
[15] Section 553.80(7), F.S.

- Training costs associated with the enforcement of the Building Code and enforcement action pertaining to unlicensed contractor activity to the extent not funded by other user fees.

***DBPR Surcharges***

Current law requires that all local governments assess and collect a one percent surcharge on any building permit issued by their enforcement agency for the purpose of enforcing the Building Code. The local jurisdictions collect the assessment and remit the surcharge fees to the DBPR to fund the activities of the Florida Building Commission, the DBPR's Building Code Compliance and Mitigation Program, and the Florida Fire Prevention Code informal interpretations.[16]

Current law also requires that all local governments assess and collect a separate 1.5 percent surcharge on any building permit issued by their enforcement agency for the purpose of enforcing the Building Code. Local governments collect the assessment and remit the surcharge fees to the DBPR, where it is divided equally to fund the activities of the BCAIB and the Florida Homeowners' Construction Recovery Fund.[17]

***Electronic Requests for Inspections***

Current law requires all local enforcement agencies to allow contractors to apply for permits electronically. However, there is no provision requiring local enforcement agencies to allow contractors to request inspections electronically. Multiple building departments in Florida already allow permit holders to electronically request inspections, while others do not. [18] Instead, they require permit holders to call the building department during its business hours, which limits the time when a permit holder can request an inspection, or use an interactive voice response.[19]

***Virtual Building Inspections***

As a result of COVID-19, many building departments in Florida began performing virtual inspections in order to prevent a shut down and to protect building department staff, contractors, and property owners. Virtual inspections allow a building official or inspector to perform an inspection without having to be physically present at the jobsite. They also allow building

[16] Section 553.721, F.S.
[17] Section 468.631, F.S.; The Florida Homeowners' Construction Recovery Fund is used to compensate homeowners who have suffered a covered financial loss at the hands of state-licensed general, building and residential contractors. Claims are filed with the DBPR, who reviews for completeness and statutory eligibility. The DBPR then presents the claim to the Construction Industry Licensing Board for review. Section 489.1401(2), F.S
[18] *See* Orange County Government Florida, Division of Building Safety, https://www.orangecountyfl.net/PermitsLicenses/DivisionOfBuildingSafety.aspx#inspections (last visited March 5, 2021); Brevard County, Brevard County Building Inspection Request, https://www.brevardfl.gov/PlanningDev/BuildingPermits/InspectionRequest (last visited March 5, 2021); Town of Davie Florida, Online Self Service, https://www.davie-fl.gov/213/Online-Self-Service (last visited March 5, 2021). Fort Myers Community Development, Building, Permitting & Inspections (BPI), https://cityftmyers.com/1293/Building-PermittingInspections (last visited March 5, 2021); Monroe County, Building and Permitting Quick Links, https://www.monroecountyfl.gov/149/Building-and-Permitting (last visited March 5, 2021)
[19] *Id*.

departments to continue operating during the COVID-19 pandemic, which allows contractors to keep working.[20]

Virtual inspections can range from roofing inspections, windows and doors inspections, to A/C change outs depending on the jurisdiction. Virtual inspections can be more efficient than in-person inspections by reducing jobsite travel time, allowing contractors to immediately request an inspection once they finish work, and allowing the contractor to remain on the jobsite.[21]

Current law does not specifically prohibit building departments from performing virtual inspections, but it also does not specifically allow building departments to perform virtual inspections.

***Reasons for Failing an Inspection***

Current law requires a building official or plans reviewer, who denies or revokes a building permit, to provide the permit applicant or permit holder a reason for denying or revoking the permit. The reason must be based on compliance with the Building Code or a local ordinance. If a building official or plans reviewer fails to provide a reason for denying or revoking a building permit based on compliance with the Building Code or a local ordinance, the building official or plans reviewer's license may be disciplined.[22]

The Building Code requires an inspector to notify the permit holder or his or her agent if there are any violations that need to be corrected in order to comply with the Building Code.[23] However, current law does not require a building official or inspector to provide the permit holder a specific reason for failing the inspection.

## III. Effect of Proposed Changes:

**Sections 1 and 2** amend ss. 125.56 and 553.79, F.S., respectively, to require local enforcement agencies to allow requests for inspections to be submitted electronically. Accepted methods of electronic submission include, but are not limited to email, fill-in form available online, or mobile device application. Requests for inspections may be submitted in person in nonelectronic form at the discretion of the local official.

Section 2 authorizes a state or local enforcement agency to perform virtual inspections to enforce the Florida Building Code at the enforcement agency's discretion. A virtual inspection may not be performed on a threshold building.[24] "Virtual inspection" is defined as a form of visual

[20] Monica Casey, Tallahassee creates virtual building inspections to save jobs and keep social distancing, WCTV.tv (Apr. 8, 2020) https://www.wctv.tv/content/news/Tallahassee-creates-virtual-building-inspections-to-save-jobs-and-keep-social-distancing569485561.html (last visited March 5, 2021)
[21] Miami Beach, Modified Procedures for Building Code Inspections During COVID-19 Emergency Period, https://www.miamibeachfl.gov/wp-content/uploads/2020/05/Virtual-inspections-procedures-2.pdf (last visited March 5, 2021); Boca Raton, Virtual Inspections, https://myboca.us/1846/Virtual-Inspections (last visited March 5, 2021)
[22] Section 553.79(1)(a), F.S.
[23] Section 110.3, Seventh Edition of the Florida Building Code (Building).
[24] A threshold building is a building that is greater than three stories or 50 feet in height, exceeds 5,000 square feet, has an occupancy of greater than 500 persons, and is for the gathering of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, or awaiting transportation. A special inspector, who is licensed as an architect or engineer, must perform structural inspections on threshold buildings. Section 553.71(12), F.S.

inspection using visual or electronic aids to allow building code administrators or inspectors to perform the inspection without physical presence.

Section 2 requires a local enforcement agency to refund 10 percent of the permit and inspection fees to a permit holder if:

- The inspector or building official determines that the work, which requires the permit, fails an inspection; and
- The inspector or building official fails to provide a reason based on compliance with the Building Code, the Florida Fire Prevention Code, or local ordinance for why the work failed inspection within 3 business days after the inspection.

If any permit and inspection fees are refunded because of the above, the DBPR surcharges for funding the Building Commission, the BCAIB, and the Florida Homeowners' Recovery Fund must be recalculated based on the amount of the permit and inspection fees after the refund.

**Sections 3 and 4** amend s. 440.103 and 553.80, F.S., respectively, to correct cross references.

**Section 5** provides that the act fulfills an important state interest.

**Section 6** provides that the bill will take effect July 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Article VII, s. 18(a), of the State Constitution provides:

> No county or municipality shall be bound by any general law requiring such county or municipality to spend funds...unless the legislature has determined that such law fulfills an important state interest and unless: the law requiring such expenditure is approved by two-thirds vote of the membership of each house of the legislature; . . .

The bill may implicate this constitutional restriction to the extent that local governments are required to expend funds (i) to update processing systems to allow permit holders to electronically request building inspections; and (ii) to refund permit and inspection fees in certain instances. However, a portion of these expenses may be offset by any efficiencies gained by allowing electronic requests. As currently drafted, Section 5 includes a legislative finding that the bill fulfills an important state interest.

Article VII, s. 18(d) of the State Constitution provides that the mandate requirements do not apply to laws having an insignificant impact,[25] which for Fiscal Year 2020-2021 is

[25] An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times $0.10. See Florida Senate Committee on Community Affairs, Interim Report 2012-115: Insignificant Impact, (Sept. 2011), available at http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited March 10, 2021).

forecast at $2.2 million.[26] If the total cost of this legislation is less than $2.2 million, then the mandate requirements do not apply. If costs imposed by the bill are determined to exceed $2.2 million in the aggregate, the bill may be binding on cities and counties if the bill contains a finding of important state interest and meets one of the exceptions specified in State Constitution (e.g., enactment by vote of two-thirds of the membership of each house).

B. Public Records/Open Meetings Issues:

None.

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 ability for permit holders to electronically request building inspections and for government entities to perform virtual inspections, in limited circumstances, may create efficiencies and reduce the time needed to complete construction projects. The provisions in the bill that incentivize local governments to timely provide the reasons for which a permit holder failed an inspection may also lead to greater efficiencies and cost savings for permit holders.

C. Government Sector Impact:

Local governments that do not already allow permit holders to electronically request building inspections may need to expend funds to update their processing systems to accommodate such requests. However, this expense may be offset by any efficiencies gained by allowing electronic requests.

[26] Based on the Florida Demographic Estimating Conference's Nov. 13, 2020 population forecast for 2021 of 21,893,919. The conference packet is available at: http://edr.state.fl.us/content/conferences/population/demographicsummary.pdf (last visited March 10, 2021).

The bill requires permit fee amounts to be refunded by local governments for failing to timely provide the reasons for which a permit holder failed an inspection. To the extent an enforcement agency fails to timely provide reasons for failure of inspection or is required to increase staff to protect against this failure, such entity will experience a negative fiscal impact. Additionally, if the refund provision is triggered and enforcement agencies are required to recalculate the surcharge, there will be a negative indeterminate fiscal impact on the surcharges received by DBPR.

Government entities may experience cost savings associated with performing certain building inspections virtually, at their discretion.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 125.56, 553.79, 440.103, and 553.80.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Governmental Oversight and Accountability on March 31, 2021:**
The committee substitute adds a statement that the act fulfills an important state interest.

**CS by Community Affairs on March 10, 2021:**
The committee substitute clarifies that 10 percent of permit and inspection fees must refunded after both a failed inspection *and* the inspector fails to provide a reason for such failure within three business days. The committee substitute also specifies three *business* days.

B. Amendments:

None.

**By** the Committee on Community Affairs; and Senator Perry

578-02662-21 20211382c1

A bill to be entitled

An act relating to building inspections; amending s. 125.56, F.S.; requiring that certain counties allow requests for inspections to be submitted electronically; providing acceptable methods of electronic submission; amending s. 553.79, F.S.; requiring that local enforcement agencies allow requests for inspections to be submitted electronically; providing acceptable methods of electronic submission; authorizing enforcement agencies to perform virtual inspections; providing an exception; providing a definition; requiring a refund of certain fees in certain circumstances; requiring that certain surcharges be recalculated under certain conditions; amending ss. 440.103 and 553.80, F.S.; conforming cross-references; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (f) is added to subsection (4) of section 125.56, Florida Statutes, to read:

125.56 Enforcement and amendment of the Florida Building Code and the Florida Fire Prevention Code; inspection fees; inspectors; etc.—

(4)

(f) A county that issues building permits must allow requests for inspections to be submitted electronically to the county building department. Acceptable methods of electronic



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



578-02662-21 20211382c1

submission include, but are not limited to, e-mail or fill-in form available on the website of the building department or through a third-party submission management software or application that can be downloaded on a mobile device. Requests for inspections may be submitted in person in a nonelectronic format, at the discretion of the building official.

Section 2. Present subsections (6) through (22) of section 553.79, Florida Statutes, are redesignated as subsections (8) through (24), respectively, paragraph (d) is added to subsection (1) of that section, new subsections (6) and (7) are added to that section, and subsection (2) of that section is amended, to read:

553.79 Permits; applications; issuance; inspections.—

(1)

(d) A local enforcement agency must allow requests for inspections to be submitted electronically to the local enforcement agency's appropriate building department. Acceptable methods of electronic submission include, but are not limited to, e-mail or fill-in form available on the website of the building department or through a third-party submission management software or application that can be downloaded on a mobile device. Requests for inspections may be submitted in person in a nonelectronic format, at the discretion of the building official.

(2) Except as provided in subsection (8) ~~subsection (6)~~, an enforcing agency may not issue any permit for construction, erection, alteration, modification, repair, or demolition of any building or structure until the local building code administrator or inspector has reviewed the plans and



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

specifications required by the Florida Building Code, or local amendment thereto, for such proposal and found the plans to be in compliance with the Florida Building Code. If the local building code administrator or inspector finds that the plans are not in compliance with the Florida Building Code, the local building code administrator or inspector shall identify the specific plan features that do not comply with the applicable codes, identify the specific code chapters and sections upon which the finding is based, and provide this information to the local enforcing agency. The local enforcing agency shall provide this information to the permit applicant. In addition, an enforcing agency may not issue any permit for construction, erection, alteration, modification, repair, or demolition of any building until the appropriate firesafety inspector certified pursuant to s. 633.216 has reviewed the plans and specifications required by the Florida Building Code, or local amendment thereto, for such proposal and found that the plans comply with the Florida Fire Prevention Code and the Life Safety Code. Any building or structure which is not subject to a firesafety code shall not be required to have its plans reviewed by the firesafety inspector. Any building or structure that is exempt from the local building permit process may not be required to have its plans reviewed by the local building code administrator. Industrial construction on sites where design, construction, and firesafety are supervised by appropriate design and inspection professionals and which contain adequate in-house fire departments and rescue squads is exempt, subject to local government option, from review of plans and inspections, providing owners certify that applicable codes and





standards have been met and supply appropriate approved drawings to local building and firesafety inspectors. The enforcing agency shall issue a permit to construct, erect, alter, modify, repair, or demolish any building or structure when the plans and specifications for such proposal comply with the Florida Building Code and the Florida Fire Prevention Code and the Life Safety Code as determined by the local authority in accordance with this chapter and chapter 633.

(6) A state or local enforcement agency may perform virtual inspections at the discretion of the enforcement agency. However, a state or local enforcement agency may not perform virtual inspections for structural inspections on a threshold building. For purposes of this subsection, the term "virtual inspection" means a form of visual inspection which uses visual or electronic aids to allow a building code administrator or an inspector, or team of inspectors, to perform an inspection without having to be physically present at the job site during the inspection.

(7)(a) A local enforcement agency must refund 10 percent of the permit and inspection fees to a permitholder if:

1. The inspector or building code administrator determines that the work, which requires the permit, fails an inspection; and

2. The inspector or building code administrator fails to provide, within 3 business days after the inspection, the permitholder or his or her agent with a reason, based on compliance with the Florida Building Code, Florida Fire Prevention Code, or local ordinance, for why the work failed the inspection.

(b) If any permit and inspection fees are refunded under paragraph (a), the surcharges provided in s. 553.721 must be recalculated based on the amount of the permit and inspection fees after the refund.

Section 3. Section 440.103, Florida Statutes, is amended to read:

440.103 Building permits; identification of minimum premium policy.—Every employer shall, as a condition to applying for and receiving a building permit, show proof and certify to the permit issuer that it has secured compensation for its employees under this chapter as provided in ss. 440.10 and 440.38. Such proof of compensation must be evidenced by a certificate of coverage issued by the carrier, a valid exemption certificate approved by the department, or a copy of the employer's authority to self-insure and shall be presented, electronically or physically, each time the employer applies for a building permit. As provided in s. 553.79(23) ~~s. 553.79(21)~~, for the purpose of inspection and record retention, site plans or building permits may be maintained at the worksite in the original form or in the form of an electronic copy. These plans and permits must be open to inspection by the building official or a duly authorized representative, as required by the Florida Building Code. As provided in s. 627.413(5), each certificate of coverage must show, on its face, whether or not coverage is secured under the minimum premium provisions of rules adopted by rating organizations licensed pursuant to s. 627.221. The words "minimum premium policy" or equivalent language shall be typed, printed, stamped, or legibly handwritten.

Section 4. Subsection (1) of section 553.80, Florida





Statutes, is amended to read:

553.80 Enforcement.—

(1) Except as provided in paragraphs (a)-(g), each local government and each legally constituted enforcement district with statutory authority shall regulate building construction and, where authorized in the state agency's enabling legislation, each state agency shall enforce the Florida Building Code required by this part on all public or private buildings, structures, and facilities, unless such responsibility has been delegated to another unit of government under s. 553.79(11) ~~pursuant to s. 553.79(9)~~.

(a) Construction regulations relating to correctional facilities under the jurisdiction of the Department of Corrections and the Department of Juvenile Justice are to be enforced exclusively by those departments.

(b) Construction regulations relating to elevator equipment under the jurisdiction of the Bureau of Elevators of the Department of Business and Professional Regulation shall be enforced exclusively by that department.

(c) In addition to the requirements of s. 553.79 and this section, facilities subject to the provisions of chapter 395 and parts II and VIII of chapter 400 shall have facility plans reviewed and construction surveyed by the state agency authorized to do so under the requirements of chapter 395 and parts II and VIII of chapter 400 and the certification requirements of the Federal Government. Facilities subject to the provisions of part IV of chapter 400 may have facility plans reviewed and shall have construction surveyed by the state agency authorized to do so under the requirements of part IV of

chapter 400 and the certification requirements of the Federal Government.

(d) Building plans approved under s. 553.77(3) and state-approved manufactured buildings, including buildings manufactured and assembled offsite and not intended for habitation, such as lawn storage buildings and storage sheds, are exempt from local code enforcing agency plan reviews except for provisions of the code relating to erection, assembly, or construction at the site. Erection, assembly, and construction at the site are subject to local permitting and inspections. Lawn storage buildings and storage sheds bearing the insignia of approval of the department are not subject to s. 553.842. Such buildings that do not exceed 400 square feet may be delivered and installed without need of a contractor's or specialty license.

(e) Construction regulations governing public schools, state universities, and Florida College System institutions shall be enforced as provided in subsection (6).

(f) The Florida Building Code as it pertains to toll collection facilities under the jurisdiction of the turnpike enterprise of the Department of Transportation shall be enforced exclusively by the turnpike enterprise.

(g) Construction regulations relating to secure mental health treatment facilities under the jurisdiction of the Department of Children and Families shall be enforced exclusively by the department in conjunction with the Agency for Health Care Administration's review authority under paragraph (c).





The governing bodies of local governments may provide a schedule of fees, as authorized by s. 125.56(2) or s. 166.222 and this section, for the enforcement of the provisions of this part. Such fees shall be used solely for carrying out the local government's responsibilities in enforcing the Florida Building Code. The authority of state enforcing agencies to set fees for enforcement shall be derived from authority existing on July 1, 1998. However, nothing contained in this subsection shall operate to limit such agencies from adjusting their fee schedule in conformance with existing authority.

Section 5. This act shall take effect July 1, 2021.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Governmental Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 15, 2021

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I respectfully request that **Senate Bill #1382**, relating to Building Inspections, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

W. Keith Perry

Senator Keith Perry
Florida Senate, District 8

File signed original with committee office

S-020 (03/2004)

**THE FLORIDA SENATE**

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/21
*Meeting Date*

1382
*Bill Number (if applicable)*

*Amendment Barcode (if applicable)*

Topic Building Inspectors

Name Rusty Payton

Job Title CEO

Address 2600 Centennial Plaza
*Street*

Tallahassee FL 32317
*City* *State* *Zip*

Phone 850-567-1073

Email rpayton@fhba.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Home Builders Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

741580

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Perry) recommended the following:

**Senate Amendment (with title amendment)**

Delete line 214

and insert:

Section 5. The Legislature determines and declares that this act fulfills an important state interest.

Section 6. This act shall take effect July 1, 2021.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

741580

Delete lines 16 - 17

and insert:

conforming cross-references; providing a declaration of important state interest; providing an effective date.

**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 1624 |
| INTRODUCER: | Senator Albritton |
| SUBJECT: | Special District Accountability |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Paglialonga | Ryon | CA | **Favorable** |
| 2. | Ponder | McVaney | GO | **Favorable** |
| 3. | | | AP | |

## I. Summary:

SB 1624 requires all independent special fire control districts and each hospital governed by the governing body of a special district or the board of trustees of a public health trust to conduct a performance audit[1] every 5 years beginning October 1, 2021, and October 1, 2022, respectively. The bill also requires the Office of Program Policy Analysis and Government Accountability to conduct performance audits of all independent mosquito control districts and soil and water conservation districts by September 30, 2023, and September 30, 2024, respectively.

The bill provides that the annual financial report and annual financial audit report of all special districts must separately specify the following information:

- The total number of people employed by the district;
- The amounts budgeted by the district for employee salaries and benefits; and
- Each construction project approved by the district to begin after October 1 of the fiscal year being reported and the amount budgeted for the project.

The annual financial report of each independent special district that levies ad valorem taxes or non-ad valorem special assessments must include the rate of such levies, the total amount collected by the levies, and the total amount of all outstanding bonds issued by the district and the terms of such bonds.

The bill clarifies that the annual financial auditing report of a community redevelopment agency must be filed separately from the annual financial auditing report of the county or municipality that created the district.

[1] A performance audit is an examination of a program, activity, or function of a governmental entity, conducted in accordance with applicable government auditing standards or auditing and evaluation standards of other appropriate authoritative bodies. The purpose of a performance audit is to provide objective information that may be used to assist in governance and oversight by providing information that will improve program performance, reduce costs to taxpayers, and otherwise facilitate decision-making.

Special districts may experience increased costs in complying with the requirements of the bill.

The bill takes effect on October 1, 2021.

## II. Present Situation:

### Independent Special Districts

A "special district" is a unit of local government created for a particular purpose, with jurisdiction to operate within a limited geographic boundary.[2] Special districts are created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.[3] A special district has only those powers expressly provided by, or reasonably implied from, the authority provided in the district's charter. Special districts provide specific municipal services in addition to, or in place of, those provided by a municipality or county.[4] Special districts are funded through the imposition of ad valorem taxes, fees, or charges on the users of those services as authorized by law.[5]

A "dependent special district" is a special district where the membership of the governing body is identical to the governing body of a single county or municipality, all members of the governing body are appointed by the governing body of a single county or municipality, members of the district's governing body are removable at will by the governing body of a single county or municipality, or the district's budget is subject to the approval of governing body of a single county or municipality.[6] An "independent special district" is any district that is not a dependent special district.[7]

According to the Department of Economic Opportunity's Special District Accountability Program Official List of Special Districts, as of March 3, 2021, the state had 1,785 special districts. There were 1,159 independent special districts and 626 dependent districts.

Special districts are governed generally by the Uniform Special District Accountability Act (Act).[8] The Act centralizes provisions governing special districts and applies such provisions to

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[2] See *Halifax Hospital Medical Center v. State of Fla*., et al., 278 So. 3d 545, 547 (Fla. 2019).
[3] See ss. 189.031(3), 189.02(1), and 190.005(1), F.S. See, generally, s. 189.012(6), F.S.
[4] 2020 – 2022 Local Gov't Formation Manual, p. 64, *available at:* https://myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3117&Session=2021&DocumentType=General+Publications&FileName=2021-2022+Local+Government+Formation+Manual.pdf (last visited Mar. 1, 2021).
[5] The method of financing a district must be stated in its charter. Sections 189.02(4)(g) and 189.031(3), F.S. Independent special districts may be authorized to impose ad valorem taxes as well as non-ad valorem special assessments in the special acts comprising their charters. See, e.g., ch. 2017-220, s. 6(6) of s. 3, Laws of Fla. (Sunbridge Stewardship District). See also, e.g., ss. 190.021 (community development districts), 191.009 (independent fire control districts), 197.3631 (non-ad valorem assessments), 298.305 (water control districts), 388.221 (mosquito control), ch. 2004-397, s. 27 of s. 3, Laws of Fla. (South Broward Hospital District).
[6] Section 189.012(2), F.S.
[7] Section 189.012(3), F.S.
[8] Section 189.01, F.S. Also see ch. 190 (community development districts), ch. 191 (independent special fire control districts), ch. 298 (water control districts), ch. 388 (mosquito control districts), and ch. 582, F.S. (soil and water conservation districts).

the formation,[9] governance,[10] administration,[11] supervision,[12] merger,[13] and dissolution[14] of special districts, unless otherwise expressly provided in law.[15]

Special districts do not possess "home rule" powers and may impose only those taxes, assessments, or fees authorized by special or general law. The special act creating an independent special district may provide for funding from a variety of sources while prohibiting others. For example, ad valorem tax authority is not mandatory for a special district.[16]

***Independent Special Fire Control Districts***

Independent special fire control districts are created by the Legislature to provide fire suppression and related activities within the territorial jurisdiction of the district.[17] As of March 1, 2021, there were 64 active independent special fire control districts.[18]

The Independent Special Fire Control District Act (Act)[19] provides standards, direction, and procedures for greater uniformity in the operation and governance of these districts, including financing authority, fiscally-responsible service delivery, and election of members to the governing boards.[20] The Act controls over more specific provisions in any special act or general law of local application creating a fire control district's charter,[21] requires every fire control district be governed by a five-member board,[22] and provides:

- General powers;[23]
- Special powers;[24]
- Authority and procedures for the assessment and collection of ad valorem taxes;[25]
- Authority and procedures for the imposition, levy, and collection of non-ad valorem assessments, charges, and fees;[26] and
- Issuance of district bonds and evidence of debt.[27]

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[9] See ss. 189.02 (creation of dependent special districts) and 189.031, F.S. (creation of independent special districts).
[10] See s. 189.0311, F.S. (charter requirements for independent special districts).
[11] See s. 189.019, F.S. (requiring codification of charters incorporating all special acts for the district).
[12] See s. 189.0651, F.S. (oversight for special districts created by special act of the Legislature).
[13] Sections 189.071 and 189.074, F.S.
[14] Sections 189.071 and 189.072, F.S.
[15] See, e.g., s. 190.004, F.S. (Ch. 190, F.S. as "sole authorization" for creation of community development districts).
[16] See, e.g., ch. 2006-354, Laws of Fla. (Argyle Fire District may impose special assessments, but has no ad valorem tax authority).
[17] Section 191.003(5), F.S.
[18] Dept. of Economic Opportunity, Special District Accountability Program, "Official List of Special Districts," *available at*: http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx (last visited Mar. 25, 2021).
[19] Chapter 191, F.S.
[20] Section 191.002, F.S.
[21] Section 191.004, F.S. Provisions in other laws pertaining to district boundaries or geographical sub-districts for electing members to the governing board are excepted from this section.
[22] Section 191.005(1)(a), F.S. (fire control district may continue to be governed by a three-member board if authorized by special act adopted in or after 1997).
[23] Section 191.006, F.S. (e.g. the power to sue and be sued in the name of the district, the power to contract, and the power of eminent domain).
[24] Section 191.008, F.S.
[25] Sections 191.006(14) and 191.009(1), F.S.
[26] Sections 191.006(11) and (15), 191.009(2), (3), and (4), and 191.011, F.S.
[27] Section 191.012, F.S.

Fire control districts may levy ad valorem taxes on real property within the district of no more than 3.75 mills unless a greater amount was previously authorized.[28] A district also may levy non-ad valorem assessments.[29] The district board may adopt a schedule of reasonable fees for services performed.[30] Additionally, the district board may impose an impact fee if so authorized by law and the local general purpose government has not adopted an impact fee for fire services that is distributed to the district for construction.[31]

***Hospital Districts***

Hospital districts are a type of independent special district specializing in the provision of health care services. As of March 1, 2021, there are 27 active hospital districts: 24 that directly operate health care facilities and three that provide oversight for facilities leased by local governments to private sector entities.[32] The charters of hospital districts generally possess a set of core features: a board appointed by the Governor, the authority to build and operate hospitals, the power of eminent domain, the ability to issue bonds payable from ad valorem taxes, the use of ad valorem tax revenue for operating and maintaining hospitals, and providing that such facilities are established for the benefit of the indigent sick.[33]

***Mosquito Control Districts***

Mosquito control districts (MCDs) are created to protect health and safety, improve quality of life, promote economic development, and allow for the enjoyment of natural attractions of the state by reducing the number of insects that transmit disease within their boundaries.[34] As of March 1, 2021, there are 18 mosquito control districts: 15 independent and three dependent districts.[35]

A MCD may contain part or all of a county or municipality.[36] The creation of new independent MCDs has been prohibited since July 1, 1980.[37] In counties without a district, the board of county commissioners may exercise all the rights, powers, and duties authorized by statute for a MCD or may direct the county health department to do so.[38]

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[28] Section 191.009(1), F.S. *But see* art. VII, s. 9, Fla. Const. (special districts may not levy an ad valorem tax in excess of the millage "authorized by law approved by vote of the electors.")
[29] Section 191.009(2), F.S. If the district levies a non-ad valorem assessment to fund emergency medical and transport services, the district is prohibited from levying an ad valorem tax to fund those services.
[30] Section 191.009(3), F.S.
[31] Section 191.009(4), F.S.
[32] Dept. of Economic Opportunity, Special District Accountability Program, "Official List of Special Districts," at http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx (last visited Mar. 1, 2021).
[33] Florida TaxWatch, Florida's Fragmented Hospital Taxing District System in Need of Reexamination, Briefings (Feb. 2009), *available at:* https://floridataxwatch.org/Research/Full-Library/ArtMID/34407/ArticleID/16012/Floridas-Fragmented-Hospital-Taxing-District-System-in-Need-of-Reexamination (last visited Mar. 1, 2021).
[34] Sections 388.0101 and 388.011(5), F.S.
[35] Dept. of Economic Opportunity, Special District Accountability Program, "Official List of Special Districts," *available at*: http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx (last visited Mar. 1, 2021).
[36] Section 388.021(1), F.S.
[37] Section 388.021(2), F.S.
[38] Sections 388.241 and 388.251, F.S. The county health department must keep the books and make all reports require under ch. 388, F.S., and all purchases, whether by bid or otherwise, must be made in accordance with the procedures allowed by the

MCDs are authorized to levy ad valorem taxes not exceeding 10 mills on real and personal property.[39] Each MCD or county participating in arthropod control under the statutes must submit to the Department of Agriculture and Consumer Services (DACS) a report for the preceding month of expenditures from all funds for arthropod control within 30 days after the end of each month.[40]

***Soil and Water Conservation Districts***

The stated purpose of soil and water conservation districts (S&WCDs) is to provide assistance, guidance, and education to landowners, land occupiers, the agricultural industry, and the general public in implementing land and water resource protection practices.[41] All S&WCDs are created by the DACS upon petition by landowners in the proposed district.[42] The DACS must provide for an annual audit of the accounts of receipts and disbursements for each district.[43] As of March 1, 2021, there are 56 active districts.[44]

Beginning in 1937,[45] S&WCDs were initially established to encourage cooperation between governments and local landowners concerning local conservation needs.[46] The authority of S&WCDs now overlap significantly with other agencies created to manage and protect the state's land and water resources, such as the Department of Environmental Protection,[47] the Department of Economic Opportunity,[48] and water management districts.[49] Due to this jurisdictional overlap, S&WCDs today primarily focus on working with partners to provide funding and technical support to aid local landowners in conservation efforts.[50]

**Local Government Financial Reports and Audits**

Florida law requires all units of local government, including special districts, to complete annual financial reports and annual financial audit reports. Each district must submit its annual financial report to the Department of Financial Services (DFS) within 9 months of the completion of its fiscal year.[51] If a district fails to file a completed annual financial report within the required

Board of County Commissioners. The health department must also submit to the Board of County Commissioners itemized monthly statements of expenses incurred in carrying out the control program in the county.

[39] Section 388.221(1), F.S.

[40] Section 388.341, F.S. The reports must detail activities and accomplishments as may be required by the DACS.

[41] Section 582.02(4), F.S.

[42] Sections 582.10-582.15, F.S.

[43] Section 582.055(3), F.S.

[44] Dept. of Economic Opportunity, Special District Accountability Program, "Official List of Special Districts," *available at:* http://specialdistrictreports.floridajobs.org/webreports/criteria.aspx (last visited Mar. 1, 2021).

[45] See ch. 18144, s. 2, Laws of Florida (1937). Originally the districts were called Soil Conservation Districts.

[46] DACS Office of Agricultural Water Policy, Soil and Water Conservation District Supervisor Handbook 3, *available at:* https://www.fdacs.gov/content/download/7357/file/Fswcd_Handbook_Final.pdf (last visited Mar. 1, 2021).

[47] See, e.g., ch. 408, F.S.

[48] See, e.g., ch. 380, F.S.

[49] See, e.g., ch. 373, F.S.

[50] The primary partners for soil and water conservation districts are the United States Department of Agriculture's Natural Resource Conservation Service, DACS's Office of Agricultural Water Policy, and county governments. DACS Office of Agricultural Water Policy, supra note 58.

[51] A district that is required to complete a financial audit report must submit both reports within 45 days of the completion of the audit report, but still no later than 9 months after the completion of the fiscal year. Section 218.32(1)(d), F.S.

period, the DFS must notify the Legislative Auditing Committee and the Special District Accountability Program of the Department of Economic Opportunity.[52]

Special districts with revenues or total expenditures and expenses exceeding $100,000 must have an annual financial audit prepared by an independent certified public accountant, unless the district has been notified before the start of the fiscal year that the Auditor General will conduct a financial audit for that year.[53] Special districts with revenues (or a total of expenditures and expenses) between $50,000 and $100,000 are required to conduct a financial audit every 3 years.[54] The financial audit must be performed according to specific statutory criteria and the rules of the Auditor General.[55] The audit report for a dependent special district may be included in the annual financial audit report of the county or municipality on which it is dependent. The audit report must be filed with the Auditor General within 45 days of its receipt by the district, but no later than 9 months after the end of the fiscal year.[56]

***Community Redevelopment Agency Auditing Requirements***

Each community redevelopment agency with revenues or a total of expenditures and expenses in excess of $100,000 must have an annual financial audit prepared by an independent certified public accountant.[57] The audit report must accompany the annual financial report of the county or municipality that created the district.[58]

**Performance Audits**

A performance audit is an examination of a program, activity, or function of a governmental entity, conducted in accordance with applicable government auditing standards or auditing and evaluation standards of other appropriate authoritative bodies.[59] This may include examining:

- The economy, efficiency, or effectiveness of the program;
- How a program is structured or designed to accomplish its goals and objectives;
- The adequacy of the program to meet the needs identified by the Legislature or local governing body;
- Whether alternative methods exist to deliver services provided by the program;
- The goals, objectives, and performance measures used by the agency to monitor and report program accomplishments;
- The accuracy or adequacy of public documents, reports, or requests prepared under the program by state agencies;
- The program's compliance with appropriate policies, rules, or laws; and

[52] Section 218.32(1)(f), F.S. A special district required to have a financial audit conducted must file a copy of the audit report along with its annual financial report. Section 218.32(1)(d) F.S.
[53] Section 218.39(1), F.S.
[54] Section 218.39(1)(h), F.S.
[55] Section 218.39(2)-(7), F.S. See ch. 10.550, Local Governmental Entity Audits (9-30-2019), *available at:* https://flauditor.gov/pages/pdf_files/10_550.pdf (last visited Mar. 1, 2020).
[56] Section 218.39(7), F.S.
[57] Section 163.387(8)(a), F.S.
[58] Section 163.387(8)(c), F.S.
[59] Section 11.45(1)(j), F.S.

- Any other issues related to governmental entities as directed by the Legislative Auditing Committee.[60]

The purpose of a performance audit is to provide objective information that may be used to assist in governance and oversight by providing information that will improve program performance, reduce costs to taxpayers, and otherwise facilitate decision-making.[61] The Auditor General currently conducts a performance audit at least once every 3 years of the local government financial reporting system and the Department of Revenue's administration of the ad valorem tax laws.[62] A performance audit also must be conducted on any program associated with a proposed discretionary sales surtax levy.[63]

**The Office of Program Policy Analysis and Government Accountability**

The Office of Program Policy Analysis and Government Accountability (OPPAGA) is the research arm of the Legislature. The OPPAGA was created by the Legislature in 1994 to help improve the performance and accountability of state government. The OPPAGA provides data, evaluative research, and objective analyses to assist legislative budget and policy deliberations. The OPPAGA conducts research as directed by state law, the presiding officers, or the Joint Legislative Auditing Committee.[64] The OPPAGA provides a variety of research services such as performance evaluations and policy reviews of government programs, research and technical assistance to legislators and legislative committees, and government program summaries containing descriptive and evaluative information on all major state programs.

## III. Effect of Proposed Changes:

**Performance Audits (Section 1)**

The bill creates s. 189.0695, F.S., to require all independent special fire control districts and each hospital governed by the governing body of a special district or the board of trustees of a public health trust to conduct a performance audit every 5 years beginning October 1, 2021, and October 1, 2022, respectively. The performance audit must be conducted by a qualified independent entity from a list generated by the Office of Program Policy Analysis and Government Accountability (OPPAGA). To be included on the list, an entity must have at least 5 years of experience conducting performance audits, must conduct audits according to applicable auditing or evaluation standards of appropriate authoritative bodies, and must follow any relevant industry best practices. The audit report must be filed with the governing body of the district, the Auditor General, the President of the Senate, and the Speaker of the House of Representatives no later than 9 months from the beginning of the fiscal year in which the report is due. If the Auditor General conducts a performance audit of a district in the same fiscal year, that report may be used to satisfy this requirement.

[60] Section 11.45(1)(j), F.S.
[61] Gov't Auditing Standards, s. 1.21 (Gov't Accountability Office 2018). Rule 10.55(3) of the Auditor General incorporate the 2018 Government Auditing Standards adopted by the U.S. Government Accounting Office (2018 Yellow Book).
[62] Section 11.45(2)(g)-(h), F.S.
[63] Section 212.055(11)(a), F.S.
[64] The Office of Program Policy Analysis and Government Accountability, *See About OPPAGA, available at* https://oppaga.fl.gov/About, (last visited March 25, 2021).

The bill also requires all independent mosquito control districts and soil and water conservation districts to undergo a performance audit conducted by the OPPAGA. The performance audit must compare the services provided by each district with similar services provided by counties and municipalities, examining the similarities and differences as well as relative costs and efficiencies of services. The OPPAGA must submit the performance audits of the districts to the President of the Senate and the Speaker of the House of Representatives by:

- September 30, 2023, for independent mosquito control districts; and
- September 30, 2024, for soil and water conservation districts.

The bill defines the term "performance audit" as having the same meaning used in statutes concerning audits performed by the Auditor General.[65]

**Annual Financial Report and Annual Financial Audit Report (Sections 2 & 3)**

Sections 2 and 3 amend ss. 218.32 and 218.39, F.S., respectively, to require the annual financial report and annual financial audit report for all special districts to separately specify the following information:

- The total number of people employed by the district;
- The amounts budgeted by the district for employee salaries and benefits; and
- Each construction project approved by the district to begin after October 1 of the fiscal year being reported and the amount budgeted for the project.

Section 2 requires the annual financial report of each independent special district that levies ad valorem taxes or non-ad valorem special assessments to include the rates of such levies, the total amount collected by the levies, and the total amount of all outstanding bonds issued by the district and the terms of such bonds.

Section 3 revises requirements concerning annual financial audit reports to clarify that the annual financial audit report of a community redevelopment agency with revenues or a total of expenditures and expenses in excess of $100,000 must be provided separately from the annual financial audit report of the county or municipality that created the district.

The bill takes effect October 1, 2021.

## 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:

None.

[65] See notes 60, 61, supra, and related text.

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:

None.

C. Government Sector Impact:

Special districts may experience workload increases and associated costs to comply with additional reporting requirements created by the bill.

Independent special fire control districts and hospitals governed by special districts or the board of trustees of a public health trust will incur increased costs related to the conduct of performance audits.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 218.32 and 218.39.

This bill creates section 189.0695 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.

**By** Senator Albritton

26-01565A-21 20211624__

A bill to be entitled

An act relating to special district accountability; creating s. 189.0695, F.S.; defining the term "performance audit"; requiring certain independent special districts to contract with an independent entity to conduct performance audits; providing an exception; specifying the frequency of such audits; requiring the Office of Program Policy Analysis and Government Accountability to conduct performance audits of certain classifications of independent special districts; providing criteria for contracting for such audits; requiring the performance audits to be reported by a time certain; amending s. 218.32, F.S.; requiring additional information to be reported by special districts in the annual report; amending s. 218.39, F.S.; requiring that certain data be included in financial audits of special districts; requiring certain community redevelopment agencies to file separate audited financial statements; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 189.0695, Florida Statutes, is created to read:

189.0695 Independent special districts; performance audits.—

(1) The term "performance audit" has the same meaning as in



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



26-01565A-21 20211624__

s. 11.45(1).

(2)(a) Each independent special district as described in paragraph (c) must contract with an independent entity to conduct a performance audit of the district. The Office of Program Policy Analysis and Government Accountability must generate a list of independent entities qualified to perform the performance audit and the independent special district must select an independent entity from the list. To be included on the list, an entity must have at least 5 years of experience conducting performance audits, must conduct audits according to applicable auditing or evaluation standards of appropriate authoritative bodies, and must follow any applicable industry best practices.

(b) The entity's final report of the performance audit must be filed with the governing board of the district, the Auditor General, the President of the Senate, and the Speaker of the House of Representatives no later than 9 months from the beginning of the district's fiscal year according to the schedule provided in paragraph (c). However, a performance audit of a district conducted by the Auditor General during the same fiscal year in which a performance audit is due pursuant to paragraph (c) qualifies as that district's scheduled performance audit under this section.

(c)1. Beginning October 1, 2021, and every 5 years thereafter, each independent special fire control district as defined in s. 191.003, must have a performance audit conducted.

2. Beginning October 1, 2022, and every 5 years thereafter, each hospital licensed under chapter 395 which is governed by the governing body of a special district as defined in s.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

189.012 or by the board of trustees of a public health trust created under s. 154.07, must have a performance audit conducted.

(3) The Office of Program Policy Analysis and Government Accountability must conduct a performance audit of all independent special districts within the classifications described in paragraphs (a) and (b). The performance audit must compare the services provided by each district examined with similar services provided by the county and municipal governments wholly or partially within the boundaries of the district, expressly stating the similarities and differences, and relative costs and efficiencies, between the services provided by the district and those provided by the relevant counties and municipalities. The Office of Program Policy Analysis and Government Accountability shall submit the final report of the performance audit to the President of the Senate and the Speaker of the House of Representatives as follows:

(a) For all independent mosquito control districts as defined in s. 388.011, no later than September 30, 2023.

(b) For all soil and water conservation districts as defined in s. 582.01, no later than September 30, 2024.

Section 2. Paragraph (e) of subsection (1) of section 218.32, Florida Statutes, is amended to read:

218.32 Annual financial reports; local governmental entities.—

(1)(e)1. Each local governmental entity that is not required to provide for an audit under s. 218.39 must submit the annual financial report to the department no later than 9 months after the end of the fiscal year. The department shall consult





with the Auditor General in the development of the format of annual financial reports submitted pursuant to this paragraph. The format must include balance sheet information used by the Auditor General pursuant to s. 11.45(7)(f). The department must forward the financial information contained within the annual financial reports to the Auditor General in electronic form. This paragraph does not apply to housing authorities created under chapter 421.

2. The annual financial report filed by a dependent special district or an independent special district shall specify separately:

a. The total number of district employees.

b. The amounts budgeted by the district for employee salaries and the amounts budgeted for employee benefits.

c. Each construction project approved by the district to begin after October 1 of the fiscal year being reported together with the amount budgeted for such project.

3. The annual financial report of an independent special district that imposes ad valorem taxes shall include the millage rate or rates imposed by the district, the total amount of ad valorem taxes collected by or on behalf of the district, and the total amount of outstanding bonds issued by the district and the terms of such bonds.

4. The annual financial report of an independent special district that imposes non-ad valorem special assessments shall include the rate or rates of such assessments imposed by the district, the total amount of special assessments collected by or on behalf of the district, and the total amount of outstanding bonds issued by the district and the terms of such

bonds.

Section 3. Paragraph (h) of subsection (1) of section 218.39, Florida Statutes, is redesignated as paragraph (i), a new paragraph (h) is added to that subsection, and subsection (3) of that section is amended, to read:

218.39 Annual financial audit reports.—

(1) If, by the first day in any fiscal year, a local governmental entity, district school board, charter school, or charter technical career center has not been notified that a financial audit for that fiscal year will be performed by the Auditor General, each of the following entities shall have an annual financial audit of its accounts and records completed within 9 months after the end of its fiscal year by an independent certified public accountant retained by it and paid from its public funds:

(h) As required by s. 163.387(8)(a), each community redevelopment agency with revenues or a total of expenditures and expenses in excess of $100,000, as reported on the trust fund financial statements.

(3)(a) A dependent special district, excluding a community redevelopment agency with revenues or a total of expenditures and expenses in excess of $100,000, as reported on the trust fund financial statements, may provide for an annual financial audit by being included in the audit of the local governmental entity upon which it is dependent. An independent special district may not make provision for an annual financial audit by being included in the audit of another local governmental entity.

(b) A special district that is a component unit, as defined





by generally accepted accounting principles, of a local governmental entity shall provide the local governmental entity, within a reasonable time period as established by the local governmental entity, with financial information necessary to comply with this section. The failure of a component unit to provide this financial information must be noted in the annual financial audit report of the local governmental entity.

(c) The financial audit of a dependent special district or of an independent special district, or the financial audit of a local governmental entity including the information of a dependent special district as provided in paragraph (a) of this subsection, shall separately include and specify the information required in s. 218.32(1)(e)2.

Section 4. This act shall take effect October 1, 2021.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Governmental Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 17, 2021

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I respectfully request that **Senate Bill #1624**, relating to Special District Accountability, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Ben Albritton
Florida Senate, District 26

File signed original with committee office

S-020 (03/2004)

**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: | CS/CS/SB 1788 |
| INTRODUCER: | Governmental Oversight and Accountability Committee; Community Affairs Committee and Senator Boyd |
| SUBJECT: | Construction Permits |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Hackett | Ryon | CA | **Fav/CS** |
| 2. | Ponder | McVaney | GO | **Fav/CS** |
| 3. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/CS/SB 1788 makes various amendments to the Florida Building Codes Act and related statutes.

The bill requires local governments to review additional information for an application for a development permit or development order within a certain time-period.

The bill requires local enforcement agencies to:

- Post each building permit application, including a list of any required attachments, such as drawings or plans, on their websites;
- Allow applicants to submit completed building permit applications electronically including any required payments and attachments, such as plans;
- Post the current status of every received building permit application on their website; and
- Post their procedures for reviewing, processing, and approving building permit applications on their websites.

The bill requires government entities which enforce the Florida Building Code Act that fail to meet current established deadlines for reviewing single-family residential building permit applications to reduce the fees and surcharges for such permits for every business day that the deadline is not met, except under certain circumstances.

The bill requires government entities that deny a building permit application for a single-family residential dwelling to allow the applicant 10 business days to correct the application.
The bill prohibits government entities from requiring a copy of a contractor's contract with owners, subcontractors, or suppliers in order to obtain a building permit for projects on commercial property. This does not apply to projects for improvements owned or leased by a government entity.

The bill takes effect October 1, 2021.

## II. Present Situation:

### The Community Planning Act

Adopted in 1985, the Local Government Comprehensive Planning and Land Development Regulation Act,[1] also known as Florida's Growth Management Act, was significantly revised in 2011, becoming the Community Planning Act.[2] The Community Planning Act governs how local governments create and adopt their local comprehensive plans.

Local comprehensive plans must include principles, guidelines, standards, and strategies for the orderly and balanced future land development of the area and reflect community commitments to implement the plan. The Community Planning Act intends that local governments manage growth through comprehensive land use plans that facilitate adequate and efficient provision of transportation, water, sewage, schools, parks, recreational facilities, housing, and other requirements and services.[3] A housing element is required as part of every comprehensive plan in the state. Among other things, the housing element must address "the creation or preservation of affordable housing to minimize the need for additional local services and avoid the concentration of affordable housing units only in specific areas of the jurisdiction."[4]

Municipalities established after the effective date of the Community Planning Act must adopt a comprehensive plan within three years after the date of incorporation.[5] The county comprehensive plan controls until a municipal comprehensive plan is adopted.[6]

The comprehensive plan is implemented via land development regulations. Each county and municipality must adopt and enforce land development regulations, such as zoning or other housing-related ordinances, which are consistent with and implement their adopted comprehensive plan.[7]

#### *Issuing Development Orders and Permits*

Under the Community Planning Act, a development permit is any official action of a local government that has the effect of permitting the development of land including, but not limited

[1] *See* ch. 85-55, s. 1, Laws of Fla.
[2] *See* ch. 2011-139, s. 17, Laws of Fla.
[3] Section 163.3161(4), F.S.
[4] Section 163.3177(6)(f)1.g., F.S.
[5] Section 163.3167(3), F.S.
[6] *Id*.
[7] Section 163.3202, F.S.

to, building permits, zoning permits, subdivision approval, rezoning, certifications, special exceptions, and variances.[8] A development order is issued by a local government and grants, denies, or grants with conditions an application for a development permit.[9]

When reviewing an application for a development permit or development order, not including building permit applications, a county or municipality may not request additional information from the applicant more than three times, unless the applicant waives the limitation in writing.[10]

Before a third request for information, the applicant must be offered a meeting to attempt to resolve outstanding issues.[11] If the applicant believes the request for additional information is not authorized by ordinance, rule, statute, or other legal authority, the applicant can request the county or municipality proceed to process the application for approval or denial.[12] If denied, the county or municipality is required to give written notice to the applicant and must provide reference to the applicable legal authority for the denial of the permit.[13]

Prior to 2019, no specified timeframes were provided in statute for reviewing an application for a development permit, development order, or additional information requested by a county or municipality.[14]

In 2019, the Legislature imposed requirements and time limits for a county or municipality to review an application for a development permit or development order, not including building permit applications, and provided procedures for addressing deficiencies in an application.[15]

Within 30 days of receiving an application for a development permit or development order, a county or municipality must review the application and issue a letter to the applicant indicating that the application is complete or specify the deficiencies within 30 days after receiving the application.[16] If the county or municipality identifies deficiencies, the applicant has 30 days to submit the required additional information.[17]

Once an application is deemed complete, a county or municipality must approve, approve with conditions, or deny the application within 120 days or 180 days for applications that require final action through a quasi-judicial hearing or a public hearing.[18]

Current law specifies how long an applicant has to submit additional information to a local government. However, current law does not specify how long a local government has to review the additional information and determine if the application is complete or still deficient.

[8] Section 163.3164(16), F.S.
[9] *See* ss. 125.022, 163.3164(15), and 166.033, F.S.
[10] Sections 125.022(1) and 166.033(1), F.S.
[11] *Id.*
[12] *Id.*
[13] Sections 125.022(2) and 166.033(2), F.S.
[14] Sections 125.022(1) and 166.033(1), F.S. (2018).
[15] *See* House Analysis of 2019 House Bill 7103 (Jul. 1, 2019).
[16] Sections 125.022(1) and (2), and 166.033 (1) and (2), F.S.
[17] *Id.*
[18] *Id.*

**The Florida Building Code**

In 1974, Florida adopted legislation requiring all local governments to adopt and enforce a minimum building code that would ensure that Florida's minimum standards were met. Local governments could choose from four separate model codes. The state's role was limited to adopting all or relevant parts of new editions of the four model codes. Local governments could amend and enforce their local codes, as they desired.[19]

In 1992, Hurricane Andrew demonstrated that Florida's system of local codes did not work. Hurricane Andrew easily destroyed those structures that were allegedly built according to the strongest code. The Governor eventually appointed a study commission to review the system of local codes and make recommendations for modernizing the system. The 1998 Legislature adopted the study commission's recommendations for a single state building code and enhanced the oversight role of the state over local code enforcement. The 2000 Legislature authorized implementation of the Florida Building Code (Building Code), and that first edition replaced all local codes on March 1, 2002.[20] The current edition of the Building Code is the seventh edition, which is referred to as the 2020 Florida Building Code.[21]

Part IV of ch. 553, F.S., is known as the "Florida Building Codes Act" (Act). The purpose and intent of the Act is to provide a mechanism for the uniform adoption, updating, interpretation, and enforcement of a single, unified state building code. The Building Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction. [22]

The Florida Building Commission (Commission) was statutorily created to implement the Building Code. The Commission, which is housed within the Department of Business and Professional Regulation (DBPR), is a 19-member technical body made up of design professionals, contractors, and government experts in various disciplines covered by the Building Code. The Commission reviews several International Codes published by the International Code Council,[23] the National Electric Code, and other nationally adopted model codes to determine if the Building Code needs to be updated and adopts an updated Building Code every three years.[24]

***Enforcement of the Florida Building Code***

It is the intent of the Legislature that local governments have the power to inspect all buildings, structures, and facilities within their jurisdiction in protection of the public's health, safety, and welfare.[25] Every local government must enforce the Building Code and issue building permits.[26]

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[19] The Florida Building Commission Report to the 2006 Legislature, *Florida Department of Community Affairs,* p. 4, http://www.floridabuilding.org/fbc/publications/2006_Legislature_Rpt_rev2.pdf (last visited March 30, 2021).
[20] *Id.*; DBPR, *Building Code Information System*, https://floridabuilding.org/c/default.aspx# (last visited March 30, 2021).
[21] Florida Building Commission Homepage, https://floridabuilding.org/c/default.aspx (last visited March 30, 2021).
[22] *See* s. 553.72(1), F.S.
[23] The International Code Council (ICC) is an association that develops model codes and standards used in the design, building, and compliance process to "construct safe, sustainable, affordable and resilient structures." International Code Council, *About the ICC*, https://www.iccsafe.org/about/who-we-are/ (last visited March 30, 2021).
[24] Sections 553.73, and 553.74, F.S.
[25] Section 553.72, F.S.
[26] Sections 125.01(1)(bb), 125.56(1), and 553.80(1), F.S.

State universities, Florida College System institutions, and public school districts enforce the Building Code for their building projects, including conducting plan review and inspections. State universities, Florida College System institutions, and public school districts must use or contract with licensed building officials, inspectors, and plan examiners, and may elect to use a local government's building department to review plans and perform inspections.[27]

Current law also provides that state agencies may enforce the Building Code if current law specifically authorizes them to do so, unless they have delegated responsibility to another public entity.[28] Current law provides that:[29]

- The Department of Corrections, the Department of Juvenile Justice, and the Department of Management Services (DMS) enforces the construction regulations relating to correctional facilities under their jurisdiction;
- The DMS enforces the construction regulations for the Governor's Mansion and its grounds, the Capitol, and the Capitol complex;
- The DBPR enforces the construction regulations relating to elevator equipment under their jurisdiction;
- The Turnpike Enterprise, which is part of the Department of Transportation, enforces the construction regulations for toll collection facilities under its jurisdiction;
- The Department of Children and Families (DCF) in conjunction with the Agency for Health Care Administration (AHCA) enforces construction regulations relating to secure mental health treatment facilities under the DCF's jurisdiction; and
- The AHCA also reviews plans and surveys construction of hospitals, nursing homes, ambulatory surgical centers, and Intermediate Care Facilities for the developmentally disabled.

It is unlawful for a person, firm, or corporation to construct, erect, alter, repair, secure, or demolish any building without first obtaining a building permit from the local government or from such persons as may, by resolution or regulation, be directed to issue such permit, upon the payment of reasonable fees as set forth in a schedule of fees adopted by the enforcing agency.[30] A building permit is not valid until the fees for the permit have been paid.[31]

A building permit is an official document or certificate issued by the local building official that authorizes performance of a specific activity.[32] A building official is a local government employee or a person contracted by a government entity who supervises building code activities, including plans review, enforcement, and inspection.[33] Any construction work that requires a building permit also requires plans and inspections by the building official to ensure the work complies with the Building Code.[34]

[27] Section 553.80(6), F.S.
[28] Sections 255.31(1), and 553.80(1), F.S.
[29] *Id.*
[30] *See* ss. 125.56(4)(a), and 553.79(1), F.S.
[31] Section 109.1 of the Seventh edition of the Florida Building Code (Building).
[32] Section 468.603(2), F.S; Section 202 of the Seventh edition of the Florida Building Code (Building).
[33] Section 468.603(2), F.S.; S. 202 of the Seventh edition of the Florida Building Code (Building).
[34] Sections 107, 110.1, and 110.3 of the Seventh edition of the Florida Building (Building).

Each government entity may provide a schedule of reasonable fees in order to defer the costs of inspection and enforcement of the Building Code. The basis for a local government's fee structure must relate to the level of service provided by the local government. Fees charged must be consistently applied. Each local government must post its permit and inspection fee schedule and a utilization report[35] on its website.[36]

A local government's permit and inspection fees must be used solely for carrying out that local government's responsibilities in enforcing the Building Code. This includes:[37]

- The direct costs and reasonable indirect costs associated with review of building plans, building inspections, reinspections, and building permit processing;
- Building Code enforcement;
- Fire inspections associated with new construction; and
- Training costs associated with the enforcement of the Building Code and enforcement action pertaining to unlicensed contractor activity to the extent not funded by other user fees.

***DBPR Surcharges***

Current law requires all local governments to assess and collect a 1 percent surcharge on any building permit issued by their enforcement agency for the purpose of enforcing the Building Code. The local jurisdictions collect the assessment and remit the surcharge fees to the DBPR to fund the activities of the Florida Building Commission, the DBPR's Building Code Compliance and Mitigation Program, and the Florida Fire Prevention Code informal interpretations.[38]

Current law also requires all local governments to assess and collect a separate 1.5 percent surcharge on any building permit issued by their enforcement agency for the purpose of enforcing the Building Code.

The local governments collect the assessment and remit the surcharge fees to the DBPR, where it is divided equally to fund the activities of the Building Code Administrators and Inspectors Board (BCAIB) and the Florida Homeowners' Construction Recovery Fund.[39]

Local government building departments are permitted to retain 10 percent of the amount of the surcharges they collect to fund participation by their agencies in the national and state building code adoption processes and to provide education related to enforcement of the Florida Building Code.[40]

[35] The utilization report must include the local government's direct and indirect costs for enforcing the Building. Section 553.80(7), F.S.
[36] Sections 125.56(2) and (4), 166.222, and 553.80(7), F.S.
[37] Section 553.80(7), F.S.
[38] Section 553.721, F.S.
[39] Section 468.631, F.S.; The Florida Homeowners' Construction Recovery Fund is used to compensate homeowners who have suffered a covered financial loss at the hands of state-licensed general, building and residential contractors. Claims are filed with the DBPR, who reviews for completeness and statutory eligibility. The DBPR then presents the claim to the Construction Industry Licensing Board for review. Section 489.1401(2), F.S.
[40] Sections 468.631, and 553.721, F.S.

***Building Permit Delays***

Any delays in obtaining a building permit can delay the completion of a construction. Delays in the completion of a construction project may:[41]

- Lead to increased costs for construction projects, which may be passed onto occupants of a completed project;
- Discourage construction, which can reduce the total supply of buildings in a community and may lead to higher rents in the community;
- Reduce property tax revenue to a local government and other taxing jurisdictions resulting from the delayed start and completion of a construction project; and
- Result in delayed occupancy of a project, including single-family residences and multi-family residences.

Streamlining the process to obtain a building permit can accelerate the completion of construction projects. The goal of streamlining is to remove overlap and duplication and create more efficient administrative procedures while not reducing a building department's ability to enforce the applicable construction codes. Streamlining the building permit process may:[42]

- Increase local government revenues by accelerating completion of a project and thus accelerating property tax collection;
- Create local construction jobs and other indirect jobs supported by local construction jobs, such as jobs at a material supplier, which may increase local tax revenue by creating local construction jobs and other indirect jobs; and
- Encourage economic development by having an efficient permit system.

***List of Required Items for Applications and Electronic Submission of Applications – Current Situation***

A local enforcement agency is an agency of local government, a local school board, a community college board of trustees, or a university board of trustees in the State University System with jurisdiction to make inspections of buildings and to enforce the Building Code.[43]

Current law requires local enforcement agencies to post each type of building permit on their website.[44] Current law also requires local enforcement agencies to allow applicants to submit applications electronically, except owners who are acting as contractor under the owner-builder exemption.[45] Accepted methods of electronic submission include, but are not limited to:[46]

- E-mail submission of applications in PDF format;

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[41] City of Austin Development Services Department, *A Program for Expedited Permitting*, http://austintexas.gov/sites/default/files/files/8-9-2016_Report_on_Expedited_Permitting_Program.pdf (last visited March 30, 2021); PricewaterhouseCoopers, *The Economic Impact of Accelerating Permit Processes on Local Development and Government Revenues*, (Dec. 7, 2005).

[42] *Id.*; Institute for Market Transformation, *Streamlining Compliance Processes*, (Winter 2012) https://www.imt.org/wp-content/uploads/2018/02/CaseStudy5.pdf (last visited March 30, 2021).

[43] Section 553.71(5), F.S.

[44] Sections 125.56(4)(b), and 553.79(1)(b), F.S.

[45] Current law requires property owners who are acting as a contractor under the owner-builder exemption to personally appear at a local enforcement agency to sign the building permit. Sections 489.103(7), and 489.503(7), F.S.

[46] Sections 125.56(4)(b), and 553.79(1)(b), F.S.

- Submission of applications through an electronic fill-in form available on the building department's website; or
- Through a third-party submission management software.

However, it is not clear if current law requires local enforcement agencies to:
- Post a list or identify other items required as part of the application for each type of building permit on their websites;
- Allow applicants to electronically submit items required as part of a building permit application including payments, attachments, or drawings; or
- Post the status of building permit applications on their websites.

Some local governments list the items required as part of an application, allow applicants to electronically submit items required as part of an application, and post the status of building permit applications on their websites, while others do not.[47]

Some in the building and development community suggest that posting a list containing all the required information for each type of building permit and the status of every received application saves time by reducing phone calls and emails to building department staff. It may also reduce the number of applications that are denied due to misunderstanding about what materials and information must be provided.[48]

Allowing applicants to submit applications electronically, including all required items, may save time and money for builders and developers by shortening the turn-around time for processing most building permits, and by preventing them from having to travel to and from a building department during business hours to drop off the required items.[49]

It is also suggested that such regulatory changes help building departments by reducing the cost of printing documents, eliminating archiving costs, easing the burden of managing paper documents, and consolidates the plan review process by having documents stored on a network server that is available to multiple departments and employees.[50]

Building departments note that the cost to post the list of required items and the status of received building permit applications, and the cost to transition from paper documents to

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[47] City of Miramar, *Building, Permits & Inspections*, https://www.miramarfl.gov/150/Building-Permits-Inspections (last visited March 30, 2021City of Orlando, *Permits & Inspections*, https://www.orlando.gov/Building-Development/Permits-Inspections (last visited March 30, 2021); Union County, *Building Department*, https://unioncounty-fl.gov/building-department/ (last visited March 30, 2021); City of Crestview, *Building Permits & Inspections*, http://www.cityofcrestview.org/161/Building-Permits-Inspections (last visited March 30, 2021).

[48] Ryan Meres, Seven Keys to Alleviating Permitting Pain, Builder (Jul. 23, 2015) https://www.builderonline.com/building/regulation-policy/seven-keys-to-alleviating-permitting-pain_o (last visited March 30, 2021); E-Gov Link, *How to Streamline your Local Government Permitting Process*, (Aug. 28, 2019) https://www2.egovlink.com/how-to-streamline-your-local-government-permitting-process/ (last visited March 30, 2021).

[49] Building Officials Association of Florida, Florida Engineering Society, AIA Florida, *Building Department Guide to Creating and Processing Electronic Construction Documents*, http://www.aiafla.org/upload_documents/BuildingDepartmentGuidetoCreatingandProcessingElectronicDocuments.pdf (last visited March 30, 2021); *See* The Florida Channel, 1/27/ 2021 House Regulatory Reform Subcommittee, https://thefloridachannel.org/videos/1-27-21-house-regulatory-reform-subcommittee/ (last visited March 30, 2021).

[50] *Id.*

electronic documents is expensive and it is not easy or quick.[51] Additionally, a building department may have to devote limited resources to updating the list of required items and the status of received building permit applications.[52]

***Time-Period to Review Building Permit Applications***

Current law requires local governments to review certain building permit applications within a specific time-period of receiving the applications. Current law has established time-periods for local governments to review applications for the following building permits:[53]

- Accessory structure;
- Alarm permit;
- Nonresidential buildings less than 25,000 square feet;
- Electric;
- Irrigation permit;
- Landscaping;
- Mechanical;
- Plumbing;
- Residential units other than a single family unit;
- Multifamily residential not exceeding 50 units;
- Roofing;
- Signs;
- Site-plan approvals and subdivision plats not requiring public hearings or public notice;
- Lot grading and site alteration associated with the permit application set forth in this subsection;
- Master building permits; and
- Single-family residential buildings.

When a local government receives an application for one of the above building permits, except master building permits and single-family residential buildings, it must:[54]

- Inform the applicant within 10 days of receiving the application, what information, if any, is needed to complete the application;
  - If the local government fails to provide written notice to the applicant within the 10-day window, the application is deemed to be properly completed.
- Notify the applicant within 45 days of the application being deemed complete if additional information is necessary to determine the sufficiency of the application; and
  - If additional information is needed the local government must specify what additional information is necessary.
  - The applicant may submit the additional information to the local government or request that the local government act on the application without the additional information.

[51] *Id.*; The Community Development Director for the City of Auburndale testified that the cost for them to purchase the software necessary for the switch to electronic documents cost $90,000. *See* The Florida Channel, *supra* note 49.
[52] The Massachusetts Association of Regional Planning Agencies, *A Best Practices for Streamlined Local Permitting*, (Nov. 30, 2007), http://www.pvpc.org/sites/default/files/BEST%20PRACTICES%20GUIDE_0.pdf (last visited Feb. 24, 2021).
[53] Section 553.792(2), F.S.
[54] Section 553.792(1), F.S.

- Approve, approve with conditions, or deny the application within 120 days following receipt of the completed application.
    - This period is tolled during the time an applicant is responding to a request for additional information and may be extended by mutual consent of the parties.

These time-periods do not apply when a law, agency rule, or local ordinance specify different timeframes for review of local building permit applications, for permits for wireless communication facilities, or when both parties agree to an extension.[55]

If a local government receives a complete master building permit application, it must approve or deny the application within 120 days of receiving the completed application, unless the applicant agrees to a longer period.[56]

If any government entity with authority to enforce the Building Code receives an application for a building permit for single-family residential dwelling, it must issue the permit within 30 business days of receiving the application, unless the application fails to satisfy the Building Code or the enforcing agency's laws or ordinances, or unusual circumstances require a longer time-period for processing the application.[57]

Current law provides time-periods for when government entities must review certain building permit applications. However, current law does not provide any penalty if a government entity fails to comply with the deadlines established by current law.

**Required Information in Building Permit Application**

To obtain a permit, an applicant must complete an application for the proposed work on a form furnished by the government entity. The form must include the following information:[58]

- The name and address of the owner of the property;
- The name and address of the contractor;
- A description sufficient to identify the property to be improved, including the property's address and legal description;
- The name and address of the bonding company, if any;
- The name and address of the architect/engineer, if any;
- The name and address of the mortgage company, if any; and
- The number or identifying symbol assigned to the building permit by the issuing authority.

In addition to the information that must be in the application, a government entity may require that any additional information be included in the application.[59]

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[55] *Id.*
[56] Section 553.794(5)(c), F.S. A master building permit is intended for builders who expect to construct identical single- or two- family dwellings or townhomes. Once a builder obtains a master building permit, he or she is not required to obtain a new permit for single- or two-family dwellings or townhome as long as the dwelling or townhome is built to the specifications in the master building permit. *See* s. 553.794, F.S.
[57] Section 553.79(14), F.S.
[58] Sections 713.135(5), and (6), F.S.
[59] *Id.*

According to testimony offered during the meeting of the Florida House of Representatives Regulatory Reform Subcommittee, many local governments use the cost of construction as a factor[60] for determining the amount of a fee for a building permit.[61] Some local governments are requiring contractors to include their contracts with private owners in order to obtain building permits so that the local government can determine the contract's construction cost and construction value.[62] Although these contracts may contain private proprietary information, when local governments request them they may become public documents.[63]

## III. Effect of Proposed Changes:

### Issuing Development Orders and Permits (Sections 1 and 3)

**Sections 1 and 2** amend ss. 125.022 and 166.033, F.S., respectively, to require that if a county or municipality makes a request for additional information from the applicant and the applicant provides the information within 30 days of receiving the request, the county or the municipality must:

- Review the additional information and issue a letter to the applicant indicating that the application is complete or specify the remaining deficiencies within 30 days of receiving the information, if the request is the county or municipality's first request.
- Review the additional information and issue a letter to the applicant indicating that the application is complete or specify the remaining deficiencies within 10 days of receiving the additional information, if the request is the county or municipality's second request.
- Deem the application complete within ten days of receiving the additional information or proceed to process the application for approval or denial unless the applicant waived the county or municipality's time limitations in writing, if the request is the county or municipality's third request.

### List of Items Required for Applications and Electronic Submission of Applications (Sections 2 and 4)

**Sections 2 and 4** amend ss. 125.56 and 553.79, F.S., respectively, requires local enforcement agencies to:

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[60] The International Code Council has created two equations to help jurisdictions determine their permit fee schedules. Two factors of the factors in the equations are the valuation of the construction cost of the project, and the value of all the construction in the jurisdiction in the previous year. *See* International Code Council, *Building Valuation Data – February 2020*, https://www.iccsafe.org/wp-content/uploads/BVD-BSJ-FEB20.pdf (last visited March 30, 2021).

[61] City of Miami, *City of Miami Building Permit Fee Schedule*, https://www.miamigov.com/Services/Building-Permitting/City-of-Miami-Building-Permit-Fee-Schedule (last visited March 30, 2021); St. Lucie County, *Building Permit Fees*, https://www.stlucieco.gov/Home/ShowDocument?id=1330 (last visited March 30, 2021); City of Seminole, *City of Seminole Permit Fee Schedule*, https://www.myseminole.com/Building/Docs/Permit_Fees.pdf (last visited March 30, 2021).

[62] *See* The Florida Channel, *1/27/ 2021 House Regulatory Reform Subcommittee*, https://thefloridachannel.org/videos/1-27-21-house-regulatory-reform-subcommittee/ (last visited March 30, 2021).

[63] Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record made or received in connection with official business of any public body, including counties, municipalities, and districts. Current law does not contain an exemption from Florida's public records laws for proprietary business information included in a building permit application. *See generally*, ch. 119. F.S.

- Post each type of building permit application on their website, including a list of all required attachments, drawings, and any other requirements that are required for each type of application;
- Post the status of received building permit applications online, and update the status; and
  - A local enforcement agency does not have to post the status of a received building permit application if it has issued a permit for the application.
- Allow building permit applicants to electronically submit applications, including all attachments, payments, drawings, and any other requirements that are required as part of the application.
  - Applications, including attachments, payments, drawings, and any other requirements or parts that are required as part of the application, may also be submitted in person at the discretion of the building official.

These sections also requires that a county or local enforcement agency post its procedures for processing, reviewing, and approving submitted building permit applications on its website.

**Time-Period to Review Building Permit Applications (Sections 4, 5 and 6)**

**Section 4** and **5** amend ss. 553.79 and 553.792, F.S., respectively, to require that, if a government entity with authority to enforce the Building Code fails to approve an application for a single-family residential dwelling building permit within 30 business days of receiving the application, the government entity must reduce the building permit fee by 10 percent of the original permit fee for each business day that the enforcing agency fails to meet the deadline.

A government entity does not have to reduce the fee for a single-family residential dwelling building permit if it provides written notice to the applicant, by email or USPS mail within 30 business days of receiving the application. The written notice must state:
- How the application fails to satisfy the Building Code or the government entity's laws or ordinances;
- That the applicant has 10 business days after receiving the notice to submit revisions to correct the permit application; and
- Failure to correct the application within 10 business days will result in a denial of the application.

An applicant has 10 business days to address the reasons specified in the government entity's notice. If the applicant submits revisions to the government entity within 10 business days of receiving the notice, the government entity must approve or deny the permit within 10 business days of receiving the applicant's revisions.

If a local enforcing agency fails to approve or deny the permit within 10 business days of receiving the applicant's revisions, it must:
- Reduce the permit fee by 20 percent of the original permit fee for the first business day that it fails to meet the deadline; and
- An additional 10 percent of the original permit fee for each business day that it fails to meet the deadline, for up to 5 business days.

A government entity does not have to reduce the permit fee if the applicant agrees to a longer period in writing.

**Section 6** amends s. 553.794, F.S, to require that, if a local building department fails to meet building permit decision timelines, or fails to approve a master building permit application within 120 business days of receiving the application, the local building department must reduce the building permit fee by 10 percent of the original permit fee for each business day that the enforcing agency fails to meet the deadline, unless the applicant agrees to a longer time period.

If any permit and inspection fees are refunded because of the above, the DBPR surcharges for funding the Building Commission, the BCAIB, and the Florida Homeowners' Recovery Fund must be recalculated based on the amount of the permit and inspection fees after the refund.

**Required Information in Building Permit Application (Section 7)**

**Section 7** amends s. 713.135, F.S, to prohibit a government entity from requiring a contract between an owner and a contractor or a contract between a contractor and a subcontractor or material supplier as a condition to apply for or obtain a building permit for construction work on a commercial property.

However, this does not apply to any construction projects for improvements that are owned or leased by a government entity.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Article VII, section 18(a) of the Florida Constitution provides:

> No county or municipality shall be bound by any general law requiring such county or municipality to spend funds...unless the legislature has determined that such law fulfills an important state interest and unless: the law requiring such expenditure is approved by two-thirds vote of the membership of each house of the legislature; ….

The bill may implicate this constitutional restriction, to the extent that local governments are required to expend funds (i) to accommodate the additional requirements pertaining to electronic processing and posting of building permit information; and (ii) to refund a percentage of the building permit fee under specified conditions. As currently drafted, this bill does not include a legislative finding that the bill fulfills an important state interest.

However, Article VII, s. 18(d) of the State Constitution provides that the mandate requirements do not apply to laws having an insignificant impact,[64] which for Fiscal Year 2020-2021 is forecast at $2.2 million.[65] The fiscal impact of this bill is indeterminate. If the total cost of this legislation is less than $2.2 million, then the mandate requirements do not apply. If costs imposed by the bill are determined to exceed $2.2 million in the aggregate, the bill may be binding on cities and counties if the bill contains a finding of important state interest and meets one of the exceptions specified in State Constitution (e.g., enactment by vote of two-thirds of the membership of each house).

B. Public Records/Open Meetings Issues:

None.

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 may have a positive impact by decreasing the time it takes to obtain a building permit, possibly decreasing the time and cost to complete projects.

C. Government Sector Impact:

Local governments may need to expend funds to accommodate the additional requirements pertaining to electronic processing and posting of building permit information. The amount of permit fees to be refunded by local governments for failing to timely review a permit application is indeterminate, but likely insignificant.

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[64] An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times $0.10. See Florida Senate Committee on Community Affairs, Interim Report 2012-115: Insignificant Impact, (Sept. 2011), available at http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited March 10, 2021).

[65] Based on the Florida Demographic Estimating Conference's Nov. 13, 2020 population forecast for 2021 of 21,893,919. The conference packet is available at: http://edr.state.fl.us/content/conferences/population/demographicsummary.pdf (last visited March 10, 2021).

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 125.022, 125.56, 166.033, 553.79, 553.792, 553.794, and 713.135.

## IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Governmental Oversight and Accountability on March 31, 2021:**
The committee substitute provides that the an enforcement agency's written notice stating why a permit application fails must also state that the applicant has 10 business days after receiving the notice to submit revisions to correct the permit application and that failure to correct the application within 10 business days will result in a denial of the application.

**CS by Community Affairs on March 10, 2021:**
The committee substitute:

- Provides that when a local government makes an initial request for additional information and receives a response within 30 days, the local government must, within 30 days, review the additional information and issue a letter indicating that all required information has been submitted or specify areas that are deficient.
- Provides that if any permit and inspection fees are refunded under the provisions of the bill, the associated DBPR surcharges must be recalculated based on the amount of the permit and inspection fees after the refund.

B. Amendments:

None.

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

**By** the Committee on Community Affairs; and Senator Boyd

578-02667-21 20211788c1

A bill to be entitled

An act relating to construction permits; amending s. 125.022, F.S.; revising the requirements for when a county may request certain information; amending s. 125.56, F.S.; requiring a county that issues building permits to post certain building permit information on its website; authorizing all components of a completed application to be submitted electronically or in person; amending s. 166.033, F.S.; revising the requirements for when a municipality may request certain information; amending s. 553.79, F.S.; requiring a local enforcement agency to post certain building permit information on its website; authorizing all components of a completed application to be submitted electronically or in person; requiring a local enforcement agency to reduce a building permit fee by a specified percentage for failing to meet certain deadlines; providing an exception; requiring the reduction of a building permit fee to be based on the original amount of such fee; requiring certain surcharges to be recalculated under certain conditions; amending ss. 553.792 and 553.794, F.S.; requiring a local government or a local building department, respectively, to reduce a building permit fee or master building permit fee, as applicable, by a specified percentage for failing to meet certain deadlines; providing exceptions; requiring certain surcharges to be recalculated under certain conditions; making technical changes; amending s.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



578-02667-21 20211788c1

713.135, F.S.; prohibiting authorities from requiring applicants to provide certain contracts as a condition of receiving a building permit; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 125.022, Florida Statutes, is amended to read:

125.022 Development permits and orders.—

(2)(a) When reviewing an application for a development permit or development order that is certified by a professional listed in s. 403.0877, a county may not request additional information from the applicant more than three times, unless the applicant waives the limitation in writing.

(b) If a county makes a request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the county must review the application for completeness and issue a letter indicating that all required information has been submitted or specify with particularity any areas that are deficient within 30 days after receiving the additional information.

(c) If a county makes a second request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the county must review the application for completeness and issue a letter indicating that all required information has been submitted or specify with particularity any areas that are deficient within 10 days after receiving the additional



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information.

(d) Before a third request for additional information, the applicant must be offered a meeting to attempt to resolve outstanding issues. If a county makes a third request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the county must deem the application complete within 10 days after receiving the additional information or proceed to process the application for approval or denial unless the applicant waived the county's limitation in writing as described in paragraph (a).

(e) Except as provided in subsection (5), if the applicant believes the request for additional information is not authorized by ordinance, rule, statute, or other legal authority, the county, at the applicant's request, shall proceed to process the application for approval or denial.

Section 2. Paragraph (b) of subsection (4) of section 125.56, Florida Statutes, is amended, and paragraph (f) is added to that subsection, to read:

125.56 Enforcement and amendment of the Florida Building Code and the Florida Fire Prevention Code; inspection fees; inspectors; etc.—

(4)

(b) A county that issues building permits shall post each type of building permit application, including a list of all required attachments, drawings, or other requirements for each type of application, on its website. A county must post and update the status of every received application on its website until the issuance of the building permit. Completed





applications, including payments, attachments, drawings, or other requirements or parts of the completed permit application, must be able to be submitted electronically to the county building department. Accepted methods of electronic submission include, but are not limited to, e-mail submission of applications in Portable Document Format or submission of applications through an electronic fill-in form available on the building department's website or through a third-party submission management software. Completed applications, including payments, attachments, ~~or~~ drawings, or other requirements or parts ~~required as part~~ of the completed permit application, may also be submitted in person in a nonelectronic format, at the discretion of the building official.

(f) A county that issues building permits must post its procedures for processing, reviewing, and approving submitted building permit applications on its website.

Section 3. Subsection (2) of section 166.033, Florida Statutes, is amended to read:

166.033 Development permits and orders.—

(2)(a) When reviewing an application for a development permit or development order that is certified by a professional listed in s. 403.0877, a municipality may not request additional information from the applicant more than three times, unless the applicant waives the limitation in writing.

(b) If a municipality makes a request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the municipality must review the application for completeness and issue a letter indicating that all required information has been

submitted or specify with particularity any areas that are deficient within 30 days after receiving the additional information.

(c) If a municipality makes a second request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the municipality must review the application for completeness and issue a letter indicating that all required information has been submitted or specify with particularity any areas that are deficient within 10 days after receiving the additional information.

(d) Before a third request for additional information, the applicant must be offered a meeting to attempt to resolve outstanding issues. If a municipality makes a third request for additional information and the applicant submits the required additional information within 30 days after receiving the request, the municipality must deem the application complete within 10 days after receiving the additional information or proceed to process the application for approval or denial unless the applicant waived the municipality's limitation in writing as described in paragraph (a).

(e) Except as provided in subsection (5), if the applicant believes the request for additional information is not authorized by ordinance, rule, statute, or other legal authority, the municipality, at the applicant's request, shall proceed to process the application for approval or denial.

Section 4. Paragraph (b) of subsection (1) and subsection (14) of section 553.79, Florida Statutes, are amended, and paragraph (d) is added to subsection (1) of that section, to





read:

553.79 Permits; applications; issuance; inspections.—

(1)

(b) A local enforcement agency shall post each type of building permit application, including a list of all required attachments, drawings, or other requirements for each type of application, on its website. A local enforcement agency must post and update the status of every received application on its website until the issuance of the building permit. Completed applications, including payments, attachments, drawings, or other requirements or parts of the completed permit application, must be able to be submitted electronically to the appropriate building department. Accepted methods of electronic submission include, but are not limited to, e-mail submission of applications in Portable Document Format or submission of applications through an electronic fill-in form available on the building department's website or through a third-party submission management software. Completed applications, including payments, attachments, ~~or~~ drawings, or other requirements or parts ~~required as part~~ of the completed permit application, may also be submitted in person in a nonelectronic format, at the discretion of the building official.

(d) A local enforcement agency must post its procedures for processing, reviewing, and approving submitted building permit applications on its website.

(14) A building permit for a single-family residential dwelling must be issued within 30 business ~~working~~ days after receiving the permit ~~of~~ application ~~therefor~~ unless ~~unusual circumstances require a longer time for processing the~~

~~application or unless~~ the permit application fails to satisfy the Florida Building Code or the enforcing agency's laws or ordinances.

(a) If a local enforcement agency fails to issue a building permit for a single-family residential dwelling within 30 business days after receiving the permit application, it must reduce the building permit fee by 10 percent for each business day that it fails to meet the deadline. Each 10 percent reduction shall be based on the original amount of the building permit fee.

(b) A local enforcement agency does not have to reduce the building permit fee if it provides written notice to the applicant, by e-mail or United States Postal Service, within 30 business days after receiving the permit application that specifically states the reasons why the permit application fails to satisfy the Florida Building Code or the enforcing agency's laws or ordinances.

(c) The applicant has 10 business days after receiving the written notice to address the reasons specified by the local enforcement agency and submit revisions to correct the permit application. If the applicant submits revisions within 10 business days after receiving the written notice, the local enforcement agency has 10 business days after receiving such revisions to approve or deny the building permit unless the applicant agrees to a longer period in writing. If the local enforcement agency fails to issue or deny the building permit within 10 business days after receiving the revisions, it must reduce the building permit fee by 20 percent for the first business day that it fails to meet the deadline unless the





applicant agrees to a longer period in writing. For each additional business day, but not to exceed 5 business days, that the local enforcement agency fails to meet the deadline, the building permit fee must be reduced by an additional 10 percent. Each reduction shall be based on the original amount of the building permit fee.

(d) If any building permit fees are refunded under this subsection, the surcharges provided in s. 468.631 or s. 553.721 must be recalculated based on the amount of the building permit fees after the refund.

Section 5. Section 553.792, Florida Statutes, is amended to read:

553.792 Building permit application to local government.—

(1)(a) Within 10 days of an applicant submitting an application to the local government, the local government shall advise the applicant what information, if any, is needed to deem the application properly completed in compliance with the filing requirements published by the local government. If the local government does not provide written notice that the applicant has not submitted the properly completed application, the application shall be automatically deemed properly completed and accepted. Within 45 days after receiving a completed application, a local government must notify an applicant if additional information is required for the local government to determine the sufficiency of the application, and shall specify the additional information that is required. The applicant must submit the additional information to the local government or request that the local government act without the additional information. While the applicant responds to the request for

additional information, the 120-day period described in this subsection is tolled. Both parties may agree to a reasonable request for an extension of time, particularly in the event of a force majeure ~~major~~ or other extraordinary circumstance. The local government must approve, approve with conditions, or deny the application within 120 days following receipt of a completed application.

(b) If a local government fails to meet a deadline provided in paragraph (a), it must reduce the building permit fee by 10 percent for each business day that it fails to meet the deadline. Each 10 percent reduction shall be based on the original amount of the building permit fee, unless the parties agree to an extension of time.

(2)(a) The procedures set forth in subsection (1) apply to the following building permit applications: accessory structure; alarm permit; nonresidential buildings less than 25,000 square feet; electric; irrigation permit; landscaping; mechanical; plumbing; residential units other than a single family unit; multifamily residential not exceeding 50 units; roofing; signs; site-plan approvals and subdivision plats not requiring public hearings or public notice; and lot grading and site alteration associated with the permit application set forth in this subsection. The procedures set forth in subsection (1) do not apply to permits for any wireless communications facilities or when a law, agency rule, or local ordinance specify different timeframes for review of local building permit applications.

(b) If a local government has different timeframes than the timeframes set forth in subsection (1) for reviewing building permit applications described in paragraph (a), the local





government must meet the deadlines established by local ordinance. If a local government does not meet an established deadline to approve, approve with conditions, or deny an application, it must reduce the building permit fee by 10 percent for each business day that it fails to meet the deadline. Each 10 percent reduction shall be based on the original amount of the building permit fee, unless the parties agree to an extension of time. This paragraph does not apply to permits for any wireless communications facilities.

(3) If any building permit fees are refunded under this section, the surcharges provided in s. 468.631 or s. 553.721 must be recalculated based on the amount of the building permit fees after the refund.

Section 6. Paragraph (c) of subsection (5) of section 553.794, Florida Statutes, is amended to read:

553.794 Local government residential master building permit program.—

(5) MASTER BUILDING PERMIT APPLICATION APPROVAL PROCESS.—

(c) The local building department must approve or deny a master building permit application within 120 days after the local building department receives a completed application, unless the applicant agrees to a longer period. If a local building department fails to approve or deny a master building permit application within 120 days after receiving the completed permit application, it must reduce the master building permit fee by 10 percent for each business day that it fails to meet the deadline, unless the applicant agrees to a longer time period. Each 10 percent reduction shall be based on the original amount of the master building permit fee. If any master building

permit fees are refunded, the surcharges provided in s. 468.631 or s. 553.721 must be recalculated based on the amount of the master building permit fees after the refund.

Section 7. Present subsections (6) and (7) of section 713.135, Florida Statutes, are redesignated as subsections (7) and (8), respectively, and a new subsection (6) is added to that section, to read:

713.135 Notice of commencement and applicability of lien.—

(6) An authority that issues building permits may not require an applicant to provide a direct contract or a contract between a contractor and any other lienor as a condition of the application for, or processing or issuance of, a building permit for the construction of improvements or for the alteration or repair of improvements on or to commercial property. This subsection does not apply to the construction of improvements or the alteration or repair of improvements owned or leased by the Federal Government; the state or any county, city, or political subdivision thereof; or other public authority.

Section 8. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**
Banking and Insurance, *Chair*
Agriculture
Appropriations Subcommittee on Agriculture, Environment, and General Government
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Criminal Justice
Judiciary

**JOINT COMMITTEE:**
Joint Legislative Auditing Committee

**SENATOR JIM BOYD**
21st District

March 12, 2021

Senator Ray Rodrigues
Committee on Gov't Oversight & Accountability
330 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399

Dear Chairman Rodrigues:

I respectfully request that CS/SB 1788: Construction Permits, be scheduled for a hearing in the Committee on Community Governmental Oversight & Accountability at your earliest convenience.

If I may be of assistance to you on this or any other matter, please do not hesitate to contact me.

Thank you for your consideration of this matter.

Best regards,

Jim Boyd

cc: Joe McVaney
Tamra Redig

REPLY TO:
❒ 717 Manatee Avenue West, Bradenton, Florida 34205 (941) 742-6445
❒ 312 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

**THE FLORIDA SENATE**

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/21
*Meeting Date*

1788
*Bill Number (if applicable)*

Topic Permitting

*Amendment Barcode (if applicable)*

Name Rusty Payton

Job Title CEO

Address 2600 Centenial Pkwy
*Street*
Tallahassee FL 32317
*City* *State* *Zip*

Phone 567-1073

Email rpayton@fhba.com

Speaking: [✓] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
*(The Chair will read this information into the record.)*

Representing Florida Home Builders Association

Appearing at request of Chair: [ ] Yes [✓] No

Lobbyist registered with Legislature: [✓] Yes [ ] No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

914314

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Boyd) recommended the following:

**Senate Amendment**

Delete lines 188 - 191
and insert:
business days after receiving the permit application which specifically states the reasons the permit application fails to satisfy the Florida Building Code or the enforcing agency's laws or ordinances. The written notice must also state that the applicant has 10 business days after receiving the written notice to submit revisions to correct the application and that

914314

failure to correct the application within 10 business days will result in denial of the application.

**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 7002 |
| INTRODUCER: | Health Policy Committee |
| SUBJECT: | OGSR/Trade Secrets/Department of Health |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Smith | Brown | | **HP Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7002 saves from repeal the public record exemption for trade secrets contained in records, reports, or information submitted to the Department of Health (DOH) under ch. 381, F.S. People or entities may be required to submit trade secrets to the DOH under ch. 381, F.S., to obtain a license or permit, such as with Medical Marijuana Treatment Centers, or to provide the DOH with the person's or entity's qualifications as the DOH seeks to procure services or commodities.

The public records exemption stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. This bill removes the scheduled repeal of the exemption to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

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] The right to inspect or copy 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]

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2010-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2020-2022).
[4] *State v. Wooten*, 260 So.3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So.2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So.2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20] 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:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program and such administration would be significantly impaired without the exemption;[21]
- The exemption protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

[14] *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991).

[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

[16] Section 119.15, F.S.

[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

[18] 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 Courts System are not subject to the Open Government Sunset Review Act.

[19] Section 119.15(3), F.S.

[20] Section 119.15(6)(b), F.S.

[21] Section 119.15(6)(b)1., F.S.

[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to question carefully the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, then records created before the sunset date may not be made public unless otherwise provided by law.[26]

**Trade Secrets**

For the purpose of s. 381.83, F.S., the term "trade secrets" is defined in s. 812.081(1)(c), F.S. In short, when the owner of the information in question takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes, a trade secret is considered to be secret, of value, for use or in use by the business, and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

The First District Court of Appeal held that the names and related information of a Medical Marijuana Treatment Center's ("MMTC's") individual investors and partners are not trade secrets under s. 812.081(c), F.S. (2015), but that the names and related information of an MMTC's consultants may be protected as trade secrets.[27]

In 2016, the definition of "trade secret" in section 812.081, F.S., was expanded to include financial information.[28] As a result, this public record exemption was amended to include the new definition of "trade secret" and is subject to the Open Government Sunset Review Act.[29]

[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Surterra Florida, LLC. v. Florida Department of Health, 233 So.2d 376, 640 (Fla. 1st DCA 2017).
[28] Ch. 5, s. 1, Laws of Fla. (2016).
[29] Ch. 6, s. 6, Laws of Fla. (2016).

**Chapter 381 - Public Health: General Provisions**

Chapter 381, F.S. encompasses a wide variety of health services and licensing provisions under the DOH regulation. This includes patients submitting medical records to apply for various programs, physicians providing reports and records on research and testing, permitting of MMTCs, licensing systems for medical marijuana patients and caregivers, permitting of migrant labor camps, and any other programs or service listed under the statute.

Licenses and permits that are issued by the DOH under ch. 381, F.S., and the number of active licenses or permits in the state for each type:[30]

- MMTCs – 22
- Certified Medical Marijuana Testing Labs - 5
- Medical Marijuana Patients and Caregivers – 435,105
- Tattoo Artist Licensure: Tattoo Artist–11,865
- Tattoo Artist Licensure: Guest Tattoo Artist– 89
- Radon Program Certification: Radon Measurement Professional -379
- Radon Program Certification: Radon Mitigation Professional -46
- Certified Environmental Health Professional: Food Protection Only – 209
- Certified Environmental Health Professional: OSTDS Only - 249
- Certified Environmental Health Professional: Food Protection & OSTDS - 349
- Septic Tank Contractor Registration – 650
- Biomedical Waste Permits (46,648):
- Generator – 45,767
- Needle Collection – 356
- Storage – 217
- Transporter – 288
- Treatment - 20
- Body Piercing Establishments (481):
- Salon – 479
- Temporary - 2
- Food Hygiene Permits (14,747):
- Adult Day Care – 381
- Afterschool Meal Program – 334
- Assisted Living Facility – 1,490
- Bar/Lounge – 2,540
- CCFP-Religious Exempt – 26
- Civic Organization – 440
- Crisis Stabilization Unit – 33
- Detention Facility – 737
- Domestic Violence Shelter – 38
- Fraternal Organization – 921
- Homes for Special Services – 18

[30] Department of Health, *Open Government Sunset Review Questionnaire relating to Trade Secrets contained in records, reports, or information submitted to the Department of Health under chapter 381, F.S.*, (prepared on Oct. 26, 2020) (on file with the Senate Committee on Health Policy).

- Hospice – 56
- Intermediate Care Facility for the Developmentally Disabled – 52
- Migrant Labor – 8
- Movie Theater – 56
- Prescribed Pediatric Extended Care Center – 114
- Recreational Camp – 94
- Residential Treatment Facility (AHCA) – 154
- School (9 months or less) – 2,831
- School (more than 9 months) – 4,245
- Short-Term Residential Treatment Center (DCF) – 164
- Transitional Living Facility - 15
- Limited Use Water Permits (11,270):
- Limited Use Commercial – 2,953
- Limited Use Community – 3,887
- Multifamily – 90
- Registered Limited Use Commercial – 4,340
- Migrant Labor Camp Permit (1,150):
- H2A Migrant Camp – 438
- HUD Housing – 3
- MHP/RV/Migrant Housing – 3
- Migrant Labor Camp – 526
- Non-permitted – 45
- Other – 5
- Residential Migrant Housing - 130
- Mobile Home Parks Permits (5,399):
- Lodging Park – 173
- MHP/RV/Migrant Housing – 28
- Mobile Home Park – 3,800
- Recreational Camp – 147
- Recreational Vehicle Park -1,225
- Temporary Event - 26
- Onsite Sewage Treatment & Disposal System (OSTDS) Operating Permits (22,192):
- Aerobic – 11,165
- Commercial – 3,105
- Industrial or manufacturing – 5,781
- Performance Based – 2,141
- OSTDS Service Permits – 1,220
- OSTDS Construction Permits – 56,716
- OSTDS Septic Tank Business Authorizations – 576
- Public Swimming Pools (42,119):
- Exempt Pools < 32 Units – 1,813
- Exempt Pools > 32 Units – 1,304
- Exempt Pool Therapy – 33
- Fountains – 51

- Natural Bathing Place – 29
- Other – 141
- Public Pool <= 25,000 Gallons – 8,788
- Public Pool > 25,000 Gallons – 20,963
- River Ride – 16
- Spa-Type Pools - 7,245
- Special Purpose Pool – 148
- Wading Pool – 839
- Water Activity – 485
- Water Attractions – 193
- Water Slide Plunge Pool – 24
- Zero Depth Entry Pool - 47
- Radon Measurement Business – 45
- Radon Mitigation Business - 26
- Tanning Establishments – 718
- Tattoo Establishments – 4,188

**Trade Secrets Submitted to the DOH under Chapter 381**

The information included in the records that may pertain to trade secrets include financial and proprietary information from applicants and licensees, financial and proprietary information from those requesting permits, and any data software, programs, and/or information submitted or created pursuant to this section for any of the programs overseen by the DOH.

Individuals and entities may be required to submit information that meets the definition of trade secret to the DOH to obtain a license or a permit. For example, s. 381.986, F.S., provides licensing requirements for MMTCs. Under this section, an MMTC provides detailed business plans to prove its ability to safely and efficiently provide medical marijuana to patients. Most of these business plans contain trade secret information. Such information is necessary for the DOH to weigh qualifications and determine the best candidates to receive licensure. However, the disclosure of this information could provide an unfair advantage to competitors and render the competitive application process meaningless.

Records and information may also be submitted to the DOH under ch. 381, F.S., as the DOH seeks to procure services or commodities. A potential vendor may include specific product specifications, financial records, or financial projections as part of its submission and may claim that the information and records are trade secrets.

Financial information that would fall under a trade secret may include calculations for pricing of certain products as the calculations may provide an advantage to a competitor on how to outbid by offering a lower price point. It could also include proprietary information on pricing from the entity's vendors, or wage and/or tax information that may give a competitor knowledge it did not previously possess, as well as bank notes and information regarding financial statuses of private investors. As part of the procurement process, it may be necessary to receive information from the potential vendors such as net worth, business plans, profit and loss statements, balance sheets, cash on hand, and other information which would support their ability to perform the

services. If this information is not protected from disclosure, there is a risk that the DOH may not receive the information it needs to make an informed decision.

**Submitting Trade Secrets to the DOH**

Each person or entity seeking a trade-secret exemption is required to provide documentation asserting the trade secret when the information is submitted. If necessary, the DOH may request both a redacted and unredacted copy of the information to be maintained on file in the case of a public records request. If a public records request is made, the DOH then makes a determination as to whether the information fits the statutory definition of "trade secret," as that term is defined in s. 812.081(1)(c), F.S.[31]

If the information is not determined to be a trade secret, the DOH allows the person or entity to provide additional information.[32] The person or entity is also put on notice that they can challenge that determination through a court proceeding.

If the information is determined to be a trade secret, the DOH will review the unredacted copy to ensure that only exempted trade secret information has been redacted. If the information should not have been redacted, the person or entity is notified and given the opportunity to correct the redactions or provide additional information prior to its release.[33]

**Staff Survey Regarding Exemption under Review**

Legislative staff received a response from the DOH to a joint survey of the House Oversight, Transparency & Public Management Subcommittee and the Senate Committee on Health Policy regarding the public record exemption for trade secrets contained in records, reports, or information submitted to the DOH under ch. 381, F.S. The DOH recommends retaining the exemption in its current form.[34]

## III. Effect of Proposed Changes:

The bill saves from repeal the public records exemption in s. 381.83, F.S., for trade secrets contained in records, reports, or information submitted to the DOH under ch. 381, F.S. The information will continue to be confidential and exempt from public disclosure beyond October 2, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities

[31] Section 381.83(1), F.S.
[32] *Id.* at 31.
[33] *Id.* at 31.
[34] *Id.* at 31.

have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

**Voting 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 newly created or expanded public record exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, a two-thirds vote of the members present and voting for final passage of the bill is not required.

**Public Necessity Statement**

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Thus, the bill does not require a public necessity statement.

**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 bill exempts trade secret information "upon a showing satisfactory to the Department"[35] that the information meets the statutory definition in s. 812.081(1)(c), F.S. Whether information constitutes a trade secret is subject to interpretation by the Department. Specific applications of the exemption could be challenged. However, "exemptions from disclosure are to be narrowly construed,"[36] and the agency having custody of the records "bears the burden of proving its right to the claimed exemption."[37]

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

[35] Section 381.83(1), F.S.
[36] *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004) (citations omitted), *rev. den*., 892 So.2d 1015 (Fla. 2004).
[37] *Id*.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost, to the extent imposed, associated with the DOH making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The DOH will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 381.83 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.

**By** the Committee on Health Policy

588-01420-21 20217002__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 381.83, F.S., which provides an exemption from public records requirements for certain trade secrets contained in records, reports, or information submitted to the Department of Health; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 381.83, Florida Statutes, is amended to read:

381.83 Trade secrets; confidentiality.—

~~(1)~~ Records, reports, or information obtained from any person under this chapter, unless otherwise provided by law, must be available to the public, except upon a showing satisfactory to the department by the person from whom the records, reports, or information is obtained that such records, reports, or information, or a particular part thereof, contains trade secrets as defined in s. 812.081. Such trade secrets are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The person submitting such trade secret information to the department must request that it be kept confidential and must inform the department of the basis for the claim of trade secret. The department shall, subject to notice and opportunity for hearing, determine whether the information, or portions thereof, claimed to be a trade secret is or is not a trade secret. Such trade secrets may be



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



588-01420-21 20217002__

disclosed, however, to authorized representatives of the department or, pursuant to request, to other governmental entities in order for them to properly perform their duties, or when relevant in any proceeding under this chapter. Authorized representatives and other governmental entities receiving such trade secret information shall retain its confidentiality. Those involved in any proceeding under this chapter, including a hearing officer or judge or justice, shall retain the confidentiality of any trade secret information revealed at such proceeding.

~~(2) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

## Redig, Tamra

**From:** Ruiz, Judith
**Sent:** Wednesday, March 31, 2021 9:20 AM
**To:** McVaney, Joe; Redig, Tamra
**Subject:** SB 7002

Please be advised the Senator Grutters will be presenting 7002 Trade secrets Department of Health.

Thank you!

Legislative Assistant/Chief of Staff
District 36
Senator Manny Diaz Jr.
10001 NW 87 Avenue
Hialeah, Florida 33016
305-364-3073

306 Senate Building
404 South Monroe Street
Tallahassee, Fl 32399-1100
850-487-5036

**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: | CS/SB 7004 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Transportation Committee |
| SUBJECT: | OGSR/Financial Information/Guarantor of a Private Entity Applicant |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Price | Vickers | | **TR Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Fav/CS** |
| 2. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 7004 saves from repeal the current public records exemption for certain financial information held by the Florida Department of Transportation (FDOT). The information covered by the exemption includes the financial information of a private entity applicant submitted for a loan or credit enhancement from the State-funded Infrastructure Bank (SIB) within the FDOT, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel. The current exemption does not apply to the financial information of a private applicant in default on a SIB loan.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 339.55, F.S., is scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal to continue the exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect July 1, 2021.

## 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]

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[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 ("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 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.[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 Act also requires specified questions to be considered during the review process.[20] In examining an exemption, the Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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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).

[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 Act 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:

- What specific records or meetings are affected by 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]

**State-funded Infrastructure Bank**

The 2000 Legislature created the SIB within the FDOT to provide loans and credit enhancements for use in constructing and improving transportation facilities.[23] Government units and private entities may apply to the SIB for assistance. As outstanding obligations are repaid to the SIB, those repayments are made available for future lending on other eligible SIB projects. All proceeds are invested by the State Treasurer in accordance with established investment guidelines.[24]

The SIB consists of two separate escrow accounts, one federally-funded and one state-funded. Projects eligible for assistance from the former account include those which meet all federal requirements under the Transportation Equity Act for the 21st Century and are eligible for assistance under Title 23, U.S.C.,[25] or capital projects as defined in s. 5302 of Title 49, U.S.C.[26] and other applicable federal guidelines.[27]

For assistance from the state-funded account, a project must:
- Be on the State Highway System;
- Provide for increased mobility on the state's transportation system; or
- Provide intermodal connectivity with airports, seaports, rail facilities, and other transportation terminals for the movement of people and goods.[28]

Additionally, projects identified under the Transportation Regional Incentive Program are eligible for assistance from the state-funded account. The FDOT is authorized to match up to 50 percent of the cost for projects that, at a minimum:
- Serve national, statewide, or regional functions and function as part of an integrated regional transportation system;

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- 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.
[23] Section 339.55, F.S.
[24] See the FDOT's website for further information describing the SIB, its history, and its capitalization: https://www.fdot.gov/comptroller/pfo/sibintro.shtm (last visited December 9, 2020).
[25] See 23 U.S.C. s. 119. Generally, projects on the National Highway System.
[26] Generally, public transportation projects.
[27] 23 U.S.C. s. 610.
[28] Section 339.55(2)(a), F.S.

- Are identified in the capital improvements element of a comprehensive plan and are in compliance with local government plan policies relative to corridor management;
- Are consistent with the Strategic Intermodal System Plan developed under s. 339.64, F.S.; and
- Have a commitment for local, regional, or private financial matching funds as a percentage of the overall project cost.[29]

Emergency loans for damages incurred to public-use seaports, airports, and other transit and intermodal facilities within an area that is part of an official state declaration of emergency are also authorized under specified conditions.[30]

A public or private entity seeking financial assistance from the SIB is required to submit an application,[31] based on published advertisement periods via the FDOT's on-line advertised process, which the FDOT reviews to ensure any potential project meets eligibility, financial, and production criteria.[32] If the criteria are met, the FDOT determines an "indicative interest rate for the application based on current market conditions, financial strength of the borrower, term, and risk of loan."[33]

Examples of financial information items required in a SIB loan application include, but are not limited to, providing details of the proposed finance plan, funding sources, information regarding any anticipated bond issue or other debt instrument, loan term and amount, and primary and secondary repayment sources.

**Open Government Sunset Review of the Current Public Records Exemption**

The current public records exemption[34] was enacted in 2016[35] and, as noted, provides that the financial information of a private entity applicant for a loan or credit enhancement from the SIB, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel, is exempt from the public records inspection and access requirements. The term "financial information" means any private entity applicant's:

- Business plan;
- Pro forma statement;[36]
- Account balance;
- Operating income or revenue;
- Asset value; or

[29] Section 339.55(2)(b), F.S., and see s. 339.2819, F.S.
[30] Section 339.55(2)(c), F.S.
[31] To review an application form, *see* FDOT, *SIB Application and Awards*, available at https://www.fdot.gov/comptroller/pfo/sib-application-and-awards.shtm (last visited December 10, 2020).
[32] *See* the FDOT's *SIB Guidelines for Federal/State* available at Microsoft Word - SIB - Guidelines Federal-State_07.12.18_Final (windows.net) (last visited December 9, 2020).
[33] FDOT, "State Infrastructure Bank," available at State Infrastructure Bank (fdot.gov) (last visited December 9, 2020).
[34] Section 339.55(10), F.S.
[35] Chapter 2016-38, L.O.F.
[36] Pro forma statements are financial statements that estimate a firm's future financial position based on the analysis of current trends and assumptions and are used to prepare future scenarios, business plans or estimates of required cash for financing proposals. The Law Dictionary, *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, available at http://thelawdictionary.org/pro-forma-statement/ (Last visited December 10, 2020).

- Debt.

The exemption ceases if the private entity goes into default.[37]

Consistent with Art. I, s. 24(c) of the State Constitution, the 2016 law included a public necessity statement for a newly created public records exemption, stating that disclosure of the specified information:

- Could harm a private entity by giving the private entity's competitors insights into its financial status and business plan, putting the private entity at a competitive disadvantage;
- Could create the opportunity for theft, fraud, and other illegal activity, jeopardizing the financial security of the private entity and placing it at risk for substantial financial harm; and
- Could expose a private person who is required to provide his or her personal financial information to the FDOT to identity theft or other criminal activity.

The 2016 law further stated:

- Private entities may be unwilling to submit an application to the SIB for a loan without the exemption, which unwillingness could limit the FDOT's opportunities for cost-effective or strategic solutions for constructing and improving transportation facilities.
- The public benefit derived from having more private entities apply for SIB assistance outweighs the public benefit derived from accessing a private entity's financial information.

The existing public records exemption for the financial information of a private entity SIB applicant stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature.

In preparation for the required review, committee staff surveyed the FDOT with respect to the existing exemption. As described by the FDOT:

> For any private entity borrower, FDOT has required customary financial statements and information regarding historical and projected collections of revenues and the value of any assets that are proposed to be pledged as collateral for repayment of the loan, together with information regarding any other liens, existing or proposed, that attach to any collateral to be pledged to FDOT. This may extend to revenues or assets of the private borrower that were not originally proposed by the borrower as a source of repayment or collateral for the requested loan. *Depending on the strength of the private borrower's financial position and the value of available collateral, FDOT may require an additional third party guaranty of repayment. Financial information required of a private borrower, or private guarantor, may include tax returns and financial account information.* The definition of "financial information" contained in s. 339.55(10), "any business plan, pro forma statement, account balance, operating income or revenue, asset value, or debt of the applicant" describes

[37] The right of the public to inspect or copy the financial information of a government-unit applicant for a SIB loan is unchanged by the bill.

> information that FDOT typically requires to be furnished by private borrowers.[38]

The FDOT additionally advises that all financial information is not always provided with the application, and not all loans are closed within one year, so applicants *and their guarantors* may have to provide updated information as negotiation for SIB assistance continues. Further, the original collateral may change, in which case new supporting financial information is required. However, the current exemption applies only to the private entity applicant's financial information and does not apply to the financial information of an applicant's guarantor.[39]

The FDOT recommends that the Legislature retain the current exemption for the financial information of a private entity SIB applicant and, in addition, the FDOT recommends expanding the exemption to apply to the financial information of a private entity SIB applicant's guarantor.

Based upon a review of this public records exemption under the Open Government Sunset Review Act, as well as survey responses from, discussions with, and recommendations of the FDOT, the professional staff of the Senate Transportation Committee recommends that the Legislature retain the existing public records exemption for the financial information of a private entity SIB applicant established in s. 338.55(10), F.S., and expand the exemption to apply to the financial information of a private entity SIB applicant's guarantor.

## III. Effect of Proposed Changes:

The bill is based on an Open Government Sunset Review of a public records exemption for the financial information of a private entity applicant for a loan or credit enhancement from the State-funded Infrastructure Bank (SIB) within the FDOT, for use in constructing and improving transportation facilities or ancillary facilities that produce or distribute natural gas or fuel.

**Section 1** continues the existing public records exemption established in s. 339.55(10), F.S., for the financial information of a private entity SIB applicant. The existing exemption does not apply to financial information of an applicant who is in default on a SIB loan. The information will continue to be exempt from public disclosure beyond October 2, 2021.

The bill takes effect July 1, 2021.

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[38] Emphasis added. *See* the FDOT's Open Government Sunset Review Questionnaire Response by email to committee staff, September 10, 2020. (On file in the Senate Transportation Committee.) Between 2012 and just prior to enactment of the current exemption in 2016, based on available records, the FDOT advises it received approximately seven requests for financial information provided by a private entity SIB applicant to the FDOT. After enactment on July 1, 2016, through October 28, 2020, the FDOT received approximately 22 requests. During both periods of time, the requesting entities included public involvement advocates, development companies, governmental bodies, private citizens, and the media.

[39] *See* the FDOT's email to committee staff, November 19, 2020. (On file in the Senate Transportation Committee.)

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not appear to require municipalities or counties to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of municipalities or counties to raise revenue.

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. The bill continues a current public records exemption beyond its current date of repeal. The bill does not create or expand an exemption. 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 that creates or expands 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 financial information submitted to the FDOT as part of the application process for a loan or credit-enhancement. This bill exempts only financial information of the applicant from the public records requirements. 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the FDOT making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The FDOT will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 339.55 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS removes language that expanded the exemption to include the financial information of the applicant's guarantor. The CS merely continues the current exemption unmodified beyond October 2, 2021.

B. Amendments:

None.

**By** the Committee on Transportation

596-01354-21 20217004__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 339.55, F.S.; expanding an existing exemption from public records requirements for financial information of a private entity applicant which the Department of Transportation requires as part of a certain application process to include the financial information of the private entity applicant's guarantor; including a private entity applicant's guarantor in an exception to the exemption; amending the definition of the term "financial information" to include the financial information of the private entity applicant's guarantor; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) of section 339.55, Florida Statutes, is amended to read:

339.55 State-funded infrastructure bank.—

(10)(a) Financial information of a private entity applicant, or of an applicant's guarantor, which the department requires as part of the application process for loans or credit enhancements from the state-funded infrastructure bank is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption does not apply to records of an applicant, or of an applicant's guarantor, who is in default of



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



596-01354-21 20217004__

a loan issued under this section. As used in this subsection, the term "financial information" means any business plan, pro forma statement, account balance, operating income or revenue, asset value, or debt of the applicant or the applicant's guarantor.

(b) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026 ~~2021~~, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. (1) The Legislature finds that it is a public necessity that financial information of the guarantor of a private entity applicant which the Department of Transportation requires as part of the application process for a loan or credit enhancement from the state-funded infrastructure bank be protected from disclosure. The disclosure of such information could harm a guarantor in the marketplace by giving the guarantor's competitors insights into its financial status and business plan, thereby putting the guarantor at a competitive disadvantage. Additionally, the disclosure of sensitive financial information regarding a guarantor could create the opportunity for theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the guarantor and placing it at risk for substantial financial harm.

(2) Without an exemption from public records requirements under s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution, some guarantors might be unwilling to provide guarantees for private entity applicants who submit an application to the state-funded infrastructure bank. This unwillingness to provide guarantees for private entity



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

applicants could limit the ability of private entity applicants to submit applications for assistance from the state-funded infrastructure bank, which could, in turn, limit opportunities the department might otherwise have for providing loans or credit enhancements to private entities who could propose cost-effective or strategic solutions for constructing and improving transportation facilities. The Legislature finds that the benefit to the public of increased opportunities for the provision of such facilities facilitated by private entity applicant guarantors outweighs any public benefit that may be derived from the disclosure of the financial information of a private entity applicant's guarantor. For this reason, the Legislature declares that financial information that the department requires of a guarantor as part of a private entity's application process for loans or credit enhancements from the state-funded infrastructure bank is exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution.

Section 3. This act shall take effect July 1, 2021.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**
Transportation, *Chair*
Military and Veterans Affairs, Space, and Domestic Security, *Vice Chair*
Appropriations Subcommittee on Health and Human Services
Children, Families, and Elder Affairs
Finance and Tax

**SELECT COMMITTEE:**
Select Committee on Pandemic Preparedness and Response

**SENATOR GAYLE HARRELL**
25th District

February 16, 2021

Chair Rodrigues
Government Oversight and Accountability Committee
404 South Monroe Street
Tallahassee, FL 32399

Dear Chair Gruters,

I respectfully request that **SB 7004 – OGSR Public Records** be placed on the next available Committee Agenda for Education. SB 7004 passed Transportation Committee unanimously.

Should you have any questions or concerns, please feel free to contact my office. Thank you in advance for your consideration of this request.

Respectfully,

Senator Gayle Harrell
Senate District 25

Cc: Joe McVaney, Staff Director
Tamra Redig, Administrative Assistant

REPLY TO:
❒ 215 SW Federal Highway, Suite 203, Stuart, Florida 34994 (772) 221-4019 FAX: (888) 263-7895
❒ 310 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5025

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

151034

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Harrell) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause and insert:

Section 1. Subsection (10) of section 339.55, Florida Statutes, is amended to read

339.55 State-funded infrastructure bank.—

(10) ~~(a)~~ Financial information of a private entity applicant which the department requires as part of the application process for loans or credit enhancements from the state-funded

151034

infrastructure bank is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption does not apply to records of an applicant who is in default of a loan issued under this section. As used in this subsection, the term "financial information" means any business plan, pro forma statement, account balance, operating income or revenue, asset value, or debt of the applicant.

~~(b) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 339.55, F.S., relating to an exemption from public records requirements for financial information of a private entity applicant which the Department of Transportation requires as part of a certain application process; removing the scheduled repeal of the exemption; providing an effective date.

**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 7006 |
| INTRODUCER: | Environment and Natural Resources Committee |
| SUBJECT: | OGSR/Trade Secrets/Department of Environmental Protection |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Anderson | Rogers | | **EN Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7006 saves from repeal the public records exemption relating to trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection (DEP) under part IV of ch. 403, F.S., which regulates solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste.

The bill continues to maintain this trade secret information as confidential and exempt from public inspection and copying. These confidential records may be disclosed to authorized representatives of DEP or, pursuant to request, to other governmental entities in order for them to properly perform their duties, when relevant to a proceeding involving the regulation of solid waste management and recycling, provided the authorized representative or governmental entity retains confidentiality.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 403.73, F.S., is scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Confidentiality of Trade Secrets Contained in Information Submitted to DEP Under Part IV of Ch. 403, F.S.**

Part IV of ch. 403, F.S., governs solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste. Section 403.73, F.S., provides a public record exemption for trade secrets[27] contained in records, reports, or information submitted to the Department of Environmental Protection (DEP) under part IV of ch. 403, F.S. The exemption also requires persons submitting trade secret information to the DEP to request that such information be kept confidential and inform the DEP of the basis for the

[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081, F.S. defines "trade secret" to mean the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it.

claim of trade secret.[28] The DEP then is required to, subject to notice and an opportunity for hearing, determine whether the information, or any portion thereof, is or is not a trade secret.[29]

The DEP may disclose information made confidential and exempt to authorized representatives of the DEP or, pursuant to request, to another state or federal government entity if disclosure is necessary for the receiving entity to perform its duties or responsibilities or when relevant to any proceeding in ch. 403, F.S.[30] Those involved in a proceeding may include an administrative law judge, a hearing officer, or a judge or justice.

Section 403.73, F.S., provides for future review and repeal of the public records exemption on October 2, 2021.

In 2016, the definition of "trade secret" in s. 812.081, F.S., was expanded to include financial information. As a result, the public record exemption in s. 403.73, F.S., was reenacted to include the new definition of "trade secret" and is subject to the Act.[31]

Chapter 2016-6, Laws of Florida, reenacted the exemption for public record disclosure requirements for trade secret information contained in records, reports, or information submitted to the DEP under part IV of ch. 403, F.S. Chapter 2016-6, Laws of Florida, included a public necessity statement that provided a rationale for the exemption, which recognized that, in many instances, businesses are required to provide financial information for regulatory or other purposes to public entities and that disclosure of such information to competitors of those businesses would be detrimental to the businesses.[32] The Legislature stated its intent to protect trade secret information of a confidential nature which includes, but is not limited to, a formula, a pattern, a device, a combination of devices, or a compilation of information used to protect or further a business advantage over those who do not know or use the information, the disclosure of which would injure the affected business in the marketplace.[33]

**Open Government Sunset Review Findings and Recommendations**

In July 2020, the Senate Environment and Natural Resources Committee and the House Oversight, Transparency & Public Management Subcommittee sent an Open Government Sunset Review Questionnaire to the DEP regarding the exemption for trade secrets contained in records, reports, or information submitted to the DEP under part IV of ch. 403, F.S.

The DEP responded to the questionnaire but did not take a position on whether the exemption should remain in effect to protect the trade secret information it obtains. The DEP estimates that under five percent of the records and reports it receives are affected by the exemption for trade

[28] Section 403.73(1), F.S.
[29] *Id*.
[30] *Id*.
[31] Section 119.15, F.S.
[32] Ch. 2016-6, Laws of Fla.
[33] Ch. 2016-6, Laws of Fla.

secrets under s. 403.73, F.S., and under one percent of the records and reports contain financial information claimed to be trade secrets.[34]

The DEP stated that the information typically contained in records and reports it receives includes, "[p]ermit application[s], engineering report[s], foundation and stability calculations, site plans, hydrogeological and geotechnical reports, design and construction drawings, groundwater monitoring plan[s], operation plan[s] including details on operating procedures, processes and contingency plans, gas monitoring, landfill/facility design and construction details, technical specifications, Construction Quality Assurance plans, cost estimates for closure and long-term care, financial mechanisms, and groundwater and landfill gas monitoring results."[35]

## III. Effect of Proposed Changes:

The bill saves from repeal the current public records exemption relating to trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403, F.S., which regulates solid waste management, including the storage, collection, transport, separation, processing, recycling, and disposal of solid waste. The information will continue to be confidential and exempt from public disclosure beyond October 2, 2021.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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. The bill does not create or expand an exemption. 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

[34] Email, Department of Environmental Protection (Aug. 12, 2020), *Open Government Sunset Review Questionnaire (Trade Secrets contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403)* (Aug. 12, 2020)(on file with the Senate Committee on Environment and Natural Resources).
[35] *Id*.

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 trade secret information contained in records, reports, or information submitted to the Department of Environmental Protection under part IV of ch. 403, F.S. This bill exempts only trade secret information from the public records requirements. 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the DEP making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The DEP will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 403.73 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.

**By** the Committee on Environment and Natural Resources

592-01946-21 20217006__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 403.73, F.S., relating to an exemption from public records requirements for trade secrets contained in information obtained by the Department of Environmental Protection; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 403.73, Florida Statutes, is amended to read:

403.73 Trade secrets; confidentiality.—

~~(1)~~ Records, reports, or information obtained from any person under this part, unless otherwise provided by law, must be available to the public, except upon a showing satisfactory to the department by the person from whom the records, reports, or information is obtained that such records, reports, or information, or a particular part thereof, contains trade secrets as defined in s. 812.081. Such trade secrets are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The person submitting such trade secret information to the department must request that it be kept confidential and must inform the department of the basis for the claim of trade secret. The department shall, subject to notice and opportunity for hearing, determine whether the information, or portions thereof, claimed to be a trade secret is or is not a trade secret. Such trade secrets may be



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



592-01946-21 20217006__

disclosed, however, to authorized representatives of the department or, pursuant to request, to other governmental entities in order for them to properly perform their duties, or when relevant in any proceeding under this part. Authorized representatives and other governmental entities receiving such trade secret information shall retain its confidentiality. Those involved in any proceeding under this part, including an administrative law judge, a hearing officer, or a judge or justice, shall retain the confidentiality of any trade secret information revealed at such proceeding.

~~(2) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Government Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** February 16, 2021

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I respectfully request that **Senate Bill 7006**, relating to a Review Under the Open Government Sunset Review Act, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Jason Brodeur

Senator Jason Brodeur
Florida Senate, District 9

File signed original with committee office

**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: | CS/SB 7008 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Environment and Natural Resources Committee |
| SUBJECT: | OGSR/Trade Secrets/Department of Environmental Protection |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Schreiber | Rogers | | **EN Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Fav/CS** |
| 2. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:


CS/SB 7008 amends s. 403.7046, F.S., to save from repeal the public records exemptions for trade secret information reported under s. 403.7046, F.S., which involves information on recovered materials reported to the Department of Environmental Protection (DEP) or local governments by recovered materials dealers or pyrolysis facilities. The bill also removes a duplicative exemption that applies only to similar information reported to local governments.

The bill continues to maintain information reported on recovered materials as confidential and exempt. The DEP may continue to provide information covered by the exemption in such form that the names of the persons reporting the information and the specific information reported are not revealed.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The two exemptions contained in s. 403.7046 F.S., are scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal of the exemption for information reported under s. 403.7046, F.S., to continue the confidential and exempt status of such information. The duplicative exemption for only information to local governments is deleted.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate* (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S.; s. 119.011(2), F.S. "Agency" is defined 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."
[6] Section 119.011(12), F.S. "Public record" is defined as "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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions, 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] Under the Act, substantially amending an exemption means expanding the scope of the exemption to include more records or information or to include meetings, but narrowing the scope of an exemption is not substantially amending the exemption.[19]

[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*.; *see, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.,* 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.,* 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.,* s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.,* s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).
[16] Section 119.15, 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(4)(b), F.S.

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.[20] 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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 by law.[26]

**Information Reported Under s. 403.7046, F.S.**

The Department of Environmental Protection (DEP) regulates resource recovery and management under part IV of ch. 403, F.S. "Recovered materials" are defined in part IV to mean materials with known recycling potential, that can be feasibly recycled, that have been diverted and separated or have been removed from the solid waste stream for sale, use, or reuse as raw materials.[27]

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[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 403.703(28), F.S. "Recovered materials" is defined as "metal, paper, glass, plastic, textile, or rubber materials that have known recycling potential, can be feasibly recycled, and have been diverted and source separated or have been removed

Section 403.7046, F.S., requires persons dealing in recovered materials (or post-use polymers[28]) to follow specified procedures.[29] Any person who handles, purchases, receives, recovers, sells, or is an end user of 600 tons or more of recovered materials must annually apply to the DEP for certification by April 1.[30] Such persons must report by February 1st of each year to the DEP, and to all counties from which they received materials, certain information for the preceding year.[31] Such reporting is submitted through a specified form of the DEP,[32] incorporated into rule by reference.[33] Information reported on the form includes the total tons of recovered materials for a given year, organized by types of materials: paper, plastic, metals, glass, rubber, and textiles.

Section 403.7046, F.S., contains a public records exemption that applies to any information reported pursuant to the section or any rule adopted pursuant thereto.[34] The exemption states that reported information which, if disclosed, would reveal a trade secret, as defined in s. 812.081, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.[35] The exemption provides that, for reporting or information purposes, the DEP may provide this information "in such form that the names of the persons reporting such information and the specific information reported are not revealed."[36] The DEP publishes various reports and data on statewide recycling efforts and solid waste management.[37]

Section 403.7046(3)(b), F.S., authorizes local governments to establish an additional registration process for recovered materials dealers and pyrolysis facilities doing business within their jurisdiction. Local governments whose population exceeds 35,000 may establish an additional reporting process, limited to the requirements established for reporting to the DEP, which must include the types and approximate amounts of recovered materials collected, recycled, or reused during the reporting period.[38] Section 403.7046(3)(b)2., F.S., contains a separate public records

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from the solid waste stream for sale, use, or reuse as raw materials, whether or not the materials require subsequent processing or separation from each other, but the term does not include materials destined for any use that constitutes disposal. Recovered materials as described in this subsection are not solid waste."

[28] Chapter 2017-167, Laws of Fla. In 2017, the Legislature amended pt. IV, ch. 403, F.S., to include emerging technologies involving post-use polymers, and these are included in the reporting requirements under s. 403.7046, F.S.; s. 403.703(10), (24), and (26), F.S. Post-use polymer means a plastic polymer that is converted to raw materials using gasification or pyrolysis. Gasification means heating post-use polymers and converting them to synthetic gas in an oxygen-deficient atmosphere. Pyrolysis means heating post-use polymers in the absence of oxygen until they are melted and converted to raw materials or products.

[29] DEP, *Recovered Materials Certification and Reporting Program*, https://floridadep.gov/waste/waste-reduction/content/recovered-materials-certification-and-reporting-program (last visited Jan. 22, 2021).

[30] Section 403.7046(1), F.S.; Fla. Admin. Code. R. 62-722.400.

[31] Section 403.7046(1), F.S.; Fla. Admin. Code. R. 62-722.400.

[32] DEP, *Form # 62-722.400(9)(b), F.A.C.* (2013), *available at* https://floridadep.gov/sites/default/files/62-722_400_9b.pdf (last visited Jan. 22, 2021).

[33] Fla. Admin. Code. R. 62-722.400(2).

[34] Section 403.7046(2), F.S.

[35] *Id*.

[36] *Id*.

[37] DEP, *Recycling*, https://floridadep.gov/waste/waste-reduction/content/recycling (last visited Jan. 22, 2021); Section 403.706(7), F.S. Counties are required to provide the DEP with recycling and solid waste information so that the DEP can assess progress towards the state's recycling goals; Fla. Admin. Code R. 62-716.450.

[38] Section 403.7046(3)(b)1., F.S.

exemption, similar to the public records exemption in s. 403.7046(2), F.S., but which only applies to information reported under subsection (3).[39]

In 2016, the definition of "trade secret" in s. 812.081, F.S., was expanded to include financial information.[40] As a result, the two public records exemptions in s. 403.7046, F.S., were reenacted to include the expanded definition of "trade secret," and, thus, became subject to the Open Government Sunset Review Act.[41] Chapter 2016-6, L.O.F., included a broad public necessity statement that provided a rationale for the exemption, recognizing that, in many instances, businesses are required to provide financial information to public entities and that disclosure of such information to competitors of those businesses would be detrimental to the businesses.[42] The Legislature stated its intent to protect trade secret information of a confidential nature.[43]

**Open Government Sunset Review Findings and Recommendations**

In July of 2020, the Senate Environment and Natural Resources Committee and the House Oversight, Transparency, and Public Management Subcommittee sent an Open Government Sunset Review Questionnaire to the DEP regarding the trade secret exemption in s. 403.7046(2), F.S., for information submitted to the DEP under s. 403.7046, F.S.

The DEP responded to the questionnaire, but did not take a position on whether the exemption in s. 403.7046(2), F.S., should remain in effect.[44] The questionnaire asked DEP what types of information reported to DEP under s. 403.7046, F.S., would reveal a trade secret if disclosed. The DEP's response was the tonnage information reported by the recovered materials dealers. The DEP explained that disclosing such information could provide confidential information regarding tonnage to the competitors of recovered materials dealers, allowing the competitors to evaluate market share.[45]

## III. Effect of Proposed Changes:

**Section 1** amends s. 403.7046, F.S., which requires persons dealing in recovered materials or post-use polymers to report to the Department of Environmental Protection (DEP) and certain local government's information on recovered materials. The section includes two public records exemptions.

For the exemption in s. 403.7046(2), F.S., the bill saves the exemption from repeal by deleting the repeal date of October 2, 2021. As a result, this information will continue to maintain its confidential and exempt status beyond October 2, 2021. This exemption applies to any information reported pursuant to s. 403.7046, F.S., or any rule adopted pursuant thereto.

[39] Section 403.7046(3)(b)2., F.S.
[40] Chapter 2016-5, Laws of Fla.
[41] Section 119.15, F.S.; *see* s. 403.7046(2), (3)(b)2., F.S.
[42] Chapter 2016-6, s. 21, Laws of Fla.
[43] *Id*.
[44] Open Government Sunset Review Questionnaire, DEP's Responses, *Information Reported to DEP by Certified Recovered Materials Dealers*, 5 (Aug. 12, 2020)(on file with the Florida Senate Environment and Natural Resources Committee).
[45] *Id*. at 3.

The bill deletes the current exemption granted in s. 403.7046(3), F.S. Information reported to local governments pursuant to s. 403.7046(3)(b), F.S., will continue to be covered under the exemption in s. 403.7046(2), F.S., since that exemption applies to any information reported pursuant to s. 403.7046, F.S., relating to the types or amounts of recovered materials or post-use polymers reported to a recovered material dealer or pyrolysis facility.

**Section 2** states that the bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 one current public records exemption beyond its current date of repeal and narrows the scope of that exemption, and also deletes one current exemption. The bill does not create or expand the scope of an exemption. Thus, the bill does not require a two-thirds vote for passage.

***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. The bill does not create or expand the scope of an exemption. 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 that must be reported to the DEP and local governments under s. 403.7046, F.S. This bill narrows the scope of the exemption to apply to such reported information only as broadly as necessary. Thus, the bill revises the exemption so it is no 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the DEP or local governments making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The DEP and local governments will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 403.7046 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS removes the language that narrowed the exemption under review. With the CS, the exemption will apply to all trade secret material reported to DEP or local governments on recycled materials.

B. Amendments:

None.

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

**By** the Committee on Environment and Natural Resources

592-01947-21 20217008__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 403.7046, F.S., which provides exemptions from public records requirements for trade secrets contained in information obtained by the Department of Environmental Protection; narrowing the exemption to the types or amounts of recovered materials or post-use polymers reported by a recovered materials dealer or pyrolysis facility; removing the scheduled repeals of the exemptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) and paragraph (b) of subsection (3) of section 403.7046, Florida Statutes, are amended to read:

403.7046 Regulation of recovered materials.—

(2) Information reported pursuant to this section or any rule adopted pursuant to this section relating to the types or amounts of recovered materials or post-use polymers reported by a recovered materials dealer or pyrolysis facility ~~which, if disclosed, would reveal a trade secret, as defined in s. 812.081,~~ is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. For reporting or information purposes, however, the department may provide this information in such form that the names of the persons reporting such information and the specific information reported are not revealed. ~~This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~







592-01947-21 20217008__

(3) Except as otherwise provided in this section or pursuant to a special act in effect on or before January 1, 1993, a local government may not require a commercial establishment that generates source-separated recovered materials to sell or otherwise convey its recovered materials to the local government or to a facility designated by the local government, nor may the local government restrict such a generator's right to sell or otherwise convey such recovered materials to any properly certified recovered materials dealer who has satisfied the requirements of this section. A local government may not enact any ordinance that prevents such a dealer from entering into a contract with a commercial establishment to purchase, collect, transport, process, or receive source-separated recovered materials.

(b)~~1.~~ Before engaging in business within the jurisdiction of the local government, a recovered materials dealer or pyrolysis facility must provide the local government with a copy of the certification provided for in this section. In addition, the local government may establish a registration process whereby a recovered materials dealer or pyrolysis facility must register with the local government before engaging in business within the jurisdiction of the local government. Such registration process is limited to requiring the dealer or pyrolysis facility to register its name, including the owner or operator of the dealer or pyrolysis facility, and, if the dealer or pyrolysis facility is a business entity, its general or limited partners, its corporate officers and directors, its

permanent place of business, evidence of its certification under this section, and a certification that the recovered materials or post-use polymers will be processed at a recovered materials processing facility or pyrolysis facility satisfying the requirements of this section. The local government may not use the information provided in the registration application to compete unfairly with the recovered materials dealer until 90 days after receipt of the application. All counties, and municipalities whose population exceeds 35,000 according to the population estimates determined pursuant to s. 186.901, may establish a reporting process that must be limited to the regulations, reporting format, and reporting frequency established by the department pursuant to this section, which must, at a minimum, include requiring the dealer or pyrolysis facility to identify the types and approximate amount of recovered materials or post-use polymers collected, recycled, or reused during the reporting period; the approximate percentage of recovered materials or post-use polymers reused, stored, or delivered to a recovered materials processing facility or pyrolysis facility or disposed of in a solid waste disposal facility; and the locations where any recovered materials or post-use polymers were disposed of as solid waste. The local government may charge the dealer or pyrolysis facility a registration fee commensurate with and no greater than the cost incurred by the local government in operating its registration program. Registration program costs are limited to those costs associated with the activities described in this paragraph ~~subparagraph~~. Any reporting or registration process established by a local government with regard to recovered materials or





post-use polymers is governed by this section and department rules adopted pursuant thereto.

~~2. Information reported under this subsection which, if disclosed, would reveal a trade secret, as defined in s. 812.081, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**SENATOR JASON BRODEUR**
9th District

**COMMITTEES:**
Environment and Natural Resources, *Chair*
Health Policy, *Vice Chair*
Appropriations Subcommittee on Agriculture, Environment, and General Government
Appropriations Subcommittee on Health and Human Services
Children, Families, and Elder Affairs
Community Affairs

**SELECT COMMITTEE:**
Select Committee on Pandemic Preparedness and Response

**JOINT COMMITTEE:**
Joint Administrative Procedures Committee


February 16, 2021

Honorable Ray Wesley Rodrigues
305 Senate Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chair Rodrigues,

I am writing to request that SB 7008, A Review Under the Open Government Sunset Review Act, be placed on the agenda to be heard in the Committee on Government Oversight and Accountability.

I appreciate your consideration in this matter.

Sincerely,

Jason Brodeur

Cc: Joe McVaney, Staff Director
Tamra Redig, Administrative Assistant


REPLY TO:
☐ 311 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5009

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

359162

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Brodeur) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 19 - 23

and insert:

rule adopted pursuant to this section which, if disclosed, would reveal a trade secret, as defined in s. 812.081, is confidential and exempt from s. 119.07(1) and s.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

359162

Delete lines 6 - 10

and insert:

the Department of Environmental Protection; removing the scheduled repeal of an exemption; deleting an exemption; providing an

**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 7010 |
| INTRODUCER: | Military and Veterans Affairs, Space, and Domestic Security Committee |
| SUBJECT: | OGSR/Space Florida |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Stallard | Caldwell | | **MS Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7010 saves from repeal a public records exemption and a public meetings exemption for trade secrets. Section 331.326, F.S., provides that any information held by Space Florida, which is a trade secret, as defined in s. 812.081, F.S., is confidential and exempt from public records disclosure requirements and may not be disclosed. The section also provides that any meeting or portion of a meeting of Space Florida's board is exempt from open meetings and public records disclosure requirements if the board is discussing trade secrets. Any public records generated as a result of the closed portions of such meetings are also confidential and exempt from public records disclosure requirements.

Section 331.326, F.S., is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment. This bill removes the scheduled repeal of the exemptions.

The original public necessity statement provides that it is a public necessity that financial information comprising a trade secret as defined in s. 812.081, F.S., be made exempt or confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the Florida Constitution. The statement also provides that it is a public necessity that any portion of a meeting in which a trade secret as defined in s. 812.081, F.S., is discussed be made exempt from s. 286.011, F.S., and s. 24(b), Article I of the Florida Constitution. Justification for the public records exemptions has not changed. Because the bill does not expand the public records exemption or the open meetings exemptions, the bill does not require a two-thirds vote of each house in order to pass.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## 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 typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often 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

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[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). Also see *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 state with specificity 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 provisions[12] 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]

**Open Government Sunset Review Act**

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] The Act 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 or repeal the sunset date.[18] In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.[19] 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:

[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. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.
[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.

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[20]
- 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;[21] or
- It protects trade or business secrets.[22]

The Act also requires specified questions to be considered during the review process.[23] In examining an exemption, the Act directs the Legislature to question carefully the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[24] If the exemption is reenacted or saved from repeal 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.[25]

**Space Florida**

Space Florida was created as an independent special district,[26] a body politic and corporate, and a subdivision of the state, to foster the growth and development of a sustainable and world-leading aerospace industry in this state. The purpose of Space Florida is to promote aerospace business development by facilitating business financing, spaceport operations, research and development, workforce development, and innovative education programs.[27] To accomplish its purpose, Space Florida advises, coordinates, cooperates, and, when necessary, enters into memoranda of agreement with municipalities, counties, regional authorities, state agencies and organizations, appropriate federal agencies and organizations, and other interested persons and groups.[28] Space Florida may purchase or construct facilities; set rates, fees, and charges for the use of facilities; and undertake joint financing with municipalities or private sector entities for any project.[29]

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[20] Section 119.15(6)(b)1., F.S.
[21] Section 119.15(6)(b)2., F.S.
[22] Section 119.15(6)(b)3., F.S.
[23] 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?

[24] FLA. CONST. art. I, s. 24(c).
[25] Section 119.15(7), F.S.
[26] Part III, Chapter 189, F.S.
[27] Section 331.302(1), F.S.
[28] Section 331.302(2), F.S. Space Florida is not an agency as defined in ss. 216.011 and 287.012, F.S. Space Florida is subject to applicable provisions of the Uniform Special District Accountability Act. Section 331.302(4) and (5), F.S.
[29] Section 331.305, F.S.

Space Florida is governed by a 13-member independent board of directors that consists of members appointed by the Governor, the President of the Senate, the Speaker of the House of Representatives, and members of the board of directors of Enterprise Florida, Inc.[30] The Governor serves as the chair and a voting member of the board.[31]

***Public Records Exemptions for Trade Secrets***

The records of Space Florida are public records subject to ch. 119, F.S., the Public Records Act,[32] and, as such, are generally open for personal inspection and copying by any person.[33] However, similar to many government offices that maintain confidential business information records resulting from interactions with private entities, Space Florida's records contain trade secrets that are exempt from public disclosure. Florida law contains a variety of provisions making trade secret information exempt or confidential and exempt from public records requirements. Space Florida relies on ss. 288.075 and 331.326, F.S., for exemptions from public records requirements for trade secrets. Both sections provide exemptions, but each uses a different definition of "trade secret." As well, s. 331.326, F.S., provides an exemption from open meetings requirements[34] when Space Florida's board is discussing trade secrets.

Section 288.075, F.S., addresses generally the confidentiality of records maintained by government economic development agencies. The section defines Space Florida as an economic development agency[35] and provides that trade secrets held by an economic development agency are confidential and exempt from s. 119.07(1), F.S., and section 24(a), Article I of the Florida Constitution (public records requirements).[36] Section 288.075, F.S., defines a trade secret as having the same meaning as provided in the Uniform Trade Secrets Act in s. 688.002(4), F.S.[37] An employee of an economic development agency who violates the confidentiality and exemption requirements for trade secrets commits a misdemeanor of the second degree.[38]

Section 331.326, F.S., is in part II of ch. 331, which creates and governs Space Florida. The section provides that any information held by Space Florida which is a trade secret, as defined in the chapter on theft crimes in s. 812.081(1)(c), F.S., including trade secrets of Space Florida, any spaceport user, or the space industry business, is confidential and exempt from the requirements of s. 119.07(1), F.S., and section 24(a), Article I of the Florida Constitution and may not be

[30] Section 331.3081, F.S.
[31] According to the Space Florida website, the following are members of the board: Lieutenant Governor Jeanette Nunez; Jay Beyrouti, President, Monicarla, Ltd..; Jesse Biter, President and CEO, Biter Enterprises, LLC; Dean Cannon, President and CEO, Gray Robinson; Gregory Celestan, Chairman and CEO, Celestar Corporation; Daniel Davis, President and CEO, Jax Chamber; Sonya Deen, Vice President of Government Relations, JM Family Enterprises, Inc.; Barbara Essenwine, Above and Beyond Group; Mori Hosseini, Chairman and CEO, ICI Homes; Kenneth Kahn, President, LRP Media; Belinda Keiser, Vice Chancellor of Community Relations and Student Advancement, Keiser University; and Katherine San Pedro, Partner, Ballard Partners, Inc. Available at https://www.spaceflorida.gov/about/board-of-directors/ (Last visited on December 3, 2020.)
[32] Section 331.326, F.S.
[33] Section 119.01(1), F.S.
[34] FLA. CONST., art. I, s. 24(b); s. 286.011, F.S.
[35] Section 288.075(1)(a)3., F.S.
[36] Section 288.075(3), F.S.
[37] Section 288.075(1)(c), F.S.
[38] Section 288.075(7), F.S.

disclosed.[39] The section further provides that any meeting or portion of a meeting of Space Florida's board is exempt from the open meetings requirements of s. 286.011, F.S., and section 24(b), Article I of the Florida Constitution if the board is discussing trade secrets. As well, any public record generated during the closed portions of the meetings, such as minutes, tape recordings, and notes, is confidential and exempt from s. 119.07(1) and section 24(a), Article I of the Florida Constitution.[40]

In 2016, the definition of trade secret in s. 812.081, F.S., was expanded to include financial information.[41] Because of the cross-reference in s. 331.326, F.S., to s. 812.081, F.S., the Legislature also reenacted s. 331.326, F.S., that same year in order to conform the section's public records and open meetings exemptions to the newly expanded definition of "trade secret" in s. 812.081, F.S. The reenactment of the section expanded the public records and public meetings exemptions for Space Florida because the trade secret exemptions in the section were expanded by adding financial information to the definition of trade secret.[42] The reenactment of s. 331.326, F.S., with the added language to the section subjected it to the Act[43] and repeal of the section on October 2, 2021, unless it is reviewed and saved from repeal through reenactment by the Legislature. The bill[44] reenacting s. 331.326, F.S., (among other sections) also provided a public necessity statement as required by the Florida Constitution.

The public necessity statement articulates as justification for the exemptions that the disclosure of businesses' financial information comprising a trade secret as defined in s. 812.081, F.S., would be detrimental to those businesses. Specifically, the public necessity statement provided:

> [t]he Legislature recognizes that, in many instances, businesses are required to provide financial information for regulatory or other purposes to public entities and that disclosure of such information to competitors of those businesses would be detrimental to the businesses. The Legislature's intent is to protect trade secret information of a confidential nature which includes, but is not limited to, a formula, a pattern, a device, a combination of devices, or a compilation of information used to protect or further a business advantage over those who do not know or use the information, the disclosure of which would injure the affected business in the marketplace. Therefore, the Legislature finds that the need to protect trade secret financial information is sufficiently compelling to override this state's public policy of open government and that the protection of such information cannot be accomplished without these exemptions.[45]

[39] Section 331.326, F.S.
[40] *Id*.
[41] Section 1, ch. 2016-5, Laws of Florida; CS/SB 180 (2016).
[42] Section 286.011, F.S. and FLA. CONST. art. 1, s. 24(b).
[43] Section 119.15, F.S.
[44] CS/CS/SB 182 (2016).
[45] Section 21, ch. 2016-6, Laws of Florida.

**Trade Secrets**

Section 288.075, F.S., providing for the confidentiality of trade secrets, relies on the definition of "trade secret" found in the Uniform Trade Secrets Act in s. 688.002(4), F.S., which defines the term as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> - Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[46]

This definition of "trade secret" does not expressly include financial information.

Section 331.326, F.S., providing for the confidentiality of trade secrets, relies on the definition of "trade secret" found in s. 812.081, F.S. This definition was amended in 2016 to include financial information, which because of the cross-reference in s. 331.326, F.S., necessitated the reenactment of s. 331.326, F.S., to conform it to the newly amended definition of trade secret in s. 812.081, F.S.

"Trade secret," as defined in s. 812.081(1)(c), F.S., of Chapter 812, F.S., pertaining to theft crimes, means:

> the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> - Secret;
> - Of value;
> - For use or in use by the business; and
> - Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.[47]

[46] Section 688.002(4), F.S.
[47] Section 812.081(1)(c), F.S.

Courts have used this last factor to determine whether a document is a trade secret subject to protection from public records disclosure laws. In *Sepro v. Department of Environmental Protection*,[48] the court held that a document was subject to disclosure because the business had failed to actively protect or hold out the document as a trade secret.

**Open Government Sunset Review**

***Review of Public Records and Open Meetings Exemptions in Section 331.326, F.S.***

During the 2020 interim, Senate and House staff met with staff of Space Florida to discuss the experience the agency has had with trade secret information exemptions in s. 331.326, F.S.[49] As reported by Space Florida staff, although a small number of public requests for information are regularly received by the agency, only one or two requests a year have required Space Florida to redact or otherwise remove trade secret information in making records available. In addition, staff reported that there have been no challenges of trade secret exemption decisions made by Space Florida, nor have meetings of Space Florida's board necessitated closure because of the discussion of trade secret information.

Space Florida does not have rules or an internal procedure or process for identifying exempted trade secret information or for removing that information from records it makes available to the public. The agency follows statutory language to ensure trade secret information it holds remains exempt from public disclosure. Staff of Space Florida made no report of having received any complaints regarding public record or open meetings exemptions for trade secret information.[50]

***Other Exemptions***

Part of an Open Government Sunset Review requires a review of other exemptions that may protect the same public records or meeting, and consideration of whether multiple exemptions may be merged. The repeal of s. 331.326, F.S., will eliminate the specific trade secret exemption from part II of ch. 331, which governs Space Florida. The remaining trade secret exemption applicable to records held by Space Florida, s. 288.075, F.S., uses the definition of trade secret in s. 688.002, F.S. Although there are similarities between that definition and the definition of trade secret in s. 812.081, F.S. (which contains the definition of trade secret that s. 331.326, F.S., incorporates), there are differences between the two that are not insignificant.

Section 688.002, F.S., limits the term's applicability to information from which independent economic value is derived. Section 812.081, F.S., on the other hand, couches the definition in terms of the operation of a business, defining trade secret as "… information … which provides the business an advantage …." As defined in s. 812.081, F.S., the term also specifically includes financial information, which is not part of the definition in s. 688.002, F.S.

Repeal of s. 331.326, F.S., will eliminate the open meeting exemption if the board were discussing trade secrets. This exemption is not provided for elsewhere in statute. While it can be argued that financial information, independent of its inclusion in a definition of trade secret, is

[48] 839 So. 2d 781 (Fla. 1st DCA 2003).
[49] A meeting took place on August 6, 2020 with follow-up emails on August 21 and August 25, 2020 (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).
[50] *Id*.

confidential and exempt pursuant to s. 288.075, F.S., if held by Space Florida, such confidentiality and exemption may depend on a request in writing by the owner of the information and may expire one year after the request.[51]

Section 288.075, F.S., governs not just Space Florida, but other economic development agencies, as well, so consideration is not given to its amendment or merger to eliminate duplication of exemptions. Because of the distinction in the definitions of trade secret between s. 812.081, F.S., and s. 688.002, F.S., and because a repeal of s. 331.326, F.S., would remove the open meeting exemption for trade secrets, the information in and application of the public records and open meetings exemptions in s. 331.326, F.S., are not duplicated elsewhere in law, nor can they be merged with another exemption.

***Recommendation on Exemptions***

Legislative staff sought the input of Space Florida regarding the repeal of s. 331.326, F.S. Representatives of the agency responded that they would prefer that the statute not be repealed. They asserted that, given the competitiveness of the space industry, the ability to close a portion of a public meeting when the board is discussing trade secrets is a very important tool.[52]

Space Florida would like to continue to use public records and open meetings exemptions that are informed by the definitions of trade secret in both s. 812.081, F.S., and s. 688.002, F.S. Representatives of the agency expressed the need for Space Florida to be able to provide assurances to potential and existing space industry customers that their trade secrets are protected to the greatest extent possible in the event of misappropriation. In addition, although a cross-reference to a definition does not create a cause of action, representatives of Space Florida assert that it is important for the agency to be able to use the definitions, penalties, and remedies afforded under both definitional sections.[53]

## III. Effect of Proposed Changes:

The bill amends s. 331.326, F.S., to save from repeal the current public records exemption and open meetings exemption. This allows the affected information to continue to be confidential and exempt and the portion of meetings relating to the Space Florida board discussing trade secrets to continue to be exempt.

Section 331.326, F.S., provides that any information held by Space Florida which is a trade secret, as defined in s. 812.081, F.S., is confidential and exempt from public records requirements and may not be disclosed. The section also provides that any meeting or portion of a meeting of Space Florida's board is exempt from open meetings and public records requirements when the board is discussing trade secrets and that any public record generated during the closed portions of such meetings is also confidential and exempt from public records requirements.

[51] Sections 288.075(2) and (4), F.S. Attorney General Opinion 2004-19 states "[d]evelopment plans, financial records, financial commitment letters and draft memoranda of understanding between the city and a developer regarding a redevelopment project appear to come within the scope of this exemption."
[52] Emails on August 21 and August 25, 2020 from Space Florida to legislative staff (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).
[53] *Id*.

Section 331.326, F.S., is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment or reenactment and removal of the sunset provisions by the Legislature.

The original public necessity statement provided that it is a public necessity that financial information comprising a trade secret as defined in s. 812.081, F.S., be made exempt or confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the Florida Constitution. The statement also provides that it is a public necessity that any portion of a meeting in which a trade secret as defined in s. 812.081, F.S., is discussed, be made exempt from s. 286.011, F.S., and s. 24(b), Article I of the Florida Constitution. Justification for the public records bill has not changed.

Because the bill does not expand the public records exemption or the open meetings exemption, the bill does not require a two-thirds vote of each house in order to pass.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 trade secret information of a confidential nature. This bill exempts only information held by Space Florida which is a trade secret, as defined in s. 812.081, F.S., from the public records requirements. 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 identified.

B. Private Sector Impact:

The private sector will continue to be subject to the cost associated with Space Florida making redactions in response to a public record request.

Businesses who submit trade secret information that falls within the definition contained in s. 812.081, F.S., to Space Florida will continue to receive protection of that information from disclosure to competing businesses. This may result in encouraging more private sector businesses to compete for contracts with Space Florida.

C. Government Sector Impact:

Space Florida will continue to incur costs relating to the redaction of exempt records.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 331.326 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.

**By** the Committee on Military and Veterans Affairs, Space, and Domestic Security

583-01965-21 20217010__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 331.326, F.S., which provides an exemption from public records requirements for records of Space Florida regarding information relating to trade secrets; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 331.326, Florida Statutes, is amended to read:

331.326 Information relating to trade secrets confidential.—The records of Space Florida regarding matters encompassed by this act are public records subject to chapter 119. Any information held by Space Florida which is a trade secret, as defined in s. 812.081, including trade secrets of Space Florida, any spaceport user, or the space industry business, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may not be disclosed. If Space Florida determines that any information requested by the public will reveal a trade secret, it shall, in writing, inform the person making the request of that determination. The determination is a final order as defined in s. 120.52. Any meeting or portion of a meeting of Space Florida's board is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution when the board is discussing trade secrets. Any public record generated during the closed portions of the meetings, such as minutes, tape recordings, and notes, is



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



583-01965-21 20217010__

confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**
Military and Veterans Affairs, Space, and Domestic Security, *Chair*
Commerce and Tourism, *Vice Chair*
Appropriations Subcommittee on Education
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Children, Families, and Elder Affairs
Finance and Tax
Transportation

**SENATOR TOM A. WRIGHT**
14th District


March 5, 2021

The Honorable Ray Rodrigues
305, Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399

Re: Senate Bill 7010 – OGSR/Space Florida

Dear Chair Rodrigues:

Senate Bill 7010, relating to OGSR/Space Florida has been referred to the Committee on Criminal Justice. I am requesting your consideration on placing SB 7010 on your next agenda. Should you need any additional information please do not hesitate to contact my office.

Thank you for your consideration.

Sincerely,

Tom A. Wright, District 14

cc: Joe McVaney, Staff Director of the Committee on Governmental Oversight and Accountability
Tamra Redig, Administrative Assistant of the Committee on Governmental Oversight and Accountability


REPLY TO:
☐ 4606 Clyde Morris Blvd., Suite 2-J, Port Orange, Florida 32129 (386) 304-7630
☐ 320 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5014

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

**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 7014 |
| INTRODUCER: | Banking and Insurance Committee |
| SUBJECT: | OGSR/Office of Insurance Regulation |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Johnson | Knudson | | **BI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7014 amends s. 624.4212, F.S., to save from repeal the public records exemption relating to insurer reporting of certain proprietary business and other information that is held by the Office of Insurance Regulation. The proprietary business information includes, but is not limited to, reports submitted by insurers, such as the enterprise risk report, the own risk and solvency assessment (ORSA) summary report or a substantially similar ORSA report, the corporate governance annual disclosure (CGAD), and supporting documentation. This information will continue to be confidential and exempt from public disclosure beyond October 2, 2020.

By saving s. 624.4212, F.S., from repeal, the bill also prevents the repeal of amendments made to s. 628.8015, F.S., and s. 628.803, F.S., implementing the following National Association of Insurance Commissioners Model Acts and Regulations:

- Risk Management and Own-risk and Solvency Assessment Model Act.
- Corporate Governance and Disclosure Model Act; and the corresponding Corporate Governance Annual Disclosure Model Regulation.

The bill is not expected to impact state or local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records – Generally

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] The right to inspect or copy applies

[1] FLA. CONST. art. I, s. 24(a).

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]

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[3] A public record includes virtually any document or recording, regardless of its physical form or the method of transmission.[4] The Florida Supreme Court has interpreted the statutory definition of "public record" to include "material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[5]

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.[6] A violation of the Public Records Act may result in civil or criminal liability.[7]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[8] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[9]

General exemptions from the public records requirements are contained in the Public Records Act.[10] Specific exemptions often are placed in the substantive statutes relating to a particular

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[2] *Id*.

[3] Section 119.01(1), F.S. 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."

[4] 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."

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

[6] Section 119.07(1)(a), F.S.

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

[8] FLA. CONST. art. I, s. 24(c).

[9] *Id*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[10] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

agency or program.[11] When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[12] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[13]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[14] (the Act) prescribes a legislative review process for newly created or substantially amended[15] public records or open meetings exemptions, with specified exceptions.[16] 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.[17]

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.[18] 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[19]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[20] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[21]

The Act also requires specified questions to be considered during the review process.[22] In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

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[11] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[12] *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991).
[13] *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).
[14] Section 119.15, F.S.
[15] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[16] 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.
[17] Section 119.15(3), F.S.
[18] Section 119.15(6)(b), F.S.
[19] Section 119.15(6)(b)1., F.S.
[20] Section 119.15(6)(b)2., F.S.
[21] Section 119.15(6)(b)3., F.S.
[22] Section 119.15(6)(a), F.S. The specified questions are:

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[23] If the exemption is continued without substantive changes or if the exemption is continued and 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.[24]

**Regulation of Insurance in Florida**

States are the primary regulators of insurance companies. In Florida, the Office of Insurance Regulation (OIR)[25] is primarily responsible for licensing insurance companies, monitoring the solvency of regulated insurers, examining insurers to determine compliance with applicable laws, and taking administrative action, if necessary.

In 2016, the Legislature enacted laws[26] implementing the National Association of Insurance Commissioners' (NAIC)[27] Risk Management and Own-risk and Solvency Assessment (ORSA) Model Act[28] and the Corporate Governance and Disclosure Model Act and the corresponding Corporate Governance Annual Disclosure Model Regulation[29] (CGAD). The ORSA Model Act requires insurers to conduct an internal assessment of all relevant material risks (e.g., underwriting, credit, market) potentially affecting their ability to meet policyholder obligations. The ORSA Model Act requires insurers (or an insurance group, as applicable) to conduct an ORSA at least annually and file an ORSA summary report based with their domestic regulator or lead state (for an insurance group).

The CGAD Model Act and Regulation, which specify requirements for extensive disclosure of regulated insurers' corporate governance practices, are designed to provide insurance regulators with sufficient information on insurers' governance practices through an annual reporting.

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- 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?

[23] *See generally* s. 119.15, F.S.
[24] Section 119.15(7), F.S.
[25] Section 20.121(3)(a), F.S.
[26] Ch. 2016-206, Laws of Fla. The ORSA and CGAD requirements are codified in ss. 628.8015, F.S. Section 628.803, F.S., provides sanctions for noncompliance with reporting requirements.
[27] The OIR is a member of the National Association of Insurance Commissioners (NAIC), which is an association of state insurance regulators. The NAIC coordinates regulation and examination of multistate insurers, and promotes uniform model laws among the states. The NAIC accreditation is a certification that a state insurance regulator is fulfilling legal, financial, and organizational standards. The NAIC establishes accreditation effective dates for states to adopt in substantially similar form models and acts for purposes of NAIC accreditation review. The OIR is accredited by the NAIC.
[28] National Association of Insurance Commissioners, The Risk Management and Own Risk and Solvency Assessment Model Act (2012) https://content.naic.org/sites/default/files/inline-files/MDL-505.pdf?64 (last viewed Oct. 26, 2020).
[29] National Association of Insurance Commissioners, Corporate Governance Annual Disclosure Model Act, (2014) https://content.naic.org/sites/default/files/inline-files/MDL-305.pdf and the Corporate Governance Annual Disclosure Model Regulation (2014) https://content.naic.org/sites/default/files/inline-files/MDL-306.pdf (last viewed October 26, 2020).

Insurers or insurer groups must file a Corporate Governance Annual Disclosure (CGAD) with their domestic regulator or the lead state regulator (for an insurance group). The CGAD Model and Regulation require insurers to document highly confidential information about their corporate governance framework, and submit annual disclosures to the insurance regulator. This includes the policies of their boards of directors, procedure for the oversight of critical risk areas, and appointment practices. Provisions in the model act and regulation require that states must keep ORSA and CGAD documents confidential.

**Open Government Sunset Review of the Public Records Exemption for Insurer Reporting of Proprietary Business Information**

Section 624.4212, F.S., defines insurer "proprietary business information"[30] and makes such information and related information held by the OIR confidential and exempt[31] from s. 119.07(1), F. S., and Art. I, s. 24(a) of the State Constitution.[32] This includes proprietary business information and supporting documents contained in documents, such as the actuarial opinion summary, principle-based valuation report, enterprise risk report, insurance holding company registration, ORSA summary report, and corporate governance annual disclosure. In some instances, the OIR may disclose this confidential and exempt proprietary business information to other state, federal, and international agencies.[33]

In 2016, the Legislature amended s. 624.4212, F.S., to provide that, except for information obtained by the OIR which would otherwise be available for public inspection, that ORSA summary reports, substantially similar ORSA reports, CGAD annual disclosure, and supporting documents held by the OIR pursuant to s. 628.8015, F.S., [34] are confidential and exempt from s. 119.07(1) and Art. I, s. 24(a) of the State Constitution. In creating the exemption, the Legislature found that exempting the ORSA reports and CGAD disclosures, and supporting information is a public necessity. The Legislature recognized that the release of the ORSA reports, the CGAD annual disclosures, and supporting documents would injure the insurer in the marketplace by providing competitors with the insurer's confidential business information.

Section 624.4212, F.S., is repealed on October 2, 2021, unless reviewed and saved from repeal by the Legislature pursuant to the Act. Further, the 2016 law[35] enacting the amendments to s. 624.4212, F.S, provides that s. 628.8015, F.S., and the amendments made by this law to s. 628.803, F.S., are repealed on October 2, 2021, unless, before that date, the Legislature saves

[30] Section 624.4212(1), F.S.
[31] There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* 85-62 Fla. Op. Att'y Gen. (1985).
[32] Ch. 2014-100, Laws of Fla.
[33] Section 624.4212(2), F.S.
[34] Ch. 2016-206, Laws of Fla.
[35] *See* s. 3, ch. 2016-206, Laws of Fla. *See* Notes to Sections 628.8015 and 628.803, F.S.

from repeal through reenactment the amendments to s. 624.4212, F.S., made by SB 1416[36] or similar legislation.[37]

Senate Banking and Insurance Committee staff surveyed the OIR to ascertain whether the public records exemption in s. 624.4212, F.S., remains necessary. Staff reviewed the OIR's responses to the questions to be considered by the Legislature in accordance with s. 119.115(6)(a), F.S. The OIR recommends that the Legislature reenact this public records exemption. The exemption in s. 624.4212, F.S., is adequately meeting its goal and the OIR does not find a need to expand the exemption at this time.[38]

## III. Effect of Proposed Changes:

**Section 1** amends s. 624.4212, F.S., to delete the scheduled repeal of the current public records exemption of insurer proprietary business information and other information. This information will continue to be confidential and exempt from public disclosure. Further, the Office of Insurance Regulation is authorized to disclose[39] such proprietary business information and other information to the Office of Insurance Consumer Advocate within the Department of Financial Services.

By saving s. 624.4212, F.S., from repeal, the bill also prevents the repeal of amendments made to s. 628.8015, F.S., and s. 628.803, F.S., implementing the following National Association of Insurance Commissioners Model Acts and Regulations:

- Risk Management and Own-risk and Solvency Assessment Model Act.
- Corporate Governance and Disclosure Model Act; and the corresponding Corporate Governance Annual Disclosure Model Regulation.

**Section 2** provides the bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[36] Ch. 2016-205, Laws of Fla.
[37] Section 628.803, F.S., authorizes the OIR to impose sanctions for specified violations of the Insurance Code. If s. 624.4212, F.S., was not reenacted, the amendments in s. 628.803(1) and (4), F.S. , provides sanctions
[38] Correspondence from the OIR (Aug. 10, 2020) on file with Senate Banking and Insurance Committee.
[39] The recipient, here the Office of Insurance Consumer Advocate, must agree in writing to maintain the confidential and exempt status of the information.

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 1, 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 this law is to protect all images obtained from an automatic license plate recognition system as well as any personal identifying information in any data generated from images obtained from such a system. 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 reenactment of the public records exemption will protect sensitive business information about an insurer or insurer group that is reported to the OIR.

C. Government Sector Impact:

The OIR will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 624.4212 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.

**By** the Committee on Banking and Insurance

597-01969-21 20217014__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 624.4212, F.S.; adding the Office of Insurance Consumer Advocate to the list of entities to which the Office of Insurance Regulation may disclose confidential and exempt information; removing the scheduled repeal of an exemption from public records requirements for certain proprietary business information and information that is confidential and held by the Office of Insurance Regulation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 624.4212, Florida Statutes, is amended to read:

624.4212 Confidentiality of proprietary business and other information.—

(1) As used in this section, the term "proprietary business information" means information, regardless of form or characteristics, which is owned or controlled by an insurer, or a person or an affiliated person who seeks acquisition of controlling stock in a domestic stock insurer or controlling company, and which:

(a) Is intended to be and is treated by the insurer or the person as private in that the disclosure of the information would cause harm to the insurer, the person, or the company's business operations and that the information has not been disclosed unless disclosed pursuant to a statutory requirement,



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



597-01969-21 20217014__

an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public;

(b) Is not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as requested by the office; and

(c) Includes:

1. Trade secrets as defined in s. 688.002 which comply with s. 624.4213.

2. Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

3. The source, nature, and amount of the consideration used or to be used in carrying out a merger or other acquisition of control in the ordinary course of business, including the identity of the lender, if the person filing a statement regarding consideration so requests.

4. Information relating to bids or other contractual data, the disclosure of which would impair the efforts of the insurer or its affiliates to contract for goods or services on favorable terms.

5. Internal auditing controls and reports of internal auditors.

(2) Proprietary business information contained in the following items held by the office is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(a) The actuarial opinion summary required under ss. 624.424(1)(b) and 625.121(3) and information related thereto.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

(b) A notice filed with the office by the person or affiliated person who seeks to divest controlling stock in an insurer pursuant to s. 628.461.

(c) The filings required under s. 628.801 and information related thereto.

(d) The enterprise risk report required under ss. 628.461(3) and 628.801 and information related thereto.

(e) Information provided to or obtained by the office pursuant to participation in a supervisory college established under s. 628.805.

(f) Beginning on the operative date of the valuation manual as defined in s. 625.1212(2):

1. An actuarial examination conducted pursuant to s. 625.1212(5)(c), and information related thereto;

2. The annual certification submitted by the insurer pursuant to s. 625.1212(6)(b)2., and information related thereto;

3. The principle-based valuation report filed pursuant to s. 625.1212(6)(b)3., and information related thereto; and

4. Mortality, morbidity, policyholder behavior, or expense experience and other data submitted pursuant to s. 625.1212(7), which includes potentially company identifiable or personally identifiable information.

(3) Except for information obtained by the office which would otherwise be available for public inspection, the following information held by the office is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(a) An ORSA summary report, a substantially similar ORSA





report, and supporting documents submitted pursuant to s. 628.8015.

(b) A corporate governance annual disclosure and supporting documents submitted pursuant to s. 628.8015.

(4) Information received from the NAIC, a governmental entity in this or another state, the Federal Government, or a government of another nation which is confidential or exempt if held by that entity and which is held by the office for use in the performance of its duties relating to insurer valuation and solvency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(5) The office may disclose information made confidential and exempt under this section:

(a) If the insurer to which it pertains gives prior written consent;

(b) Pursuant to a court order;

(c) To the Actuarial Board for Counseling and Discipline upon a request stating that the information is for the purpose of professional disciplinary proceedings and specifying procedures satisfactory to the office for preserving the confidentiality of the information;

(d) To other states, federal and international agencies, the Office of Insurance Consumer Advocate, the National Association of Insurance Commissioners and its affiliates and subsidiaries, and state, federal, and international law enforcement authorities, including members of a supervisory college described in s. 628.805 if the recipient agrees in writing to maintain the confidential and exempt status of the document, material, or other information and has certified in

writing its legal authority to maintain such confidentiality; or

(e) For the purpose of aggregating information on an industrywide basis and disclosing the information to the public only if the specific identities of the insurers, or persons or affiliated persons, are not revealed.

~~(6) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and is repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**
Banking and Insurance, *Chair*
Agriculture
Appropriations Subcommittee on Agriculture, Environment, and General Government
Appropriations Subcommittee on Transportation, Tourism, and Economic Development
Criminal Justice
Judiciary

**JOINT COMMITTEE:**
Joint Legislative Auditing Committee

**SENATOR JIM BOYD**
21st District

February 10, 2021

Senator Ray Rodrigues
Committee on Governmental Oversight and Accountability
330 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399

Dear Chairman Rodrigues:

I respectfully request that SB 7014: OGSR/Office of Insurance Regulation, be scheduled for a hearing in the Committee on Governmental Oversight and Accountability at your earliest convenience.

If I may be of assistance to you on this or any other matter, please do not hesitate to contact me.

Thank you for your consideration of this matter.

Best regards,

Jim Boyd

cc: Joe McVaney
Tamra Redig

REPLY TO:
❒ 717 Manatee Avenue West, Bradenton, Florida 34205 (941) 742-6445
❒ 312 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5021

Senate's Website: *www.flsenate.gov*

**WILTON SIMPSON**
**President of the Senate**

**AARON BEAN**
**President Pro Tempore**

**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 7020 |
| INTRODUCER: | Commerce and Tourism Committee |
| SUBJECT: | OGSR/County Tourism Promotion Agencies/Florida Tourism Industry Marketing Corporation |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Reeve | McKay | | **CM Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7020 saves from repeal the public records exemption relating to trade secrets held by a county tourism promotion agency. The bill also saves from repeal the public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation, doing business as VISIT FLORIDA, or trade secrets obtained pursuant to such activities.

Unless saved from repeal by the Legislature, both exemptions are scheduled to sunset on October 2, 2021. This bill removes the scheduled repeals to continue the exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

[5] Section 119.01(1), F.S. 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."

[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."

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

[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20] 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[16] Section 119.15, F.S.

[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

[18] 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.

[19] Section 119.15(3), F.S.

[20] Section 119.15(6)(b), F.S.

[21] Section 119.15(6)(b)1., F.S.

[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets**

Section 812.081, F.S., defines a "trade secret" as information used in the operation of a business which provides the business an advantage or an opportunity to obtain an advantage over those who do not know it. The term includes scientific, technical, commercial, and financial information.[27] Irrespective of the field to which the trade secret pertains, a trade secret is considered to be secret; of value; for use or in use by the business; and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know it or use it.[28]

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt from public records requirements. Some exemptions only protect trade secrets, while others protect "proprietary business information" and define that term to specifically include trade secrets.

**Public Records Exemption for Trade Secrets Held by a County Tourism Promotion Agency**

Section 125.0104(9)(d)3., F.S., provides a public records exemption for trade secrets, as defined in s. 812.081, F.S., held by a county tourism promotion agency. In 2016, the Legislature expanded the definition of a trade secret in s. 812.081, F.S., to include financial information.[29]

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[23] Section 119.15(6)(b)3., F.S.

[24] 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?

[25] *See generally* s. 119.15, F.S.

[26] Section 119.15(7), F.S.

[27] Section 812.081(1)(c), F.S.

[28] *Id.*

[29] Chapter 2016-6, s. 21, Laws of Fla., provides a public necessity statement with a rationale for expanding the public records exemption for trade secrets. The statement recognized that businesses are often required to provide financial information to

Thus, all public records exemptions for trade secrets were considered to have been substantially amended and subject to the Open Government Sunset Review Act. The public records exemption for trade secrets in s. 125.0104(9)(d)3., F.S., is scheduled to be repealed on October 2, 2021, unless it is reviewed and saved from repeal by the Legislature.

***Open Government Sunset Review of s. 125.0104, F.S.***

In September 2020, the Senate Committee on Commerce and Tourism and the House Oversight, Transparency, & Public Management Subcommittee sent an Open Government Sunset Review questionnaire to the county tourism promotion agencies operating within the state regarding the scheduled repeal of the public records exemption and the need to maintain said exemption. Agencies were asked about the types of records held, how records that contain trade secrets are reviewed, public records requests, and various other questions related to how agencies work with public records that contain trade secrets. The surveyed agencies reported holding public records containing trade secrets that include contracts, financial and budget information, consumer trend data, marketing initiatives and research, visitor center and convention center data, business leads, industry partner contacts, consumer databases, administrative records, funding requests, purchased data, and paid research. Agencies cited the need to remain competitive and effectively market their counties as the general purposes of using trade secret information. Of the agencies that responded to the questionnaire, 13 reported receiving a public records request for a records containing trade secrets within the last 4 years. The questionnaire also asked agencies whether they recommend that the Legislature repeal or reenact the public record exemption, the majority of which recommended reenacting the exemption as it is written.

**Public Records Exemption for VISIT FLORIDA**

Section 288.1226(9), F.S., provides a public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by VISIT FLORIDA, or trade secrets as defined by s. 812.081, F.S., obtained through such activities. In 2016, the Legislature expanded the definition of a trade secret in s. 812.081, F.S., to include financial information.[30] Thus, all public records exemptions for trade secrets were considered to have been substantially amended and subject to the Open Government Sunset Review Act. The public records exemption for information and trade secrets in s. 288.1226(9), F.S., is scheduled to be repealed on October 2, 2021, unless it is reviewed and saved from repeal by the Legislature.

***Open Government Sunset Review of s. 288.1226, F.S.***

In August 2020, the Senate Committee on Commerce and Tourism and the House Oversight, Transparency, & Public Management Subcommittee held a meeting with a representative from VISIT FLORIDA to discuss marketing projects or advertising research projects and how records associated with those projects are handled, the types of records that include trade secret information, and how VISIT FLORIDA addresses public record requests for such records.

Representatives from VISIT FLORIDA stated that they rely on the ability to protect trade secrets gathered from marketing projects in order to remain competitive. Specifically, VISIT FLORIDA

public entities for regulatory or other purposes and that the disclosure of such information to competitors would be detrimental to businesses.

[30] *Id.*

tends to apply the exemption to data gathered from marketing projects and research that will be used to further develop other marketing strategies. Because VISIT FLORIDA is subject to several reporting and transparency requirements necessitating making contracts and other documents available to the public, VISIT FLORIDA relies on the exemption found in s. 288.1226(9), F.S., to protect information found in the publicly available contracts and documents, such as the timing and distribution locations of marketing activities before the activities take place and financial information relating to the marketing activities, from use by competing destinations.

VISIT FLORIDA recommended the Legislature reenact the exemption as written in order to remain at a competitive advantage.

## III. Effect of Proposed Changes:

SB 7020 amends s. 125.0104, F.S., to remove the scheduled repeal of the public records exemption for trade secrets held by a county tourism promotion agency. The bill also amends s. 288.1226, F.S., to remove the scheduled repeal of the public records exemption for the identity of any person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation, doing business as VISIT FLORIDA, or trade secrets obtained through such activities.

Under the bill, trade secrets held by a county tourism promotion agency, as well as information and trade secrets obtained by VISIT FLORIDA, will continue to be exempt from public disclosure beyond October 2, 2021.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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. The bill continues current public records exemptions beyond their scheduled repeal dates. 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 current public records exemptions without substantial amendment. 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 the identity of any person who responds to a marketing or advertising research project conducted by VISIT FLORIDA, or trade secrets as defined by s. 812.081, F.S., obtained through such activities, and to protect trade secrets, as defined in s. 812.081, F.S., held by a county tourism promotion agency. This bill continues the public records exemption for information and trade secrets held by VISIT FLORIDA and for trade secrets held by a county tourism promotion agency. 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:

None.

C. Government Sector Impact:

VISIT FLORIDA and the county tourism promotion agencies will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 125.0104 and 288.1226.

## 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.

**By** the Committee on Commerce and Tourism

577-02139-21 20217020__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 125.0104, F.S., which provides an exemption from public records requirements for trade secrets held by county tourism promotion agencies; removing the scheduled repeal of the exemption; amending s. 288.1226, F.S., which provides an exemption from public records requirements for the identity of a person who responds to a marketing or advertising research project conducted by the Florida Tourism Industry Marketing Corporation and for certain trade secrets; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (9) of section 125.0104, Florida Statutes, is amended to read:

125.0104 Tourist development tax; procedure for levying; authorized uses; referendum; enforcement.—

(9) COUNTY TOURISM PROMOTION AGENCIES.—In addition to any other powers and duties provided for agencies created for the purpose of tourism promotion by a county levying the tourist development tax, such agencies are authorized and empowered to:

(d) Undertake marketing research and advertising research studies and provide reservations services and convention and meetings booking services consistent with the authorized uses of revenue as set forth in subsection (5).

1. Information given to a county tourism promotion agency



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



577-02139-21 20217020__

which, if released, would reveal the identity of persons or entities who provide data or other information as a response to a sales promotion effort, an advertisement, or a research project or whose names, addresses, meeting or convention plan information or accommodations or other visitation needs become booking or reservation list data, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

2. The following information, when held by a county tourism promotion agency, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

a. Booking business records, as defined in s. 255.047.

b. Trade secrets and commercial or financial information gathered from a person and privileged or confidential, as defined and interpreted under 5 U.S.C. s. 552(b)(4), or any amendments thereto.

3. A trade secret, as defined in s. 812.081, held by a county tourism promotion agency is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. Subsection (9) of section 288.1226, Florida Statutes, is amended to read:

288.1226 Florida Tourism Industry Marketing Corporation; use of property; board of directors; duties; audit.—

(9) PUBLIC RECORDS EXEMPTION.—The identity of any person who responds to a marketing project or advertising research project conducted by the corporation in the performance of its



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duties on behalf of Enterprise Florida, Inc., or trade secrets as defined by s. 812.081 obtained pursuant to such activities, are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 3. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7022 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Proprietary Confidential Business Information |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Sharon | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7022 saves from repeal the public records exemption for proprietary confidential business information submitted by voice communications services providers (providers) to the E911 Board, the Division of Telecommunications (division) within the Department of Management Services (DMS), or the Department of Revenue (DOR) as an agent of the E911 Board.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

> in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* Section 688.008, F.S.

not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.

- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.

- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

***Proprietary Confidential Business Information and Trade Secrets***

Under s. 365.174(1), F.S., proprietary confidential business information submitted by a voice communications services[34] provider[35] includes:

- Customer lists;
- Customer numbers;
- Individual or aggregate customer data by location;
- Usage and capacity data;
- Network facilities used to serve subscribers;
- Technology descriptions;
- Technical information, or trade secrets, including trade secrets as defined in s. 812.081; and
- Actual or developmental costs of E911 systems that are developed, produced, or received internally by a provider or by a provider's employees, directors, officers, or agents.

"Trade secrets," as defined in s. 812.081(1)(c), F.S., means information, the owner of which has taken measures to prevent such information from becoming available to persons other than those that the owner has intended to have access for a limited purpose. Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or an opportunity to obtain an advantage over those that do not have that information.[36]

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] "Voice communication services" is defined as two-way voice service through the use of any technology including voice-over Internet protocol service. See s. 365.172(3)(cc), F.S.
[35] "Voice communications services providers" is defined as "any person or entity providing voice communications services except for a resale supplier. See s. 365.172(3)(dd), F.S.
[36] Section 812.081(1)(c), F.S.

Section 812.081(1)(c), F.S., states that "trade secrets" include "any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof."

In 2016, the term "trade secret" was expanded to include "financial information."[37] Accordingly, s. 365.174, F.S., was revised to incorporate the expanded definition. [38] As a result of this expansion, s. 365.174, F.S. was made subject to repeal on October 2, 2021, unless saved through reenactment by the Legislature.[39]

**General Overview of E911 Provisions within Chapter 365**

The Emergency Communications Number E911 Act (E911 Act) was established to create a statewide emergency telecommunications number system, providing users of voice communications service rapid and direct access to public safety and emergency agencies.[40] The Communications Number E911 System Fund (the fund),[41] reimburses counties and wireless providers for certain costs incurred in complying with the E911 Act.[42] The fund is administered by the E911 Board (board).[43] The fund is comprised of fees levied on subscribers pursuant to the E911 Fee[44] and the Prepaid Wireless E911 Fee.[45]

Providers must deliver the collected E911 fees to the E911 Board within 60 days of billing subscribers, along with a monthly report that includes data as to the number of subscribers within each county.[46] This section expressly makes the information provided in the report exempt from public records pursuant to s. 365.174, F.S.[47] The fee must then be paid by the board into the State Treasury and accounted for in the fund on a monthly basis. [48]

As to the Prepaid Wireless E911 Fee, the provider collects the amount of the fee from the customers on each transaction performed within the state. [49] The provider must then remit the fees collected in the previous month along with a fee return to the Department of Revenue (DOR).[50] The DOR then transfers the fees to the fund on a monthly basis.[51]

Both the E911 Fee report and the return filed for the Prepaid Wireless E911 Fees contain information considered to be proprietary confidential business information, falling within the

[37] Ch. 2016-5, Laws of Fla.
[38] Ch. 2016-6, s. 5, Laws of Fla.
[39] *Id*.
[40] Section 365.172, F.S.
[41] Section 365.173, F.S.
[42] Section 365.172(2)(b), F.S.
[43] Section 365.172(2)(d) F.S. The E911 Board is overseen by the Division of Telecommunications within the Department of Management Services.
[44] Section 365.172(8), F.S.
[45] Section 365.172(9), F.S.
[46] Section 365.172(8)(e), F.S.
[47] *Id*.
[48] Section 365.173(1)(a), F.S.
[49] Section 365.172(9)(c), F.S.
[50] Section 365.172(9)(g), F.S.
[51] Section 365.173(1)(b), F.S.

exemption in s. 365.174, F.S.[52] According to CTIA, the trade association for the wireless communications industry:

> The E911 fee submission reports to the E911 Board contain E911 fee collections from customers separated by local county jurisdiction, which is "aggregate customer data by location," and financial data from which aggregate customer data by location can be derived. Prepaid wireless E911 fee collections may contain vendor specific information. In addition, cost and technical information may have been submitted by one or more Members in support of affidavits seeking reimbursement from the E911 Board for implementation of E911 service.[53]

CTIA explains that the information remitted is internal and cannot be obtained by any other means.[54] They assert that the information submitted is competitively sensitive and disclosure could result in harm to the providers.[55]

Moreover, Florida Internet and Television contends that because the information remitted includes the total number of subscribers by county and the amount of fees paid, it is considered sensitive proprietary information that reflects market share data for the entire telecommunications industry.[56] They also assert that disclosure of this information in such a competitive market could result in economic harm.[57]

## III. Effect of Proposed Changes:

The bill retains the exemption for proprietary confidential business information submitted by voice communications services providers to the E911 Board, the division, or the DOR as an agent of the board by removing the repeal date of October 2, 2021 in current law.

The bill is effective October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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[52] Section 365.172(8)(e), F.S.
[53] *See* Response by CTIA to Open Government Sunset Review Questionnaire (Oct. 8, 2020) (on file with the Senate Committee on Regulated Industries).
[54] *Id*.
[55] *See* Response by ATT to Open Government Sunset Review Questionnaire (Sep. 29, 2020) (on file with the Senate Committee on Regulated Industries).
[56] *See* Supplemental Response by Florida Internet and Television to Open Government Sunset Review Questionnaire (Oct. 14, 2020) (on file with the Senate Committee on Regulated Industries).
[57] *Id*.

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the E911 Board, the Department of Management Services, or the Department of Revenue making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The E911 Board, the Department of Management Services, and the Department of Revenue will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 365.174 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.

**By** the Committee on Regulated Industries

580-02165-21 20217022__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 365.174, F.S., which provides an exemption from public records requirements for proprietary confidential business information submitted by a voice communications services provider to the E911 Board, the Division of Telecommunications within the Department of Management Services, or the Department of Revenue; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 365.174, Florida Statutes, is amended to read:

365.174 Proprietary confidential business information.—

(1)(a) All proprietary confidential business information submitted by a provider to the board or the office is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) Statistical abstracts of information collected by the board or the office may be released or published, but only in a manner that does not identify or allow identification of subscribers or their service numbers or of revenues attributable to any provider.

(2)(a) All proprietary confidential business information submitted by a provider to the Department of Revenue, as an agent of the board, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



580-02165-21 20217022__

(b) The Department of Revenue may provide information relative to s. 365.172(9) to the Secretary of Management Services, or his or her authorized agent, or to the E911 Board established in s. 365.172(5) for use in the conduct of the official business of the Department of Management Services or the E911 Board.

(3) As used in this section, the term "proprietary confidential business information" means customer lists, customer numbers, individual or aggregate customer data by location, usage and capacity data, network facilities used to serve subscribers, technology descriptions, technical information, or trade secrets, including trade secrets as defined in s. 812.081, and the actual or developmental costs of E911 systems that are developed, produced, or received internally by a provider or by a provider's employees, directors, officers, or agents.

~~(4) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

3/31/21
*Meeting Date*

SB 7022
*Bill Number (if applicable)*

Topic OGSR/Proprietary Confidential Business Information - 2021

*Amendment Barcode (if applicable)*

Name Jorge Chamizo

Job Title Attorney

Address 108 S Monroe St.
*Street*

Phone 850-681-0024

Tallahassee FL 32301
*City* *State* *Zip*

Email jorge@flapartners.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Internet and Television Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**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 7024 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Agency Trade Secrets |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Oxamendi | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7024 saves from repeal the public records exemption for data, programs, or supporting documentation that is a trade secret as defined in s. 812.081, F.S., that is held by an agency as defined in ch. 119, F.S., and that resides or exists internal or external to a computer, computer system, computer network, or electronic device.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. Under the bill, qualified trade secrets remain confidential and exempt from public disclosure.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibitions***

Offenses Against Intellectual Property

Section 815.04(3), F.S., makes data, programs, or supporting documentation that are a trade secret, as defined in s. 812.081, F.S., reside or exist internal or external to a computer, computer system, or computer network, and are held by an agency as defined in chapter 119, confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. A person who willfully, knowingly, and without authorization discloses or takes such information commits an offense against intellectual property.[27] Section 815.04(5), F.S., provides that a violation is a felony of the third degree.[28]

Section 815.02, F.S., expresses the legislative intent for the computer-related crimes provided in ch. 815, F.S., including the concern that such crimes are a growing concern, and affect financial institutions, government programs, government records, and other business enterprises.[29]

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 815.04(4), F.S.
[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.
[29] *See* s. 815.02, F.S.

In 2016, the definition of "trade secret" in s. 812.081, F.S., was expanded to include financial information. As a result, this public record exemption in s. 815.04(3), F.S., was reenacted in 2016 to incorporate the new definition of "trade secret."[30] The public records exemption in s. 815.04(3), F.S., stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.[31]

Theft, Embezzlement, and Unlawful Copying

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[32]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets as defined by s. 812.081(1)(c), F.S.:

- Section 119.071(1)(f), F.S., exempts data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is a trade secret and agency-produced data processing software that is sensitive.
- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.

[30] *See* ch 2016-5, s. 20, Laws of Fla.
[31] *Id.*
[32] *See* s. 812.081(2), F.S.

- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[33]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S., makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.

[33] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[34] and the right to recover damages for the misappropriation of a trade secret.[35] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[36]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.

[34] Section 688.003, F.S.
[35] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[36] *See* s. 688.008, F.S.

- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.
- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or

received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.

- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.
- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[37] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[38]

[37] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[38] *Id.*

**Open Government Sunset Review Questionnaires**

In September 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to several state agencies and to the Florida League of Cities and the Florida Association of Counties for transmittal to those association's member-agencies. Twenty-two state and local agencies responded to the questionnaires, representing 15 state agencies, five city governments, and two school boards. Staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

The majority of responding agencies stated that they have records that are affected by the exemption. The types of records vary by agency. Examples of the types of affected records include bids or competitive contract proposals submitted by prospective vendors, contracts, financial information and personal identifying and financial information of employees, and records received from the Seminole Tribe of Florida under the state's Indian gaming compact.[39]

The questionnaire asked the agencies if it would be more appropriate for the public record exemption under review to use the definition of "trade secret" provided for in s. 688.002(4), F.S., as opposed to the definition in s. 812.081(1)(c), F.S. Of the agencies that responded to this question, most stated that the exemption should not be changed, two respondents recommended that the definitions should be revised to be identical or merged into a single definition, one respondent stated that either definition was appropriate, and two agencies stated that the definition in s. 688.002(4), F.S., was the more appropriate definition.

Advising that the exemption should continue to use the definition in s. 812.081(1)(c), F.S., the Department of Corrections (DOC) stated that changing the definition would "upend years of case law." The definition of a "trade secret" in s. 812.081, F.S., has been referenced by Chapter 119 since the exemption was created in 1985." The DOC noted that such a change "would be detrimental to records custodians as their guidance would have to be altered. The elements for each test differ and adopting the elements in s. 688.002(4), F.S., would require a determination of "reasonableness" that is often hard to define and easy to litigate. Section 688.002(4), F.S., doesn't encompass the same level of specificity as s. 812.081, F.S., and this would create confusion for both custodians and the public."[40]

Agencies also noted that the public records exemption in s. 119.071(1)(f), F.S., relating to data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret and agency-produced data processing software that is sensitive is similar to the public records exemption in s. 815.04(3), F.S.

Some agencies noted other public record exemptions are applicable to the types of records in their possession. For example, the Office of Insurance Regulation noted that it receives data that is identified as "trade secret" pursuant to s. 624.4213, F.S. Those "trade secrets" are considered

[39] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Business and Professional Regulation, dated Nov. 16, 2020, and on file with the Senate Committee on Regulated Industries.
[40] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Corrections, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.

"proprietary business information" as defined by s. 624.4212, F.S., which references the definition of "trade secret" in s. 688.002, F.S.[41]

None of the agencies surveyed recommended that the exemption in s. 815.04(3), F.S., should not be reenacted. Two respondents made recommendations to amend the exemption that did not relate to the definition of the term trade secret in ss. 688.002(4) and 812.081(1)(c), F.S.

The City of Clearwater recommended that s. 119.071(1)(f), F.S., should be reenacted and amended to "include language applicable to Remote Software Service Providers and/or "Cloud" provided software and services."[42]

The Department of Highway Safety and Motor Vehicles noted that the 2016 amendment to s. 812.081(1)(c), F.S., which added financial information to the definition of the term "trade secret," has led to vendors submitting bids, proposals, or replies claiming that their pricing is a trade secret. The agency noted that "when pricing for competitive solicitations, as "financial information," is deemed a trade secret, both government watchdogs and vendors who submit unsuccessful responses are restricted in their review of the procurement process, which thereby diminishes the transparency of government contracting. It would greatly assist agencies if the Legislature clarified whether a vendor's pricing constitutes a trade secret."[43]

## III. Effect of Proposed Changes:

The bill amends s. 815.04(3), F.S., to remove the scheduled repeal of a public records exemption for data, programs, or supporting documentation that is a trade secret as defined in s. 812.081, F.S., that is held by an agency as defined in ch. 119, F.S., and that resides or exists internal or external to a computer, computer system, computer network, or electronic device.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. Under the bill, qualified trade secrets remain confidential and exempt from public disclosure.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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[41] *See Open Government Sunset Review Questionnaire* response from the Office of Insurance Regulation, dated Oct. 23, 2020, and on file with the Senate Committee on Regulated Industries.
[42] *See Open Government Sunset Review Questionnaire* response from the City of Clearwater, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.
[43] *See Open Government Sunset Review Questionnaire* response from the Department of Highway Safety and Motor Vehicles, dated Oct. 20, 2020, and on file with the Senate Committee on Regulated Industries.

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with agencies making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

Agencies will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 815.04 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.

**By** the Committee on Regulated Industries

580-02168-21 20217024__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 815.04, F.S.; abrogating the scheduled repeal of a public records exemption for data, programs, or supporting documentation that is a trade secret held by an agency and which resides or exists internal or external to a computer, a computer system, a computer network, or an electronic device; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 815.04, Florida Statutes, is amended to read:

815.04 Offenses against intellectual property; public records exemption.—

(3) Data, programs, or supporting documentation that is a trade secret as defined in s. 812.081, that is held by an agency as defined in chapter 119, and that resides or exists internal or external to a computer, computer system, computer network, or electronic device is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7026 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Florida State Boxing Commission |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Oxamendi | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7026 saves from repeal the public records exemption for proprietary confidential business information provided by a promoter to the Florida State Boxing Commission (commission) or through an audit of the promoter's books and records pursuant to s. 548.06, F.S.

This public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 119.071(1)(f), F.S., exempts from public records requirements in s. 119.07(1), F.S., data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.
- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. 85-62 (1985).

- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* s. 688.008, F.S.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.

- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.
- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss

Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.
- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Florida State Boxing Commission**

Chapter 548, F.S., provides for the regulation of professional and amateur boxing, kickboxing, and mixed martial arts by the Florida State Boxing Commission (commission) within the Department of Business and Professional Regulation (department).

Section 548.006(3), F.S., provides the commission with exclusive jurisdiction over every professional boxing match and professional mixed martial arts and kickboxing matches. Professional matches held in this state must meet the requirements of ch. 548, F.S., and the rules adopted by the commission for holding the match.

The commission's jurisdiction over amateur matches is limited to the approval, disapproval, suspension of approval, and revocation of approval of all amateur sanctioning organizations for boxing and kickboxing matches held in the state.[34] Amateur sanctioning organizations are business entities organized for sanctioning and supervising matches involving amateurs.[35] This jurisdiction does not extend to amateur sanctioning organizations for mixed martial arts.

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] Section 548.006(3), F.S.
[35] Section 548.002(2), F.S.

Section 548.002(20), F.S., defines the term "promoter" to mean:

> any person, and includes any officer, director, employee, or stockholder of a corporate promoter, who produces, arranges, or stages any match involving a professional.

***Reporting and Tax Requirement***

Within seventy-two hours after a match, the promoter of that match must file a written report with the commission.[36] The report must include information about the number of tickets sold, the amount of gross receipts, and any other facts that the commission requires.[37] Chapter 548, F.S., does not require the promoter to retain a copy of the written report.
The term "gross receipts" includes:

- The gross price charged for the sale or lease of broadcasting, television, and motion picture rights without any deductions for commissions, brokerage fees, distribution fees, advertising or other expenses or charges;
- The portion of the receipts from the sale of souvenirs, programs, and other concessions received by the promoter;
- The face value of all tickets sold and complimentary tickets issued, provided, or given; and
- The face value of any seat or seating issued, provided, or given in exchange for advertising sponsorships, or anything of value to the promotion of an event.[38]

According to the department, the current definition of "gross receipts" has led to some confusion in the industry because licensees are not sure whether to include state and federal taxes within the face value of a ticket.

Promoters include persons who have rights to telecast a match or matches held in this state under the supervision of the Florida State Boxing Commission. Such persons must be licensed as a promoter, and must, within 72 hours after the sale, transfer, or extension of such rights in whole or in part, file with the commission a written report that includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require.[39]

A concessionaire must also file with the commission, within 72 hours after the match, a written report that includes the number of tickets sold, the amount of gross receipts, and any other facts the commission may require.[40]

Any written report must be filed with the commission and postmarked within 72 hours after the conclusion of the match with an additional 5 days allowed for mailing.[41] According to the department, the report is required to enable the commission to verify the accuracy of the post-event tax payment for both tickets sold and broadcasting/television rights.

[36] Section 548.06(1), F.S.
[37] *Id.*
[38] Section 548.06(1), F.S.
[39] Section 548.06(2), F.S.
[40] Section 548.06(3), F.S.
[41] Section 548.06(4), F.S.

Section 548.015, F.S., requires a concessionaire to file a surety bond, cash deposit, or other security in an amount determined by the commission. The security is required before licensure, license renewal, or before a match.

These written reports must be accompanied with a tax payment in the amount of 5 percent of the total gross receipts exclusive of any federal taxes. The tax payment for the sale or lease of broadcasting, television, and motion picture rights cannot exceed $40,000 for any single event.[42]

***Public Records Exemption for a Promoter's Books and Records***

Section 548.062, F.S., provides a public records exemption for proprietary confidential business provided by a promoter to the commission or obtained by the commission through an audit of the promoter's books and records under s. 548.06, F.S.[43]

Under s. 548.062, F.S., proprietary confidential information means information that:
- Is owned or controlled by the promoter;
- The promoter intends to be and treats as private;
- If disclosed, would cause harm to the promoter or its business operations;
- Has not been disclosed, except for any disclosure pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information not be released to the public.

The information protected also includes:
- The number of ticket sales for a match;
- The amount of gross receipts after a match;
- A trade secret, as defined in s. 688.002, F.S.;
- Business plans;
- Internal auditing controls and reports of internal auditors; or
- Reports of external auditors.

This public records exemption stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

**Open Government Sunset Review Questionnaires**

In August 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to the commission and to approximately 50 promoters. The commission and one promoter responded to the questionnaire. Staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

In its response to the questionnaire, the commission noted that public records requests for information provided to the commission by promoters are common, and that such requests are

[42] Section 548.06(5), F.S.
[43] This exemption was enacted in ch. 2014-129, Laws of Fla., and amended by ch. 2016-21, Laws of Fla.

typically made by reporters and competitors. The commission has relied on the exemption in s. 548.062, F.S., to deny such requests.

The commission noted that it has not conducted an audit of any promoter since July 1, 2016. Therefore, it has not acquired any information that is subject to the exemption from promoters through an audit.

The commission recommended that the exemption in s. 548.062, F.S., be reenacted.[44]

## III. Effect of Proposed Changes:

The bill amends s. 548.062, F.S., to remove the scheduled repeal of a public records exemption for proprietary confidential business information provided by a promoter to the Florida State Boxing Commission (commission) or through an audit of the promoter's books and records pursuant to s. 548.06, F.S.

This public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. Under the bill, proprietary confidential information will remain confidential and exempt from public disclosure.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, Thus, the bill does not require an extraordinary vote for enactment. thus, the bill does not require a two-thirds vote to be enacted.

**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

[44] *See Open Government Sunset Review Questionnaire* response from the Florida Boxing Commission on file with the Senate Committee on Regulated Industries.

justifying the exemption. This bill does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with Florida State Boxing Commission making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Florida State Boxing Commission will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 548.062 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.

**By** the Committee on Regulated Industries

580-02166-21 20217026__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 548.062, F.S., relating to an exemption from public records requirements for proprietary confidential business information obtained through an audit of a promoter's books and records or provided by a promoter to the Florida State Boxing Commission; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 548.062, Florida Statutes, is amended to read:

548.062 Public records exemption.—

(1) As used in this section, the term "proprietary confidential business information" means information that:

(a) Is owned or controlled by the promoter;

(b) The promoter intends to be and treats as private;

(c) If disclosed, would cause harm to the promoter or its business operations;

(d) Has not been disclosed, except for any disclosure pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information not be released to the public; and

(e) Concerns any of the following:

1. The number of ticket sales for a match;

2. The amount of gross receipts after a match;

3. A trade secret, as defined in s. 688.002;



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



580-02166-21 20217026__

4. Business plans;

5. Internal auditing controls and reports of internal auditors; or

6. Reports of external auditors.

(2) Proprietary confidential business information provided by a promoter to the commission or obtained by the commission through an audit of the promoter's books and records pursuant to s. 548.06 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Information made confidential and exempt by this subsection may be disclosed to another governmental entity in the performance of its duties and responsibilities.

~~(3) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7028 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Data Processing Software |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Oxamendi | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7028 saves from repeal the public records exemption for data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal to continue the exempt status of the qualified trade secrets and sensitive information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* Section 688.008, F.S.

or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.

- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.

- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

***Trade Secrets Exemption for Data Processing Software***

Section 119.071(1)(f), F.S., exempts from public records copying and inspection requirements data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.[34]

In 2016, the definition of "trade secret" in s. 812.081, F.S., was expanded to include financial information. As a result, this public record exemption in s. 119.07(1)(f), F.S., was also reenacted in 2016 to incorporate the new definition of "trade secret."[35] This exemption is subject to the Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.[36]

Section 119.10(1), F.S., provides that any public officer who violates any provision of ch. 119, F.S., commits a noncriminal infraction punishable by fine not exceeding $500. If the public officer violated the provisions of s. 119.07(1), F.S., the person is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree.[37]

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[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] Section 119.011(14), F.S., defines the term "sensitive" for the purposes of defining agency-produced software, to mean:
…only those portions of data processing software, including the specifications and documentation, which are used to:
(a) Collect, process, store, and retrieve information that is exempt from s. 119.07(1), F.S.;
(b) Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or
(c) Control and direct access authorizations and security measures for automated systems.
[35] Chapter 2016-5, Laws of Fla.
[36] *Id.*
[37] Section 775.082, F.S., provides that a misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year. Section 775.083, F.S., provides that a misdemeanor of the first degree is punishable by a fine not to exceed $1,000.

Section 119.10(2), F.S., provides that any person who willfully and knowingly violates any of the provisions of this chapter commits a misdemeanor of the first degree.[38]

**Open Government Sunset Review Questionnaires**

In September 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to several state agencies and to the Florida League of Cities and the Florida Association of Counties for transmittal to those associations' member-agencies. Twenty-three state and local agencies responded to the questionnaires, representing 15 state agencies, five city governments, one county government, and two school boards. Staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

The majority of responding agencies stated that they have data processing software licensing agreements in place that require the software to be kept confidential as a trade secret. The number of such agreements for an agency ranged from one licensing agreement to more than 4,000 agreements. Section 119.071, F.S., does not require a licensing agreement for the exemption to apply, but such an agreement may evidence the labeling of a trade secret as such or the trade secret owner's written notice to the agency that the information provided to the agency is a trade secret. As noted by the Department of Highway Safety and Motor Vehicles, most commercial off-the-self software is typically subject to a licensing agreement which restricts the duplication, copying, or other disclosure.[39]

The questionnaire asked the agencies if it would be more appropriate for the public record exemption under review to use the definition of "trade secret" provided for in s. 688.002(4), F.S., as opposed to the definition in s. 812.081(1)(c), F.S. Of the agencies that responded to this question, 11 stated that the exemption should not be changed, three respondents recommended that the definitions should be revised to be identical or merged into a single definition, one respondent stated that either definition was appropriate, and one agency stated that the definition in s. 688.002(4), F.S., was the more appropriate definition. Eight respondents did not offer an opinion.

Advising that the exemption should continue to use the current definition in s. 812.081(1)(c), F.S., the Department of Corrections (DOC) stated that changing the definition would "upend years of case law. The definition of a "trade secret" in section 812.081, F.S., has been referenced by Chapter 119 since the exemption was created in 1985." The DOC noted that such a change "would be detrimental to records custodians as their guidance would have to be altered. The elements for each test differ and adopting the elements in section 688.002(4), F.S., would require a determination of "reasonableness" that is often hard to define and easy to litigate. Section 688.002(4), F.S., does not encompass the same level of specificity as section 812.081, F.S., and this would create confusion for both custodians and the public."[40]

[38] *Id.*
[39] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Highway Safety and Motor Vehicles, dated Oct. 20, 2020, and on file with the Senate Committee on Regulated Industries.
[40] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Corrections, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.

Several of the agencies also noted that the public records exemption in s. 815.04(3), F.S., relating to trade secret data, programs, and supporting documentation that is a trade secret, as defined in s. 812.081(1)(c), F.S., and held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device, is similar the public records exemption in s. 119.071(1)(f), F.S.

None of the agencies surveyed recommended that the exemption in s. 119.071(1)(f), F.S., should not be reenacted.

Only one respondent made a recommendation to amend the exemption that did not relate to the definition of the term trade secret in ss. 688.002(4) and 812.081(1)(c), F.S. The City of Clearwater recommended that s. 119.071(1)(f), F.S., should be reenacted and amended to "include language applicable to Remote Software Service Providers and/or "Cloud" provided software and services."[41]

## III. Effect of Proposed Changes:

The bill amends s. 119.071(1)(f), F.S., to remove the scheduled repeal of the public records exemption for data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal of the exemption. Thus, the qualified trade secrets and sensitive information remain exempt from public disclosure.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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

[41] *See Open Government Sunset Review Questionnaire* response from the City of Clearwater, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.

public records requirements. This bill does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with an agency making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

Agencies will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 119.071 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.

**By** the Committee on Regulated Industries

580-02167-21 20217028__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 119.071, F.S., relating to an exemption from public records requirements for certain data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret and agency-produced data processing software that is sensitive; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (f) of subsection (1) of section 119.071, Florida Statutes, is amended to read:

119.071 General exemptions from inspection or copying of public records.—

(1) AGENCY ADMINISTRATION.—

(f) Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, and agency-produced data processing software that is sensitive are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The designation of agency-produced software as sensitive does not prohibit an agency head from sharing or exchanging such software with another public agency. ~~This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment~~



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



580-02167-21 20217028__

~~by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7030 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Trade Secrets/Department of Business and Professional Regulation |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Kraemer | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7030 saves from repeal the public records exemption for information required to be submitted to the Department of Business and Professional Regulation (DBPR) that is designated by a distributor of medical gas as a trade secret. Medical gas is a liquid or vaporized gas that is a prescription drug. Affected parties are medical gas wholesale distributors, medical gas manufacturers, and medical oxygen retail establishments, including applicants for such licensing.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. This bill removes the scheduled repeal to continue the confidential and exempt status of the trade secret information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[16] Section 119.15, F.S.

[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

[18] 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.

[19] Section 119.15(3), F.S.

[20] Section 119.15(6)(b), F.S.

[21] Section 119.15(6)(b)1., F.S.

[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

> state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* Section 688.008, F.S.

advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.

- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.
- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.

- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.
- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Select Trade Secrets held by the Department of Business and Professional Regulation**

Section 499.931, F.S., requires trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder to be maintained as required under s. 499.051, F.S. Section 499.051, F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt. As a result, trade secrets are deemed to be confidential and exempt under s. 499.931, F.S. This exemption to the public records disclosure requirements is scheduled to repeal on October 1, 2021.

**Open Government Sunset Review Questionnaires**

In November 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to various entities identified by the Department of Business and Professional Regulation as permitted medical gas manufacturers and medical gas wholesale distributors. Representatives of the Compressed Gas Association,[34] and the Gases and Welding Distributors Association,[35] (the associations) responded to the

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] The Compressed Gas Association (CGA) is an accredited standards-developing organization dedicated to the development and promotion of safety standards and safe practices in the industrial, medical, and food gases industry, representing over 130 member companies — manufacturers, distributors, suppliers, and transporters of gases, cryogenic liquids, and related products and services. CGA develops technical specifications, safety standards, and training and educational materials, and works with government agencies to formulate responsible regulations and standards and to promote compliance with these regulations and standards. *See* About Us - Compressed Gas Association (cganet.com) (last visited Feb. 11, 2021).
[35] The CGA's sister organization is the Gases and Welding Distributors Association (GAWDA), formerly the National Welding Supply Association. GAWDA represents over 500 small to very large welding equipment and industrial gas

questionnaire on behalf of their members, and staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

According to the associations, which represent manufacturers, distributors, suppliers and transporters of gases in the industrial, medical, and food gases industry, as well as the welding equipment and industrial gas industry, the exemption allows applicants and permit holders to share important information with the state in a manner that does not cause irreparable financial harm.[36]
The associations noted the following trade secret information is required to be submitted to DBPR by their members, as applicants or as permit holders inspected by DBPR:

- List of medical gas customers;
- Medical gas customer shipping documents that may contain pricing and volume information;
- Medical gas receipt documents;
- Medical gas pricing information;
- Documents associated with specific customer names and addresses;
- Billing documents; and
- The name, position/title, social security number, date of birth and address of each owner, partner, member, manager, officer, director, chief executive, or other person who directly or indirectly controls the operation of the business entity, as applicable.[37]

The questionnaire asked if the exemption in s. 499.931, F.S., should be repealed, and the associations strongly recommended the exemption be reenacted, without the need to reenact the protection of the above trade secret information every five years.[38]

## III. Effect of Proposed Changes:

The bill saves from repeal the exemption for qualified trade secrets from public disclosure in s. 499.931, F.S., for a trade secret required to be submitted as part of the permitting or renewal process for medical gas wholesale distributors, medical gas manufacturers, and medical oxygen retail establishments.

The bill saves the exemption from repeal by removing the scheduled repeal date of October 2, 2021 in current law.

The bill is effective October 1, 2021.

distributors as well as several hundred manufacturers, suppliers, and service providers to the welding and industrial gas industry. GAWDA's mission is to promote the safe operation and economic vitality of distributors of industrial gases and related welding equipment and supplies. *See* Frequently Asked Questions - GAWDA (last visited Feb. 11, 2021).
[36] *See* Response by CGA and GAWDA to Open Government Sunset Review Questionnaire, at p. 3 (Dec. 9, 2020) (on file with the Senate Committee on Regulated Industries).
[37] *Id*.
[38] *Id*. at p. 4.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption, 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 exemption in the bill 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.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost, to the extent imposed, associated with DBPR making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

DBPR will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 499.931 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.

**By** the Committee on Regulated Industries

580-02163-21 20217030__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 499.931, F.S., which relates to an exemption from public records requirements for trade secrets contained in certain information submitted to the Department of Business and Professional Regulation as required by specified provisions relating to medical gas; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 499.931, Florida Statutes, is amended to read:

499.931 Trade secret information.—Information required to be submitted under this part which is a trade secret as defined in s. 812.081 and designated as a trade secret by an applicant or permitholder must be maintained as required under s. 499.051. ~~This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7032 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Prescription Drug Purchase Lists |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Kraemer | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7032 saves from repeal the public records exemption for a trade secret related to prescription drug purchase lists submitted to the Department of Business and Professional Regulation (DBPR) by certain wholesale distributors of prescription drugs in Florida.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. This bill removes the scheduled repeal to continue the confidential and exempt status of the trade secret information.

The bill is not expected to impact state and local revenues and expenditures.

The bill is effective October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

> state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* Section 688.008, F.S.

advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.

- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.
- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.

- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.
- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Trade Secrets relating to Prescription Drug Purchase List**

Section 499.0121, F.S., requires trade secrets related to written lists of wholesale distributors and manufacturers submitted to DBPR to be maintained as required under s. 499.051, F.S. Section 499.051, F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt. As a result, trade secrets are deemed to be confidential and exempt under s. 499.0121, F.S. This exemption to the public records disclosure requirements is scheduled to repeal on October 1, 2021.

**Open Government Sunset Review Questionnaires**

In September 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to the Department of Business and Professional Regulation, Division of Drugs, Devices, and Cosmetics (DDC), and to the Pharmaceutical Research and Manufacturers of America (PhRMA) for consideration. Both parties responded to the questionnaires, and staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

According to the DDC, prescription drug purchase lists are a key element in protecting the prescription drug supply, as part of verifying only authorized parties supply prescription drugs in Florida, and only authentic, and not counterfeit, prescription drugs are supplied. These lists allow verification by DDC that the listed suppliers are authorized to sell prescription drugs in the United

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*

States and are properly registered as manufacturers with the Federal Food and Drug Administration, or with the DDC as wholesalers.[34]

The DDC notes that in-person inspections of the business records of each prescription drug wholesale distributor would be a significant cost to the state, and for that reason, continued submission of the purchase lists with trade secret protection is preferable. [35]

According to a trade association for pharmaceutical and biotechnology companies and manufacturers, while manufacturers are not required to provide prescription drug purchase lists, the disclosure of trade secret information, i.e., the lists, is also prohibited by federal constitutional and recent statutory law.[36] Further, the trade secret exemption in s. 499.0121(7), F.S. helps "to ensure that the State's public records statutes do not conflict with federal statutory law," and "are better safeguards from a public policy perspective because they provide both manufacturers and the State with more certainty about what information may be subject to public disclosure." [37]

The questionnaire asked if the exemption should be repealed or merged with other exemptions, and neither respondent favored such action, as the various exemptions in ch. 499, F.S., do not have overlapping subject matter. The DDC recommended reenactment of the exemption as a fair protection of business interest and the public's right to know.[38] The DDC noted drug purchase lists are a powerful and cost-effective tool for regulation of prescription drugs in Florida.[39]

PhRMA suggested it would be preferable to adopt a broad exemption covering all confidential and proprietary business information held by the state, but that if such comprehensive changes are not made, the exemption should be reenacted.[40]

## III. Effect of Proposed Changes:

The bill reenacts the exemption for qualified trade secrets from public disclosure in s. 499.0121, F.S., for a trade secret contained in prescription drug purchase lists required to be submitted annually by certain wholesale distributors of prescription drugs to the DBPR pursuant to s. 499.0121(7)(a), F.S. Such purchase lists must be submitted by all wholesale distributors, other

[34] *See* Response by the DDC to Open Government Sunset Review Questionnaire (Sep. 25, 2020) (on file with the Senate Committee on Regulated Industries).
[35] *Id*.
[36] *See* Response by Pharmaceutical Research and Manufacturers of America (PhRMA) to Open Government Sunset Review Questionnaire (Nov. 12, 2020) (on file with the Senate Committee on Regulated Industries). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and the Defend Trade Secrets Act, 18 U.S.C. s. 1836 *et seq.*, enacted in 2016, available at 18 USC 1836 - Civil proceedings (govregs.com) (last visited Feb. 11, 2021).
[37] *Id*.
[38] *See* Response by the DDC to Open Government Sunset Review Questionnaire, p. 5, (Sep. 25, 2020) (on file with the Senate Committee on Regulated Industries).
[39] *Id*.
[40] *See* Response by Pharmaceutical Research and Manufacturers of America (PhRMA) to Open Government Sunset Review Questionnaire, at pp. 4-5, (Nov. 12, 2020) (on file with the Senate Committee on Regulated Industries).

than manufacturers.[41] The list must identify all wholesale distributors and manufacturers from whom the wholesale distributor purchases prescription drugs.[42]

The bill reenacts the exemption by removing the repeal date of October 2, 2021 in current law.

The bill is effective October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill does not appear to be broader than necessary to accomplish the purpose of the law.

### C. Trust Funds Restrictions:

None.

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[41] Under s. 499.003(49), F.S., the term "wholesale distributor" means "a person, other than a manufacturer, a manufacturer's co-licensed partner, a third-party logistics provider, or a repackager, who is engaged in wholesale distribution. The term "wholesale distribution" means the "distribution of a prescription drug to a person other than a consumer or patient, or the receipt of a prescription drug by a person other than the consumer or patient," but does not include numerous exceptions described in ss. 499.003(48)(a) through (x), F.S.

[42] Section 499.0121(7)(a), F.S.

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 private sector will continue to be subject to the cost, to the extent imposed, associated with DBPR making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

DBPR will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 499.0121 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.

**By** the Committee on Regulated Industries

580-02150-21 20217032__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 499.0121, F.S., which provides an exemption from public records requirements for trade secrets contained in certain prescription drug purchase lists submitted to the Department of Business and Professional Regulation; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (7) of section 499.0121, Florida Statutes, is amended to read:

499.0121 Storage and handling of prescription drugs; recordkeeping.—The department shall adopt rules to implement this section as necessary to protect the public health, safety, and welfare. Such rules shall include, but not be limited to, requirements for the storage and handling of prescription drugs and for the establishment and maintenance of prescription drug distribution records.

(7) PRESCRIPTION DRUG PURCHASE LIST.—

(a) Each wholesale distributor, except for a manufacturer, shall annually provide the department with a written list of all wholesale distributors and manufacturers from whom the wholesale distributor purchases prescription drugs. A wholesale distributor, except a manufacturer, shall notify the department not later than 10 days after any change to either list.

(b) Such portions of the information required pursuant to



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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this subsection which are a trade secret, as defined in s. 812.081, shall be maintained by the department as trade secret information is required to be maintained under s. 499.051. ~~This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7034 |
| INTRODUCER: | Regulated Industries Committee |
| SUBJECT: | OGSR/Trade Secrets/Department of Business and Professional Regulation |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Kraemer | Imhof | | **RI Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7034 amends s. 499.051, F.S., to remove the scheduled repeal of a public records exemption for a trade secret related to a complaint filed against a licensed prescription drug manufacturer, repackager, or distributor, or a trade secret obtained by the Department of Business and Professional Regulation (DBPR) pursuant to inspections and investigations of licensees as authorized under s. 499.051, F.S. Affected licensees include prescription and over-the-counter drug manufacturers, drug distributors, repackagers, and wholesalers; manufacturers of drugs, devices, or cosmetics; and certain health care clinics, veterinary drug retail establishments, freight forwarders, and logistics providers.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. Under the bill, qualified trade secrets remain exempt from public disclosure.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* s. 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt "trade secrets" as defined in s. 688.002(4), F.S., or include "trade secrets" as defined in s. 688.002(4), F.S., within the meaning of the term "proprietary confidential information" or "proprietary business information" when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.

- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.
- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.

- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.
- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In *Sepro v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Open Government Sunset Review Questionnaires**

In September 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to the Department of Business and Professional Regulation, Division of Drugs, Devices, and Cosmetics (DDC), and to the Pharmaceutical Research and Manufacturers of America (PhRMA) for consideration. Both parties responded to the questionnaires, and staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*

According to the DDC, when an allegation of failing to meet current good manufacturing practices is investigated, the information collected typically includes a firm's formula and ingredients for the product, the design for the product, the development and manufacturing process, and other procedures related to the product.[34] When an inspection or investigation of a firm is conducted to determine if the firm is selling products to authorized recipients, the information collected may include financial documents and customer lists.[35] When prescription drugs are manufactured and there is a potential manufacturing issue, immediate access to a firm's records protects public health and safety; firms provide immediate access with the knowledge its records will be protected from public disclosure pursuant to the trade secret exemptions in Florida law.[36]

According to a trade association for pharmaceutical and biotechnology companies and manufacturers, pharmaceutical manufacturers invest substantially each year investigating and developing new life-saving and life-enhancing drugs for patients, including vaccines.[37] Such investment relies on strong legal protections for intellectual property, including trade secrets, which allow manufacturers to compete based on quality, price, and market access. If trade secrets were subject to public inspection during or following an investigation, a manufacturer's ability to innovate or compete could be hindered.[38] The association further notes that an investigation may not uncover any violations, and that a manufacturer should not be penalized for cooperating with an investigation by risking exposure of valuable trade secrets.[39]

The questionnaire asked if the exemption should be repealed or merged with other exemptions, and neither respondent favored such action, as the various exemptions in ch. 499, F.S., do not have overlapping subject matter. The DDC recommended reenactment of the exemption as a fair protection of business interest and the public's right to know.[40] PhRMA suggested it would be preferable for the Legislature to adopt a broad exemption covering all confidential and proprietary business information held by the state, with safeguards that will help ensure that manufacturers' sensitive information is not disseminated, including (but not limited to):

- Providing manufacturers with notice within 30 days of receipt of a public records request that information sought under section 119.07(1), Florida Statutes, or section 24(a) of Article I of the Florida Constitution may contain trade secrets;
- Providing manufacturers with an opportunity to file written objections to any such requests for information and to explain why the information sought should be protected;
- If the authority determines that information labeled a trade secret by the manufacturer is not subject to an exemption, providing manufacturers with at least a 30-day grace period to seek

[34] *See* Response by the DDC to Open Government Sunset Review Questionnaire (Sep. 25, 2020) (on file with the Senate Committee on Regulated Industries).
[35] *Id*.
[36] *Id*.
[37] *See* Response by Pharmaceutical Research and Manufacturers of America (PhRMA) to Open Government Sunset Review Questionnaire (Nov. 12, 2020) (on file with the Senate Committee on Regulated Industries).
[38] *Id*.
[39] *Id*.
[40] *See* Response by the DDC to Open Government Sunset Review Questionnaire, at p. 5, (Sep. 25, 2020) (on file with the Senate Committee on Regulated Industries).

judicial relief before releasing the contested materials in response to the public records act request.[41]

If such comprehensive changes are not made, PhRMA recommended the exemption in s. 499.051, F.S., should be reenacted.[42]

**Trade Secrets**

For purposes of the exemption in s. 499.051, F.S., the term "trade secrets," as defined in s. 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[43]
Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

In 2016, when the term "trade secret" was expanded to include the term "financial information,"[44] s. 499.051, F.S., was revised to incorporate that expanded meaning, and made subject to repeal on October 2, 2021 unless saved through reenactment by the Legislature.[45]

## III. Effect of Proposed Changes:

The bill saves from repeal the exemption for qualified trade secrets from public disclosure in s. 499.051, F.S., for a trade secret:

- Submitted as part of the permitting or renewal process related to the manufacture, repackaging, or distribution of a drug or for a permit or product registration; or
- Contained in a complaint investigated by the DBPR or a trade secret obtained by the DBPR pursuant to any investigation of a licensee conducted to enforce public health and safety rules or the requirements of ch. 499, F.S., (Florida Drug and Cosmetic Act), ch. 465, F.S., (Pharmacy), ch. 501, F.S., (Consumer Protection), and ch. 893, F.S., (Drug Abuse Prevention and Control).

Affected licensees include prescription and over-the-counter drug manufacturers, drug distributors, repackagers, and wholesalers; manufacturers of drugs, devices, or cosmetics; and certain health care clinics, veterinary drug retail establishments, freight forwarders, and logistics providers.

[41] *See* Response by Pharmaceutical Research and Manufacturers of America (PhRMA) to Open Government Sunset Review Questionnaire, at p. 5, (Nov. 12, 2020) (on file with the Senate Committee on Regulated Industries).
[42] *Id*.
[43] Section 812.081(1)(c), F.S.
[44] Ch. 2016-5, Laws of Fla.
[45] *See* Ch. 2016-6, s. 11, Laws of Fla.

The bill saves the exemption from repeal by removing the repeal date of October 2, 2021, in current law.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the DBPR making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The DBPR will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 499.051 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.

**By** the Committee on Regulated Industries

580-02164-21 20217034__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 499.051, F.S., which relates to an exemption from public records requirements for trade secrets contained within complaints or pursuant to an investigation of such complaints obtained by the Department of Business and Professional Regulation, which are submitted by permittees relating to the manufacture, repackaging, or distribution of a drug or for a permit or product registration or for the renewal of such permit or product registration; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 499.051, Florida Statutes, is amended to read:

499.051 Inspections and investigations.—

(1) The agents of the department and of the Department of Law Enforcement, after they present proper identification, may inspect, monitor, and investigate any establishment permitted pursuant to this chapter during business hours for the purpose of enforcing this chapter, chapters 465, 501, and 893, and the rules of the department that protect the public health, safety, and welfare.

(2) In addition to the authority set forth in subsection (1), the department and any duly designated officer or employee of the department may enter and inspect any other establishment



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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for the purpose of determining compliance with this chapter and rules adopted under this chapter regarding any drug, device, or cosmetic.

(3) Any application for a permit or product registration or for renewal of such permit or registration made pursuant to this chapter and rules adopted under this chapter constitutes permission for any entry or inspection of the premises in order to verify compliance with this chapter and rules; to discover, investigate, and determine the existence of compliance; or to elicit, receive, respond to, and resolve complaints and violations.

(4) Any application for a permit made pursuant to s. 499.012 or s. 499.831 and rules adopted under those sections constitutes permission for agents of the department and the Department of Law Enforcement, after presenting proper identification, to inspect, review, and copy any financial document or record related to the manufacture, repackaging, or distribution of a drug as is necessary to verify compliance with this chapter and the rules adopted by the department to administer this chapter, in order to discover, investigate, and determine the existence of compliance, or to elicit, receive, respond to, and resolve complaints and violations.

(5) The authority to inspect under this section includes the authority to access, review, and copy any and all financial documents related to the activity of manufacturing, repackaging, or distributing prescription drugs.

(6) The authority to inspect under this section includes the authority to secure:

(a) Samples or specimens of any drug, device, or cosmetic;



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

or

(b) Such other evidence as is needed for any action to enforce this part and the rules adopted under this part.

(7)(a) The complaint and all information obtained pursuant to the investigation by the department are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the investigation and the enforcement action are completed.

(b) Information that constitutes a trade secret, as defined in s. 812.081, contained in the complaint or obtained by the department pursuant to the investigation must remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution as long as the information is held by the department. ~~This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(c) This subsection does not prohibit the department from using such information for regulatory or enforcement proceedings under this chapter or from providing such information to any law enforcement agency or any other regulatory agency. However, the receiving agency shall keep such records confidential and exempt as provided in this subsection.

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7036 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Department of Agriculture and Consumer Services |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7036 saves from repeal the public records exemption for criminal or civil intelligence or investigative information or any other information held by the Department of Agriculture and Consumer services as part of a joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency which is confidential and exempt under the laws or regulations of that state or federal agency under s. 570.077, F.S.

The public records exemption stands repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. This bill removes the scheduled repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*,

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[16] Section 119.15, F.S.

[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

[18] 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.

[19] Section 119.15(3), F.S.

[20] Section 119.15(6)(b), F.S.

[21] Section 119.15(6)(b)1., F.S.

[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**The Department of Agriculture and Consumer Services**

The Department of Agriculture and Consumer Services (department) safeguards the public from unsafe or defective products and deceptive business practices. The Division of Consumer Services (division) within the department is the clearinghouse for consumer complaints, information, and protection. The division regulates various businesses, such as motor vehicle repair shops, charitable organizations, pawnbrokers, health studios, sellers of travel, intrastate movers, professional surveyors and mappers, sweepstakes/game promotions, and telemarketers.[27]

Until 2016 Florida's public record laws made any information obtained by the department in administrative and civil investigations open to the public. According to the department, this presented a hurdle to partnering with other state and federal agencies, such as the Federal Trade Commission (FTC) or Internal Revenue Service (IRS), because the department could not maintain the same level of privacy adopted and required by those federal and other state agencies.[28] As a result, investigations by the department were hindered because it was often unable to gather pertinent information from, enter into confidentiality agreements with, or participate in multi-jurisdiction task forces with other state and federal agencies.

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] *See* https://www.fdacs.gov/Divisions-Offices/Consumer-Services, (last visited March 3, 2021).
[28] Florida Department of Agriculture and Consumer Services, *SB 754 Agency Analysis*, (November 12, 2015) (on file with the Senate Committee on Agriculture).

The FTC operates a Consumer Sentinel database that is protected from public record disclosure. Information from this database can only be provided to a state agency that agrees not to disseminate the information.[29] This database contains information on subjects relating to:

- Identity Theft;
- Do-Not-Call Registry Violations;
- Computers, the Internet, and Online Auctions;
- Telemarketing Scams;
- Advance-fee loans and credit scams;
- Immigration Services;
- Sweepstakes, Lotteries, and Prizes;
- Business Opportunities and Work-at-home Schemes;
- Health and Weight Loss Products; and
- Debt Collection, Credit Reports, and Financial Matters.

***Public Record Exemptions under Review***

In 2016, the Legislature created a public records exemption for criminal or civil intelligence or investigative information or any other information held by the department as part of a joint or multi-agency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency when the information that is shared is confidential or exempt[30] under the laws or regulations of that state or federal agency. The department may obtain, use, and release the information in accordance with the conditions imposed by the joint or multi-agency agreement.

The public records exemption does not apply to information held by the department as part of an independent examination or investigation conducted by the department.

The department may release the confidential and exempt information in the furtherance of its official duties and responsibilities, or to another governmental agency in the furtherance of its official duties and responsibilities.

The 2016 public necessity statement[31] for the exemptions states the following:

> Without the exemption, the department will be unable to obtain information that could assist it in pursuing violations of law under its jurisdiction. With this exemption, the department should increase efficiency of investigations by saving time on developing investigative leads, witness data, and victim data. Furthermore, the exemption is necessary to enable the department to participate in joint or multiagency investigations

[29] *Id*. See also, Federal Trade Commission, *Consumer Sentinel Network*, available at: https://www.ftc.gov/enforcement/consumer-sentinel-network, (last visited March 1, 2021).

[30] There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See WFTV, Inc. v. Sch. Bd. of Seminole, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); City of Riviera Beach v. Barfield, 642 So.2d 1135 (Fla. 4th DCA 1994); Williams v. City of Minneola, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (Aug. 1, 1985).

[31] Article I, s. 24(c), FLA. CONST., requires each public record exemption "state with specificity the public necessity justifying the exemption."

> and examinations. Without the exemption, the department would continue to be excluded from information due to the inability to maintain investigative confidentiality. Without the sharing and coordination of information, governmental agencies may be required to conduct duplicative independent investigations or examinations in order to meet their regulatory responsibilities. With this exemption, the department will strengthen relationships with other state and federal agencies, allowing them to become more efficient by sharing critical investigative data.[32]

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2021, unless reenacted by the Legislature.[33]

**Open Government Sunset Review Questionnaire**

In February 2021, the Professional Staff of the Senate Agriculture Committee sent an Open Government Sunset Review Questionnaire to the department. The department reported that between 2017 and 2020 it received a total of ten requests for information held under s. 570.077, F.S. Information for active cases was not released but information was eventually released once investigations ceased to be active or were adjudicated by the courts.[34]

The department stated that all federal, state, county, and local law enforcement information and intelligence products generated by agencies across the nation are shared with the Office of Agricultural Law Enforcement (OALE) staff via multi-agency portals, email, and physical transmission and are shared with the expectation and belief that active intelligence and law enforcement investigative information is confidential and exempt. Should these protections be withdrawn from department documents, it would substantially change the mechanisms by which information would be shared with the OALE. This would increase the manpower and subsequent effort required to obtain such documentation and would also risk officer safety.[35]

The department recommended that the public records exemption in s. 570.077, F.S., should be reenacted.[36]

## III. Effect of Proposed Changes:

SB 7036 amends s. 570.077, F.S., to remove the scheduled repeal of a public records exemption for criminal or civil intelligence or investigative information or any other information held by the Department of Agriculture and Consumer services as part of a joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency which is confidential and exempt under the laws or regulations of that state or federal agency.

[32] Chapter 2016-161, Laws of Fla.
[33] Section 624.4212(6), F.S
[34] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Agriculture and Consumer Services on file with the Senate Committee on Agriculture.
[35] *Id.*
[36] *Id.*

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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:

None. The private sector will continue to be subject to the cost, to the extent imposed, associated with the department making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

None. The department will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 570.077 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.

**By** the Committee on Agriculture

575-02382-21 20217036__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 570.077, F.S., which provides an exemption from public records requirements for criminal or civil intelligence or investigative information or any other information held by the Department of Agriculture and Consumer Services as part of an examination or investigation with another state or federal regulatory, administrative, or criminal justice agency; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 570.077, Florida Statutes, is amended to read:

570.077 Confidentiality of intelligence or investigative information.—

(1) Criminal or civil intelligence or investigative information or any other information held by the department as part of a joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency which is confidential or exempt under the laws or regulations of that state or federal agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The department may obtain, use, and release the information in accordance with the conditions imposed by the joint or multiagency agreement.

(2) The department may release information that is made



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



575-02382-21 20217036__

confidential and exempt under subsection (1):

(a) In the furtherance of its official duties and responsibilities.

(b) To another governmental agency in the furtherance of its official duties and responsibilities.

(3) The public records exemption provided in subsection (1) does not apply to information held by the department as part of an independent examination or investigation conducted by the department.

~~(4) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7038 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Division of Fruit and Vegetables/Trade Secrets |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7038 saves from repeal the public records exemption for trade secrets held by the Department of Agriculture and Consumer Services Division of Fruit and Vegetables under s. 570.48(3), F.S.

The public records exemption stands repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal of the exemption to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

legislature.3 Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
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[5] Section 119.01(1), F.S. 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."
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[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
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[11] *Id*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

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- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
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- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* s. 688.008, F.S.

"independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Department of Agriculture and Consumer Services Division of Fruit and Vegetables**

The Department of Agriculture and Consumer Services (department) Division of Fruit and Vegetables (division) inspects and certifies all fresh shipments of vegetables, fruit, and nuts covered by state and federal marketing orders.[34]

The duties of the division include, but are not limited to:

- Performing duties relating to the inspection and certification of fresh citrus fruit shipments for maturity and grade required by rules promulgated under the Florida Citrus Code;
- Performing the inspection and certification duties assigned in connection with regulations issued under federal or state marketing agreements or orders; and
- Performing the other inspection and certification assignments requested by and agreed upon with the applicant.[35]

**Marketing Orders and Agreements**

Marketing agreements and orders are initiated by industry to help provide stable markets for dairy products, fruits, vegetables and specialty crops. Each order and agreement is tailored to the individual industry's needs. Marketing Orders are a binding regulation for the entire industry in the specified geographical area, once it is approved by the producers and the Secretary of Agriculture. Marketing Agreements are only binding for those handlers that sign the agreement.[36]

**Public Records Exemption for the Division of Fruit and Vegetables**

The Legislature enacted a public records exemption for the division to include information which would separately disclose the business transactions of any person, trade secrets, names of customers, plant production, or other individual commercial information. The records of the division are public records; however, trade secrets as defined in s. 812.081, F.S., are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.
The exemption should not be construed to prohibit:

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[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] *See* https://www.fdacs.gov/Divisions-Offices/Fruit-and-Vegetables, (last visited March 3, 2021).
[35] S. 570.48(1), F.S.
[36] *See* https://www.ams.usda.gov/rules-regulations/moa (last visited March 3, 2021).

- A disclosure necessary to enforcement procedures;
- The department from releasing information to other governmental agencies. Other governmental agencies that receive confidential information from the department under this subsection shall maintain the confidentiality of that information; and
- The department or other agencies from compiling and publishing appropriate data regarding procedures, yield, recovery, quality, and related matters, provided such released data do not reveal by whom the activity to which the data relate was conducted.

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it rarely receives a public record request for the information exempt under s. 570.48(3), F.S., as the exemption is well known within the industry and producers rely on it to protect their trade secret information provided to the department during its regulatory inspections.[37]

The department recommended that the exemption in s 570.48(3), F.S., should be reenacted.[38]

## III. Effect of Proposed Changes:

SB 7036 amends s. 570.48(3), F.S., to remove the scheduled repeal of a public records exemption for records of the Department of Agriculture and Consumer Services Division of Fruit and Vegetables that are considered trade secrets as defined in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[37] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Agriculture and Consumer Services on file with the Senate Committee on Agriculture.
[38] *Id.*

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

***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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the department making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The department will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 570.48 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.

**By** the Committee on Agriculture

575-02383-21 20217038__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 570.48, F.S., which provides an exemption from public records requirements for information related to trade secrets held by the Division of Fruit and Vegetables of the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) of section 570.48, Florida Statutes, is amended to read:

570.48 Division of Fruit and Vegetables; powers and duties; records.—The duties of the Division of Fruit and Vegetables include, but are not limited to:

(3) Maintaining the records of the division. The records of the division are public records; however, trade secrets as defined in s. 812.081 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~ This section may not be construed to prohibit:

(a) A disclosure necessary to enforcement procedures.

(b) The department from releasing information to other governmental agencies. Other governmental agencies that receive



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



575-02383-21 20217038__

confidential information from the department under this subsection shall maintain the confidentiality of that information.

(c) The department or other agencies from compiling and publishing appropriate data regarding procedures, yield, recovery, quality, and related matters, provided such released data do not reveal by whom the activity to which the data relate was conducted.

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7040 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Department of Agriculture and Consumer Services |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7040 amends s. 573.123(3), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Agriculture and Consumer Services that, if disclosed, would reveal a trade secret as defined in Section 812.081, F.S., of any person subject to a marketing order.

The public records exemption stands repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. This bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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 The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Trade Secrets***

The term "trade secrets," as defined in Section 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[27]

Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081(1)(c), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[28]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[29]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.
[29] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[30] and the right to recover damages for the misappropriation of a trade secret.[31] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[32]

[30] Section 688.003, F.S.
[31] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[32] *See* Section 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[33] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[34]

**Department of Agriculture and Consumer Services Division of Fruit and Vegetables**

The Department of Agriculture and Consumer Services (department) Division of Fruit and Vegetables (division) inspects and certifies all fresh shipments of vegetables, fruit, and nuts covered by state and federal marketing orders.[35]

The duties of the division include, but are not limited to:

- Performing duties relating to the inspection and certification of fresh citrus fruit shipments for maturity and grade required by rules promulgated under the Florida Citrus Code;
- Performing the inspection and certification duties assigned in connection with regulations issued under federal or state marketing agreements or orders; and
- Performing the other inspection and certification assignments requested by and agreed upon with the applicant.[36]

[33] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[34] *Id.*
[35] *See* https://www.fdacs.gov/Divisions-Offices/Fruit-and-Vegetables, (last visited March 1, 2021).
[36] Section 570.48(1), F.S.

**Marketing Orders and Agreements**

At the federal level, marketing agreements and orders are initiated by industry to help provide stable markets for dairy products, fruits, vegetables and specialty crops. Each order and agreement is tailored to the individual industry's needs. Marketing orders are a binding regulation for the entire industry in the specified geographical area, once it is approved by the producers and the United States Secretary of Agriculture. Marketing agreements are only binding for those handlers that sign the agreement.[37]
At the state level, marketing agreements are agreements between the department and distributors, producers, handlers, and others engaged in the handling of agricultural commodities which regulate the handling of the commodities.[38] Marketing orders are orders issued by the department that prescribe rules governing the distributing, or handling in any manner, of agricultural commodities in the primary channel of trade during any specified period or periods.[39]

The department may require anyone directly affected by and subject to the provisions of any marketing order to maintain books and records reflecting their operations under the marketing order, to furnish to the department any information related to operations under the marketing order, and to inspect the portions of books and records that relate to operations under the marketing order.[40] Such information that, if disclosed, would reveal a trade secret as defined in Section 812.081, F.S., is confidential and exempt from public disclosure requirements. This information may be provided to an attorney who provides legal advice to the division about enforcing a marketing order or by court order.[41]

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it rarely receives a public record request for the information exempt under s 573.123(2), F.S., as the exemption is well known within the industry and producers rely on it to protect their trade secret information provided to the department to administer various marketing orders. The department indicated that such information is minimally requested.[42]

The department recommended that the exemption in s 573.123(3), F.S., should be reenacted.[43]

## III. Effect of Proposed Changes:

The bill amends s. 573.123(3), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Agriculture and Consumer Services that, if disclosed, would reveal a trade secret as defined in Section 812.081, F.S., of any person subject to a marketing order.

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[37] *See* https://www.ams.usda.gov/rules-regulations/moa (last visited March 1, 2021).
[38] Section 570.103(8), F.S.
[39] Section 570.103(9), F.S.
[40] Section 570.123(1), F.S.
[41] Section 570.123(2), F.S.
[42] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Agriculture and Consumer Services on file with the Senate Committee on Agriculture.
[43] *Id.*

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. This bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the department making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The department will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 573.123 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.

**By** the Committee on Agriculture

575-02384-21 20217040__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 573.123, F.S., which provides an exemption from public records requirements for trade secret information of a person subject to a marketing order held by the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 573.123, Florida Statutes, is amended to read:

573.123 Maintenance and production of records.—

(1) The department may require any and all persons directly affected by and subject to the provisions of any marketing order to maintain books and records reflecting their operations under the marketing order, to furnish to the department or its duly authorized or designated representative or representatives any information as may be from time to time requested by them relating to operations under the marketing order, and to permit the inspection by the department or its duly authorized or designated representative or representatives of such portions of the books and records as relate to operations under the marketing order.

(2) Information that, if disclosed, would reveal a trade secret, as defined in s. 812.081, of any person subject to a marketing order is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may not be



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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disclosed except to an attorney who provides legal advice to the division about enforcing a marketing order or by court order. A person who receives confidential information under this subsection shall maintain the confidentiality of that information. ~~This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(3) The department or its duly authorized or designated representative or representatives may hold hearings, take testimony, administer oaths, subpoena witnesses, and issue subpoenas for the production of books, records, or documents relevant and material to the subject matter of the hearings.

(4) No person shall be excused from attending and testifying or from producing documentary evidence before the department, or its duly authorized or designated representative or representatives, in obedience to the subpoena of the department on the ground or the reason that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate her or him or subject her or him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which she or he may be so required to testify, or to produce evidence, documentary or otherwise, before the department in obedience to a subpoena issued, provided no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7042 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Trade Secret/Department of Citrus |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7042 amends s. 601.10(8)(b), F.S., to remove the scheduled repeal of a public records exemption for information provided to the Department of Citrus that is trade secret as defined in Section 812.081, F.S.

The public records exemption stands repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves from repeal the exemption to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

**Access to Public Records - Generally**

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.3 Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Trade Secrets***

The term "trade secrets," as defined in Section 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[27]

Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081(1)(c), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[28]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[29]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.
[29] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[30] and the right to recover damages for the misappropriation of a trade secret.[31] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[32]

[30] Section 688.003, F.S.
[31] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[32] *See* s. 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[33] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[34]

**Florida Department of Citrus**

The Department of Citrus (department) is an executive agency of Florida government charged with the marketing, research, and regulation of the Florida citrus industry. Activities of the department are funded by an assessment paid by growers on each box of citrus that moves through commercial channels. The industry employs more than 45,000 people, provides an annual economic impact of $8.6 billion to the state, and contributes hundreds of millions of dollars in tax revenues that help support Florida's schools, roads, and health care services. The department also has extensive regulatory responsibilities, covering every aspect of the industry, including research, production, maturity standards, licensing, transportation, labeling, packing, and processing.[35]

The department is required to prepare and disseminate information of importance to citrus growers, handlers, shippers, processors, and industry-related and interested persons and

[33] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[34] *Id.*
[35] Florida Department of Citrus, *See* https://www.floridacitrus.org/grower/about/florida-department-of-citrus (Last visited March 3, 2021).

organizations, relating to Department of Citrus activities and the production, handling, shipping, processing, and marketing of citrus fruit and processed citrus products. Any information which consists of a trade secret as defined in s. 812.081(1)(c), F.S., is confidential and exempt from the provisions of s. 119.07(1), F.S., and shall not be disclosed.

Additionally, any nonpublished reports or data related to studies or research conducted, caused to be conducted, or funded by the department under s. 601.13, F.S., is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it has never received a request for the information exempt under s. 601.10(8)(b), F.S. The department indicated that should this exemption be repealed it would be difficult, if not impossible, to effectively facilitate the collection of information, which is utilized by their Economic and Market Research Department to analyze data on behalf of, and for the benefit of, the Florida citrus industry.[36]

The department recommended that the exemption in s. 601.10(8)(b), F.S., be reenacted.[37]

## III. Effect of Proposed Changes:

The bill amends s. 601.10(8)(b), F.S., to remove the scheduled repeal of a public records exemption for information provided to the Department of Citrus that is trade secret as defined in s. 812.081, F.S.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[36] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Citrus on file with the Senate Committee on Agriculture.
[37] *Id.*

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with Department of Citrus making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Department of Citrus will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 601.10 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.

**By** the Committee on Agriculture

575-02389-21 20217042__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 601.10, F.S., which provides a public records exemption for trade secret information provided to the Department of Citrus; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 601.10, Florida Statutes, is amended to read:

601.10 Powers of the Department of Citrus.—The department shall have and shall exercise such general and specific powers as are delegated to it by this chapter and other statutes of the state, which powers shall include, but are not limited to, the following:

(8)(a) To prepare and disseminate information of importance to citrus growers, handlers, shippers, processors, and industry-related and interested persons and organizations relating to department activities and the production, handling, shipping, processing, and marketing of citrus fruit and processed citrus products. For referendum and other notice and informational purposes, the department may prepare and maintain, from the best available sources, a citrus grower mailing list. Such list shall be a public record available as other public records but is not subject to the purging provisions of s. 283.55.

(b) Any information provided to the department which constitutes a trade secret as defined in s. 812.081 is



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



575-02389-21 20217042__

confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(c) Any nonpublished reports or data related to studies or research conducted, caused to be conducted, or funded by the department under s. 601.13 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7044 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Noncommodity Advertising and Promotional Program Participants/Department of Citrus |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7044 amends s. 601.15(7)(d), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Citrus that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S., of any participant in a noncommodity advertising and promotional program.

The public records exemption stands repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[16] Section 119.15, F.S.

[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

[18] 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.

[19] Section 119.15(3), F.S.

[20] Section 119.15(6)(b), F.S.

[21] Section 119.15(6)(b)1., F.S.

[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Trade Secrets***

The term "trade secrets," as defined in Section 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[27]

Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 19.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081(1)(c), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[28]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[29]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.
[29] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[30] and the right to recover damages for the misappropriation of a trade secret.[31] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[32]

[30] Section 688.003, F.S.
[31] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[32] *See* s. 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[33] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[34]

**Florida Department of Citrus**

The Department of Citrus (department) is an executive agency of Florida government charged with the marketing, research, and regulation of the Florida citrus industry. Activities of the department are funded by an assessment paid by growers on each box of citrus that moves through commercial channels. The industry employs more than 45,000 people, provides an annual economic impact of $8.6 billion to the state, and contributes hundreds of millions of dollars in tax revenues that help support Florida's schools, roads, and health care services. The department also has extensive regulatory responsibilities, covering every aspect of the industry, including research, production, maturity standards, licensing, transportation, labeling, packing, and processing.[35]

The department is responsible for planning and conducting campaigns for commodity advertising, publicity, and sales promotion, and may conduct campaigns to encourage

[33] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[34] *Id.*
[35] Florida Department of Citrus, *See* https://www.floridacitrus.org/grower/about/florida-department-of-citrus (Last visited March 3, 2021).

noncommodity advertising, to increase the consumption of citrus fruits and may contract for any such advertising, publicity, and sales promotion service.[36] The department may require commercial information necessary to determine eligibility for and performance in noncommodity advertising and promotional programs from participants in such programs. Such information that is considered a trade secret as defined in s. 812.081, F.S., is confidential and exempt from public record disclosure.[37]

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it has received one request for the information exempt under s. 601.15(7)(d), F.S. An attorney requested the final 3R-Processed and 4R-Import forms on behalf of a processor owned by a foreign entity. The forms were released with the final totals of fruit handled redacted and the firm did not request additional information. The department indicated that if the packers' and producers' information is not kept confidential and exempt it would expose the industry's trade secrets to improper and financially damaging exposure.[38]

The department recommended that the exemption in s. 601.15(7)(d), F.S., should be reenacted.[39]

## III. Effect of Proposed Changes:

The bill amends s. 601.15(7)(d), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Citrus that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S., of any participant in a noncommodity advertising and promotional program.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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[36] s. 601.15(2), F.S.
[37] s. 601.15(7)(d)
[38] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Citrus on file with the Senate Committee on Agriculture.
[39] *Id.*

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the Department of Citrus making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Department of Citrus will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 601.15 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.

**By** the Committee on Agriculture

575-02386-21 20217044__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 601.15, F.S., which provides an exemption from public records requirements for the trade secret information of noncommodity advertising and promotional program participants held by the Department of Citrus; deleting the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (7) of section 601.15, Florida Statutes, is amended to read:

601.15 Advertising campaign; methods of conducting; assessments; emergency reserve fund; citrus research.—

(7) All assessments levied and collected under this chapter shall be paid into the State Treasury on or before the 15th day of each month. Such moneys shall be accounted for in a special fund to be designated as the Florida Citrus Advertising Trust Fund, and all moneys in such fund are appropriated to the department for the following purposes:

(a) Four percent of all income of a revenue nature deposited in this fund, including transfers from any subsidiary accounts thereof and any interest income, shall be deposited in the General Revenue Fund pursuant to chapter 215.

(b) Moneys in the Florida Citrus Advertising Trust Fund shall be expended for the activities authorized by s. 601.13 and for the cost of those general overhead, research and development, maintenance, salaries, professional fees,



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

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enforcement costs, and other such expenses that are not related to advertising, merchandising, public relations, trade luncheons, publicity, and other associated activities. The cost of general overhead, maintenance, salaries, professional fees, enforcement costs, and other such expenses that are related to advertising, merchandising, public relations, trade luncheons, publicity, and associated activities shall be paid from the balance of the Florida Citrus Advertising Trust Fund.

(c) Moneys in the Florida Citrus Advertising Trust Fund shall also be used by the department for defraying those expenses not included in paragraph (b). After payment of such expenses, the money levied and collected under subsection (3) shall be used exclusively for commodity and noncommodity advertising, merchandising, publicity, or sales promotion of citrus products in both fresh form and processed form, including citrus cattle feed and all other products of citrus fruits, produced in the state, in such equitable manner and proration as the department may determine, but funds expended for commodity advertising thereunder shall be expended through an established advertising agency. A proration of moneys between commodity programs and noncommodity programs and among types of citrus products shall be made on or before November 1 of each shipping season and may not thereafter be modified for that shipping season unless the department finds such action necessary to preserve the economic welfare of the citrus industry.

(d)1. The pro rata portion of moneys allocated to each type of citrus product in noncommodity programs shall be used by the department to encourage substantial increases in the effectiveness, frequency, and volume of noncommodity



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

advertising, merchandising, publicity, and sales promotion of such citrus products through rebates and incentive payments to handlers and trade customers for these activities. The department shall adopt rules providing for the use of such moneys. The rules shall establish alternate incentive programs, including at least one incentive program for product sold under advertised brands, one incentive program for product sold under private label brands, and one incentive program for product sold in bulk. For each incentive program, the rules must establish eligibility and performance requirements and must provide appropriate limitations on amounts payable to a handler or trade customer for a particular season. Such limitations may relate to the amount of citrus assessments levied and collected on the citrus product handled by such handler or trade customer during a 12-month representative period.

2. The department may require from participants in noncommodity advertising and promotional programs commercial information necessary to determine eligibility for and performance in such programs. Any information required which constitutes a trade secret as defined in s. 812.081 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7046 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Trade Secret/Marketing Order/Department of Citrus |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7046 amends s. 601.152(8)(c), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Citrus that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S., of any person subject to a marketing order.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Trade Secrets***

The term "trade secrets," as defined in Section 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[27]

Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081(1)(c), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[28]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[29]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.
[29] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[30] and the right to recover damages for the misappropriation of a trade secret.[31] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[32]

[30] Section 688.003, F.S.
[31] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[32] *See* s. 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[33] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[34]

**Florida Department of Citrus**

The Department of Citrus (department) is an executive agency of Florida government charged with the marketing, research, and regulation of the Florida citrus industry. Activities of the department are funded by an assessment paid by growers on each box of citrus that moves through commercial channels. The industry employs more than 45,000 people, provides an annual economic impact of $8.6 billion to the state, and contributes hundreds of millions of dollars in tax revenues that help support Florida's schools, roads, and health care services. The department also has extensive regulatory responsibilities, covering every aspect of the industry, including research, production, maturity standards, licensing, transportation, labeling, packing, and processing.[35]

[33] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[34] *Id.*
[35] Florida Department of Citrus, *See* https://www.floridacitrus.org/grower/about/florida-department-of-citrus (Last visited March 2, 2021).

**The Florida Citrus Commission**

The Florida Citrus Commission (commission) governs the department.[36] The commission is a nine-member board appointed by the governor to represent citrus growers, processors, and packers. The department carries out commission policy and acts as the commission's staff by conducting a wide variety of programs, involving regulation; scientific, market, and economic research; advertising; merchandising; public and industry relations; and consumer promotions.[37]

Assessments collected and levied by the department are paid into the State Treasury and accounted for in the Florida Citrus Advertising Trust Fund.[38] All money in the State Treasury, including that deposited into the Florida Citrus Advertising Trust Fund, is subject to the legislative appropriations process.[39]

**Marketing Orders and Agreements**

At the federal level, marketing agreements and orders are initiated by industry to help provide stable markets for dairy products, fruits, vegetables and specialty crops. Each order and agreement is tailored to the individual industry's needs. Marketing orders are a binding regulation for the entire industry in the specified geographical area, once it is approved by the producers and the United States Secretary of Agriculture. Marketing agreements are only binding for those handlers that sign the agreement.[40]

At the state level, the department shall direct that a proposed marketing order be formulated for a special marketing campaign of advertising and sales promotion, including, but not limited to, brand advertising rebate promotions or the conduct of market and product research and development for such type, variety, or form of citrus fruit or processed citrus product, and shall designate a public hearing to consider adoption and implementation of such proposed marketing order. The department shall direct such orders whenever, upon its own motion or upon petition of any handler or producer or group association of handlers or producers of citrus, when the commission, upon affirmative vote by seven of its members, determines that:

- The conduct of a special advertising and promotional marketing campaign or the conduct of market and product research and development, in addition to the advertising campaign being conducted pursuant to s. 601.15, F.S., and the research being conducted pursuant to the other provisions of the Florida Citrus Code, may substantially further increase the consumer acceptance and consumption of, and strengthen the market for, any type, variety, or form of citrus fruit or processed citrus product by further increasing the number of families buying such citrus fruit or such processed citrus product or by further increasing the quantity of such citrus fruit or processed citrus product purchased by buying families; and
- Such substantial further increase and strengthening may be of substantial benefit to handlers thereof, producers thereof, and to the economy and well-being of the state.[41]

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[36] *See generally* s. 601.04, F.S.
[37] Florida Citrus Commission, *See* https://www.floridacitrus.org/grower/about/florida-citrus-commissiion/ (Last visited March 2, 2021).
[38] Section 601.15(7), F.S.
[39] FLA. CONST. Art. VII, s. 1(d).
[40] *See* https://www.ams.usda.gov/rules-regulations/moa (last visited March 2, 2021).
[41] Section 601.152(1)(a), F.S.

Under current statute, every handler must file with the department a return stating the quantity of the type, variety, and form of citrus fruit or citrus product specified in the marketing order first handled in the primary channels of trade in the state by such handler during the period of time specified in the marketing order. Such returns must contain any further information deemed by the department to be reasonably necessary to properly administer or enforce s. 601.52(8)(c), F.S., or any marketing order implemented under s. 601.52(8)(c), F.S. Information that, if disclosed, would reveal a trade secret, as defined in s. 812.081, F.S., of any person subject to a marketing order is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it has never received a request for the information exempt under s. 601.15(8)(c), F.S. The department indicated that should the commission enact a marketing order, this exemption would be vital to protect the industry's trade secrets.[42]

The department recommended that the exemption in s. 601.15(8)(c), F.S., should be reenacted.[43]

## III. Effect of Proposed Changes:

The bill amends s. 601.152(8)(c), F.S., to remove the scheduled repeal of a public records exemption for information held by the Department of Citrus that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S., of any person subject to a marketing order.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

[42] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Citrus on file with the Senate Committee on Agriculture.
[43] *Id.*

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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. 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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the Department of Citrus making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Department of Citrus will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 601.152 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.

**By** the Committee on Agriculture

575-02387-21 20217046__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 601.152, F.S., which provides an exemption from public records requirements for the trade secret information of a person subject to a marketing order held by the Department of Citrus; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 601.152, Florida Statutes, is amended to read:

601.152 Special marketing orders.—

(8)(a) Each person who, during the period specified in any marketing order implemented under this section, first handles in the primary channel of trade in the state any citrus fruit or processed citrus product of the type, variety, and form specified in such marketing order shall, for the privilege of so handling such citrus fruit or such citrus product, pay to the department such assessments as are levied and imposed thereon by such marketing order, which funds shall be used by the department to defray the necessary expenses incurred in the formation, issuance, administration, and enforcement of such marketing order and in the conduct of the special marketing campaign or market and product research and development provided for in such marketing order. However, such assessments levied and imposed under this section may not exceed 8 cents per standard-packed box on citrus fruits in fresh form, 1.3 cents



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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per gallon on single strength citrus juices or sections, or 1.3 cents per pound of soluble citrus solids on concentrated citrus juices.

(b) The department shall prescribe procedures for the assessment and collection of such funds to defray the necessary expenses incurred, or expected to be incurred, by the department in the formation, issuance, administration, and enforcement of any marketing order implemented under this section.

(c)1. Every handler shall, at such times as the department may require, file with the department a return, not under oath, on forms to be prescribed and furnished by the department, certified as true and correct, stating the quantity of the type, variety, and form of citrus fruit or citrus product specified in the marketing order first handled in the primary channels of trade in the state by such handler during the period of time specified in the marketing order. Such returns must contain any further information deemed by the department to be reasonably necessary to properly administer or enforce this section or any marketing order implemented under this section.

2. Information that, if disclosed, would reveal a trade secret, as defined in s. 812.081, of any person subject to a marketing order is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. ~~This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

(d) All assessments imposed under this section are due and payable and shall be paid by such handlers at such times and in



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

such installments as the commission prescribes in such marketing order, or the amount thereof shall be provided for and guaranteed by giving a surety bond or cash deposit or as the department otherwise prescribes.

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7048 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Manufacturer's Formula/Department of Agriculture and Consumer Services |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7048 amends s. 601.176, F.S., to remove the scheduled repeal of a public records exemption for any formula held by the Department of Agriculture and Consumer Services which is required to be filed with the Department of Agriculture that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Trade Secrets***

The term "trade secrets," as defined in Section 812.081(1)(c), F.S., means information for which an owner "takes measures to prevent the information from becoming available to persons other than those selected by the owner to have access for limited purposes." Such information may include formulas, patterns, devices, compilations of information, or any portion thereof, which is used in a business and provides the business an advantage, or the opportunity to do so, over those who do not know or use such information.[27]

Under Section 812.081(1)(c), F.S., the term "trade secret" includes:

- Any scientific, technical, or commercial information, including financial information; and
- Any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof.

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 812.081(1)(c), F.S.

making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[28]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
> 1. Secret;
> 2. Of value;
> 3. For use or in use by the business; and
> 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
>
> when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[29]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.

[28] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

[29] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[30] and the right to recover damages for the misappropriation of a trade secret.[31] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[32]

[30] Section 688.003, F.S.
[31] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[32] *See* s. 688.008, F.S.

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[33] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[34]

**Public Records Exemption for formulas held by DACS**

Section 601.76, F.S, provides that any formula required to be filed with the Department of Agriculture and Consumer Services (department) shall be deemed a trade secret as defined in s. 812.081, F.S., and is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The formula may be divulged only to the department or to its duly authorized representatives or upon court order when necessary in the enforcement of this law. A person who receives such a formula from the department under s. 601.76, F.S., is required to maintain the confidentiality of the formula.

**Open Government Sunset Review Findings and Recommendations**

In February 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that it has never received a request for the information exempt under s. 601.76, F.S. The department indicated that without an exemption it is likely that companies would be more reluctant to turn

[33] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[34] *Id.*

over information regarding their formula, as they would have no protection against those trade secrets from being divulged.[35]

The department recommended that the exemption in s. 601.76, F.S., be reenacted.[36]

## III. Effect of Proposed Changes:

The bill amends s. 601.176, F.S., to remove the scheduled repeal of a public records exemption for any formula held by the Department of Agriculture and Consumer Services which is required to be filed with the Department of Agriculture that, if disclosed, would reveal a trade secret as defined in s. 812.081, F.S.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. Thus, a statement of public necessity is not required.

[35] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Citrus on file with the Senate Committee on Agriculture.
[36] *Id.*

**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 exemption in the bill 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the agency making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Department of Agriculture and Consumer Services will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends s. 601.76 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.

**By** the Committee on Agriculture

575-02388-21 20217048__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 601.76, F.S., which provides an exemption from public records requirements for a manufacturer's formula filed with the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 601.76, Florida Statutes, is amended to read:

601.76 Manufacturer to furnish formula and other information.—Any formula required to be filed with the Department of Agriculture shall be deemed a trade secret as defined in s. 812.081, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may be divulged only to the Department of Agriculture or to its duly authorized representatives or upon court order when necessary in the enforcement of this law. A person who receives such a formula from the Department of Agriculture under this section shall maintain the confidentiality of the formula. ~~This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7050 |
| INTRODUCER: | Community Affairs Committee |
| SUBJECT: | OGSR/Unsolicited Proposals |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Hackett | Ryon | | **CA Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7050 amends s. 255.065, F.S., to save from repeal the public records and public meeting exemptions relating to unsolicited proposals submitted by a private entity to a public entity seeking to establish a public-private partnership (P3).

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 255.065, F.S., is scheduled to repeal on October 2, 2021. This bill removes the scheduled repeal to continue the exempt status of unsolicited P3 proposals.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S.,

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

***Competitive Solicitations and the Public Records Act***

Section 119.071(1)(b), F.S., exempts from public disclosure sealed responses to a competitive solicitation.[16] Vendors' sealed responses are exempt until a governmental entity notices its intended decision or 30 days after the governmental entity unseals the responses. Sealed responses to a competitive solicitation may be exempt under certain circumstances if a competitive solicitation is withdrawn and reissued; however, such records remain exempt for no longer than 12 months after the governmental entity rejects the responses to the initial competitive solicitation.

Meetings where negotiations, presentations, and discussions concerning a competitive solicitation are held may be closed to the public, pursuant to s. 286.0113(2), F.S. Transcripts of these meetings and any records presented during such meetings are exempt from public disclosure. All meeting records become public when the governmental entity notices its intended decision or 30 days after the governmental entity unseals the vendors' responses.

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[17] (the act) prescribes a legislative review process for newly created or substantially amended[18] public records or open meetings exemptions, with specified exceptions.[19] 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.[20]

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[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] "Competitive solicitation" is defined to mean the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.
[17] Section 119.15, F.S.
[18] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[19] 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.
[20] Section 119.15(3), F.S.

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.[21]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[22]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[23] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[24]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[25]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[26] If the exemption is continued without substantive changes or if the exemption is continued and 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.[27]

**Public-private Partnerships – Section 255.065, F.S.**

Public-private partnerships (P3s) are contractual agreements formed between public entities and private sector entities that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects. Through the agreements, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use

[21] Section 119.15(6)(b), F.S.
[22] Section 119.15(6)(b)1., F.S.
[23] Section 119.15(6)(b)2., F.S.
[24] Section 119.15(6)(b)3., F.S.
[25] Section 119.15(6)(a), F.S.
[26] *See generally* s. 119.15, F.S.
[27] Section 119.15(7), F.S.

of the public. In addition to the sharing of resources, each party shares in the risk and reward potential in the delivery of the service and/or facility. Numerous Florida Statutes encourage and provide guidance for P3 projects including those for services and facilities specific to transportation,[28] housing,[29] and education[30].

Chapter 2013-223, L.O.F., created s. 287.05712, F.S., to authorize the use of public-private partnerships by local governments. The law also established the Partnership for Public Facilities and Infrastructure Act Guidelines Task Force to study the new P3 process outlined in law and make recommendations for the Legislature's consideration for purposes of creating a uniform process for establishing public-private partnerships.[31] Chapters 2016-153 and 2016-154, L.O.F., utilized the task force analysis to create the current provisions of s. 255.065, F.S.

Section 255.065, F.S., grants responsible public entities (RPEs) (e.g., counties, municipalities, school districts and special districts)[32] the authority to engage in P3 projects for the development of a wide range of public-use facilities or projects that serve a public purpose. Examples of qualifying projects include those for mass transit, vehicle parking, airports or seaports, educational facilities and courthouse or city hall public sector buildings or complexes.[33] The public-private partnerships law establishes requirements to which RPEs must adhere, including procedures for reviewing and approving proposals and public records and public meetings exemptions related to any unsolicited proposals submitted.

***Procurement Procedures[34]***

A responsible public entity (RPE) may receive unsolicited proposals or may solicit proposals for a qualifying public-private project. A reasonable application fee may be established to cover an RPE's costs of evaluating unsolicited proposal submissions.[35] If the RPE does not evaluate the unsolicited proposal, the RPE must return the application fee.

If the RPE intends to enter into a comprehensive agreement for a project as a result of an unsolicited proposal, the public entity must publish notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks stating that the public entity has received a proposal and will accept other proposals for the same project.

The timeframe within which the public entity accepts proposals is determined on a project-by-project basis based upon the complexity of the project and the public benefit to be gained by allowing a longer or shorter period of time within which other proposals may be received.

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[28] *See* s. 334.30, F.S., on public-private transportation facilities.
[29] *See* s. 420.0003(3)(b), F.S., on the state housing strategy.
[30] *See* s. 1013.35, F.S., on school district educational facilities plans.
[31] The task force held 10 meetings to study the law, understand how governmental entities around the world have implemented public-private partnerships, and to hear from interested parties and stakeholders.
[32] Section 255.065(1)(j), F.S., defines "responsible public entity" to mean a county, municipality, school district, special district, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project.
[33] *See* s. 255.065(1)(i)1.-4., F.S.
[34] *See* s. 255.065(3), F.S.
[35] Section 255.06(3)(a)3., F.S., allows an RPE to request additional review funds if the initial application fee does not cover the costs to evaluate an unsolicited proposal.

Certain benchmark timeframe parameters are, however, specified: receipt of other proposals must be for at least 21 days, but no more than 120 days, after the initial date of publication.[36]

***Project Qualification and Approval[37]***

In the case of an unsolicited proposal, after the public notification period has expired, the RPE ranks the proposals received in order of preference. The RPE may then begin negotiations for a comprehensive agreement with the highest-ranked firm.[38] Before approving a comprehensive agreement, the RPE must determine that the proposed project:

- Is in the public's best interest.
- Is for a facility that is owned by the RPE or for a facility for which ownership will be conveyed to the RPE.
- Has adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the comprehensive agreement by the RPE.
- Has adequate safeguards in place to ensure that the RPE or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes.
- Will be owned by the RPE upon completion, expiration, or termination of the comprehensive agreement and upon payment of the amounts financed.

**Public Records and Public Meetings Exemptions – Section 255.065(15), F.S.**

Similar to the competitive solicitation governance in the Public Records Act, pursuant to s. 255.065(15)(b), F.S., an unsolicited proposal received by a RPE is exempt from the inspection and copying provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until such time as the RPE provides notice of an intended decision for a qualifying project. If the RPE rejects all proposals submitted pursuant to a competitive solicitation for a qualifying project and such entity concurrently provides notice of its intent to seek additional proposals for such project, the unsolicited proposal remains exempt until the RPE provides notice of an intended decision concerning the reissued competitive solicitation for the qualifying project or until the responsible public entity withdraws the reissued competitive solicitation for such project.

An unsolicited proposal is exempt for no longer than 90 days after the initial notice by the RPE rejecting all proposals. If the responsible public entity does not issue a competitive solicitation for a qualifying project, the unsolicited proposal ceases to be exempt 180 days after receipt of the unsolicited proposal by such entity.[39]

In addition, s. 255.065(15)(d)1., F.S., provides that any portion of a meeting of a RPE during which an unsolicited proposal that is exempt is discussed is exempt from the public meetings

[36] Section 255.065(3)(b), F.S

[37] *See* ss. 255.065(4)-(5), F.S.

[38] Section 225.065(5)(c), F.S., includes provisions for the RPE to consider subsequent-ranked firms or reject all proposers if negotiations results are unsatisfactory.

[39] These provisions echo the 2014 task force recommendation to consider establishing an exemption from public records requirements for proprietary and confidential and trade secret information provided in P3 proposals. The task force also recommended such an exemption be temporary, with the proposal becoming publicly accessible after a period of time.

governance found in s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. A complete recording must be made of any portion of an exempt meeting. No portion of the exempt meeting may be held off the record. The recording of, and any records generated during, the exempt meeting are exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until such time as the RPE provides notice of an intended decision for a qualifying project or 180 days after receipt of the unsolicited proposal by the RPE if such entity does not issue a competitive solicitation for the project.

**Staff Review of Exemption under Review**

The Senate Committee on Community Affairs and the House Oversight, Transparency & Public Management Subcommittee disseminated a questionnaire to local governments surveying their experiences with the s. 255.065, F.S., P3 process since its adoption in 2016.[40] Ultimately, 16 local governments provided responses to the questionnaires.[41]

Responding local governments that actually engaged in s. 255.065, F.S., P3s roughly split between those recommending reenacting the exemptions as is and those recommending reenacting the exemptions with certain changes.[42] No respondents recommended repealing the exemptions. One local government cited litigation surrounding unsolicited P3 proposals under s. 255.065, F.S.[43] Additionally, Miami-Dade County and Seminole County have local administrative codes that supplement the statutory P3 process in their jurisdictions.[44]

Examples of suggested potential changes include extending the 180 day time limit that an unsolicited proposal remains exempt from public records requirements to give local governments more time to evaluate and review submissions. There was also mention of difficulty in creating a notice for other similar proposals based on an unsolicited proposal which complies with the public records exemption but also generates commensurate and comparable scope and design submissions from additional entities.

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[40] Senate Committee on Community Affairs, *Open Government Sunset Review Questionnaire: Information related to unsolicited proposals for a public-private partnership* (Sep. 8, 2020) (on file with the Senate Committee on Community Affairs). The Florida League of Cities and the Florida Association of Counties assisted in the dissemination of these questionnaires to their respective memberships.

[41] Local governments included the following counties: Broward, Indian River, Miami-Dade, Monroe, Pasco, St. John's, Seminole; cities: Clarke Shores, Hialeah, Jacksonville Beach, Ocean Ridge, Pinellas Park, South Miami, Southwest Ranches, Venice; and special districts: Seminole Improvement District. Questionnaire on file with the Senate Committee on Community Affairs.

[42] There were four "as is" recommendations, four "with changes" recommendations, one "as is" that clarified they were not "averse to considering changes," and two that did not answer the recommendations queries. Five respondents signified having no experience with P3s and therefore did not opine on reenactment.

[43] *See AECOM Technical Services, Inc. v. Broward County, Florida*, No. CACE-19-025964 (Fla. 17th Cir. Ct., Broward County, filed December 19, 2019). The complaint contends that because the unsolicited proposal was not timely considered or accepted within 180 days, it should not be a public record. An Agreed Order to reschedule an April 6, 2020, Final Hearing was granted on March 20, 2020, which effectively suspends the case at the complaint stage.

[44] *See* Section 2-8.2.6, Public-private partnerships; unsolicited proposals, Code of Ordinances, Miami-Dade County; Section 3.56, Guidelines for Public/Private Partnerships, Unsolicited Proposals and Evaluation Process, Seminole County Administrative Code.

## III. Effect of Proposed Changes:

The bill amends s. 255.065, F.S., to save from repeal the current public records and public meeting exemptions relating to unsolicited proposals submitted by a private entity to a public entity seeking to establish a public-private partnership. This information will continue to be exempt from public disclosure beyond October 2, 2021.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not appear to require municipalities or counties to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of municipalities or counties to raise revenue.

### 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 newly created or expanded public records exemption. If an 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. The bill does not create or expand a public records exemption; therefore, it does not require a two-thirds vote for final passage.

**Public Necessity Statement**

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, the bill does not require a public necessity statement.

**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 public records exemption appears to be a reasonable measure to prevent release of proprietary or trade secret information provided in unsolicited P3 proposals. Because the exemptions are temporary, proposals become publically accessible after a period of time.

### 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 private sector will continue to be subject to the cost, to the extent imposed, associated with the agencies making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The agencies will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill amends section 255.065 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

B. Amendments:

None.

**By** the Committee on Community Affairs

578-02375-21 20217050__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 255.065, F.S., which provides exemptions from public records and public meetings requirements for unsolicited proposals received by a responsible public entity and portions of meetings at which such proposals are discussed; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (15) of section 255.065, Florida Statutes, is amended to read:

255.065 Public-private partnerships; public records and public meetings exemptions.—

(15) PUBLIC RECORDS AND PUBLIC MEETINGS EXEMPTIONS.—

(a) As used in this subsection, the term "competitive solicitation" has the same meaning as provided in s. 119.071(1).

(b)1. An unsolicited proposal received by a responsible public entity is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision for a qualifying project.

2. If the responsible public entity rejects all proposals submitted pursuant to a competitive solicitation for a qualifying project and such entity concurrently provides notice of its intent to seek additional proposals for such project, the unsolicited proposal remains exempt until the responsible public



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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entity provides notice of an intended decision concerning the reissued competitive solicitation for the qualifying project or until the responsible public entity withdraws the reissued competitive solicitation for such project.

3. An unsolicited proposal is exempt for no longer than 90 days after the initial notice by the responsible public entity rejecting all proposals.

(c) If the responsible public entity does not issue a competitive solicitation for a qualifying project, the unsolicited proposal ceases to be exempt 180 days after receipt of the unsolicited proposal by such entity.

(d)1. Any portion of a meeting of a responsible public entity during which an unsolicited proposal that is exempt is discussed is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution.

2.a. A complete recording must be made of any portion of an exempt meeting. No portion of the exempt meeting may be held off the record.

b. The recording of, and any records generated during, the exempt meeting are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision for a qualifying project or 180 days after receipt of the unsolicited proposal by the responsible public entity if such entity does not issue a competitive solicitation for the project.

c. If the responsible public entity rejects all proposals and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records generated at the exempt meeting remain exempt from s. 119.07(1)



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision concerning the reissued competitive solicitation or until the responsible public entity withdraws the reissued competitive solicitation for such project.

d. A recording and any records generated during an exempt meeting are exempt for no longer than 90 days after the initial notice by the responsible public entity rejecting all proposals.

~~(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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 7058 |
| INTRODUCER: | Agriculture Committee |
| SUBJECT: | OGSR/Dairy Industry Business' Trade Secrets |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| | Becker | Becker | | **AG Submitted as Committee Bill** |
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | RC | |

## I. Summary:

SB 7058 amends s. 502.222, F.S., to remove the scheduled repeal of a public records exemption for records of a dairy business held by the Department of Agriculture and Consumer Services that would reveal a trade secret as defined in s. 812.081, F.S.

The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill saves the exemption from repeal to continue the confidential and exempt status of the information.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect October 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.3 Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

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[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or

[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Trade Secrets Public Records Exemptions**

***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. A violation is a felony of the third degree.[27]

Section 812.081(1)(c), F.S., defines a "trade secret" to mean:

> …the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill

[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed $5,000.

in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.[28]
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt.
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt.
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.

[28] Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Op. Att'y Gen. Fla. 85-62 (1985).

- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt.
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S, makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,[29] and the right to recover damages for the misappropriation of a trade secret.[30] Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.[31]

Section 688.002(4), F.S., defines the term "trade secret" to mean:

> …information, including a formula, pattern, compilation, program, device, method, technique, or process that:
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be

[29] Section 688.003, F.S.
[30] Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*
[31] *See* s. 688.008, F.S.

interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has "independent economic value," rather than just be "of value," as required under s. 812.081(1)(c), F.S.

***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.[32] In Sepro v. Department of Environmental Protection, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.[33]

**Department of Agriculture and Consumer Services**

The Department of Agriculture and Consumer Services (department) administers and enforces laws governing milk, milk products, and frozen desserts. Specifically, the department regulates:

- The production, processing, and distribution of milk, milk products, frozen dessert, and frozen dessert mix;
- The sanitation and sanitary practices of establishments where food and drink, including milk and milk products, are sold for consumption on the premises, except food service establishments regulated under chapters 381 and 509, including the sanitary and healthful condition of the food and drink sold by such establishments; and
- The laboratory work of testing and analyzing milk, milk products, frozen dessert, and frozen dessert mix.[34]

Section 502.222, F.S., makes any information that would reveal a trade secret, as defined in s. 812.081, F.S., of a dairy industry business is confidential and exempt from s. 119.07(1), F.S., and s. 20 24(a), Art. I of the State Constitution. If the department determines that any information requested by the public will reveal a trade secret, it shall, in writing, inform the person making the request of that determination. The determination is a final order as defined in s. 120.52, F.S.

**Open Government Sunset Review Findings and Recommendations**

In March 2021, the Professional Staff of the Senate Committee on Agriculture sent an Open Government Sunset Review Questionnaire to the department. The department reported that in the last 10 years it received two requests for the information exempt under s. 502.222, F.S., and that the information was not released as it was determined to be a trade secret and exempt from public records requirements. The department releases this exempt information to the United States Food and Drug Administration.[35]

[32] *Sepro v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
[33] *Id.*
[34] Section 502.014(1), F.S.
[35] *See Open Government Sunset Review Questionnaire* response from the Florida Department of Agriculture and Consumer Services on file with the Senate Committee on Agriculture.

The department recommended that the exemption in s 502.222, F.S., be reenacted.[36]

## III. Effect of Proposed Changes:

The bill amends s. 502.222, F.S., to remove the scheduled repeal of a public records exemption for records of a dairy business held by the Department of Agriculture and Consumer Services that would reveal a trade secret as defined in s. 812.081, F.S.
The public records exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act.

The bill takes effect October 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not appear to require municipalities or counties to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of municipalities or counties to raise revenue.

### 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 does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

**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 does not create or expand an exemption. Thus, a state 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 exemption in the bill does not appear to be broader than necessary to accomplish the purpose of the law.

### C. Trust Funds Restrictions:

None.

[36] *Id.*

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 private sector will continue to be subject to the cost, to the extent imposed, associated with the agency making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The Department of Agriculture and Consumer Services will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 502.222 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.

**By** the Committee on Agriculture

575-02686-21 20217058__

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 502.222, F.S., which provides an exemption from public records requirements for a dairy industry business' trade secrets held by the Department of Agriculture and Consumer Services; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 502.222, Florida Statutes, is amended to read:

502.222 Information relating to trade secrets confidential.—The records of the department regarding matters encompassed by this chapter are public records, subject to chapter 119, except that any information that would reveal a trade secret, as defined in s. 812.081, of a dairy industry business is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. If the department determines that any information requested by the public will reveal a trade secret, it shall, in writing, inform the person making the request of that determination. The determination is a final order as defined in s. 120.52. ~~This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**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: | CS/SB 968 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Senator Gainer |
| SUBJECT: | Public Records/Economic Development Agency |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Reeve | McKay | CM | **Favorable** |
| 2. | Candelaria | McVaney | GO | **Fav/CS** |
| 3. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 968 exempts from public inspection and copying requirements certain identifying information held by an economic development agency, including the Department of Economic Opportunity, pursuant to the administration of a state- or federally-funded small business loan program.

The bill provides for the automatic repeal of the public records exemption on October 2, 2026, unless reenacted by the Legislature under the Open Government Sunset Review Act.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three

[1] FLA. CONST. art. I, s. 24(a).

branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

**Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and 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]

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state

[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[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).

with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]
General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20] 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize

[11] *Id*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.

the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Economic Development Agencies**

Section 288.075, F.S., defines an "economic development agency" as:
- The Department of Economic Opportunity (DEO);
- Any industrial development authority created in accordance with part III of chapter 159 of the Florida Statutes, or by special law;
- Space Florida;
- The public economic development agency of a county or municipality;
- Any research and development authority created in accordance of part v of chapter 159 of the Florida Statutes; or
- Any private agency, person, partnership, corporation, or business entity authorized by the state, a municipality, or a county to promote the general business or industrial interests of the state or that municipality or county (e.g. Enterprise Florida, Inc.[27]).

***Small Business Loan Programs***

The DEO administers a number of state and federally funded small business loan programs, including:[28]

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[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] *See* s. 288.901, F.S.
[28] Department of Economic Opportunity, *Small and Minority Business Programs¸ available at* https://floridajobs.org/community-planning-and-development/Small-and-Minority-Business-Development-Resources/Small-and-Minority-Business-Programs (last visited Mar. 30, 2021).

- Small Business Emergency Bridge Loan Program;
- Rebuild Florida Business Loan Fund;
- Rural Community Development Revolving Loan Program;
- Small Business Loan Program;
- Microfinance Guarantee Program; and
- Black Business Loan Program.

**Existing Public Records Exemptions for Economic Development Agencies**

Section 288.075, F.S., provides for a number of temporary public records exemptions for information held by an economic development agency, including:

- Information concerning a corporation's plans to relocate or expand any of its business activities in the state for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed;
- Proprietary confidential business information, until the information becomes publicly available or is no longer treated by the proprietor as confidential; and
- Specific sales, employee wage, and tax information the administration of an economic incentive program for qualified businesses for the duration of the incentive agreement or upon termination of the agreement.

Trade secrets, federal employer identification numbers, reemployment assistance account numbers, and Florida sales tax registration numbers are permanently exempt from public records.[29]

An employee of an economic development agency who violates the provisions of s. 288.075, F.S., commits a second degree misdemeanor, punishable by a maximum penalty of 60 days in jail or a $500 fine.[30]

## III. Effect of Proposed Changes:

**Section 1** amends s. 288.075, F.S., to exempt certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program from inspection by the public. Specifically, the bill exempts:

- Tax returns; and
- Credit history information, credit reports, and credit scores.

The bill does not prohibit the disclosure of such exempt information in an aggregated and anonymized format.

The public records exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

[29] Sections 288.075(3) and (5), F.S.
[30] Section 288.075(7), F.S.

**Section 2** provides a public necessity statement. Economic development agencies may obtain certain financial information about borrowers that, if released, could be used by fraudulent contractors, predatory lenders, thieves, or individuals seeking to impose on the borrower. The statement specifies that the public records exemption is necessary to ensure borrowers are not harassed, intimidated, or potentially defrauded.

**Section 3** provides an effective date of July 1, 2021.

## 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 a state tax shares with counties and 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 creates a new public records exemption for certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program. Thus the bill requires a two-thirds 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 creates a new public records exemption. Thus, the bill contains a statement of public necessity.

***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. This bill creates a public records exemption for certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program. 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 private sector will be subject to the cost associated with the state making redactions in response to public records requests.

C. Government Sector Impact:

The DEO and other economic development agencies may experience additional workload and incur costs associated with 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 288.075 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS removes the exemption on the home address, telephone number, and e-mail address of a person who submits an application for a loan on behalf of a business and the exemption on bank and financial statements. The CS changes the term "section" to "subsection" to fulfill the intent of the bill. The CS revises the public necessity statement to align it with the information exempted in the bill.

B. Amendments:

None.

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

**By** Senator Gainer

2-00919-21 2021968__

A bill to be entitled

An act relating to public records; amending s. 288.075, F.S.; providing an exemption from public records requirements for certain information held by an economic development agency; providing that such information may be released in an aggregated and anonymized format; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Present subsection (7) of section 288.075, Florida Statutes, is redesignated as subsection (8), and a new subsection (7) is added to that section, to read:

288.075 Confidentiality of records.—

(7) LOAN PROGRAMS.—

(a) The following information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. The home address, telephone number, and e-mail address of a person who submits an application for a loan on behalf of a business.

2. Tax returns.

3. Bank and financial statements.

4. Credit history information, credit reports, and credit scores.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



2-00919-21 2021968__

(b) This section does not prohibit the disclosure of information held by an economic development agency pursuant to its administration of a small business loan program in an aggregated and anonymized format.

(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the home address, telephone number, and e-mail address of a person who submits an application for a loan on behalf of a business; tax returns; bank and financial statements; and credit history information, credit reports, and credit scores held by an economic development agency pursuant to its administration of any state or federally funded small business loan program be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. In order to process and disburse loan funds, an economic development agency may obtain sensitive information needed to assess viability of loans. This information may be used to locate and identify and contact the borrower. If released, locating and identifying information could be used by fraudulent contractors, predatory lenders, thieves, or individuals seeking to impose on the borrower. Therefore, it is necessary that certain information held by an economic development agency pursuant to its administration of any state or federally funded small business loan program be protected to ensure that borrowers are not harassed, intimidated, or potentially defrauded.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

Section 3. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

03/31/2021
*Meeting Date*

SB 968
*Bill Number (if applicable)*

Topic SB 968 - Public Records/ Economic Development Agency

*Amendment Barcode (if applicable)*

Name Ethan Perry

Job Title Deputy Director of Legislative and Cabinet Affairs, DEO

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Tallahassee FL 32399
*City* *State* *Zip*

Email Ethan.Perry@deo.myflorida.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Department of Economic Opportunity

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

254654

LEGISLATIVE ACTION

| Senate | . | House |
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| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
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The Committee on Governmental Oversight and Accountability (Rodrigues) recommended the following:

**Senate Amendment**

Delete lines 23 - 58
and insert:
1. Tax returns.
2. Credit history information, credit reports, and credit scores.
(b) This subsection does not prohibit the disclosure of information held by an economic development agency pursuant to its administration of a small business loan program in an

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aggregated and anonymized format.

(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the tax returns and credit history information, credit reports, and credit scores held by an economic development agency pursuant to its administration of any state or federally funded small business loan program be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. In order to assess the viability of loans, an economic development agency may obtain sensitive information of a borrower, including certain financial information. If released, the sensitive information could be used by fraudulent contractors, predatory lenders, thieves, or individuals seeking to impose on the borrower. Therefore, it is necessary that sensitive information held by an economic development agency pursuant to its administration of any state or federally funded small business loan program be protected to ensure that borrowers are not harassed, intimidated, or potentially defrauded. The Legislature finds the harm that may result from the release of such sensitive information outweighs the public benefit that may be derived from the disclosure of the information.

**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 1314 |
| INTRODUCER: | Senators Gruters and Harrell |
| SUBJECT: | Communicable and Infectious Diseases |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | McVaney | McVaney | GO | **Favorable** |
| 2. | | | CA | |
| 3. | | | AP | |

## I. Summary:


SB 1314 adds an "infectious disease" to the list of diseases that, if suffered by an emergency rescue or public safety worker, is presumed to have been suffered in-the-line-of-duty. The bill defines "infectious disease" to mean any condition or impairment of health caused by a disease that has been declared a public health emergency by the State Health Officer. As a result any person employed full time by the state or a political subdivision as a firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer who suffers a condition caused by an "infectious disease" that results in total or partial disability or death is presumed to have a disability suffered in-the-line-of-duty and is therefore entitled to certain higher benefits. This presumption can be defeated by competent evidence to the contrary.

In order to be entitled to the presumption, the bill requires the emergency rescue or public safety worker to submit a written declaration under penalty of perjury verifying that, to the best of his or her knowledge, he or she contracted the infectious disease during a public health emergency and was not exposed to any person known to have the infectious disease outside the scope of his or her employment.

The bill specifies that the vaccine or immunization that an emergency rescue or public safety worker may be required by their employer to receive in order to enjoy the presumption must be approved by the United States Food and Drug Administration.

The bill requires an emergency rescue or public safety worker to file an incident or accident report with his or her employer for each instance of known or suspected occupational exposure to an infectious disease.

The bill may have a fiscal impact on the state and local governments that employ emergency rescue or public safety workers. See Fiscal Comments section.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Background

#### *Workers' Compensation Insurance*

Chapter 440, F.S., relating to workers' compensation, requires an employer to pay compensation or furnish benefits if an employee suffers an accidental compensable injury or death arising out of work performed in the course and scope of employment.[1] The injury, its occupational cause, and any resulting disability must be established to a reasonable degree of medical certainty, and the accidental compensable injury must be the major contributing cause of any resulting injury.[2]

Compensation for permanent total disability is equal to 66 2/3 percent of the employee's average weekly wages payable to the employee during the continuance of the total disability.[3] In addition, an employee will generally receive an annual supplemental income benefit equal to 3 percent per year of the compensation payment, multiplied by the number of calendar years since the date of the injury, until age 62.[4]

Compensation for temporary total disability is equal to 66 2/3 percent of the employee's average weekly wages payable to the employee during the continuance of the total disability, but payment may not exceed 104 weeks. At the earlier of the 104th week or the employee reaching maximum medical improvement, the temporary disability payment will cease, and the injured employee's permanent impairment will be determined.[5]

Where the disability or death of an employee results from an "occupational disease," it will be treated as an injury by accident.[6] The employee or his or her survivors will be entitled to compensation. "Occupational disease" is defined to mean "only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may cause the precise disease sustained by the employee."[7]

An accidental compensable injury must be the major contributing cause of any resulting injury, meaning that the cause must be more than 50 percent responsible for the injury as compared to all other causes combined, as demonstrated by medical evidence only. For an injury or disease involving an occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence.[8]

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[1] Section 440.09(1), F.S.
[2] *Id.*
[3] Section 440.15(1)(a), F.S.
[4] Section 440.15(1)(f), F.S.
[5] Section 440.15(2)(a), F.S.
[6] Section 440.151(1)(a), F.S.
[7] Section 440.151(2), F.S.
[8] Section 440.09(1), F.S.

***Florida Retirement System***

The Florida Retirement System (FRS) was established in 1970 when the Legislature consolidated the Teachers' Retirement System, the State and County Officers and Employees' Retirement System, and the Highway Patrol Pension Fund. In 1972, the Judicial Retirement System was consolidated into the FRS, and in 2007, the Institute of Food and Agricultural Sciences Supplemental Retirement Program was consolidated into the FRS as a closed group.[9]

The Florida Retirement System Act[10] governs the FRS, which is a multi-employer, contributory plan that provides retirement income benefits to 644,338 active members,[11] 432,258 annuitants, 15,512 disabled retirees, and 33,593 active participates of the Deferred Retirement Option Program.[12] It is the primary retirement plan for employees of state and county government agencies, district school boards, community colleges, and universities. Municipalities, independent special districts, metropolitan planning districts, and public charter schools may elect to participate in the FRS. Such election is irrevocable.[13] The FRS also serves as the retirement plan for participating employees of the 177 cities and 149 special districts that have elected to join the system.[14]

Membership in the FRS is compulsory for all full-time and part-time employees working in regularly established positions for covered employers.

The FRS is managed by the Department of Management Services and the State Board of Administration.

***Class Structure***

The membership of the FRS is divided into five membership classes. The five membership classes include:

- Regular Class[15] has 557,754 members;
- Special Risk Class[16] has 76,343 members;
- Special Risk Administrative Support Class[17] has 108 members;

[9] *Florida Retirement System Pension Plan and Other State Administered Systems Comprehensive Annual Financial Report Fiscal Year 2019-2020*, at 35. A copy of the report can be found at: https://www.dms.myflorida.com/workforce_operations/retirement/publications/annual_reports.
[10] *See* ch. 121, F.S.
[11] As of June 30, 2020, the FRS pension plan, which is a defined benefit plan, had 479,043 members, and the investment plan, which is a defined contribution plan, had 165,295 members.
[12] *Annual Report*, *supra* note 1, at 160.
[13] *See* s. 121.051(2), F.S.
[14] *Annual Report*, *supra* note 1, at 195.
[15] Regular Class members are those members who do not qualify for membership in the other classes within the FRS. Section 121.021(12), F.S.
[16] Special Risk Class members include law enforcement officers, firefighters, correctional officers, probation officers, paramedics, and emergency medical technicians, among others. Section 121.0515, F.S.
[17] Special Risk Administrative Support Class members are former members of the Special Risk Class who are transferred or reassigned to an administrative support position in certain circumstances. Section 121.0515(8), F.S.

- Elected Officers' Class[18] has 2,153 members; and
- Senior Management Service Class[19] has 7,980 members.[20]

Each class is funded separately based upon the costs attributable to the members of that class.

***Plan Options***

Members of the FRS have two primary plan options available for participation:
- The investment plan, which is a defined contribution plan; and
- The pension plan, which is a defined benefit plan.

Regardless of whether the member elects to participate in the pension plan or the investment plan, the member must contribute three percent of the member's salary.[21]

Certain members, as specified by law, may, in lieu of FRS participation, participate in optional retirement plans, which include the Senior Management Service Optional Annuity Program, State Community College System Optional Retirement Program, and the State University System Optional Retirement Program.

***Special Risk Class***

The Special Risk Class of the FRS consists of state and local government employees who meet the criteria for special risk membership. The class covers persons employed in law enforcement, firefighting, criminal detention, and emergency and forensic medical care who meet the statutory criteria.[22]

When originally establishing the Special Risk Class of membership in the FRS, the Legislature recognized that persons employed in certain categories of positions:

> are required as one of the essential functions of their positions to perform work that is physically demanding or arduous, or work that requires extraordinary agility and mental acuity, and that such persons, because of diminishing physical and mental faculties, may find that they are not able, without risk to the health and safety of themselves, the public, or their coworkers, to continue performing such duties and thus enjoy the full career and retirement benefits enjoyed by persons employed in other membership classes and that, if they find it necessary, due to the physical and mental limitations of their age, to retire at an earlier age

[18] Membership in the Elected Officers' Class is comprised of those participants who hold specified elective offices in either state or local government. Section 121.052, F.S.
[19] Senior Management Service Class members generally are high level executive and legal staff or as specifically provided in law. Section 121.055, F.S.
[20] All figures from *Annual Report, supra* note 3, at 161.
[21] Prior to 1975, members of the FRS were required to make employee contributions of either 4 percent for Regular Class employees or 6 percent for Special Risk Class members. Employees were again required to contribute to the system after July 1, 2011.
[22] *See* s. 121.0515, F.S.

> and usually with less service, they will suffer an economic deprivation therefrom.[23]

Compared to the Regular Class members, a person who is a member in the Special Risk Class earns a higher annual service accrual rate, may retire at an earlier age, and is eligible to receive higher disability and death benefits. As a result, the contribution rates to fund the normal cost of the special risk benefits are higher than the contribution rates to fund the normal cost of the Regular Class benefits.

***Disability Retirement Benefits for Special Risk Members of the FRS***

There are two types of disability retirement available under the FRS: regular disability retirement and in-the-line-of-duty disability retirement. To qualify for either type of disability retirement, members must be totally and permanently disabled to the extent that they are unable to work.[24] An employee who is physically or mentally unable to continue performing in his or her present occupation, but is able to perform another type of work, will not qualify for disability benefits.[25]

To be eligible for regular disability retirement under the FRS, a member must complete eight years of creditable service.[26] Under the FRS Pension Plan, the minimum benefit under regular disability retirement, regardless of class, is 25 percent of the employee's average final compensation.[27] In contrast, in-the-line-of-duty disability benefits are available to a member on the first day of employment. There is no vesting period. A Special Risk Class member receives a minimum in-the-line-of-duty disability benefit of 65 percent of the member's average final compensation.[28] Members in all other classes are eligible to receive a minimum in-the-line-of-duty disability benefit of 42 percent of their average final compensation.[29]

Under the FRS Investment Plan, the disability benefits are provided in lieu of the normal retirement benefits (the accumulations of contributions and investment earnings in the member's retirement account).[30] To receive the disability benefits, the member must transfer all of his or her accumulations to the investment plan disability account. The member will then receive a monthly benefit calculated the same as a similarly situated pension plan member.[31]

***Death Benefits for Special Risk Members of the FRS***

If a member of the FRS is terminated by reason of death prior to becoming vested in the FRS, the member's beneficiary is only entitled to the member's accumulated contributions.[32] Under the pension plan, if the member is vested at the time of his or her death, the member's joint

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[23] Section 121.0515(1), F.S.
[24] Section 121.091(4), F.S.
[25] Florida Retirement System Employer Handbook, Disability Retirement, ch. 10, available at https://www.rol.frs.state.fl.us/forms/EH_ch10.pdf.
[26] Sections 121.091(4)(a) and 121.591(2)(b)2., F.S.
[27] Section 121.091(4)(f), F.S.
[28] *Id.*
[29] *Id.*
[30] Section 121.591(2), F.S.
[31] Section 121.591(2)(g), F.S.
[32] For purposes of disbursement of benefits, a member is considered retired as of the date of the death.

annuitant[33] is entitled to receive the optional form[34] of payment for the annuitant's lifetime.[35] If the designated beneficiary does not qualify as a joint annuitant, the member's beneficiary is only entitled to the return of the member's personal contributions, if any.[36]

The FRS currently provides death benefits for surviving spouses and/or eligible dependents of active members of the pension plan. Death benefits may be paid for an active member of the FRS Pension Plan who dies before retirement due to an injury or illness.[37] If the injury or illness arises out of and in the actual performance of duties required by a member's job, the member's surviving spouse and/or eligible dependent(s) are entitled to in-the-line-of-duty death benefits. These in-the-line-of-duty death benefits are also available to members of the investment plan if the member's beneficiary elects to transfer the accumulations in the member's investment plan account to the pension fund.[38]

If an FRS member who is not in the Special Risk Class dies in the line of duty, the surviving spouse of the member is entitled to receive a monthly benefit equal to one-half of the monthly salary being received by the member at the time of death for the rest of the surviving spouse's lifetime.[39] If there is no surviving spouse or the surviving spouse dies, the member's children under 18 years of age and unmarried may receive the benefits until the youngest child's 18th birthday.[40]

If an FRS member who is in the Special Risk Class dies in the line of duty, the member's surviving spouse and children are eligible to receive a monthly payment equal to the member's total monthly salary at the time of death.[41] These benefits may be extended to the 25th birthday of an unmarried child enrolled as a full time student if there is no surviving spouse or the surviving spouse dies.[42]

***Presumptions and Burdens of Proof Relating to in-the-line-of-duty Disability and Death***

An FRS member has the burden of proof when claiming in-the-line-of-duty disability or death benefits. The member must show by competent medical evidence that the death or disability occurred in-the-line-of-duty in order to receive the higher benefits. If the employee or the employee's survivors cannot meet the burden of proof, the employee or the employee's survivors are entitled only to the lesser benefits available under regular death or disability

[33] A joint annuitant is considered to be the member's spouse, natural or legally adopted child who is either under age 25 or is physically or mentally disabled and incapable of self-support (regardless of age), or any person who is financially dependent upon the member for one-half or more of his or her support and is the member's parent, grandparent, or person for whom the member is the legal guardian. Section 121.021(28), F.S.
[34] Under the pension plan, a member has a choice of payment options. If the member dies prior to retirement, the member's joint annuitant is entitled to select either to receive the member's contributions or a reduced monthly benefit payment for life.
[35] Section 121.091(7)(b)1., F.S.
[36] Section 121.091(7)(b)2., F.S.
[37] Section 121.091(7), F.S.
[38] Section 121.591(4), F.S.
[39] Section 121.091(7)(d)1., F.S.
[40] Section 121.091(7)(d)2. and 3., F.S.
[41] Section 121.091(7)(i), F.S.
[42] *Id.*

An FRS member employed as an emergency rescue or public safety worker[43] who suffers a condition caused by hepatitis, meningococcal meningitis, or tuberculosis that results in total or partial disability or death is presumed to have a disability suffered in-the-line-of-duty and to be entitled to the higher benefits.[44] The presumption can be defeated by competent evidence to the contrary.

In order to be eligible for the presumption, the member, prior to diagnoses, must have undergone test for the disease, which fail to indicate the presence of the infection. A prior negative test is not required, however, in the case of meningococcal meningitis. In addition, the member must sign a written declaration under penalty of perjury verifying he or she has not:

- In the case of a medical condition caused by hepatitis:
  - Been exposed to any person known to have sickness or medical conditions derived from hepatitis, outside the scope of his or her employment;
  - Had a blood transfer, other than a transfusion arising out of an accident or injury happening in connection with his or her employment;
  - Engaged in unsafe sexual practices or other high-risk behavior; or
  - Used intravenous drugs not prescribed by a physician.
- In the case of meningococcal meningitis, in the last 10 days, has not been exposed outside of the scope of his or her employment to any person known to have meningococcal meningitis or known to be an asymptomatic carrier of the disease; and
- In the case of tuberculosis, since the member's last negative tuberculosis skin test, has not been exposed outside of the scope of his or her employment to any person known by the member to have tuberculosis.[45]

If medically indicated in the given circumstances pursuant to the immunization policies established by the Advisory Committee on Immunization Practices of the United States Public Health Service,[46] whenever a medically recognized vaccine or other form of immunization exists for the above mentioned communicable diseases, the emergency rescue or public safety worker may be required by his or her employer to undergo the immunization, unless the member's physician determines in writing that the immunization would pose a significant risk to the member's health.[47] Absent such written declaration, failure or refusal to undergo immunization disqualifies the member from the benefits of the presumption.

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[43] "Emergency rescue or public safety worker" means any person employed full time by the state or any political subdivision of the state as a firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer who, in the course of employment, runs a high risk of occupational exposure to hepatitis, meningococcal meningitis, or tuberculosis and who is not employed elsewhere in a similar capacity. However, the term "emergency rescue or public safety worker" does not include any person employed by a public hospital licensed under chapter 395 or any person employed by a subsidiary thereof. Section 112.181(1)(b), F.S.

[44] Section 112.181(2), F.S.

[45] *Id.*

[46] The Advisory Committee on Immunization Practices comprises medical and public health experts who develop recommendations on the use of vaccines in the civilian population of the United States. The recommendations stand as public health guidance for safe use of vaccines and related biological products. Center for Disease Control and Prevention, *Advisory Committee on Immunization Practices (ACIP)*, https://www.cdc.gov/vaccines/acip/committee/index.html (last visited March 17, 2021).

[47] Section 112.181(3), F.S.

An emergency rescue or public safety worker is required to file an incident report with his or her employer for every known or suspected occupational exposure to hepatitis, meningococcal meningitis, or tuberculosis. An employing agency must maintain a record of such exposures, and notify any employee that may have been exposed.[48]

**Public Health Emergency**

Section 381.00315, F.S., grants authority to the State Health Officer to declare public health emergencies. During the last 30 years, the following public health emergencies relating to infectious diseases have been declared:

- Zika virus in 2016;
- Hepatitis A in 2019; and
- COVID-19 in 2020.

**In Line of Duty Deaths of Law Enforcement Officers, Correctional Officers, and others**

According to the Officer Down Memorial Page,[49] thirteen law enforcement officers and correctional officers employed local governments in Florida and one correctional officer employed by the state died in 2020 of COVID-19 or COVID-19-related complications. Another three officers employed by local governments have died in 2021 of COVID-19 or COVID-19-related complications.

## III. Effect of Proposed Changes:

The bill adds an "infectious disease" to the list of diseases that, if suffered by an emergency rescue or public safety worker, is presumed to have been suffered in-the-line-of-duty thereby entitling the worker to higher death or disability benefits, unless the contrary can be shown by competent evidence. The bill defines "infectious disease" to mean any condition or impairment of health caused by a disease that has been declared a public health emergency by the State Health Officer.

In order to be entitled to the presumption, the bill requires the emergency rescue or public safety worker to submit a written declaration under penalty of perjury verifying that, to the best of his or her knowledge, he or she contracted the infectious disease during a public health emergency declared by the State Health Officer and was not exposed, outside of the scope of his or her employment, to any person known to have the infectious disease.

The bill specifies that the vaccine or immunization that an emergency rescue or public safety worker may be required by their employer to receive in order to enjoy the presumption must be approved by the United State Food and Drug Administration.

The bill requires an emergency rescue or public safety worker to file an incident or accident report with his or her employer for each instance of known or suspected occupational exposure to an infectious disease.

[48] Section 112.181(5), F.S.
[49] Officer Down Memorial Page, https://www.odmp.org/ (last viewed on March 28, 2021).

The bill specifies that similar to meningococcal meningitis, an emergency rescue or public safety worker is not required to undergo test, prior to diagnosis, which fail to indicate the presence of the infection in order to enjoy the presumption.

As drafted, the bill does not have retroactive application and thus will not apply disabilities and deaths occurring prior to July 1, 2021 (the effective date of the bill).

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Article VII, s. 18(a), of the State Constitution provides:

> No county or municipality shall be bound by any general law requiring such county or municipality to spend funds...unless the legislature has determined that such law fulfills an important state interest and unless: the law requiring such expenditure is approved by two-thirds vote of the membership of each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; . . ..

This bill creates a new presumption for "infectious disease" that will be applicable to workers' compensation benefits and retirement benefits paid to emergency rescue or public safety workers. As a result, counties and municipalities may incur additional costs associated with funding. An exception may apply because all similarly situated state and local government employers of emergency rescue and public safety workers are required to provide the workers' compensation benefit and retirement. However, for this exception to apply, the bill must declare that it fulfills an important state interest. As currently drafted, this bill does not include a legislative finding that the bill fulfills an important state interest.

However, Article VII, s. 18(d) of the State Constitution provides that the mandate requirements do not apply to laws having an insignificant impact,[50] which for Fiscal Year 2020-2021 is forecast at $2.2 million.[51] If the total cost of this legislation is less than $2.2 million, then the mandate requirements do not apply. If costs imposed by the bill are determined to exceed $2.2 million in the aggregate, the bill may be binding on counties and municipalities if the bill contains a finding of important state interest and meets one of the exceptions specified in State Constitution (e.g., enactment by vote of two-thirds of the membership of each house or applies to all persons similarly situated).

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[50] An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times $0.10. See Florida Senate Committee on Community Affairs, Interim Report 2012-115: Insignificant Impact, (Sept. 2011), available at http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited March 10, 2021).

[51] Based on the Florida Demographic Estimating Conference's Nov. 13, 2020 population forecast for 2021 of 21,893,919. The conference packet is available at: http://edr.state.fl.us/content/conferences/population/demographicsummary.pdf (last visited March 10, 2021).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Article X, section 14 of the Florida Constitution provides:

> A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

An actuarial study has not been completed to comply with Article X, section 14 of the Florida Constitution.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill adds a new subset of diseases that are presumed to be suffered in-the-line-of-duty for certain workers, thereby entitling those workers to higher disability and death benefits. Accordingly, more state and local government employees may qualify for enhanced workers' compensation or retirement benefits. The fiscal impact on the state and local governments is unknown at this time.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 112.181 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.

**By** Senator Gruters

23-01334B-21 20211314__

A bill to be entitled

An act relating to communicable and infectious diseases; amending s. 112.181, F.S.; revising definitions and defining a term; providing a presumption to specified workers that an impairment of health caused by an infectious disease happened in the line of duty; requiring certain actions in order to be entitled to the presumption; requiring certain vaccines or immunizations to be approved by the United States Food and Drug Administration; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 112.181, Florida Statutes, is amended to read:

112.181 Firefighters, paramedics, emergency medical technicians, law enforcement officers, correctional officers; special provisions relative to certain communicable and infectious diseases.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Body fluids" means blood and body fluids containing visible blood and other body fluids to which universal precautions for prevention of occupational transmission of blood-borne pathogens, as established by the Centers for Disease Control and Prevention, apply. For purposes of potential transmission of meningococcal meningitis or tuberculosis, the term "body fluids" includes respiratory, salivary, and sinus fluids, including droplets, sputum, and saliva, mucous, and



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



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other fluids through which infectious airborne organisms can be transmitted between persons.

(b) "Emergency rescue or public safety worker" means any person employed full time by the state or any political subdivision of the state as a firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer who, in the course of employment, runs a high risk of occupational exposure to hepatitis, meningococcal meningitis, ~~or~~ tuberculosis, or an infectious disease and who is not employed elsewhere in a similar capacity. However, the term "emergency rescue or public safety worker" does not include any person employed by a public hospital licensed under chapter 395 or any person employed by a subsidiary thereof.

(c) "Hepatitis" means hepatitis A, hepatitis B, hepatitis non-A, hepatitis non-B, hepatitis C, or any other strain of hepatitis generally recognized by the medical community.

(d) "High risk of occupational exposure" means that risk that is incurred because a person subject to the provisions of this section, in performing the basic duties associated with his or her employment:

1. Provides emergency medical treatment in a non-health-care setting where there is a potential for transfer of body fluids between persons;

2. At the site of an accident, fire, or other rescue or public safety operation, or in an emergency rescue or public safety vehicle, handles body fluids in or out of containers or works with or otherwise handles needles or other sharp instruments exposed to body fluids;

3. Engages in the pursuit, apprehension, and arrest of law



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

violators or suspected law violators and, in performing such duties, may be exposed to body fluids; or

4. Is responsible for the custody, and physical restraint when necessary, of prisoners or inmates within a prison, jail, or other criminal detention facility, while on work detail outside the facility, or while being transported and, in performing such duties, may be exposed to body fluids.

(e) "Infectious disease" means any condition or impairment of health caused by a disease that has been declared a public health emergency in accordance with s. 381.00315.

(f) ~~(c)~~ "Occupational exposure," in the case of hepatitis, meningococcal meningitis, ~~or~~ tuberculosis, or an infectious disease, means an exposure that occurs during the performance of job duties that may place a worker at risk of infection.

(2) PRESUMPTION; ELIGIBILITY CONDITIONS.—Any emergency rescue or public safety worker who suffers a condition or impairment of health that is caused by hepatitis, meningococcal meningitis, ~~or~~ tuberculosis, or an infectious disease, that requires medical treatment, and that results in total or partial disability or death is ~~shall be~~ presumed to have a disability suffered in the line of duty, unless the contrary is shown by competent evidence; however, in order to be entitled to the presumption, the emergency rescue or public safety worker must, by written affidavit as provided in s. 92.50, verify by written declaration that, to the best of his or her knowledge and belief:

(a) In the case of a medical condition caused by or derived from hepatitis, he or she has not:

1. Been exposed, through transfer of bodily fluids, to any



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



person known to have sickness or medical conditions derived from hepatitis, outside the scope of his or her employment;

2. Had a transfusion of blood or blood components, other than a transfusion arising out of an accident or injury happening in connection with his or her present employment, or received any blood products for the treatment of a coagulation disorder since last undergoing medical tests for hepatitis, which tests failed to indicate the presence of hepatitis;

3. Engaged in unsafe sexual practices or other high-risk behavior, as identified by the Centers for Disease Control and Prevention or the Surgeon General of the United States, or had sexual relations with a person known to him or her to have engaged in such unsafe sexual practices or other high-risk behavior; or

4. Used intravenous drugs not prescribed by a physician.

(b) In the case of meningococcal meningitis, in the 10 days immediately preceding diagnosis he or she was not exposed, outside the scope of his or her employment, to any person known to have meningococcal meningitis or known to be an asymptomatic carrier of the disease.

(c) In the case of tuberculosis, in the period of time since the worker's last negative tuberculosis skin test, he or she has not been exposed, outside the scope of his or her employment, to any person known ~~by him or her~~ to have tuberculosis.

(d) In the case of an infectious disease, he or she contracted the infectious disease during a public health emergency declared in accordance with s. 381.00315 and was not exposed, outside of the scope of his or her employment, to any



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person known to have the infectious disease.

(3) IMMUNIZATION.—Whenever any standard, medically recognized vaccine, or other form of immunization or prophylaxis exists for the prevention of a communicable or infectious disease for which a presumption is granted under this section, if medically indicated in the given circumstances under the ~~pursuant to~~ immunization policies established by the Advisory Committee on Immunization Practices of the United States Public Health Service and if the vaccine or immunization has been approved by the United States Food and Drug Administration, an emergency rescue or public safety worker may be required by his or her employer to undergo the immunization or prophylaxis unless the worker's physician determines in writing that the immunization or other prophylaxis would pose a significant risk to the worker's health. Absent such written declaration, failure or refusal by an emergency rescue or public safety worker to undergo such immunization or prophylaxis disqualifies the worker from the benefits of the presumption.

(4) LIFE AND DISABILITY INSURANCE COVERAGE.—This section does not apply to benefits payable under or granted in a noncompulsory policy of life insurance or disability insurance, unless the insurer and insured have negotiated for such additional benefits to be included in the policy contract. However, the state or any political subdivision of the state may negotiate a policy contract for life and disability insurance which includes accidental death benefits or double indemnity coverage for any condition or impairment of health suffered by an emergency rescue or public safety worker, which condition or impairment is caused by a disease described in this section and





results in total or partial disability or death.

(5) RECORD OF EXPOSURES.—The employing agency shall maintain a record of any known or reasonably suspected exposure of an emergency rescue or public safety worker in its employ to the diseases described in this section and shall immediately notify the employee of such exposure. An emergency rescue or public safety worker shall file an incident or accident report with his or her employer of each instance of known or suspected occupational exposure to hepatitis infection, meningococcal meningitis, ~~or~~ tuberculosis, or an infectious disease.

(6) REQUIRED MEDICAL TESTS; PREEMPLOYMENT PHYSICAL.—In order to be entitled to the presumption provided by this section:

(a) An emergency rescue or public safety worker must, prior to diagnosis, have undergone standard, medically acceptable tests for evidence of the communicable disease for which the presumption is sought, or evidence of medical conditions derived therefrom, which tests fail to indicate the presence of infection. This paragraph does not apply in the case of meningococcal meningitis or an infectious disease.

(b) On or after June 15, 1995, an emergency rescue or public safety worker may be required to undergo a preemployment physical examination that tests for and fails to reveal any evidence of hepatitis or tuberculosis.

(7) DISABILITY RETIREMENT.—This section does not change the basic requirements for determining eligibility for disability retirement benefits under the Florida Retirement System or any pension plan administered by this state or any political subdivision thereof, except to the extent of affecting the

determination as to whether a member was disabled in the line of duty or was otherwise disabled.

Section 2. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Governmental Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 3, 2021

---

I respectfully request that **Senate Bill #1314**, relating to Communicable and Infectious Diseases, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Please let me know if you have any questions.

Sincerely,

Joe Gruters

Cc: Joe McVaney, Staff Director
Tamra Redig, Committee Administrative Assistant

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/21
*Meeting Date*

1314
*Bill Number (if applicable)*

Topic Communicable & Infectious Diseases

*Amendment Barcode (if applicable)*

Name Rocco Salvatori

Job Title Firefighter

Address 343 W Madison St
*Street*

Phone 850-224-7333

Tallahassee FL 34209
*City* *State* *Zip*

Email Rocco@fpfp.org

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
*(The Chair will read this information into the record.)*

Representing Florida Professional Firefighters

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

March 31, 2021
*Meeting Date*

1314
*Bill Number (if applicable)*

*Amendment Barcode (if applicable)*

Topic Communicable and Infectious Diseases

Name Matt Puckett

Job Title Executive Director

Address 300 East Brevard Street
*Street*

Phone

Tallahassee — *City* | Florida — *State* | 32301 — *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Police Benevolent Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

March 31, 2021
*Meeting Date*

SB1314
*Bill Number (if applicable)*

*Amendment Barcode (if applicable)*

Topic Communicable and Infectious Diseases

Name Ray Colburn

Job Title Executive Director

Address 5289 Palm Drive
*Street*

Melbourne Beach FL 32951
*City* *State* *Zip*

Phone 407-468-6622

Email ray@ffca.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**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: | CS/SB 1704 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Senator Broxson |
| SUBJECT: | Public Records/County Supervisor of Elections |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Rey | Roberts | EE | **Favorable** |
| 2. | Candelaria | McVaney | GO | **Fav/CS** |
| 3. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 1704 makes confidential and exempt from public copying and inspection portions of records held by a supervisor of elections which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, if the disclosure of such records would facilitate unauthorized access, modification, disclosure, or destruction of data, information, or IT resources.

The bill requires that portions of records made exempt must be available to the Auditor General and may be made available to another governmental entity for IT security purposes or in the furtherance of official duties.

The public records exemption shall stand repealed on October 2, 2026, unless reviewed and saved from repeal by the Legislature, and applies to records held by a supervisor before, on, or after the effective date of the exemption.

The bill provides a statement of public necessity as required by the Florida Constitution.

Because the bill creates a public records exemption, it requires a two-thirds vote of members present and voting in each house of the legislature for final passage.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect upon becoming law.

## 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 employees 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 public records requirements.[9] An exemption must pass a two-thirds vote of the House and Senate.[10] In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than

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[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 records" 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."
[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] *Id.*

necessary to accomplish the stated purpose of the exemption.[11] A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.[12]

When creating a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'[13] Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature. Records designed as 'exempt' may be released at the discretion of the records custodian.[14]

**Open Government Sunset Review Act**

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (Act).

The Act prescribes a legislative review process for newly created or substantially amended public records.[15] The Act 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.[16] In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.[17] 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 by law.[18]

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[11] *Id*.

[12] *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*. 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.

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

[14] A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

[15] 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. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So.3d 379 (Fla. 2013).

[16] Section 119.15(3), F.S.

[17] FLA CONST., art I, s. 24(c).

[18] Section 119.15(7), F.S.

**Supervisor of Elections**

A supervisor of elections (supervisor) shall be elected in each county at the general election in each year the number of which is a multiple of four for a four-year term commencing on the first Tuesday after the first Monday in January succeeding his or her election.[19] The duties of the supervisor include updating voter registration information, entering new voter registrations into the statewide system, and acting as the official custodian of documents received in relation to elections. The supervisor must preserve statements and other information required to be filed with the supervisor's office for a period of 10 years from date of receipt.

Each supervisor may select and appoint as many deputy supervisors as are necessary, whose compensation must be paid by the supervisor and who has the same powers and whose acts must have the same effect as the acts of a supervisor. Each supervisor must make training in the proper implementation of voter registration procedures available to any individual, group, center for independent living, or public library in the supervisor's county. Each supervisor must ensure that all voter registration and list maintenance procedures conducted by such supervisor are in compliance with any applicable requirements prescribed by rule through the statewide voter registration system.[20]

When ballots are produced for inspection or examination, no persons other than the supervisor of elections or the supervisor's employees shall touch the ballots. If the ballots are being examined before the of an electoral contest period, the supervisor must make a reasonable effort to notify all candidates by telephone or otherwise of the time and place of the examination. All such candidates, or their representatives, shall be allowed to be present during the inspection or examination.[21]

## III. Effect of Proposed Changes:

The bill makes confidential and exempt from public copying and inspection for portions of records held by a supervisor of elections which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, if the disclosure of such records would facilitate unauthorized access, modification, disclosure, or destruction of data, information, or IT resources.

This exemption will be repealed on October 2, 2026,[22] unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity as required by the Florida Constitution. The bill asserts that the unauthorized use of portions of records of a supervisor of elections which contain network schematics, hardware and software configurations, or encryption could be used as a tool to influence elections, frustrate the voting process, manipulate election results, or otherwise

[19] Section 98.015(1), F.S.
[20] *Id.*
[21] Section 119.01(5), F.S.
[22] Section 282.318, F.S.

interfere with the administration of elections. If such information is released, it could result in an increase in security breaches and fraud impacting the electoral process.

The bill takes effect upon becoming a law.

## 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 a state tax shares with counties and municipalities.

### B. Public Records/Open Meetings Issues:

**Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public record or public meeting exemption. Therefore, this bill requires a two-thirds vote for passage.

**Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a bill that creates or expands an exemption to public records disclosure requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

**Breadth of Exemption**

Article I, s. 24(c) of the Florida Constitution requires a newly created record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public records exemption to allow supervisors of elections to exempt records relating to IT security from public disclosures. If such information is released, it could result in security breaches and fraud impacting the electoral process. Thus, the bill does not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

### 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 private sector will be subject to the cost, to the extent imposed, associated with the agency making redactions in response to public records requests.

C. Government Sector Impact:

The bill may have a fiscal impact on agencies relating to training or redaction of the newly confidential and exempt information. However, costs are likely minimal.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 98.015 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS transfers the information amended in the underlying bill from s. 282.318, F.S., to s. 98.015, F.S.

B. Amendments:

None.

**By** Senator Broxson

1-01547-21 20211704__

A bill to be entitled

An act relating to public records; amending s. 282.318, F.S.; expanding a public records exemption for portions of records containing network schematics, hardware and software configurations, or encryption to include those records held by a county supervisor of elections; providing for retroactive application; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (5) and (9) of section 282.318, Florida Statutes, are amended, and subsections (8) and (10) of that section are republished, to read:

282.318 Security of data and information technology.—

(5) Portions of records held by a state agency or a supervisor of elections which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches, are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

(a) Data or information, whether physical or virtual; or

(b) Information technology resources, which includes:

1. Information relating to the security of the agency's



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



1-01547-21 20211704__

technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

2. Security information, whether physical or virtual, which relates to the agency's existing or proposed information technology systems.

(8) The portions of records made confidential and exempt in subsections (5), (6), and (7) shall be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, the Florida Digital Service within the department, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General. Such portions of records may be made available to a local government, another state agency, or a federal agency for information technology security purposes or in furtherance of the state agency's official duties.

(9) The exemptions contained in subsections (5), (6), and (7) apply to records held by a state agency or a supervisor of elections before, on, or after the effective date of this exemption.

(10) Subsections (5), (6), and (7) are subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the portions of records of a supervisor of elections which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including



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suspected or confirmed breaches, which could be used to facilitate unauthorized access to or unauthorized modification, disclosure, or destruction of virtual or physical data or information or information technology resources be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Such information could be used as a tool to influence elections, frustrate the voting process, manipulate election results, or otherwise interfere with the administration of elections. If such information was released, it could result in an increase in security breaches and fraud impacting the electoral process. For these reasons, the Legislature finds that it is a public necessity that such information be made confidential and exempt from public records requirements.

Section 3. This act shall take effect upon becoming a law.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Governmental Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 23, 2021

---

I respectfully request that **Senate Bill 1704**, relating to Public Records/County Supervisor of Elections, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Doug Broxson
Florida Senate, District 1

File signed original with committee office

S-020 (03/2004)

**THE FLORIDA SENATE**

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

5/31
*Meeting Date*

1704
*Bill Number (if applicable)*

Topic ELECTION SECURITY

*Amendment Barcode (if applicable)*

Name DAVID RAMBA

Job Title

Address 120 S. MONROE ST
*Street*

TALLAHASSEE FL 32301
*City* *State* *Zip*

Phone

Email david@rambalaw.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing FLORIDA SUPERVISORS OF ELECTIONS

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

677486

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Broxson) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause and insert:

Section 1. Subsection (13) is added to section 98.015, Florida Statutes, to read:

98.015 Supervisor of elections; election, tenure of office, compensation, custody of registration-related documents, office hours, successor, seal; appointment of deputy supervisors; duties; public records exemption.—

677486

(13)(a) Portions of records held by a supervisor of elections which contain network schematics, hardware and software configurations, or encryption or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches, are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:

1. Data or information, whether physical or virtual; or

2. Information technology resources as defined in s. 119.011 which include:

a. Information relating to the security of a supervisor of elections' technology, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or

b. Security information, whether physical or virtual, which relates to a supervisor of elections' existing or proposed information technology systems.

(b) The portions of records made confidential and exempt in paragraph (a) must be available to the Auditor General and may be made available to another governmental entity for information technology security purposes or in the furtherance of the governmental entity's official duties.

(c) The public record exemption created in paragraph (a) applies to records held by a supervisor of elections before, on, or after the effective date of the exemption.

(d) This subsection is subject to the Open Government

677486

Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the portions of records of a supervisor of elections which contain network schematics, hardware and software configurations, or encryption or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches, and which could be used to facilitate unauthorized access to or unauthorized modification, disclosure, or destruction of virtual or physical data or information or information technology resources be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Such information could be used as a tool to influence elections, frustrate the voting process, manipulate election results, or otherwise interfere with the administration of elections. The release of such information could result in an increase in security breaches and fraud impacting the electoral process. For these reasons, the Legislature finds that the public record exemption should be applied on a retroactive basis because the harm that may result from the release of such information outweighs the public benefit that may be derived from the disclosure of the information.

Section 3. This act shall take effect upon becoming a law.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

677486

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to public records; amending s. 98.015, F.S.; creating a public records exemption for portions of records containing network schematics, hardware and software configurations, or encryption or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches held by a county supervisor of elections; providing that such confidential and exempt information must be available to the Auditor General and may be made available to governmental entities for specified purposes; providing for retroactive application; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

**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 1760 |
| INTRODUCER: | Senator Albritton |
| SUBJECT: | Personal Protective Equipment |
| DATE: | March 29, 2021 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Stallard | Caldwell | MS | **Favorable** |
| 2. | Ponder | McVaney | GO | **Favorable** |
| 3. | | | AP | |

## I. Summary:

SB 1760 requires the Division of Emergency Management to ensure that doctors, nurses, and other health care practitioners will be able to purchase personal protective equipment in the event of a declared emergency caused by an infectious or communicable disease. Examples of personal protective equipment include respirators, gloves, gowns, and masks.

In order to ensure the availability of these items, the division must complete an inventory of the personal protective equipment "held in reserve." In light of this inventory, the division must procure additional equipment or arrange by contract for it to be sold to health care workers in the event of a health emergency.

The equipment must be available for purchase by the health care practitioners or their employers at the cost for which it was procured, and the equipment may not be resold at a higher price.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Florida Division of Emergency Management

In the State Emergency Management Act (Act), the Legislature created the Division of Emergency Management within the Executive Office of the Governor.[1] The division is responsible for "maintaining a comprehensive statewide program of emergency management."[2] The division is also "responsible for coordination with efforts of the Federal Government with

[1] *See* ss. 252.32(1) and 252.34(3), F.S.
[2] Section 252.35(1), F.S.

other departments and agencies of state government, with county and municipal governments and school boards, and with private agencies that have a role in emergency management."[3]

"Emergency management" is defined as the preparation for, mitigation of, response to, and recovery from emergencies and disasters.[4] Specific emergency management responsibilities include, but are not limited to:

- Reduction of vulnerability of people and communities of Florida to damage, injury, and loss of life and property resulting from natural, technological, or man-made emergencies or hostile military or paramilitary action;
- Preparation for prompt and efficient response and recovery to protect lives and property affected by emergencies;
- Response to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by an emergency;
- Recovery from emergencies by providing for the rapid and orderly start of restoration and rehabilitation of persons and property affected by emergencies;
- Provision of an emergency management system embodying all aspects of preemergency preparedness and postemergency response, recovery, and mitigation; and
- Assistance in anticipation, recognition, appraisal, prevention, and mitigation of emergencies that may be caused or aggravated by inadequate planning for, and regulation of, public and private facilities and land use.[5]

The division is also responsible for establishing a statewide system to facilitate the transport and distribution of essentials in commerce during a declared emergency. [6] The division must develop a system to certify persons who transport or distribute essentials and may only certify those who routinely transport or distribute essentials.[7]

Persons certified by the division need not satisfy any other requirement to transport or distribute essentials in an emergency. [8] In developing the certification system, the division:

- May provide for a preemergency or postemergency declaration certification;
- Must allow the certification of an employer, if requested by the employer, to constitute a certification of the employer's employees;
- Must create an easily recognizable indicium of certification to assist local officials' efforts in determining which persons have been certified; and
- Must limit the duration of each certificate to no more than 1 year. Each certificate may be renewed so long as the criteria for certification are met.[9]

[3] *Id.*
[4] Section 252.34(5), F.S.
[5] Section 252.34(5)(a)-(f), F.S.
[6] Section 252.359(1), F.S.
[7] Section 252.359(3), F.S. Section 252.359(2), F.S., defines "essentials" for such purposes to mean goods that are consumed or used as a direct result of a declared emergency or that are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being.
[8] Section 252.359(4), F.S.
[9] Section 252.359(3)(a)-(d), F.S.

The division is charged with "carrying out" the Act, which includes the duty to prepare and maintain the state's comprehensive emergency management plan.[10] This plan must be integrated and coordinated with the plans and programs of the federal government.[11] The emergency management plan must include:

- An evacuation component that includes specific regional and interregional planning provisions and promotes the intergovernmental coordination of evacuation activities;[12]
- A shelter component that includes specific regional and interregional planning provisions and promotes the coordination of shelter activities between the public, private, and nonprofit sectors;[13]
- A postdisaster response and recovery component that includes specific regional and interregional planning provisions and promotes intergovernmental coordination of postdisaster response and recovery activities;[14] and
- Additional provisions addressing aspects of preparedness, response, recovery, and mitigation as determined necessary by the division.[15]

Other duties of the division include cooperating with various partners in emergency management and coordinating several aspects of the state's emergency management apparatus. In more detail, the division must:

- Cooperate with the President, the heads of the Armed Forces, the various federal emergency management agencies, and the officers and agencies of other states in matters pertaining to emergency management in the state and the nation;[16]
- Coordinate federal, state, and local emergency management activities and take all other steps to ensure the availability of adequately trained and equipped forces of emergency management personnel before, during, and after emergencies and disasters;[17] and

[10] Section 252.35(2), F.S.
[11] Section 252.35(2)(a), F.S.
[12] Section 252.35(2)(a)1., F.S. This section further provides that, at a minimum, this component must contain guidelines for lifting tolls on state highways, ensure coordination pertaining to evacuees crossing county lines, set forth procedures for directing people caught on evacuation routes to safe shelter, establish strategies for ensuring sufficient, reasonably priced fueling locations along evacuation routes, and establish policies and strategies for emergency medical evacuations.
[13] Section 252.35(2)(a)2., F.S. This section further provides that, at a minimum, this component must contain strategies to ensure the availability of adequate public shelter space in each region of the state, establish strategies for refuge-of-last-resort programs, provide strategies to assist local emergency management efforts to ensure that adequate staffing plans exist for all shelters, including medical and security personnel, provide for a postdisaster communications system for public shelters, establish model shelter guidelines for operations, registration, inventory, power generation capability, information management, and staffing, and set forth policy guidance for sheltering people with special needs.
[14] Section 252.35(2)(a)3., F.S. This component must, at a minimum, establish the structure of the state's postdisaster response and recovery organization, establish procedures for activating the state's plan, set forth policies used to guide postdisaster response and recovery activities, describe the chain of command during the postdisaster response and recovery period, describe initial and continuous postdisaster response and recovery actions, identify the roles and responsibilities of each involved agency and organization, provide for a comprehensive communications plan, establish procedures for monitoring mutual aid agreements, provide for rapid impact assessment teams, ensure the availability of an effective statewide urban search and rescue program coordinated with the fire services, ensure the existence of a comprehensive statewide medical care and relief plan administered by the Department of Health, and establish systems for coordinating volunteers and accepting and distributing donated funds and goods.
[15] Section 252.35(2)(a)4., F.S.; *See* Rule 27P-2.002 et seq., F.A.C.
[16] Section 252.35(2)(e), F.S.
[17] Section 252.35(2)(l), F.S.

- Cooperate with the Federal Government and any public or private entity in achieving any purpose of the State Emergency Management Act and in implementing programs for mitigation, preparation, response, and recovery. [18]

The division is also responsible for various educational and outreach tasks. It is charged with instituting statewide public awareness programs, to include a public educational campaign on emergency preparedness issues. In cooperation with the Department of Education, the division must coordinate with the Agency for Persons with Disabilities to provide an educational outreach program on disaster preparedness and readiness to individuals who have limited English skills and identify persons who are in need of assistance but are not defined under special-needs criteria. Additionally, the division must assist political subdivisions with the creation and training of urban search and rescue teams, and promote the development and maintenance of a state urban search and rescue program.[19]

Finally, the division is responsible for keeping inventories of equipment that may be needed during an emergency. In this area, the division must:

- In accordance with the state comprehensive emergency management plan and program for emergency management:
  - Ascertain the requirements of the state and its political subdivisions for equipment and supplies of all kinds in the event of an emergency.[20]
  - Plan for and either procure supplies, medicines, materials, and equipment or enter into memoranda of agreement or open purchase orders that will ensure their availability.[21]
  - Use and employ from time to time any of the property, services, and resources within the state in accordance with the Act.[22]
- Complete an inventory of portable generators which are capable of operating during a major disaster, identifying, at a minimum, the:
  - Location of each generator.
  - Number of generators stored at each specific location.
  - Agency to which each generator belongs.
  - Primary use of the generator by the owner agency.
  - Names, addresses, and telephone numbers of persons having the authority to loan the stored generators as authorized by the division during a declared emergency.[23]
- Maintain an inventory list of generators owned by the state and local governments. In addition, the division may keep a list of private entities, along with appropriate contact information, which offer generators for sale or lease.[24]

**Personal Protective Equipment**

Personal protective equipment (PPE) refers to protective clothing, helmets, gloves, face shields, goggles, facemasks, respirators, or other equipment designed to protect a person from injury or

[18] Section 252.35(2)(x), F.S.
[19] Section 252.35(2)(u), F.S.
[20] Section 252.35(2)(g), F.S.
[21] *Id.*
[22] *Id.*
[23] Section 252.35(2)(s), F.S.
[24] Section 252.35(2)(t), F.S.

the spread of infection or illness. PPE is commonly used in health care settings to act as a barrier between infectious materials such as viral and bacterial contaminants and a person's skin, mouth, nose, or eyes, to block transmission of contaminants from blood, bodily fluids, or respiratory secretions. PPE is also used to protect patients who are at high risk for contracting infections brought in by visitors and healthcare workers.[25]

The COVID-19 Pandemic[26] increased the need for PPE for healthcare workers, patients, and the general public, resulting in PPE shortages nationwide. Some healthcare facilities were unable to access appropriate PPE, forcing them to identify alternative means to protect healthcare workers and provide adequate patient care.

The Centers for Disease Control and Prevention (CDC) released guidance for optimizing PPE during a shortage. One of the CDC's strategies includes utilizing a burn rate calculator, which estimates how long remaining supply of PPE will last based on average consumption rates.[27] PPE is subject to expiration, which varies depending on the manufacturer's guidance, the product type, usage rate, and the environment it is used or stored in. The CDC offers guidance for using expired PPE depending on the capacity in which the PPE is needed for. Due to PPE shortages, the Florida Department of Business and Professional Regulation issued an emergency order suspending the provisions of s. 499.006(9), F.S., as they relate to the expiration date of PPE on March 23, 2020.[28]

## III. Effect of Proposed Changes:

The bill amends s. 252.35, F.S., to require the Division of Emergency Management to complete an inventory of personal protective equipment (PPE), such as respirators, gloves, gowns, and masks that are used to protect the wearer from illness during a declared emergency caused by an infectious or communicable disease, which are held in reserve.

The division must plan for and procure PPE, or have sufficient standby logistic contracts in place that will ensure the availability of PPE, in the event of a declared emergency caused by an infectious or communicable disease. Such PPE must be available for purchase by a health care practitioner as defined in s. 456.001, F.S., or an employer of a health care practitioner at the cost

[25] U.S. Food and Drug Administration, *Personal Protective Equipment for Infection Control* (Feb. 10, 2021), https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/personal-protective-equipment-infection-control (last visited Mar. 30, 2021).
[26] In December 2019, an outbreak of a new strain of coronavirus, called Severe Acute Respiratory Syndrome Coronavirus 2, emerged in China. The disease caused by this strain of the coronavirus, coronavirus disease 2019 (COVID-19), quickly spread worldwide. COVID-19 causes a wide range of symptoms including fever, cough, difficulty breathing, fatigue, loss of taste or smell, sore throat, and congestion or runny nose. The U.S. reported its first known case of COVID-19 in January 2020, and its first known death in February 2020. In March 2020, Florida reported both the state's first known COVID-19 case and death. On March 11, 2020, the World Health Organization declared COVID–19 a pandemic. *See* National Institute of Allergy and Infectious Diseases, *Coronaviruses*, https://www.niaid.nih.gov/diseases-conditions/coronaviruses (last visited Mar. 30, 2021).
[27] Centers for Disease Control and Prevention, *Optimizing Supply of PPE and Other Equipment during Shortages* (Jul. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/general-optimization-strategies.html (last visited Mar. 30, 2021).
[28] Fla. Emergency Order No. 2020-02, Department of Business and Professional Regulation (Mar. 23, 2020).

procured or negotiated by the division.[29] The bill prohibits the division from reselling the PPE at a price that exceeds the purchase price.

The bill takes effect July 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

### B. Public Records/Open Meetings Issues:

None.

### 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.

[29] Section 456.001, F.S. defines "heath care practitioner" to mean means any person licensed under chapter 457(acupuncture); chapter 458 (medical practice); chapter 459 (osteopathic medicine); chapter 460 (chiropractic medicine); chapter 461 (podiatric medicine); chapter 462 (naturapathy); chapter 463 (optometry); chapter 464 (nursing); chapter 465 (pharmacy); chapter 466 (dentistry, dental hygiene, and dental laboratories); chapter 467 (midwifery); part I (speech-language pathology and audiology), part II (nursing home administration), part III (occupational therapy), part V (respiratory therapy), part X (dietetics and nutrition practice), part XIII (athletic trainers), or part XIV (orthotics, prosthetics, and pedorthics) of chapter 468; chapter 478 (electrolysis); chapter 480 (massage practice); part I or part II of chapter 483 (health testing services); chapter 484 (dispensing of optical devices and hearing aids); chapter 486 (physical therapy practice); chapter 490 (psychological services); or chapter 491 (clinical, counseling, and psychotherapy services).

B. Private Sector Impact:

The bill may have a positive fiscal impact because it ensures that personal protective equipment (PPE) necessary for health care practitioners and their employers to conduct their practices will be available for purchase at cost to the division.

C. Government Sector Impact:

The bill may have a positive fiscal impact on the government sector in allowing access to qualifying health care practitioners and their employers to PPE for purchase so they may continue to conduct their practices. The bill may have a negative fiscal impact on the division to the extent it needs to procure sufficient PPE and reprocure expired PPE.

## VI. Technical Deficiencies:

The bill amends s. 252.35(2), F.S., by adding a paragraph (z) as the last item on a list of duties of the division. However, under current law, subparagraph (y) is a catch-all provision that states "[d]o other things necessary, incidental, or appropriate for the implementation of ss. 252.31-252.90." Accordingly, the Legislature may wish to amend the bill to replace subparagraph (y) and renumber (y) to (z).

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 252.35 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.

**By** Senator Albritton

26-01730B-21 20211760__

A bill to be entitled

An act relating to personal protective equipment; amending s. 252.35, F.S.; requiring the Division of Emergency Management to complete an inventory of personal protective equipment; requiring the division to take certain action to ensure the availability of personal protective equipment during a declared emergency caused by an infectious or communicable disease; requiring that such equipment be available for purchase at a certain cost by specified persons and entities; prohibiting such equipment from being resold at certain prices; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (z) is added to subsection (2) of section 252.35, Florida Statutes, to read:

252.35 Emergency management powers; Division of Emergency Management.—

(2) The division is responsible for carrying out the provisions of ss. 252.31-252.90. In performing its duties, the division shall:

(z) Complete an inventory of personal protective equipment, such as respirators, gloves, gowns, and masks, that are used to protect the wearer from illness during a declared emergency caused by an infectious or communicable disease, which are held in reserve. The division must plan for and procure personal protective equipment, or have sufficient standby logistic contracts in place that will ensure the availability of personal



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



26-01730B-21 20211760__

protective equipment, in the event of a declared emergency caused by an infectious or communicable disease. Such personal protective equipment shall be available for purchase by a health care practitioner as defined in s. 456.001 or an employer of a health care practitioner at the cost procured or negotiated by the division and may not be resold at a price that exceeds the purchase price.

Section 2. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Governmental Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 17, 2021

---

I respectfully request that **Senate Bill #1760**, relating to Personal Protective Equipment, be placed on the:

☒ committee agenda at your earliest possible convenience.

☐ next committee agenda.

Senator Ben Albritton
Florida Senate, District 26

File signed original with committee office

THE FLORIDA SENATE

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31
*Meeting Date*

1760
*Bill Number (if applicable)*

Topic Personal Protective Equipment

*Amendment Barcode (if applicable)*

Name Jarod Fowler

Job Title Dir. of Health Care Policy

Address 1430 Piedmont Dr. E
*Street*

Phone 850-224-6496

Tallahassee FL 32308
*City* *State* *Zip*

Email Jfowler@fmedical.org

Speaking: ☒ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Medical Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

3/31/21
*Meeting Date*

1760
*Bill Number (if applicable)*

*Amendment Barcode (if applicable)*

Topic Personal Protective Equipment

Name Steve Winn

Job Title Executive Director

Address 2544 Blairstone Pines Dr
*Street*

Phone 878-7364

Tallahassee FL 32301
*City* *State* *Zip*

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Osteopathic Medical Association

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

8

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

March 31, 2021
*Meeting Date*

SB1760
*Bill Number (if applicable)*

*Amendment Barcode (if applicable)*

Topic Personal Protective Equipment

Name Ray Colburn

Job Title Executive Director

Address 5289 Palm Drive
*Street*

Phone 407-468-6622

Melbourne Beach FL 32951
*City* *State* *Zip*

Email ray@ffca.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**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 1634 |
| INTRODUCER: | Senators Brodeur and Ausley |
| SUBJECT: | Public Records/Aquaculture/Department of Agriculture and Consumer Services |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Becker | Becker | AG | **Favorable** |
| 2. | Candelaria | McVaney | GO | **Favorable** |
| 3. | | | RC | |

## I. Summary:

SB 1634 makes confidential and exempt from public inspection and copying requirements certain aquaculture records held by the Department of Agriculture and Consumer Service. The confidential and exempt records include shellfish receiving and production records generated by shellfish processing facilities, audit records and supporting documentation required for submerged land leases, and aquaculture production records and receipts generated by aquaculture facilities. A record may be disclosed to another governmental entity in the performance of its duties and responsibilities. This exemption applies to aquaculture records held before, on, or after July 1, 2021.

This exemption is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution.

Because the bill creates a new public records exemption and expands other public records exemptions, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

---

[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 89 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The Act requires the Legislature to consider the following specific questions in such a review:[24]

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Aquaculture Records Held by the Department of Agriculture and Consumer Services**

The Department of Agriculture and Consumer Services (department) is Florida's lead aquaculture agency. The department coordinates and assists in the development of aquaculture and regulates aquafarms to protect and conserve Florida's natural resources. There are an estimated 1,500 species or varieties of fish, plants, mollusks, crustaceans, and reptiles grown in the state.[27]

[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S.
[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] *See* https://www.fdacs.gov/Divisions-Offices/Aquaculture (Last visited March 10, 2021).

Currently, aquaculture producers are required to provide the department with receiving logs, production volume records, inventories, and receipts and invoices related to their aquaculture facilities to ensure compliance with the terms and conditions of sovereign submerged land lease agreements and aquaculture best management practices. These records include information, such as quantity and price of seed stock purchased and harvest times which, if released, could be detrimental to their businesses. Information regarding products, harvest times, and locations make aquaculture businesses susceptible to theft, particularly with respect to sovereign submerged land leases in remote locations. Because these required records are public, potential aquaculture producers may make the decision not to operate in this state. This makes the department's regulating and monitoring responsibilities more difficult and hinders its efforts to continue developing Florida's aquaculture industry.

The department has indicated that there is a significant precedent for the exemption of private sales and production information for agriculture and fisheries products. The aquaculture information which is proposed to become exempt under this bill was, in fact, exempt under s. 397.362(6), F.S., until 1998 when the Florida Game and Freshwater Fish Commission was reorganized, including its aquaculture regulatory authority. After the formation of the Florida Fish and Wildlife Conservation Commission (FWC), authority for the regulation of marine life was redistributed between the department, the FWC, and the Department of Environmental Protection. The public records exemption was transferred along with other statutory authority to the FWC but was not specifically added for the records held by the department.[28]

## III. Effect of Proposed Changes:

**Section 1** creates s. 597.0042, F.S., to make certain aquaculture records required by the department confidential and exempt from public inspection and copying requirements. The confidential and exempt records include shellfish receiving and production records generated by shellfish processing facilities, audit records and supporting documentation required for submerged land leases, and aquaculture production records and receipts generated by aquaculture facilities. This exemption applies to aquaculture records held before, on, or after July 1, 2021.

This section is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal by the Legislature.

**Section 2** provides legislative intent that it is a public necessity that certain production records related to aquaculture and shellfish facilities held by the department are exempt from Florida's public records laws. Without this exemption, the department may be hindered from obtaining valuable and accurate information. With this exemption, the department can protect the aquaculture industry and its facilities while maintaining compliance with federal partners and documenting the compliance of aquaculture producers with statutory requirements.

**Section 3** provides that the bill takes effect July 1, 2021.

[28] *See* Department of Agriculture and Consumer Services, Bill Analysis for SB 1634 (March 4, 2021) (on file with the Senate Committee on Agriculture).

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. 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:

***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 enacts a new exemption for the private sales and production information for aquaculture businesses, thus, the bill requires a two-thirds vote to be enacted.

***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. Section 2 of the bill contains a statement of public necessity for the exemption. The bill asserts that, in the absence of the exemption, the department may be hindered from obtaining valuable and accurate information due to the nature of the industry and its inability to maintain confidentiality of information that is required by Florida law. With this exemption, the department can protect this industry and its facilities while maintaining compliance with federal partners and documenting the compliance of aquaculture producers with statutory requirements.

***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 private aquaculture business information, to make facilities theft more difficult, and to enable the department to more efficiently monitor the industry. This bill exempts the following from the public records requirements:

- Shellfish receiving and production records generated by shellfish processing facilities;
- Audit records and supporting documentation required for submerged land leases; and
- Aquaculture production records and receipts generated by certified aquaculture facilities.

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 private sector will be subject to the cost associated with an agency making redactions in response to a public records request.

C. Government Sector Impact:

The department will incur minor costs relating to the redaction of exempt records.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 597.0042 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.

**By** Senator Brodeur

9-01429A-21 20211634__

A bill to be entitled

An act relating to public records; creating s. 597.0042, F.S.; providing a public records exemption for certain aquaculture records held by the Department of Agriculture and Consumer Services; providing that the records may be disclosed to other governmental entities under certain circumstances; providing for retroactive application of the exemption; providing for future legislative review and repeal under the Open Government Sunset Review Act; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 597.0042, Florida Statutes, is created to read:

597.0042 Public records exemptions; aquaculture records.—

(1) The following records held by the department are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(a) Shellfish receiving and production records generated by shellfish processing facilities licensed pursuant to s. 597.020.

(b) Audit records and supporting documentation required for submerged land leases issued in accordance with chapter 253 or former chapter 370.

(c) Aquaculture production records and receipts generated by aquaculture facilities certified pursuant to s. 597.004.

(2) A record made confidential and exempt under subsection



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.



9-01429A-21 20211634__

(1) may be disclosed to another governmental entity in the performance of its duties and responsibilities and may be disclosed pursuant to s. 474.2165.

(3) The exemption from public records requirements under subsection (1) applies to aquaculture records held before, on, or after July 1, 2021.

(4) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that certain production records related to aquaculture and shellfish facilities held by the Department of Agriculture and Consumer Services be made confidential and exempt from disclosure under s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. In the absence of the exemption, the department may be hindered from obtaining valuable and accurate information due to the nature of the industry and its inability to maintain confidentiality of information that is required by Florida law. With this exemption, the department can protect this industry and its facilities while maintaining compliance with federal partners and documenting the compliance of aquaculture producers with statutory requirements.

Section 3. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

The Florida Senate

# Committee Agenda Request

**To:** Senator Ray Wesley Rodrigues, Chair
Committee on Government Oversight and Accountability

**Subject:** Committee Agenda Request

**Date:** March 10, 2021

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I respectfully request that **Senate Bill 1634**, relating to Public Records/Aquaculture/Department of Agriculture and Consumer Services, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Jason Brodeur
Florida Senate, District 9

File signed original with committee office

S-009 (01/2021)

**THE FLORIDA SENATE**

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/31/21
*Meeting Date*

1624
*Bill Number (if applicable)*

Topic Special District Accountability

*Amendment Barcode (if applicable)*

Name Chris Lyon

Job Title

Address 315 S. Calhoun St., Suite 830
*Street*

Tallahassee FL 32301
*City* *State* *Zip*

Phone 222-5702

Email clyon@llw-law.com

Speaking: ☐ For ☐ Against ☑ Information

Waive Speaking: ☐ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Assn. of Special Districts/Florida Mosquito Control Assn.

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

THE FLORIDA SENATE

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3-31-21
*Meeting Date*

1624
*Bill Number (if applicable)*

Topic Special Districts

*Amendment Barcode (if applicable)*

Name Justin Thames

Job Title Director of Governmental Affairs

Address 119 S. Monroe St
*Street*

Phone 528-2209

Tallahassee FL 32303
*City* *State* *Zip*

Email justin@ficpa.org

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Florida Institute of CPAs

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

THE FLORIDA SENATE

# APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

3/3/2021
*Meeting Date*

SB 1624
*Bill Number (if applicable)*

Topic SPECIAL DISTRICT ACCOUNTABILITY

*Amendment Barcode (if applicable)*

Name CHRISTIAN CAMARA

Job Title

Address PO BOX 122
*Street*
TALLAHASSEE FL 32302
*City* *State* *Zip*

Phone 305 608 4300

Email

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing INSTITUTE FOR JUSTICE

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**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: | CS/SB 762 |
| INTRODUCER: | Criminal Justice Committee and Senator Baxley |
| SUBJECT: | Public Records/Criminal Conflict and Civil Regional Counsel Offices |
| DATE: | March 29, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Cellon | Jones | CJ | **Fav/CS** |
| 2. | Candelaria | McVaney | GO | **Favorable** |
| 3. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:


CS/SB 762 makes all records relating to the application of a confidential registration certificate and registration license plate or decal submitted to the Department of Highway Safety and Motor Vehicles (DHSMV) by an office of the Criminal Conflict and Civil Regional Counsel (CCCRC), and any other records necessary to carry out the purpose of s. 320.025, F.S., exempt the public inspection and copying requirements of s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.

The bill authorizes the CCCRC to register a vehicle or vessel under a fictitious name with the DHSMV and receive a license plate or decal based on such fictitious name similar to how the state public defender's offices currently register vehicles.

The bill provides a statement of public necessity. The bill appears to be no more broad than necessary to accomplish its purpose.

The bill is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature. The bill requires a two-thirds vote of the members present and voting for final passage.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public record" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] Fla. Const. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from the public records requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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.[20]

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[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*. *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.
[20] Section 119.15(6)(b), F.S.

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Confidential Motor Vehicle Registration**

Section 320.025, F.S., authorizes the DHSMV to issue a confidential registration certificate and registration license plate or decal under a fictitious name for a motor vehicle or vessel owned or operated by:

- A law enforcement agency of state, county, municipal, or federal government;
- The Attorney General's Medicaid Fraud Control Unit; or
- Any state public defender's office.[27]

To register a motor vehicle or vessel under a fictitious name, the law enforcement agency, Fraud Control Unit, or public defender's office must file a written application with the DHSMV

[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.
[27] Section 320.025(1), F.S.

affirming the license plate or decal will be used for activities that require concealment of the true owner of the vehicle and listing individuals who are authorized to use the vehicle.[28] All records relating to the registration application are exempt from disclosure under the public records provisions in s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.[29]

**Criminal Conflict and Civil Regional Counsel**

The CCCRC was created by the Legislature in 2007 to provide legal representation to indigent persons that are constitutionally entitled to court-appointed counsel.[30] The CCCRC primarily provides representation in three types of cases:

- Criminal cases in which the public defender must withdraw due to a conflict of interest;[31]
- Dependency cases;[32] and
- Involuntary civil commitment cases involving a mentally ill person, sexually violent predator, or a person with developmental disabilities.[33]

In representing a defendant in a criminal case, the CCCRC performs similar functions to that of a traditional public defender. To effectively represent a client in a criminal proceeding, both the public defender and the CCCRC employ investigators to investigate cases and conduct interviews with defendants and witnesses.[34] Currently, the CCCRC employs approximately 20 investigators.[35]

## III. Effect of Proposed Changes:

The bill amends s. 320.025, F.S., to authorize the CCCRC to register a vehicle or vessel under a fictitious name with the DHSMV and receive a license plate or decal based on such fictitious name. The bill provides that all records relating to the application of a confidential registration certificate and registration license plate or decal submitted to the DHSMV by an office of the CCCRC, and any other records necessary to carry out the purpose of s. 320.025, F.S., be made exempt from the public inspection and copying requirements in s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.

The bill provides that the public records exemption is a public necessity because investigations by the CCCRC may be jeopardized if a vehicle is registered in the name of the CCCRC or in the name of an investigator. Additionally, a person under investigation may use registration information to retaliate against a CCCRC office or its investigators. The bill provides the CCCRC with the same protections and confidentiality enjoyed by a public defender's office, which performs a virtually identical function.

[28] *Id*.
[29] Section 320.025(3), F.S.
[30] Chapter 2007-62, L.O.F.
[31] Section 27.511(5), F.S.
[32] Section 27.511(6), F.S.
[33] *Id*.
[34] Section 27.53, F.S.
[35] E-mail correspondence with Legislative Affairs, CCCRC, (February 2, 8, and 9, 2021), on file with the Senate Criminal Justice Committee.

This bill is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature. The bill requires a two-thirds vote of the members present and voting for final passage.

The bill takes effect July 1, 2021.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of 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 creates an exemption for the office of the CCCRC to register a vehicle or vessel under a fictitious name with the DHSMV and receive a license plate or decal based on such fictitious name in s. 320.025, F.S., thus, the bill requires a two-thirds vote to be enacted.

***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. Section 2 of the bill contains a statement of public necessity for the exemption.

***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 the safety of the CCCRC investigators by disguising their vehicles' tag and registration. The exemption does not appear to be broader than necessary to accomplish the purpose of the exemption.

### 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:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Statutes Affected:

This bill substantially amends section 320.025 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Criminal Justice on March 23, 2021:**
The committee substitute:

- Corrects how the office of criminal conflict and civil regional counsel (CCCRC) is referred to throughout the bill to provide consistency.
- Corrects a reference in the bill to the CCCRC being akin to a law enforcement agency when, in fact, the CCCRC is comparable to the public defenders.

B. Amendments:

None.

**By** the Committee on Criminal Justice; and Senator Baxley

591-03237-21 2021762c1

A bill to be entitled

An act relating to public records; amending s. 320.025, F.S.; authorizing the issuance of confidential registration certificates and license plates or decals under a fictitious name to criminal conflict and civil regional counsel offices to conduct specified activities; expanding a public records exemption to include all records pertaining to a registration application submitted by any office of criminal conflict and civil regional counsel; providing for construction; providing for future legislative review and repeal; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (3) of section 320.025, Florida Statutes, are amended, and subsection (4) is added to that section, to read:

320.025 Registration certificate and license plate or decal issued under fictitious name; application.—

(1) A confidential registration certificate and registration license plate or decal shall be issued under a fictitious name only for a motor vehicle or vessel owned or operated by a law enforcement agency of state, county, municipal, or federal government~~;~~ ~~,~~ the Attorney General's Medicaid Fraud Control Unit~~;~~ ~~, or~~ any state public defender's office; or any office of criminal conflict and civil regional counsel. The requesting agency shall file a written application with the department, on







591-03237-21 2021762c1

forms furnished by the department, which includes a statement that the license plate or decal will be used for certain activities by the Attorney General's Medicaid Fraud Control Unit, ~~or~~ law enforcement, ~~or~~ any state public defender's office, or any office of criminal conflict and civil regional counsel which require the ~~activities requiring~~ concealment of publicly leased or owned motor vehicles or vessels and a statement of the position classifications of the individuals who are authorized to use the license plate or decal. The department may modify its records to reflect the fictitious identity of the owner or lessee until such time as the license plate or decal and registration certificate are surrendered to it.

(3) This section constitutes an exception to other statutes relating to falsification of public records, false swearing, and similar matters. All records relating to the registration application of the Attorney General's Medicaid Fraud Control Unit, a law enforcement agency, ~~or~~ any state public defender's office, or any office of criminal conflict and civil regional counsel, and records necessary to carry out the intended purpose of this section, are exempt from ~~the provisions of~~ s. 119.07(1)~~,~~ and s. 24(a), Art. I of the State Constitution as long as the information is retained by the department. This section does not prohibit other personations, fabrications, or creations of false identifications by the Attorney General's Medicaid Fraud Control Unit, ~~or~~ law enforcement or public defender's officers, or any office of criminal conflict and civil regional counsel in the official performance of covert operations.

(4) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed

on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that all records relating to the application of a confidential registration certificate and registration license plate or decal submitted by an office of criminal conflict and civil regional counsel, and any other records necessary to carry out the intended purpose of s. 320.025, Florida Statutes, be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Investigations by an office of criminal conflict and civil regional counsel may be jeopardized by the registration of motor vehicles under the office's name or under the names of the office's investigators in that persons under investigation may acquire such registration information in order to seek retaliation against the office or its investigators. Authorizing offices of criminal conflict and civil regional counsel to obtain confidential registration certificates and registration license plates or decals in the same manner as any state public defender's office would better ensure the safety of the regional counsel offices' investigators in performing their official duties.

Section 3. This act shall take effect July 1, 2021.



**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**SENATOR DENNIS BAXLEY**
12th District

**COMMITTEES:**
Ethics and Elections, *Chair*
Appropriations Subcommittee on Criminal and Civil Justice
Community Affairs
Criminal Justice
Health Policy
Judiciary
Rules

**JOINT COMMITTEE:**
Joint Legislative Auditing Committee, *Alternating Chair*

March 23, 2021

The Honorable Chair Ray Rodrigues
305 Senate Office Building
Tallahassee, Florida 32399

Dear Chair Rodrigues,

I would like to request that CS/SB 762 Public Records Exemption Criminal Conflict & Civil Regional Counsels be heard in the next Governmental Oversight and Accountability Committee meeting.

This bill authorizes the issuance of confidential registration certificates and license plates or decals under a fictitious name to criminal conflict and civil regional counsel offices to conduct specified law enforcement activities expanding a public records exemption to include all records pertaining to a registration application submitted by any regional counsel office. This gives them the same protections as members in the public defender's office.

Thank you for your favorable consideration.

Onward & Upward,

Senator Dennis K. Baxley
Senate District 12

DKB/dd

cc: Joe McVaney , Staff Director

REPLY TO:
☐ 206 South Hwy 27/441, Lady Lake, Florida 32159 (352) 750-3133
☐ 315 SE 25th Avenue, Ocala, Florida 34471 (352) 789-6720
☐ 320 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5012

Senate's Website: *www.flsenate.gov*

**Wilton Simpson**
**President of the Senate**

**Aaron Bean**
**President Pro Tempore**

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

***THE FLORIDA SENATE***

# *APPEARANCE RECORD*

03/31/2021
*Meeting Date*

762
*Bill Number (if applicable)*

Topic Public Records/Criminal Conflict and Civil Regional Counsel Offices

*Amendment Barcode (if applicable)*

Name Andrew Kalel

Job Title Legislative Affairs Director

Address 227 North Bronough Street, Suite 1125
*Street*

Phone (850)999-4655

Tallahassee — *City* | Florida — *State* | 32301 — *Zip*

Email andrew.kalel@regionalcounsels.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
*(The Chair will read this information into the record.)*

Representing Offices of Criminal Conflict & Civil Regional Counsel

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

**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: | CS/SB 1488 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Senator Stargel |
| SUBJECT: | Public Records/Members of the Legislature and the Cabinet |
| DATE: | March 31, 2021 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Biehl | Roberts | EE | **Favorable** |
| 2. | Candelaria | McVaney | GO | **Fav/CS** |
| 3. | | | RC | |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

## I. Summary:

CS/SB 1488 exempts from public inspection and copying requirements certain identifying and location information held by an agency of current legislators, along with their spouses and children.

The bill defines the term "identification and location information" to mean the:

- Home address and telephone numbers of a current member of the Senate or House of Representatives;
- Name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
- Names and locations of schools and day care facilities attended by the child of a current legislator.

The identification and location information held by an agency is exempt from public inspection and copying requirements if such legislator submits to an agency a written request to exempt such information, and a written statement that such legislator has made a reasonable effort to protect the identification and location information from being accessible through other means.

The bill provides a public necessity statement for the new public records exemption. Passage of the bill requires a two-thirds vote of members present and voting in each house of the Legislature.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Access to Public Records - Generally

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] The right to inspect or copy 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]

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the Legislature.[3] Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.[4] Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.[5]

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 the statutory definition of "public records" to include "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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

[1] FLA. CONST. art. I, s. 24(a).
[2] *Id*.
[3] *See* Rule 1.48, *Rules and Manual of the Florida Senate* (2020-2022), and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1 (2020-2022).
[4] *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).
[5] Section 119.01(1), F.S. 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."
[6] Section 119.011(12), F.S., defines "public records" 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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

**Exemptions to Public Disclosure Requirements**

The Legislature may exempt public records from public disclosure requirements by passing a general law by a two-thirds vote of both the House and the Senate.[10] The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.[11]

General exemptions from public disclosure requirements are contained in the Public Records Act.[12] Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.[13]

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.[14] Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.[15]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[16] (the Act) prescribes a legislative review process for newly created or substantially amended[17] public records or open meetings exemptions, with specified exceptions.[18] 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.[19]

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[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). Such law shall contain only exemptions from public records or open meetings requirements and provisions governing the enforcement of those requirements, and shall relate to one subject.
[11] FLA. CONST. art. I, s. 24(c). *See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).
[12] *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).
[13] *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).
[14] *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).
[15] *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[16] Section 119.15, F.S.
[17] An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.
[18] 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.
[19] Section 119.15(3), F.S.

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 the purpose.[20] 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;[21]
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information may exempted;[22] or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24]

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.[25] If the exemption is continued without substantive changes or if the exemption is continued and 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.[26]

**Public Records Exemptions for Certain Public Officers/Employees in Sensitive Roles**

There is currently no general public records exemption for personal identifying and location information of Cabinet officers, legislators, and/or their spouses and children.

Such protection does exist for a wide range of other public officers and employees who in the course of their official duties make decisions that could subject them to threats or harassment, such as justices and judges, state attorneys and statewide prosecutors, public defenders, and

[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] 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?

[25] *See generally* s. 119.15, F.S.
[26] Section 119.15(7), F.S.

certain agency investigative personnel.[27] For example, with respect to justices and judges, Florida law exempts the following public records from inspection and copying:[28]

> (e) The home addresses, dates of birth, and telephone numbers of current or former justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current or former justices or judges; and the name and locations of schools and day care facilities attended by the children of current or former justices and judges.

**Penalties for Violations of Public Records Laws**

Current law provides general penalties for violations of the Public Records Act. Any public officer who:

- Violates any provision of the Act commits a noncriminal infraction, punishable by fine not exceeding $500; and
- Knowingly violates the provisions of s. 119.07(1), F.S., is subject to suspension and removal or impeachment and, in addition, commits a first degree misdemeanor.[29]

Any person who willfully and knowingly violates:

- Any of the provisions of the Act commits a first degree misdemeanor; and
- Section 119.105, F.S.,[30] commits a third degree felony.[31]

In addition to the general penalties, a number of individual public records exemptions provide penalties for disclosing the protected information. For example, the exemption for personal identifying information of an enrollee or participant in the Florida Health Choice Program makes it a second degree misdemeanor to knowingly and willfully violate the exemption's confidentiality provisions.[32]

## III. Effect of Proposed Changes:

**Section 1** amends s. 119. 071, F.S., to exempt certain identifying and location information held by an agency of current legislators, along with their spouses and children.

This section defines the term "identification and location information" to mean the:

- Home address and telephone numbers of a current member of the Senate or House of Representatives;

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[27] *See* s. 119.071(4), F.S. (detailing public records protections for a list of public officers and employees and their immediate families).
[28] Section 119.071(4)(d)2.e., F.S.
[29] Section 119.10(1), F.S.
[30] Section 119.105, F.S., provides that a person who comes into possession of exempt or confidential information contained in police reports may not use that information for any commercial solicitation of the victims or relatives of the victims of the reported crimes or accidents and may not knowingly disclose such information to any third party for the purpose of such solicitation during the period of time that information remains exempt or confidential.
[31] Section 119.10(2), F.S.
[32] Section 408.910(14), F.S.

- Name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
- Names and locations of schools and day care facilities attended by the child of a current legislator.

Identification and location information held by an agency is exempt from public inspection and copying requirements if such legislator submits to an agency that has custody of the identification and location information:

- A written request to exempt such information from public disclosure; and
- A written statement that he or she has made a reasonable effort to protect the identification and location information from being accessible through other means available to the public.

**Section 2** provides the requisite public necessity statement that identifies potential retribution against legislators (and their families) for making necessary and impactful policy decisions as one justification for the bill. It also cites such threats, harassment, and intimidation as potentially discouraging residents from seeking elective office.

**Section 3** provides that the bill takes effect July 1, 2021.

## 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:

***Vote Requirement***

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage of a bill creating or expanding an exemption to public records disclosure requirements. This bill creates a new exemption for certain identifying and location information of legislators, their spouses, and their children. Therefore, the bill requires a two-thirds vote of members present and voting to be enacted.

***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to public records disclosure requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill provides a statement of public necessity for the exemption.

***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to public records disclosure requirements to be no broader than necessary to accomplish the stated purpose

of the law. The stated purpose of the law is to protect legislators and their spouses and children from threats, harassment, and intimidation that may result from their necessary and impactful policy decisions. To a large degree, it mirrors (and is even more limited than some) existing exemptions for other public officers and employees. Thus, the exemption does not appear to be broader than necessary to accomplish the stated 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 private sector will be subject to the cost, to the extent imposed, associated with the state making redactions in response to public records requests.

C. Government Sector Impact:

The state may incur costs, and additional workload, 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 119.071 of the Florida Statutes.

## IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 31, 2021:**
The CS:

- Defines the term "identification and location information" to mean:
  - The home address and telephone number of a current member of the Senate or House of Representatives;
  - The name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
  - The name and location of a school or day care facility attended by the child of a current legislator.
- Establishes that identification and location information held by an agency is exempt if such legislator submits to an agency a written request to exempt such information, and a written statement that such legislator has made a reasonable effort to protect the identification and location information from being accessible through other means.
- Removes penalties for any person who knowingly, and with intent to intimidate, disseminates the information protected from disclosure without express authorization of such legislators.

B. Amendments:

None.

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

**By** Senator Stargel

22-00943-21 20211488__

A bill to be entitled

An act relating to public records; amending s. 119.071, F.S.; providing an exemption from public records requirements for certain identifying and location information of current members of the Legislature and the Cabinet, and the children and spouses of such legislators and officers; providing for retroactive application; amending s. 119.10, F.S.; creating a criminal penalty for any person who knowingly and maliciously publishes or disseminates protected identifying information with the intent to intimidate, hinder, or interrupt current legislators and officers; providing that a violation results in a first degree misdemeanor; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (d) of subsection (4) of section 119.071, Florida Statutes, is amended to read:

119.071 General exemptions from inspection or copying of public records.—

(4) AGENCY PERSONNEL INFORMATION.—

(d)1. For purposes of this paragraph, the term:

a. "Home addresses" means the dwelling location at which an individual resides and includes the physical address, mailing address, street address, parcel identification number, plot identification number, legal property description, neighborhood name and lot number, GPS coordinates, and any other descriptive



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22-00943-21 20211488__

property information that may reveal the home address.

b. "Telephone numbers" includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices.

2.a. The home addresses, telephone numbers, dates of birth, and photographs of active or former sworn law enforcement personnel or of active or former civilian personnel employed by a law enforcement agency, including correctional and correctional probation officers, personnel of the Department of Children and Families whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, or other criminal activities, personnel of the Department of Health whose duties are to support the investigation of child abuse or neglect, and personnel of the Department of Revenue or local governments whose responsibilities include revenue collection and enforcement or child support enforcement; the names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

b. The home addresses, telephone numbers, dates of birth, and photographs of current or former nonsworn investigative personnel of the Department of Financial Services whose duties include the investigation of fraud, theft, workers' compensation coverage requirements and compliance, other related criminal activities, or state regulatory requirement violations; the



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names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

c. The home addresses, telephone numbers, dates of birth, and photographs of current or former nonsworn investigative personnel of the Office of Financial Regulation's Bureau of Financial Investigations whose duties include the investigation of fraud, theft, other related criminal activities, or state regulatory requirement violations; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

d. The home addresses, telephone numbers, dates of birth, and photographs of current or former firefighters certified in compliance with s. 633.408; the names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such firefighters; and the names and locations of schools and day care facilities attended by the children of such firefighters are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

e. The home addresses, dates of birth, and telephone numbers of current or former justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the names, home addresses, telephone





numbers, dates of birth, and places of employment of the spouses and children of current or former justices and judges; and the names and locations of schools and day care facilities attended by the children of current or former justices and judges are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

f. The home addresses, telephone numbers, dates of birth, and photographs of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors; the names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors; and the names and locations of schools and day care facilities attended by the children of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

g. The home addresses, dates of birth, and telephone numbers of general magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of general magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers; and the names and locations of schools and day care facilities attended by the children of general magistrates,

special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

h. The home addresses, telephone numbers, dates of birth, and photographs of current or former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers of any local government agency or water management district whose duties include hiring and firing employees, labor contract negotiation, administration, or other personnel-related duties; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

i. The home addresses, telephone numbers, dates of birth, and photographs of current or former code enforcement officers; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

j. The home addresses, telephone numbers, places of employment, dates of birth, and photographs of current or former guardians ad litem, as defined in s. 39.820; the names, home addresses, telephone numbers, dates of birth, and places of





employment of the spouses and children of such persons; and the names and locations of schools and day care facilities attended by the children of such persons are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

k. The home addresses, telephone numbers, dates of birth, and photographs of current or former juvenile probation officers, juvenile probation supervisors, detention superintendents, assistant detention superintendents, juvenile justice detention officers I and II, juvenile justice detention officer supervisors, juvenile justice residential officers, juvenile justice residential officer supervisors I and II, juvenile justice counselors, juvenile justice counselor supervisors, human services counselor administrators, senior human services counselor administrators, rehabilitation therapists, and social services counselors of the Department of Juvenile Justice; the names, home addresses, telephone numbers, dates of birth, and places of employment of spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

l. The home addresses, telephone numbers, dates of birth, and photographs of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal

conflict and civil regional counsel; and the names and locations of schools and day care facilities attended by the children of current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

m. The home addresses, telephone numbers, dates of birth, and photographs of current or former investigators or inspectors of the Department of Business and Professional Regulation; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such current or former investigators and inspectors; and the names and locations of schools and day care facilities attended by the children of such current or former investigators and inspectors are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

n. The home addresses, telephone numbers, and dates of birth of county tax collectors; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such tax collectors; and the names and locations of schools and day care facilities attended by the children of such tax collectors are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

o. The home addresses, telephone numbers, dates of birth, and photographs of current or former personnel of the Department of Health whose duties include, or result in, the determination or adjudication of eligibility for social security disability benefits, the investigation or prosecution of complaints filed against health care practitioners, or the inspection of health



care practitioners or health care facilities licensed by the Department of Health; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

p. The home addresses, telephone numbers, dates of birth, and photographs of current or former impaired practitioner consultants who are retained by an agency or current or former employees of an impaired practitioner consultant whose duties result in a determination of a person's skill and safety to practice a licensed profession; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such consultants or their employees; and the names and locations of schools and day care facilities attended by the children of such consultants or employees are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

q. The home addresses, telephone numbers, dates of birth, and photographs of current or former emergency medical technicians or paramedics certified under chapter 401; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such emergency medical technicians or paramedics; and the names and locations of schools and day care facilities attended by the children of such emergency medical technicians or paramedics are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

r. The home addresses, telephone numbers, dates of birth, and photographs of current or former personnel employed in an agency's office of inspector general or internal audit department whose duties include auditing or investigating waste, fraud, abuse, theft, exploitation, or other activities that could lead to criminal prosecution or administrative discipline; the names, home addresses, telephone numbers, dates of birth, and places of employment of spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

s. The home addresses, telephone numbers, dates of birth, and photographs of current or former directors, managers, supervisors, nurses, and clinical employees of an addiction treatment facility; the home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. For purposes of this sub-subparagraph, the term "addiction treatment facility" means a county government, or agency thereof, that is licensed pursuant to s. 397.401 and provides substance abuse prevention, intervention, or clinical treatment, including any licensed service component described in s. 397.311(26).

t. The home addresses, telephone numbers, dates of birth, and photographs of current or former directors, managers, supervisors, and clinical employees of a child advocacy center





that meets the standards of s. 39.3035(1) and fulfills the screening requirement of s. 39.3035(2), and the members of a Child Protection Team as described in s. 39.303 whose duties include supporting the investigation of child abuse or sexual abuse, child abandonment, child neglect, and child exploitation or to provide services as part of a multidisciplinary case review team; the names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel and members; and the names and locations of schools and day care facilities attended by the children of such personnel and members are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

u. The home addresses, telephone numbers, and dates of birth of current members of the Senate, members of the House of Representatives, and Cabinet officers; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current legislators and Cabinet officers; and the names and locations of schools and day care facilities attended by the children of current legislators and Cabinet officers are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

3. An agency that is the custodian of the information specified in subparagraph 2. and that is not the employer of the officer, employee, justice, judge, or other person specified in subparagraph 2. shall maintain the exempt status of that information only if the officer, employee, justice, judge, other person, or employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency.

4. An officer, an employee, a justice, a judge, or other person specified in subparagraph 2. may submit a written request for the release of his or her exempt information to the custodial agency. The written request must be notarized and must specify the information to be released and the party that is authorized to receive the information. Upon receipt of the written request, the custodial agency shall release the specified information to the party authorized to receive such information.

5. The exemptions in this paragraph apply to information held by an agency before, on, or after the effective date of the exemption.

6. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Subsection (3) is added to section 119.10, Florida Statutes, to read:

119.10 Violation of chapter; penalties.—

(3) Any person who knowingly and, with the intent to intimidate, hinder, or interrupt current members of the Senate, members of the House of Representatives, and Cabinet officers in the legal performance of their duties, maliciously publishes or disseminates information protected from disclosure by s. 119.071(1)(u) without the express authorization of such legislators and officers shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 3. The Legislature finds that it is a public





necessity that the home addresses, telephone numbers, and dates of birth of current members of the Senate and the House of Representatives and Cabinet officers; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of such legislators and officers; and the names and locations of schools and day care facilities attended by the children of such legislators and officers be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Members of the Legislature and the Cabinet are often confronted with making difficult and impactful policy decisions. As a result, legislators and Cabinet officers and their family members may receive threats, including, but not limited to, verbal threats, harassment, and intimidation, as a result of carrying out their official duties. Vulnerability to such threats may discourage residents of this state from seeking elected office in order to protect themselves and their families. Moreover, the Legislature finds that a criminal penalty is necessary for any person who attempts to interfere with the legislators' or officers' official duties. The Legislature further finds that the harm that may result from the release of such personal identifying and location information outweighs any public benefit that may be derived from the disclosure of the information.

Section 4. This act shall take effect July 1, 2021.

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LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: RCS | . | |
| 03/31/2021 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Governmental Oversight and Accountability (Stargel) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause and insert:

Section 1. Paragraph (l) is added to subsection (5) of section 119.071, Florida Statutes, to read:

119.071 General exemptions from inspection or copying of public records.—

(5) OTHER PERSONAL INFORMATION.—

(l)1. For purposes of this paragraph, "identification and

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location information" means:

a. The home address and telephone number of a current member of the Senate or House of Representatives;

b. The name, home address, telephone number, and place of employment of the spouse or child of a current legislator;

c. The name and location of a school or day care facility attended by the child of a current legislator.

2. Identification and location information held by an agency is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution if such legislator submits to an agency that has custody of the identification and location information:

a. A written request to exempt such information from public disclosure; and

b. A written statement that he or she has made a reasonable effort to protect the identification and location information from being accessible through other means available to the public.

3. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the home addresses and telephone numbers of current members of the Senate and the House of Representatives; the names, home addresses, telephone numbers, and places of employment of the spouses and children of such legislators; and the names and location of schools and day care facilities attended by the children of such legislators be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the

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State Constitution. Members of the Legislature often have to make difficult and impactful policy decisions. As a result, legislators and their family members may receive threats, including, but not limited to, verbal threats, harassment, and intimidation, as a result of carrying out their official duties. Vulnerability to such threats may discourage residents of this state from seeking elected office in order to protect themselves and their families. The Legislature further finds that the harm that may result from the release of such personal identifying and location information outweighs any public benefit that may be derived from the disclosure of the information.

Section 3. This act shall take effect July 1, 2021.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to public records; amending s. 119.071, F.S.; providing an exemption from public records requirements for certain identifying and location information of current members of the Legislature and the spouses and children of such legislators; providing for future legislative review and repeal of the exemption under the Open Government Sunset Review Act; providing a statement of public necessity; providing an effective date.

# CourtSmart Tag Report

**Room:** SB 37 **Case No.:** **Type:**
**Caption:** Senate Governmental Oversight and Accountability Committee **Judge:**

**Started: 3/31/2021 8:00:05 AM**
**Ends: 3/31/2021 9:22:38 AM** **Length: 01:22:34**

**8:00:11 AM** Meeting called to order by Chair Rodrigues
**8:00:16 AM** Quorum is present
**8:00:22 AM** Chair comments
**8:01:16 AM** Tab 4 - SB 1624 by Sen Albritton
**8:01:33 AM** Sen Albritton explains bill
**8:02:18 AM** Sen Stewart with questions
**8:02:43 AM** Sen Albritton responds
**8:02:56 AM** Speaker Chris Lyon, FL Assn of Special Districts/FL Mosquito Control Assn
**8:05:32 AM** Speaker Justin Thames, FL Institute of CPA
**8:08:54 AM** Christian Camara, Institute of Justice, waives in support
**8:09:23 AM** Sen Torres in debate
**8:09:51 AM** Sen Albritton closes on bill
**8:11:00 AM** SB 1624 reported favorably
**8:11:16 AM** Tab 32 - SB 1760 by Sen Albritton
**8:11:36 AM** Sponsor explains bill
**8:12:00 AM** No questions
**8:12:16 AM** Jarrod Fowler, Florida Medical Assoc, waives in support
**8:12:25 AM** Steve Winn, Florida Osteopathic Medical Assoc., waives in support
**8:12:34 AM** Ray Colburn waives in support
**8:13:01 AM** No debate
**8:13:04 AM** Sen Albritton waives close on bill
**8:13:07 AM** SB 1760 reported favorably
**8:13:30 AM** Tab 29 - SB 968 by Sen Gainer
**8:13:54 AM** Chair turns gavel over to Vice Chair Gruters
**8:14:00 AM** Sen Gainer explains bill
**8:15:04 AM** Amendment 254654 by Sen Rodrigues
**8:15:16 AM** Sen Rodrigues explains amendment
**8:15:36 AM** No questions
**8:15:39 AM** No appearance forms
**8:15:51 AM** No debate
**8:15:51 AM** Sen Rodrigues waives close on amendment
**8:15:57 AM** With no objections, the amendment is adopted
**8:16:02 AM** Back on bill as amended
**8:16:06 AM** No questions
**8:16:11 AM** Ethan Perry waives in support of bill
**8:16:19 AM** No debate
**8:16:22 AM** Sen Gainer waives close on bill
**8:16:32 AM** SB 968 reported favorably
**8:16:42 AM** Senator Gruters turns gavel back over to Chair Rodrigues
**8:16:52 AM** Tab 31 - SB 1704 by Sen Broxson
**8:17:05 AM** Sen Broxson explains amendment 677486
**8:17:23 AM** No questions
**8:17:32 AM** No appearance forms
**8:17:39 AM** No debate
**8:17:44 AM** Sen Broxson waives close on amendment
**8:17:48 AM** The amendment is adopted
**8:17:53 AM** Back on the bill as amended
**8:17:58 AM** No questions
**8:18:04 AM** David Ramba waives in support of the bill
**8:18:23 AM** No debate
**8:18:27 AM** Sen Broxson waives close on bill
**8:18:30 AM** CS/SB 1704 reported favorably

**8:18:54 AM** Tab 12 - SB 7020 by Senator Hooper
**8:19:13 AM** Sen Hooper explains bill
**8:19:48 AM** Question from Chair
**8:20:01 AM** Sen Hooper responds to question
**8:20:12 AM** No appearance forms
**8:20:22 AM** No debate
**8:20:23 AM** Sen Hooper waives close on bill
**8:20:30 AM** SB 7020 reported favorably
**8:20:49 AM** Tab 35 - SB 1488 by Sen Stargel
**8:21:00 AM** Sen Stargel explains delete-all amendment 588452
**8:21:35 AM** No questions
**8:21:37 AM** No appearance forms
**8:21:47 AM** Without objections, amendment is adopted
**8:21:52 AM** Back on bill as amended
**8:22:00 AM** Sen Torres with questions
**8:22:18 AM** Sen Stargel responds to questions
**8:22:42 AM** Back and forth in questions
**8:23:50 AM** No appearance cards
**8:24:03 AM** Sen Gruters in debate
**8:24:56 AM** Chair in debate
**8:26:03 AM** Sen Stewart in debate
**8:27:15 AM** Sen Stargel closes on bill
**8:27:39 AM** CS/SB 1488 reported favorably
**8:28:01 AM** Tab 3 - SB 1382 by Sen Perry
**8:28:15 AM** Sen Perry explains bill
**8:28:34 AM** No questions on bill
**8:28:41 AM** Sen Perry explains amendment 741580
**8:28:55 AM** No questions
**8:29:00 AM** No appearance cards
**8:29:11 AM** Senator Perry waives close on the amendment
**8:29:13 AM** Without objection, the amendment is adopted
**8:29:19 AM** Back on bill as amended
**8:29:23 AM** No questions
**8:29:28 AM** No appearance forms
**8:29:37 AM** No debate
**8:29:41 AM** Sen Perry waives close on bill
**8:29:47 AM** CS/CS/SB 1382 is reported favorably
**8:30:03 AM** Tab 2 - SB 1900 by Sen Boyd
**8:30:20 AM** Sen Boyd explains bill
**8:30:24 AM** Take up Amendment 257954
**8:30:31 AM** Sponsor explains amendment
**8:31:12 AM** No questions
**8:31:17 AM** No appearance forms
**8:31:26 AM** No debate
**8:31:32 AM** Sen Boyd waives close on amendment
**8:31:35 AM** Amendment is adopted
**8:31:41 AM** Back on the bil as amended
**8:32:03 AM** Jorge Chamizo waives in support
**8:32:13 AM** No debate
**8:32:16 AM** Sen Boyd closes on bill
**8:33:32 AM** CS/SB 1900 is reported favorably
**8:33:47 AM** Tab 5 - SB 1788 by Sen Boyd
**8:34:00 AM** Sen Boyd explains bill
**8:34:59 AM** Amendment 914314
**8:35:11 AM** Sen Boyd explains amendment
**8:35:28 AM** No questions
**8:35:32 AM** No appearance cards
**8:35:38 AM** No debate
**8:35:42 AM** The amendment is adopted
**8:35:49 AM** Back on the bill as amended
**8:35:56 AM** No questions
**8:35:59 AM** No appearance forms

**8:36:05 AM** Sen Boyd waives close on bill
**8:36:14 AM** CS/CS/SB 1788 is reported favorably
**8:36:31 AM** Tab 11 - SB 7014 by Sen Boyd
**8:36:43 AM** Sen Boyd explains bill
**8:37:07 AM** No questions
**8:37:10 AM** No appearance forms
**8:37:15 AM** No debate
**8:37:19 AM** Sen Boyd waives close
**8:37:23 AM** SB 7014 is reported favorably
**8:37:38 AM** Tab 8 - SB 7006 by Sen Brodeur
**8:37:53 AM** Sponsor explains bill
**8:38:34 AM** No questions
**8:38:38 AM** No appearance forms
**8:38:40 AM** No debate
**8:38:45 AM** Sen Brodeur waives close
**8:38:47 AM** SB 7006 reported favorably
**8:39:04 AM** Tab 9 - SB 7008 by Sen Brodeur
**8:39:19 AM** Sen Brodeur explains bill
**8:39:27 AM** Amendment 359162
**8:39:36 AM** Amendment explained by sponsor
**8:39:50 AM** Question from Chair
**8:39:57 AM** Sen Brodeur responds to question
**8:39:58 AM** No appearance forms
**8:40:05 AM** No debate
**8:40:09 AM** Sen Brodeur waives close on amendment
**8:40:13 AM** Without objection, amendment is adopted
**8:40:19 AM** Back on the bill as amended
**8:40:25 AM** No questions
**8:40:28 AM** No appearance forms
**8:40:32 AM** No debate
**8:40:34 AM** Sen Brodeur waives close on bill
**8:40:42 AM** CS/SB 7008 is reported favorably
**8:40:58 AM** Tab 33 - SB 1634 by Sen Brodeur
**8:41:10 AM** Sponsor explains bill
**8:41:30 AM** No questions
**8:41:34 AM** No appearance forms
**8:41:40 AM** No debate
**8:41:42 AM** Sen Brodeur waives close on bill
**8:41:46 AM** SB 1634 is reported favorably
**8:42:03 AM** Tab 7 - SB 7004 By Sen Harrell
**8:42:25 AM** Amendment 151034
**8:42:33 AM** Sponsor explains amendment
**8:42:59 AM** No questions
**8:43:02 AM** No appearance forms
**8:43:09 AM** No debate
**8:43:15 AM** Sen Harrell waives close on amendment
**8:43:19 AM** Amendment is adopted
**8:43:34 AM** Back on the bill as amended
**8:43:40 AM** No questions
**8:43:48 AM** No Apearance cards
**8:43:52 AM** Sen Harrell waives close on bill
**8:43:57 AM** CS/SB 7004 is reported favorably
**8:44:19 AM** Tab 10 - SB 7010 by Sen Wright
**8:44:40 AM** Sponsor explains bill
**8:45:19 AM** No questions
**8:45:22 AM** No appearance forms
**8:45:28 AM** No debate
**8:45:31 AM** Sen Wright waives close on bill
**8:45:34 AM** SB 7010 is reported favorably
**8:45:51 AM** Tab 20 - SB 7036 by Sen Rouson
**8:46:15 AM** Sen Rouson explains bill
**8:47:03 AM** No questions

**8:47:07 AM** No appearance forms
**8:47:13 AM** No debate
**8:47:18 AM** Sen Rouson waives close on bill
**8:47:24 AM** SB 7036 is reported favorably
**8:47:38 AM** Tab 21- SB 7038 by Sen Rouson
**8:47:54 AM** Sen Rouson explains bill
**8:48:06 AM** No questions
**8:48:09 AM** No appearance forms
**8:48:15 AM** No debate
**8:48:19 AM** Sen Rouson waives close on bill
**8:48:21 AM** SB 7038 is reported favorably
**8:48:40 AM** Tab 34 - CS/SB 762 by Sen Baxley
**8:48:54 AM** Sponsor explains bill
**8:49:58 AM** No questions
**8:50:01 AM** Speaker Andrew Kalel, Offices of Criminal Conflict & Civil Regional Counsel, waives in support
**8:50:35 AM** No debate
**8:50:42 AM** Sen Baxley waives close on bill
**8:50:45 AM** CS/SB 762 is reported favorably
**8:51:04 AM** Tab 22 - SB 7040 by Sen Rouson
**8:51:17 AM** Sponsor explains bill
**8:51:37 AM** No appearance forms
**8:51:47 AM** No debate
**8:51:51 AM** Sen Rouson waives close on bill
**8:51:53 AM** SB 7040 is reported favorably
**8:52:08 AM** Tab 23 - SB 7042 by Sen Rouson
**8:52:17 AM** Sponsor explains bill
**8:52:32 AM** No questions
**8:52:34 AM** No appearance cards
**8:52:39 AM** No debate
**8:52:44 AM** Sen Rouson waives close on bill
**8:52:46 AM** SB 7042 is reported favorably
**8:53:01 AM** Tab 24 - SB 7044 by Sen Rouson
**8:53:15 AM** Sponsor explains bill
**8:53:31 AM** No questions
**8:53:34 AM** No appearance forms
**8:53:38 AM** No debate
**8:53:46 AM** SB 7044 is reported favorably
**8:54:01 AM** Tab 25 - SB 7046 by Sen Rouson
**8:54:39 AM** Sponsor explains bill
**8:54:57 AM** No questions
**8:54:59 AM** No appearance forms
**8:55:03 AM** No debate
**8:55:06 AM** Sen Rouson waives close on bill
**8:55:09 AM** SB 7046 is reported favorably
**8:55:23 AM** Tab 26 - SB 7048 by Sen Rouson
**8:55:37 AM** Sponsor explains bill
**8:55:47 AM** No questions
**8:55:52 AM** No appearance forms
**8:56:00 AM** No debate
**8:56:03 AM** Sen Rouson waives close on bill
**8:56:04 AM** SB 7048 is reported favorably
**8:56:20 AM** Tab 28 - SB 7058 by Sen Rouson
**8:56:33 AM** Sponsor explains bill
**8:56:46 AM** No questions
**8:56:49 AM** No appearance forms
**8:56:53 AM** No debate
**8:56:56 AM** Sen Rouson waives close on bill
**8:56:57 AM** SB 7058 is reported favorably
**8:57:23 AM** Tab 27 - SB 7050 by Sen Bradley
**8:57:33 AM** Sen Bradley explains bill
**8:58:02 AM** No questions
**8:58:05 AM** No appearance forms

**8:58:12 AM** No debate
**8:58:14 AM** Sen Bradley waives close on bill
**8:58:19 AM** SB 7050 is reported favorably
**8:58:38 AM** Tab 30 - SB 1314 by Sen Gruters
**8:58:56 AM** Sen Gruters explains bill
**8:59:56 AM** Sen Torres with questions
**9:00:15 AM** Response of sponsor
**9:00:26 AM** Sen Stewart with questions
**9:00:43 AM** Sen Gruters responds to questions
**9:01:15 AM** Speaker Rocco Salvatori, Florida Professional Firefighters, in support of bill
**9:01:57 AM** Matt Puckett, Florida Police Benevolent Assoc., waives in support
**9:02:10 AM** Ray Colburn waives in support of the bill
**9:02:23 AM** No debate
**9:02:33 AM** Sen Gruters waives close on bill
**9:02:39 AM** SB 1314 reported favorably
**9:02:59 AM** Tab 13 - SB 7022 By Sen Hutson
**9:03:15 AM** Sponsor explains bill
**9:04:32 AM** No questions
**9:04:36 AM** Jorge Chomizo, Florida Internet and Televison Assoc, waives in support of bill
**9:04:55 AM** Sen Hutson waives close on bill
**9:04:56 AM** SB 7022 is reported favorably
**9:05:09 AM** Tab 14 - SB 7024 by Sen Hutson
**9:05:20 AM** Sponsor explains bill
**9:06:10 AM** No questions
**9:06:14 AM** No appearance forms
**9:06:20 AM** No debate
**9:06:24 AM** Sen Hutson waives close on bill
**9:06:27 AM** SB 7024 is reported favorably
**9:06:41 AM** TAb 15 - SB 7026 by Sen Hutson
**9:06:55 AM** Sponsor explains bill
**9:07:39 AM** No questions
**9:07:43 AM** No appearance forms
**9:07:48 AM** No debate
**9:07:52 AM** Sen Hutson waives close on bill
**9:07:54 AM** SB 7026 is reported favorably
**9:08:10 AM** Tab 16 - SB 7028 by Sen Hutson
**9:08:24 AM** Sponsor explains bill
**9:09:12 AM** No questions
**9:09:16 AM** No appearance forms
**9:09:24 AM** No debate
**9:09:27 AM** Sen Hutson waives close on bill
**9:09:30 AM** SB 7028 is reported favorably
**9:09:45 AM** Tab 17 - SB 7030 by Sen Hutson
**9:09:56 AM** Sponsor explains bill
**9:10:48 AM** No questions
**9:10:53 AM** No appearance forms
**9:11:00 AM** No debate
**9:11:02 AM** Sen Hutson waives close on bill
**9:11:06 AM** SB 7030 is reported favorably
**9:11:21 AM** Tab 18 - SB 7032 by Sen Hutson
**9:11:33 AM** Sponsor explains bill
**9:12:23 AM** No questions
**9:12:27 AM** No appearance forms
**9:12:34 AM** No debate
**9:12:40 AM** Sen Hutson waives close on bill
**9:12:43 AM** SB 7032 is reported favorably
**9:12:58 AM** Tab 19 - SB 7034 by Sen Hutson
**9:13:12 AM** Sponsor explains bill
**9:14:19 AM** No questions
**9:14:23 AM** No appearance forms
**9:14:29 AM** No debate
**9:14:34 AM** Sen Hutson waives close on bill

**9:14:38 AM** SB 7034 is reported favorably
**9:15:02 AM** Tab 1 - Senate Confirmation Hearings
**9:15:21 AM** Chair introduces the appointee names
**9:15:41 AM** Takes one vote on all three appointees
**9:15:51 AM** No questions
**9:15:53 AM** No appearance forms
**9:16:07 AM** Motion by Sen Gruters to confirm confirmation
**9:16:18 AM** Roll call by Administrative Assistant
**9:16:25 AM** Appointees are recommended favorably
**9:16:44 AM** (Brief Recess)
**9:16:56 AM** Recording Paused
**9:20:23 AM** Recording Resumed
**9:20:36 AM** Tab 6 - SB 7002 by Sen Diaz (presented by Sen Gruters)
**9:20:51 AM** Sen Gruters explains bill
**9:21:27 AM** No questions
**9:21:32 AM** No appearance forms
**9:21:38 AM** No debate
**9:21:50 AM** Sen Gruters waives close on bill
**9:21:52 AM** SB 7002 is reported favorably
**9:22:07 AM** Comments from chair
**9:22:25 AM** Moves to adjourn
**9:22:28 AM** The meeting is adjourned