

Tab 1	SB 654 by Bradley; (Similar to CS/H 01069) Public Records/Department of Military Affairs				
184448	D	S	MS, Bradley	Delete everything after	03/29 10:30 AM

Tab 2	SB 1824 by Powell; (Similar to H 01153) Public Records/Division of Emergency Management or a Local Emergency Management Agency				
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Tab 3	CS/SB 1924 by CA, Diaz; (Compare to CS/H 00945) Emergency Management Powers of Political Subdivisions				
681788	A	S	MS, Torres	Delete L.185 - 191:	03/29 11:54 AM

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

**MILITARY AND VETERANS AFFAIRS, SPACE, AND
DOMESTIC SECURITY**

Senator Wright, Chair
Senator Harrell, Vice Chair

MEETING DATE: Tuesday, March 30, 2021

TIME: 12:30—3:00 p.m.

PLACE: Mallory Horne Committee Room, 37 Senate Building

MEMBERS: Senator Wright, Chair; Senator Harrell, Vice Chair; Senators Burgess, Cruz, Gibson, Rodriguez, 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			
1	SB 654 Bradley (Similar CS/H 1069)	Public Records/Department of Military Affairs; Providing an exemption from public records requirements for certain records in the custody of the Department of Military Affairs which are protected from disclosure under specified federal laws; providing that certain information may be disclosed only in accordance with applicable federal and state laws; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc. MS 03/30/2021 GO RC	
2	SB 1824 Powell (Similar H 1153)	Public Records/Division of Emergency Management or a Local Emergency Management Agency; Expanding an exemption from public records requirements for information furnished by a person or business to the Division of Emergency Management or a local emergency management agency to receive assistance with emergency planning to include emergency response assessment reports, evaluation tools, or after-action reports prepared by the division or a local emergency management agency; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc. MS 03/30/2021 GO RC	

COMMITTEE MEETING EXPANDED AGENDA

Military and Veterans Affairs, Space, and Domestic Security
Tuesday, March 30, 2021, 12:30—3:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	CS/SB 1924 Community Affairs / Diaz (Compare CS/H 945, H 7047)	Emergency Management Powers of Political Subdivisions; Specifying that a political subdivision has the burden of proving the proper exercise of its police power in the issuance of certain emergency orders; authorizing the Governor or the Legislature to invalidate emergency measures issued by a political subdivision under specified conditions; providing for the automatic expiration of emergency orders issued by a political subdivision; authorizing the extension of such orders if certain conditions are met; prohibiting a political subdivision from issuing a subsequent order for the same emergency that is substantially similar to the expired order, etc. CA 03/16/2021 Fav/CS MS 03/30/2021 RC	
Presentation by Senator Wright on FHP Retention Program			
Other Related Meeting Documents			

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 Military and Veterans Affairs, Space, and Domestic Security

BILL: SB 654

INTRODUCER: Senator Bradley

SUBJECT: Public Records/Department of Military Affairs

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Caldwell	MS	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 654 creates a public records exemption for records held by the Department of Military Affairs which are protected from disclosure by federal law. The records included in this public records exemption are those which are protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974. These records are made exempt from disclosure.

In the required public necessity statement, the bill provides as justification for the exemption that it is a public necessity that records protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974 be made exempt from disclosure as the information could adversely affect national security and the safety of servicemembers and their families. Further, it is necessary that sensitive information held by the Department of Military Affairs receive the same protection as is required by federal law.

The exemption retroactively applies to information that is made exempt by this bill.

As this is a public records bill, a two-thirds vote of each House of the Legislature is required for passage.

This public records exemption is subject to an Open Government Sunset Review and is scheduled for repeal October 2, 2026, unless the Legislature reviews and saves the exemption from repeal before that date.

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 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

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

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

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 carefully question 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

Freedom of Information Act

The Freedom of Information Act, passed by Congress in 1967,²⁶ provides the public the right to request access to records of any federal agency, unless exempted in law. Categories of exempt information are records that are:

- Specifically authorized and properly classified by an Executive order in the interest of national defense or foreign policy;
- Related solely to internal personnel rules and agency practices;
- Statutorily exempted, if the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, and if enacted after October 28, 2009,²⁷ specifically cites to this exemption;
- Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

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 5 U.S.C. s. 552.

²⁷ Department of Justice, *OIP Guidance*, available at <https://www.justice.gov/oip/blog/foia-post-2010-congress-passes-amendment-exemption-3-foia> (last visited Feb. 25, 2021).

- Inter- or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege does not apply to records created 25 years or more before the date the records were requested;
- Personnel and medical files and similar files the disclosure of which would clearly constitute an unwarranted invasion of personal privacy;
- Compiled for law enforcement purposes, to an extent and in certain instances;
- Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- Geological and geophysical information and data, including maps, concerning wells.²⁸

Upon request, a reasonably segregable portion of a record must be provided after the custodian of the record deletes the information that is exempt.²⁹

The Privacy Act of 1974

The Privacy Act of 1974³⁰ establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals maintained in systems of records by federal agencies. A system of records is a group of records under agency control from which information is retrieved by name or other identifier assigned to an individual.

The Privacy Act requires agencies to give the public notice of their systems of records by publication in the Federal Register. The Privacy Act prohibits the disclosure of a record about an individual from a system of records unless the individual has consented in writing, or the disclosure qualifies under one of 12 statutory exceptions.³¹ The Privacy Act authorizes disclosure in the following instances:

- To the officers and employees of the agency which maintains the record, who need the record in the performance of their duties;
- When the disclosure is made under the Freedom of Information Act;
- For an established routine use;
- To the Census Bureau to carry out a census or survey;
- For statistical research or reporting without release of individually identifying data, provided that adequate notice is given;
- To the National Archives and Records Administration as a record of historical value;
- To another agency or an instrumentality of the government for a civil or criminal law enforcement activity;
- To an individual under a compelling circumstance affecting health or safety, and the person whose health or safety is affected is sent a notification of the disclosure;

²⁸ 5 U.S.C. s. 552(b).

²⁹ *Id.*

³⁰ 5 U.S.C. s. 552(a).

³¹ Department of Justice, *Privacy Act of 1974*, available at <https://www.justice.gov/opcl/privacy-act-1974#:~:text=The%20Privacy%20Act%20of%201974,of%20records%20by%20federal%20agencies>. (last visited March 23, 2021).

- To either House of Congress, or one of its committees or subcommittees;
- To the Comptroller General in the course of duties of the General Accountability Office;
- Pursuant to the order of a court of competent jurisdiction; or
- To a consumer reporting agency.³²

Applicability of Confidentiality Pursuant to Federal Law on State Agencies

A record that is exempt from disclosure under federal law is not automatically protected from disclosure pursuant to state law. Specifically on point is the case of *Wallace v. Guzman*, which provides that an exemption from disclosure provided in the Freedom of Information Act applies to federal, but not to state agencies.³³ The records in question, personal income tax returns and personal financial statements submitted in an application for a loan, are maintained by the state housing authority. These records, which would be protected from disclosure pursuant to the Freedom of Information Act, are not protected under state law.³⁴

Likewise, tenant records of a state public housing authority which would be exempt from disclosure pursuant to the Federal Privacy Act are not protected from disclosure by Florida Public Records Law.³⁵ Here, the public housing authority asserted that it is considered a federal agency for purposes of the mandates of the Federal Privacy Act, as the authority receives funding from the federal government.³⁶ In refuting this, the court determined:

On the basis of the foregoing authority the Court finds that the Housing Authority is not an agency for purposes of the Federal Privacy Act. The Housing Authority is a public body created by state statute. It would be an overly broad reading of the state statute to suggest that the authorization to receive funds from the Federal Government and the requirement to be monitored by the Federal Government thereby renders a public housing authority a federally chartered corporation or federal “agency.” Although the Federal Government funds the Housing Authority and requires compliance with federally mandated standards, it does not provide extensive, detailed or virtually day-to-day supervision over the Housing Authority's business.³⁷

³² United States Department of Legal Affairs, *Privacy Reminders, Privacy Act “Exceptions”*, available at https://www.dla.mil/Portals/104/Documents/GeneralCounsel/FOIA/PrivacyReminders/FOIA_Reminder12.pdf?ver=pmD36CFRR8zarytVh_aWCg%3d%3d (last visited March 24, 2021).

³³ *Wallace v. Guzman*, 687 So.2d 1351, 1353 (Fla. 3d DCA 1997).

³⁴ *Id.*

³⁵ *Housing Authority of the City of Daytona Beach v. Gomillion*, 639 So. 2d 117, 118 (Fla. 5th DCA 1994).

³⁶ *Id.* at 121.

³⁷ *Id.*

Exemptions to Public Records Disclosure in Florida Law

Public Records Exemption for Social Security Numbers

A Social Security Number of Agency Personnel

Social security numbers of current and former agency personnel held by an employing agency are confidential and exempt from disclosure.³⁸ However, social security numbers of current and former agency employees may be disclosed by the employing agency if:

- Disclosure of the social security number is expressly required by federal or state law or a court order;
- Disclosure is necessary to another agency or governmental entity for the receiving agency or entity to perform its duties and responsibilities; or
- The employee expressly consents in writing to the disclosure.³⁹

A Social Security Number of a Member of the Public

Additionally, an exemption applies generally to social security numbers held by an agency other than for personnel, in which case, this information is also confidential and exempt from public disclosure. This exemption applies to social security numbers held by an agency before, on, or after the effective date of this exemption. The exemption does not supersede any federal law prohibiting the release of social security numbers or any other applicable public records exemption for social security numbers existing prior to May 13, 2002, or created after that date.⁴⁰

However, a social security number held by an agency may be disclosed if:

- Disclosure is expressly required by federal or state law or a court order.
- Disclosure is necessary for the receiving agency or governmental entity to perform its duties and responsibilities.
- The individual expressly consents in writing to disclosure.
- The disclosure of the social security number is made to comply with the USA Patriot Act of 2001, or Presidential Executive Order 13224⁴¹.
- The disclosure is made to a commercial entity for the permissible uses set forth in the federal Driver's Privacy Protection Act of 1994; the Fair Credit Reporting Act; or the Financial Services Modernization Act of 1999.
- The disclosure is for the purpose of the administration of health benefits for an agency employee or his or her dependents.⁴²
- The disclosure of the social security number is for the purpose of the administration of a pension fund administered for the agency employee's retirement fund, deferred compensation plan, or defined contribution plan.

³⁸ Section 119.071(4)(a)1., F.S.

³⁹ Section 119.071(4)(a)2., F.S.

⁴⁰ Section 119.071(5)(a)5., F.S.

⁴¹ Presidential Executive Order 13224, signed September 23, 2001, is an anti-terrorism order aimed at blocking financial assets of networks that fund terrorism. U.S. Dep't of State, Bureau of Counterterrorism, *Executive Order 13224*, <https://www.state.gov/executive-order-13224/>

⁴² Section 119.071(5)(a)6., F.S.

- The disclosure of the social security number is for the purpose of the administration of the Uniform Commercial Code by the office of the Secretary of State.

Public Records Exemption for Medical Information

Medical information pertaining to a prospective, current, or former officer or employee of an agency which, if disclosed, would identify that officer or employee is exempt from disclosure. However, the information may be disclosed if the person to whom the information pertains or the person's legal representative provides written permission or pursuant to court order.⁴³

Public Records Exemption for Personal Identifying Information

Personal identifying information required to be maintained for an agency group insurance plan of a dependent child of a current or former agency officer or employee, is exempt from disclosure.⁴⁴

Information Maintained by the Department of Military Affairs

Records held by the Department of Military Affairs include information on military missions, units, deployments, troop concentrations, rules on the use of force, highly deployable units, personal identifying information of servicemembers and their families, and certain identifying information of employees of the Department of Defense.⁴⁵

III. Effect of Proposed Changes:

SB 654 creates a public records exemption for records held by the Department of Military Affairs which are protected from disclosure by federal law. The records included in this public records exemption are those which are protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974. These records are made exempt from disclosure.

In the required public necessity statement, the bill provides as justification for the exemption that it is a public necessity that records protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974 be made exempt from disclosure as the information could adversely affect national security and the safety of servicemembers and their families. Further, it is necessary that sensitive information held by the Department of Military Affairs receive the same protection as is required by federal law.

The exemption applies to information made exempt which is held by the department before, on, or after the effective date of the exemption.

As this is a public records bill, a two-thirds vote of each House of the Legislature is required for passage.

⁴³ Section 119.071(4)(b)1., F.S.

⁴⁴ Section 119.071(4)(b)2.a., F.S.

⁴⁵ Department of Military Affairs, *2021 Agency Legislative Bill Analysis* (Jan. 21, 2021) (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).

This public records exemption is subject to an Open Government Sunset Review and is scheduled for repeal October 2, 2026, unless the Legislature reviews and saves the exemption from repeal before that date.

The bill takes effect upon becoming law.

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 shared 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 creates a new public records exemption; thus, the bill requires 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 includes a statement of public necessity. The statement provides as justification for the exemption that it is a public necessity that records protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974 be made exempt from disclosure as the information could adversely affect national security and the safety of servicemembers and their families. Further, the statement provides that it is necessary that sensitive information held by the Department of Military Affairs receive the same protection as is required by federal law.

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 records that contain information held by the Department of Military Affairs on servicemembers or potential national security issues. Rather than exempting specific categories of information, the bill exempts any and all records that are protected from disclosure by the Freedom of Information Act and the Privacy Act of 1974, and therefore may 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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Lines 25 through 28 of the bill provide that “Any information not made exempt by this subsection may be disclosed only after the department makes any redactions in accordance with the applicable federal and state laws.” This language is unnecessary based on the standard practice of redaction for a document that contains both protected and unprotected information.

VIII. Statutes Affected:

This bill substantially amends section 119.0712 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.



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LEGISLATIVE ACTION

Senate

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House

The Committee on Military and Veterans Affairs, Space, and Domestic Security (Bradley) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsection (4) is added to section 119.0712,
Florida Statutes, to read:

119.0712 Executive branch agency-specific exemptions from
inspection or copying of public records.—

(4) DEPARTMENT OF MILITARY AFFAIRS.—Information received or
maintained by the Department of Military Affairs which is stored



184448

11 in a United States Department of Defense system of records, is
12 transmitted using a United States Department of Defense network
13 or communications device, or pertains to the United States
14 Department of Defense, pursuant to 10 U.S.C. s. 394, is exempt
15 from s. 119.07(1) and s. 24(a), Art. I of the State
16 Constitution. This exemption applies to information made exempt
17 by this subsection which is held by the department before, on,
18 or after the effective date of the exemption. This subsection is
19 subject to the Open Government Sunset Review Act in accordance
20 with s. 119.15 and shall stand repealed on October 2, 2026,
21 unless reviewed and saved from repeal through reenactment by the
22 Legislature.

23 Section 2. The Legislature finds that it is a public
24 necessity that certain information received or maintained by the
25 Department of Military Affairs which is stored in a United
26 States Department of Defense system of records, is transmitted
27 using a United States Department of Defense network or
28 communications device, or pertains to the United States
29 Department of Defense, pursuant to 10 U.S.C. s. 394, be made
30 exempt from s. 119.07(1), Florida Statutes, and s. 24(a),
31 Article I of the State Constitution. The disclosure of such
32 information could adversely affect national security and the
33 safety of servicemembers and their families. A servicemember's
34 information should only be disclosed by consent, as provided in
35 the Privacy Act of 1974. It is necessary that such sensitive
36 information in the custody of the Department of Military Affairs
37 be protected from disclosure to the same degree required under
38 federal law. Therefore, the Legislature finds that it is a
39 public necessity that such information be made exempt from



184448

40 public records requirements.

41 Section 3. This act shall take effect upon becoming a law.

42

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

44 And the title is amended as follows:

45 Delete everything before the enacting clause

46 and insert:

47 A bill to be entitled

48 An act relating to public records; amending s.

49 119.0712, F.S.; providing an exemption from public

50 records requirements for certain information received

51 or maintained by the Department of Military Affairs

52 which is stored in a United States Department of

53 Defense system of records, is transmitted using a

54 United States Department of Defense network or

55 communications device, or pertains to the United

56 States Department of Defense; providing for

57 retroactive application; providing for future

58 legislative review and repeal of the exemption;

59 providing a statement of public necessity; providing

60 an effective date.

By Senator Bradley

5-00834-21

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1 A bill to be entitled
 2 An act relating to public records; amending s.
 3 119.0712, F.S.; providing an exemption from public
 4 records requirements for certain records in the
 5 custody of the Department of Military Affairs which
 6 are protected from disclosure under specified federal
 7 laws; providing that certain information may be
 8 disclosed only in accordance with applicable federal
 9 and state laws; providing for retroactive application;
 10 providing for future legislative review and repeal of
 11 the exemption; providing a statement of public
 12 necessity; providing an effective date.
 13
 14 Be It Enacted by the Legislature of the State of Florida:
 15
 16 Section 1. Subsection (4) is added to section 119.0712,
 17 Florida Statutes, to read:
 18 119.0712 Executive branch agency-specific exemptions from
 19 inspection or copying of public records.-
 20 (4) DEPARTMENT OF MILITARY AFFAIRS.-Records in the custody
 21 of the Department of Military Affairs which contain information
 22 that is protected from disclosure under the Freedom of
 23 Information Act, 5 U.S.C. s. 552, and the Privacy Act of 1974, 5
 24 U.S.C. s. 552a, are exempt from s. 119.07(1) and s. 24(a), Art.
 25 I of the State Constitution. Any information not made exempt by
 26 this subsection may be disclosed only after the department makes
 27 any redactions in accordance with the applicable federal and
 28 state laws. This exemption applies to information made exempt by
 29 this subsection which is held by the department before, on, or

Page 1 of 2

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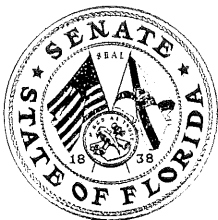
5-00834-21

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30 after the effective date of the exemption. This subsection is
 31 subject to the Open Government Sunset Review Act in accordance
 32 with s. 119.15 and shall stand repealed on October 2, 2026,
 33 unless reviewed and saved from repeal through reenactment by the
 34 Legislature.
 35 Section 2. The Legislature finds that it is a public
 36 necessity that certain records in the custody of the Department
 37 of Military Affairs which are protected from disclosure under
 38 the Freedom of Information Act, 5 U.S.C. s. 552, and the Privacy
 39 Act of 1974, 5 U.S.C. s. 552a, be made exempt from s. 119.07(1),
 40 Florida Statutes, and s. 24(a), Article I of the State
 41 Constitution. The disclosure of such information could adversely
 42 affect national security and the safety of servicemembers and
 43 their families. A servicemember's information should only be
 44 disclosed by consent as provided in the Privacy Act of 1974. It
 45 is necessary that such sensitive information in the custody of
 46 the Department of Military Affairs be protected from disclosure
 47 to the same degree that is required under federal law.
 48 Therefore, the Legislature finds that it is a public necessity
 49 that such information be made exempt from public records
 50 requirements.
 51 Section 3. This act shall take effect upon becoming a law.

Page 2 of 2

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



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JENNIFER BRADLEY

5th District

COMMITTEES:
Community Affairs, *Chair*
Agriculture, *Vice Chair*
Appropriations Subcommittee on Agriculture,
Environment, and General Government
Education
Ethics and Elections
Judiciary

SELECT COMMITTEE:
Select Committee on Pandemic
Preparedness and Response

JOINT COMMITTEES:
Joint Legislative Auditing Committee
Joint Select Committee on Collective Bargaining

January 27, 2021

Senator Tom Wright, Chairman
Committee on Military & Veterans Affairs, Space, and Domestic Security
531 Knott Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Dear Mr. Chairman:

I respectfully request that Senate Bill 654 be placed on the agenda of the Committee on Military & Veterans Affairs, Space and Domestic Security at your earliest convenience. This bill creates a public records exemption for records that are held by the Department of Military Affairs which are protected under the Freedom of Information Act.

Thank you for your consideration of this request. Please let me know if I can be of any assistance.

Sincerely,



Jennifer Bradley

cc: Diana Caldwell
Lois Graham

REPLY TO:

- ☐ 1279 Kingsley Avenue, Kingsley Center, Suite 117, Orange Park, Florida 32073 (904) 278-2085
- ☐ 324 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5005

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 Military and Veterans Affairs, Space, and Domestic Security

BILL: SB 1824

INTRODUCER: Senator Powell

SUBJECT: Public Records/Division of Emergency Management or a Local Emergency Management Agency

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Caldwell	MS	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 1824 provides that the following items held by the Division of Emergency Management or a local emergency management agency are exempt from disclosure under this state's public records laws:

- "Emergency response assessment reports"
- "Evaluation tools"
- "After-action reports."

The bill also exempts all data and records contained in an "emergency management electronic collaboration system."

The bill defines each of these four terms. "Emergency management electronic collaboration system" means a web-based collaborative application designed to support a shared relational database used by the division of Emergency Management or a local emergency management agency to store and update transactional data related to an emergency or a disaster which is input and used by multiple sources.

"Emergency response assessment report" means a report containing analysis and evaluation of collected data and information pertinent to the response actions taken by first responders and disaster response stakeholders before, during, or after a disaster or an emergency.

"Evaluation tool" means an instrument or technique used to measure and evaluate the quality or efficacy of disaster response actions or interventions.

Finally, "after-action report" means a report containing observations of a disaster, an incident, an emergency, or an exercise and recommendations identifying specific corrective actions for post-event improvements.

The bill provides a public necessity statement as required by the Florida Constitution. According to this statement, the exemption is necessary to protect sensitive information regarding the state's vulnerabilities in responding to emergencies. The public necessity statement also asserts that the exemption is needed to allow agencies to make candid written assessments of their responses to emergencies without making a public record of the assessments, which could be misunderstood or misinterpreted by the public.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

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, 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

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.”

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

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

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).

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).

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ 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
- 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

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.

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.

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

Information Furnished to the Division of Emergency Management

Information furnished by a person or a business to the Division of Emergency Management (division) for the purpose of being provided assistance with emergency planning is exempt from disclosure under this state's public records laws.²⁷

III. Effect of Proposed Changes:

The bill provides that the following items held by the Division of Emergency Management (division) or a local emergency management agency are exempt from disclosure under this state's public records laws:

- “Emergency response assessment reports”
- “Evaluation tools”
- “After-action reports.”

The bill also exempts all data and records contained in an “emergency management electronic collaboration system.”

The bill defines each of these four terms. “Emergency management electronic collaboration system” means:

A web-based collaborative application designed to support a shared relational database used by the division or a local emergency management agency to store and update transactional data related to an emergency or a disaster which is input and used by multiple sources.

“Emergency response assessment report” means a report containing analysis and evaluation of collected data and information pertinent to the response actions taken by first responders and disaster response stakeholders before, during, or after a disaster or an emergency. For the purposes of this definition, response actions include, but are not limited to:

- Saving lives or relieving suffering
- Protecting the health and safety of the public
- Preventing the escalation of an incident
- Mitigating further damage
- Maintaining or restoring critical functions
- Safeguarding the environment
- Restoring normal services.

“Evaluation tool” means an instrument or technique used to measure and evaluate the quality or efficacy of disaster response actions or interventions.

²⁶ Section 119.15(7), F.S.

²⁷ Section 252.905, F.S.

Finally, “after-action report” means a report containing observations of a disaster, an incident, an emergency, or an exercise and recommendations identifying specific corrective actions for post-event improvements.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill’s public necessity statement reads as follows:

The Legislature finds it is a public necessity that emergency response assessment reports, evaluation tools, and after-action reports relied upon by emergency management agencies to evaluate the effectiveness of a response and used to improve that response be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Such assessments, tools, and reports cover a cross-section of agencies and entities and may include protected information, such as threat, vulnerability, and capability assessment information. This protected information must be exempt from public records requirements not only because of its sensitive nature, but to assure participating agencies that their candid assessments of response techniques or procedures will not be misunderstood or misinterpreted, but instead be the basis for meaningful evaluation and improvement of existing response systems. This need outweighs the value of publicly disclosing these emergency response assessment reports, evaluations tools, and after-action reports.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the State Constitution.

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 public records exemption, and thus 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 after-action reports, emergency response assessment reports, and evaluation tools from public disclosure. In short, the bill exempts these records in part because they include information that could be exploited. The bill also exempts these records because agencies may be hesitant to include candid assessments of what went wrong in responding to an emergency in the records if the agencies know that the assessments are going to be subjected to public scrutiny. The exemption appears to be only as broad as is necessary to achieve these purposes.

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 bill may have a minimal fiscal impact on agencies due to the fact agency staff responsible for complying with public records requests may require training related to the creation of the public records exemptions. Costs associated with redacting the exempt information prior to releasing a record may be incurred. The costs, however, would be absorbed by existing resources, as they are part of day-to-day responsibilities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 252.905 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

By Senator Powell

30-01626-21

20211824__

1 A bill to be entitled
 2 An act relating to public records; amending s.
 3 252.905, F.S.; defining terms; expanding an exemption
 4 from public records requirements for information
 5 furnished by a person or business to the Division of
 6 Emergency Management or a local emergency management
 7 agency to receive assistance with emergency planning
 8 to include emergency response assessment reports,
 9 evaluation tools, or after-action reports prepared by
 10 the division or a local emergency management agency;
 11 providing for future legislative review and repeal of
 12 the exemption; providing a statement of public
 13 necessity; providing an effective date.
 14
 15 Be It Enacted by the Legislature of the State of Florida:
 16
 17 Section 1. Section 252.905, Florida Statutes, is amended to
 18 read:
 19 252.905 Emergency planning information; public records
 20 exemption.—
 21 (1) As used in this section, the term:
 22 (a) "After-action report" means a report containing
 23 observations of a disaster, an incident, an emergency, or an
 24 exercise and recommendations identifying specific corrective
 25 actions for post-event improvements.
 26 (b) "Emergency management electronic collaboration system"
 27 means a web-based collaborative application designed to support
 28 a shared relational database used by the division or a local
 29 emergency management agency to store and update transactional

Page 1 of 3

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

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30 data related to an emergency or a disaster which is input and
 31 used by multiple responders.
 32 (c) "Emergency response assessment report" means a report
 33 containing analysis and evaluation of collected data and
 34 information pertinent to the response actions taken by first
 35 responders and disaster response stakeholders before, during, or
 36 after a disaster or an emergency as those terms are defined in
 37 s. 252.34. Such response actions include, but are not limited
 38 to, saving lives or relieving suffering, protecting the health
 39 and safety of the public, preventing the escalation of an
 40 incident, mitigating further damage, maintaining or restoring
 41 critical functions, safeguarding the environment, and restoring
 42 normal services.
 43 (d) "Evaluation tools" means instruments or techniques used
 44 to measure and evaluate the quality or efficacy of disaster
 45 response actions or interventions.
 46 (2) The following ~~Any~~ information held by the division or a
 47 local emergency management agency, including all data and
 48 records contained in an emergency management electronic
 49 collaboration system, ~~furnished by a person or a business to the~~
 50 ~~division for the purpose of being provided assistance with~~
 51 ~~emergency planning~~ is exempt from s. 119.07(1) and s. 24(a),
 52 Art. I of the State Constitution;
 53 (a) Any information furnished by a person or a business to
 54 the division or a local emergency management agency for the
 55 purpose of receiving assistance with emergency planning.
 56 (b) Emergency response assessment reports, evaluation
 57 tools, or after-action reports prepared by the division or a
 58 local emergency management agency.

Page 2 of 3

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59 (3) This section is subject to the Open Government Sunset
60 Review Act in accordance with s. 119.15 and shall stand repealed
61 on October 2, 2026, unless reviewed and saved from repeal
62 through reenactment by the Legislature. This exemption applies
63 to information held by the division before, on, or after the
64 effective date of this exemption.

65 Section 2. The Legislature finds it is a public necessity
66 that emergency response assessment reports, evaluation tools,
67 and after-action reports relied upon by emergency management
68 agencies to evaluate the effectiveness of a response and used to
69 improve that response be made exempt from s. 119.07(1), Florida
70 Statutes, and s. 24(a), Article I of the State Constitution.
71 Such assessments, tools, and reports cover a cross-section of
72 agencies and entities and may include protected information,
73 such as threat, vulnerability, and capability assessment
74 information. This protected information must be exempt from
75 public records requirements not only because of its sensitive
76 nature, but to assure participating agencies that their candid
77 assessments of response techniques or procedures will not be
78 misunderstood or misinterpreted, but instead be the basis for
79 meaningful evaluation and improvement of existing response
80 systems. This need outweighs the value of publicly disclosing
81 these emergency response assessment reports, evaluations tools,
82 and after-action reports.

83 Section 3. This act shall take effect July 1, 2021.



The Florida Senate

Committee Agenda Request

To: Senator Tom Wright, Chair
Committee on Military and Veterans Affairs, Space, and Domestic Security

Subject: Committee Agenda Request

Date: March 5, 2021

I respectfully request that **Senate Bill #1824**, relating to Public Records/Division of Emergency Management or a Local Emergency Management Agency, be placed on the:

- ☐ committee agenda at your earliest possible convenience.
- ☒ next committee agenda.

A handwritten signature in blue ink, appearing to read "Bobby Powell".

Senator Bobby Powell
Florida Senate, District 30

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 Military and Veterans Affairs, Space, and Domestic Security

BILL: CS/SB 1924

INTRODUCER: Community Affairs Committee and Senator Diaz

SUBJECT: Emergency Management Powers of Political Subdivisions

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Stallard</u>	<u>Caldwell</u>	<u>MS</u>	<u>Pre-meeting</u>
3.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1924 provides that if a county, city, or other subdivision of the state deprives a person of property, a statutory or constitutional right, or a fundamental liberty to address a purported emergency, the deprivation is subject to a highest level of judicial scrutiny. Under current law, this level of “strict scrutiny” is reserved for measures that deprive a person of a fundamental right or liberty.

Under the bill, as under strict scrutiny, a county or city must prove that its exercise of police power is “narrowly tailored,” serves a “compelling governmental interest,” and accomplishes the intended goal through the use of the “least intrusive means.”

The bill also provides that the Governor, or Legislature by concurrent resolution, may invalidate a political subdivision's emergency ordinance, rule, or other measure if the Governor or Legislature determines that the measure “unnecessarily restricts a constitutional right, fundamental liberty, or statutory right.”

Lastly, the bill provides that an emergency order issued by a political subdivision will automatically expire 10 days after its issuance unless extended by a majority vote of the political subdivision's governing body.

The bill takes effect July 1, 2021.

II. Present Situation:

Summary

Current law does not expressly provide the Governor or Legislature with the authority to invalidate an ordinance or other measure of a political subdivision which unnecessarily restricts a constitutional right, fundamental liberty, or statutory right. However, current law does provide that any emergency order or rule of a political subdivision is invalid if it is inconsistent with any order or rule of an executive agency, provided the Governor or the Division of Emergency Management has delegated emergency authority to the agency.¹

Moreover, under case law interpreting the United States Constitution, governmental action—such as an emergency order or a rule—that infringes a “fundamental” constitutional right or liberty is subject to “strict scrutiny,” the most demanding level of judicial scrutiny.² If an order or rule fails to survive strict scrutiny, it is unconstitutional, and thus invalid.³

State Emergency Management Act

Overview and Legislative Intent

The State Emergency Management Act is set forth in ch. 252, F.S. In the Act, the Legislature finds and declares that Florida is vulnerable to a wide range of emergencies, including natural, manmade, and technological disasters.⁴ These emergencies and disasters threaten people, property, and the economy.⁵

Accordingly, Legislature passed the Act with the intent to reduce the state’s vulnerability to these circumstances and to prepare to respond to them.⁶ The legislative intent also includes promoting the state’s emergency readiness through enhanced coordination, long-term planning, and adequate funding.⁷

The Act describes the respective emergency powers of state government, as well as the powers of counties, cities, and other subdivisions of the state. The Act grants the executive branch with primary authority for emergency management.⁸

The Governor has the authority to declare an emergency and enter emergency orders, which have the force and effect of law.⁹ The Division of Emergency Management in the Executive Office of the Governor is charged with maintaining the state comprehensive emergency management plan and otherwise leading the state’s emergency management apparatus.¹⁰ Nonetheless, the Act also

¹ Section 252.46(1), F.S.

² See *Zablocki v. Redhail*, 434 US 374, 383 (1978).

³ See generally, *Id.*

⁴ Section 252.311(1), F.S.

⁵ *Id.*

⁶ Section 252.311(2), F.S.

⁷ *Id.*

⁸ See ss. 252.35 and 252.36, F.S.

⁹ Section 252.36, F.S.

¹⁰ Section 252.35, F.S.

grants local governments with the authority to enter emergency orders and rules that are consistent with those of the executive branch.¹¹

The Governor's Duties and Authority Regarding Emergencies

If the Governor finds that an emergency has occurred or is imminent, he or she must declare a state of emergency.¹² The state of emergency continues until the Governor terminates it, or until more than 60 days pass, whichever occurs sooner.¹³ However, the Legislature may end a state of emergency by passing a concurrent resolution.¹⁴

The Florida Statutes acknowledge that the Governor “is responsible for meeting the dangers presented to this state and its people by emergencies.”¹⁵ Accordingly, in the event of an emergency that is beyond local control, the Governor is authorized to assume “direct operational control” over all or any part of the emergency management functions.¹⁶ Moreover, he or she may issue executive orders, proclamations, and rules, all of which have the “force and effect of law.”¹⁷

The Division of Emergency Management

In the State Emergency Management Act, the Legislature created the Division of Emergency Management within the Executive Office of the Governor.¹⁸ The division is responsible for “maintaining a comprehensive statewide program of emergency management.”¹⁹ The division is also “responsible for coordination with efforts of the Federal Government, with 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.”²⁰

Additionally, the division is responsible for “carrying out” the State Emergency Management Act.²¹ This includes various enumerated duties, the first of which is the creation of the state comprehensive emergency management plan.²²

As for its contents, the plan must:

- Address the need for coordinated and expeditious deployment of the National Guard and other state resources.
- Establish a system of communications and warning to be used during natural disasters and other emergencies.

¹¹ Section 252.46, F.S.

¹² Section 252.36(2), F.S.

¹³ *Id.*

¹⁴ Section 252.36(2), F.S.

¹⁵ Section 252.36(1), F.S.

¹⁶ *Id.*

¹⁷ Section 252.36(1)(b), F.S.

¹⁸ *See* ss. 252.32(1) and 252.34(3), F.S.

¹⁹ Section 252.35(1), F.S.

²⁰ *Id.*

²¹ Section 252.35(2), F.S.

²² *See Id.*

- Establish guidelines and schedules for annual exercises that evaluate the ability of the state and its political subdivisions to respond to disasters and support local emergency management agencies.
- Assign lead and support responsibilities to state agencies and personnel.²³
-

Additionally, the plan must include:

- An evacuation component that includes regional and interregional coordination of evacuation activities.
- A shelter component that includes regional and interregional planning provisions and promotes coordination of sheltering between the public, private, and nonprofit sectors.
- A post-disaster relief component.²⁴

In addition to the creation of the state comprehensive emergency management plan, the division must fulfill more than 20 duties listed in Act, including:

- 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 and incidents thereof.
- Institute statewide public awareness programs, including an intensive public educational campaign on emergency preparedness issues.
- Delegate, as necessary and appropriate, authority vested in it under the State Emergency Management Act and provide for the subdelegation of this authority.
- Report to the President of the Senate, the Speaker of the House of Representatives, and the Governor, no later than February 1 of every odd-numbered year, the status of the emergency management capabilities of the state and its political subdivisions.
- Maintain, in coordination with local emergency management agency of the state, a registry of persons with special needs located within the jurisdiction of the local agency.²⁵

Cities' and Counties' Emergency Management Authority

The State Emergency Management Act expressly grants cities, counties, and other subdivisions of the state with certain emergency management powers.²⁶

A city or county is “authorized and empowered to make, amend, and rescind such orders and rules as are necessary for emergency management purposes and to supplement the carrying out of” the State Emergency Management Act.²⁷ However, the rules and orders may not be “inconsistent with any orders or rules adopted by the division or by any state agency exercising a power delegated to it by the Governor or the division.”²⁸ The rules and orders have the “full force and effect of law” if they are adopted as rules pursuant to the Administrative Procedure

²³ *Id.*

²⁴ *Id.*

²⁵ Section 252.35(2)(b)-(y), F.S.

²⁶ *See* ss. 252.38 and 252.46, F.S.

²⁷ Section 252.46(1), F.S.

²⁸ *Id.*

Act.²⁹ Nonetheless, political subdivisions' authority is subject to the authority of the state, and the subdivisions' actions must be consistent with statewide plans, laws, orders, and rules.³⁰

Accordingly, each county is “within the jurisdiction of, and shall be served by,” the Division of Emergency Management.³¹ And each county must establish an emergency management agency and plan or be part of an interjurisdictional emergency management agreement that is recognized by the Governor.³² Moreover, each county must appoint an emergency management director and inform the division of the appointment.³³ In addition to performing emergency management duties within its county, each county emergency management agency must conduct activities outside its county as required under the Act and in accordance with state and county emergency management plans and mutual-aid agreements.

Municipalities are authorized and encouraged, but not required, to create municipal emergency management programs.³⁴ If a municipality chooses to establish an emergency management program, it must comply with all laws, rules, and requirements applicable to county emergency management agencies.³⁵

Finally, the Act grants cities and counties a list of emergency management powers, including the power and authority to, appropriate and expend funds, establish operating centers, and declare a local emergency and request aid consistent with the emergency.³⁶

Judicial Review of Governmental Action – Levels of Scrutiny

Any governmental action, including the entry of orders and the promulgation of rules, is subject to the courts' review of the action's constitutionality.³⁷ If a court finds that a law, rule, or order infringes a person's constitutional rights, the court must then subject it to one of three levels of scrutiny, depending upon the nature of the infringement.³⁸ These levels are strict scrutiny, intermediate scrutiny, and rational basis review. If the action fails to pass the applicable level of scrutiny, it is unconstitutional, and thus invalid.³⁹

Governmental action that infringes a “fundamental right” is subject to “strict scrutiny,” which is the most demanding level of scrutiny.⁴⁰ To survive strict scrutiny, a rule or an order must further a “compelling governmental interest.”⁴¹ Additionally, the rule or order must be “narrowly tailored” to advance the interest.⁴² Moreover, the rule or order must be the “least restrictive

²⁹ Section 252.46(2), F.S. The Administrative Procedure Act is ch. 120, F.S.

³⁰ *See Id.*

³¹ Section 252.38(1)(a), F.S.

³² *Id.*

³³ Section 252.38(1)(b), F.S.

³⁴ Section 252.38(2), F.S.

³⁵ *Id.*

³⁶ Section 252.38(3), F.S.

³⁷ *See Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982).

³⁸ *See generally, Birchansky v. Clabaugh*, 955 F.3d 751, 756 (2020).

³⁹ *Id.*

⁴⁰ *See Zablocki v. Redhail*, 434 US 374, 383 (1978).

⁴¹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978).

⁴² *Westerheide v. State*, 831 So. 2d 93, 110 (Fla. 2002).

means” of furthering the compelling governmental interest.⁴³ Examples of fundamental rights include the right to marry,⁴⁴ the right to free speech, and the freedom of worship and assembly, and the right to life, liberty, and private property.⁴⁵ Strict scrutiny also applies to laws that discriminate on the basis of a protected characteristic, such as race.⁴⁶

Intermediate scrutiny has been applied to laws or other governmental actions that discriminate on the basis of sex or sexual orientation.⁴⁷ To pass intermediate scrutiny, a law, order, or rule must serve an important governmental objective and be substantially related to the objective.⁴⁸

The lowest level of review, and thus the easiest for the government to pass, is rational basis review.⁴⁹ This level applies to laws, orders, or rules that are allegedly irrational or arbitrary or that discriminate on less-protected bases, such as age or disability.⁵⁰ To survive a rational basis review, the governmental action at issue must be rationally related to a legitimate state interest.⁵¹

United States Supreme Court Cases in the COVID-19 Era

The United States Supreme Court has heard at least two cases regarding the constitutionality of COVID restrictions.⁵² In neither case did the court depart from the normally applicable level of scrutiny, notwithstanding the “emergency” surrounding the governmental action.⁵³

Challenges to Local COVID-19 Restrictions in Florida

Walton County Beach Closure

On March 19, 2020, the Walton County Board of County Commissioners adopted Ordinance 2020-08, which states, “[a]ll beaches within Walton County, Florida, are temporarily CLOSED to the public... It shall be unlawful for members of the public to access the beaches within Walton County.” The ordinance recitals cite Governor DeSantis’ Executive Order 20-68⁵⁴ as the authority for the emergency measure and ss. 252.38 and 125.66(3), F.S.

A group of property owners who own oceanfront (beach) property in Walton County affected by Ordinance 2020-08 filed suit challenging the ordinance’s legality.⁵⁵ These parties claimed that

⁴³ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978).

⁴⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁴⁵ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

⁴⁶ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978).

⁴⁷ *See Craig v. Boren*, 429 U.S. 190 (1976).

⁴⁸ *See Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011).

⁴⁹ *See generally, Silvio Membreno and Fla. Ass’n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 19 (Fla. 2016).

⁵⁰ *Id.*

⁵¹ *Id.* at 19-20.

⁵² *See e.g., South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

⁵³ *Id.*

⁵⁴ EO 20-68 (March 17, 2020) Section 2 states “[p]ursuant to section 252.36(5)(k), Florida Statutes, I direct parties accessing public beaches in the State of Florida to follow the CDC guidance by limiting their gatherings to no more than ten persons, distance themselves from other parties by 6 feet, and support beach closures at the discretion of local authorities.”

⁵⁵ *Dodero v. Walton County*, N.D. Fla. 2020, Case No.: 3:20cv5358-RV/HTC.

Walton County's ordinance constituted a Fifth Amendment Takings,⁵⁶ was preempted by the Governor, violated Florida's constitutional Right to Privacy, violated constitutional due process rights, and lacked statutory authority.

After the plaintiffs filed a motion for an injunction against Walton County and a preliminary hearing, the Federal Judge issued an order denying plaintiffs' requests for relief. The judge did not find the county's action to violate the Fourth Amendment or Florida's privacy rights and found the ordinance to be consistent with, and authorized by, the Governor's Executive Order No. 20-68.

Alachua County Restrictions on Businesses and Mask Mandate

On May 2, 2020, the Alachua County Board of County Commissioners issued Emergency Order 2020-21, which among other measures, imposed mandatory face coverings in certain situations and locations where social distancing was not possible and imposed additional business occupancy restrictions.⁵⁷

A local business owner challenged the county's order claiming that the order lacked authority under the county code and the State Emergency Management Act, constituted a Fifth Amendment Takings, violated Florida's constitutional Right to Privacy, and violated the Equal Protection Clause.⁵⁸ In denying the plaintiff's motion for an injunction against the county, the judge claims several rationales. First, the judge states, "[t]he protection of the safety and welfare of the public is inherent in the role of local government." The judge continues this line of reasoning by explaining:

"Alachua County is responsible for reducing the spread of COVID-19 among its citizens and also for ensuring its citizens have access to medical care if they become infected. An individual Alachua County citizen's right to be let alone is no more precious than the corresponding right of his fellow citizens not to become infected by that person and potentially hospitalized."⁵⁹

Leon County Mask Mandate

On June 23, 2020, Leon County's board of commissioners held a special meeting and unanimously adopted face-covering requirements through Emergency Ordinance 20-15. The Emergency Ordinance requires individuals in an indoor business establishment to wear a face covering. The Emergency Ordinance was challenged as being unconstitutional.⁶⁰ On July 27, 2020, Circuit Court Judge John C. Cooper upheld the ordinance as constitutional. In his ruling, Judge Cooper states that:

⁵⁶ The Fifth Amendment of the United States Constitution includes a provision known as the Takings clause, which states that "private property [shall not] be taken for public use, without just compensation."

⁵⁷ EO 20-112 (April 29, 2020) states "[i]n-store retail sales establishments may open storefronts if they operate at no more than 25 percent of their building occupancy and abide by the safety guidelines issued by the CDC and OSHA." Section 7 of Alachua County's order states, "[e]ssential services and activities, and retail establishments shall limit occupancy, to one per five hundred square feet of covered space. In no case does this allow more than Executive Order 20-112."

⁵⁸ *Green v. Alachua County*, Case No. 2020-CA-001249, Fla. 8th Cir. Ct.

⁵⁹ *Id.*

⁶⁰ *Power v. Leon County*, Case No. 2020-CA-001200, Fla. 2nd Cir. Ct., available at: <https://www.fl-counties.com/sites/default/files/2020-07/7.27.20%20Final%20Order.pdf> (last visited Mar. 12, 2021).

"It has long been recognized that when, as here, there is an emergency, the police power gives governmental authorities power to act for the public welfare that they might not otherwise have. This line of cases extends back to the 1905 United States Supreme Court case of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11(1905)[.]"

Judge Cooper quoted a recent case from the United States Fifth Circuit Court of Appeals:

"Importantly, it is 'no part of the function of a court to decide which measures are likely to be the most effective for the protection of the public against disease.' *In re Abbott*, 954 F. 3d 772, 778 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 29). When as here, a court is faced with a society threatening epidemic, 'a state may implement emergency measures that curtail constitutional rights so long as the measures have at least real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' *Id.* at 784 (quoting *Jacobson*, 197 U.S. at 31)."⁶¹

Miami-Dade County Curfew

Miami-Dade County's third amendment to Emergency Order 27-20 included a late-night curfew provision commencing on October 12, 2020. The curfew provided that "no person shall make use of any street or sidewalk for any purpose, except police, fire rescue, first responder, medical, health care, media, and utility repair service personnel." The curfew also made additional exceptions for individuals traveling to and from "essential establishments" for work, persons walking dogs within 250 feet of a residence, and individuals "[t]raveling to and from any sporting event sponsored by the NCAA, Major League Baseball, or the National Football League, or any other national professional sports league or organization." In the order's recitals, Miami-Dade cited subsections (e) and (o) of section 8B-7(2) of the Code of Miami-Dade County as authority to issue the order.⁶²

On November 4, 2020, Florida's Third District Court of Appeal reversed a trial court injunction Miami-Dade County's enforcing a late-night curfew meant to address the transmission of COVID-19.⁶³ In this case, the court found that Governor DeSantis' executive order⁶⁴ forbidding local governments from enacting COVID-19 emergency measures that "prevent[ed] an individual from working or from operating a business" did not expressly preempt the imposition of a curfew by the county.

⁶¹ *Id.* at 8.

⁶² Section 8B-7(2)(e) and (o) of the Code of Miami-Dade County state, "(2) Once a Local State of Emergency has been declared, the Manager is authorized by the Mayor and the Board to order any or all of the following actions: (e) Curfew: In the period before, or during and immediately after an event, an order imposing a general curfew applicable to Miami-Dade County as a whole, or to geographical area(s) of Miami-Dade County and during hours the Manager deems necessary, and from time to time, to modify the hours the curfew will be in effect and what area(s) it applies to; (o) Such other orders as are immediately necessary for the protection of life and property; provided, however that any such orders shall, at the earliest practicable time, be presented to the Board for ratification or confirmation in accordance with this chapter."

⁶³ *Miami-Dade County v. Miami Gardens Square One, Inc.*, --- So.3d ---, 2020 WL 6472542 (Fla. 3rd DCA 2020).

⁶⁴ EO 20-244 (Sep. 25, 2020).

In reaching this decision, the court found that the State Emergency Management Act did not expressly preempt emergency powers to the state. The imposition of a curfew was within the home rule powers of Miami-Dade County. The court noted the provision in the State Emergency Management Act, which states, "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state."⁶⁵

Broward County Curfew

On October 16, 2020, Broward County issued Emergency Order 20-28, which allowed businesses to re-open subject to certain health protocols related to COVID-19. Sections 1 and 2 of Emergency Order 20-28, however, prohibited the sale or consumption of food or alcohol between the hours of midnight and 5:00 a.m. In response, a collective of restaurants and entertainment establishments licensed to serve food and libations in Broward County filed a lawsuit challenging the curfew.⁶⁶

On December 21, 2020, the Southern District of Florida U.S. District Court granted the Plaintiffs' motion for a temporary restraining order and preliminary injunction. It enjoined Broward County from enforcing the midnight to 5:00 a.m. curfew on the sale or consumption of food or alcohol. The court reasoned that the curfew restrictions did not "quantify the economic impact of each limitation or requirement on those restaurants" and "explain why each limitation or requirement is necessary for public health[,]" as required by Governor DeSantis' Executive Order 20-244. When discussing this issue, the court states:

And, the restrictions on the sale, service, or consumption of food, is not related, in this record, to the increasing likelihood of contracting COVID-19. The record is certainly absent any analysis that "quantif[ies] the economic impact of each limitation or requirement on those restaurants" and "explain[s] why each limitation or requirement is necessary for public health" as applied to food service. Fla. Exec. Order 20-244, §§ 3(A)(i), (ii) (Sept. 25, 2020). Thus, on this record, the temporal restrictions on food and alcohol service are rather arbitrary.

III. Effect of Proposed Changes:

The bill provides that if a county, city, or other subdivision of the state deprives a person of property, a statutory or constitutional right, or a fundamental liberty to address a purported emergency, the deprivation is subject to a highest level of judicial scrutiny. Under current law, this level of "strict scrutiny" is reserved for measures that deprive a person of a fundamental right or liberty.

Under the bill, as under strict scrutiny, a county or city must prove that its exercise of police power is "narrowly tailored," serves a "compelling governmental interest," and accomplishes the intended goal through the use of the "least intrusive means."

The bill also provides that the Governor, or Legislature by concurrent resolution, may invalidate a political subdivision's emergency ordinance, rule, or other measure if the Governor or

⁶⁵ *Id.* at 5.

⁶⁶ *828 Management, LLC v. Broward county*, 2020 WL 7635169 (S.D. Fla. Dec. 21, 2020).

Legislature determines that the measure “unnecessarily restricts a constitutional right, fundamental liberty, or statutory right.”

Lastly, the bill provides that an emergency order issued by a political subdivision will automatically expire 10 days after its issuance unless extended by a majority vote of the political subdivision's governing body.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the State Constitution.

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:

None.

VI. Technical Deficiencies:

The bill authorizes the Governor or the Legislature to invalidate an emergency measure, such as an ordinance, if it “unnecessarily” restricts a constitutional right, fundamental liberty, or statutory right. The Legislature may wish to explain more clearly what unnecessarily restricting a right or liberty means. Under the bill, one might wonder, for instance: If an ordinance would reduce COVID-19 infections by 10 percent but would deprive residents of their constitutional right to freely exercise their religion, would this *unnecessarily* restrict this right? What if the ordinance would reduce the spread of COVID-19 by 50 percent?

This provision of the bill also raises the question of how the Legislature or the Governor would make the determination that a local emergency measure unnecessarily restricts a constitutional right, fundamental right, or statutory right.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 252.38 and 252.46 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 Community Affairs on March 16, 2021:

The committee substitute:

- Provides a more precise iteration of the strict scrutiny standard of judicial review;
- Provides that the Governor, or Legislature by concurrent resolution, may at any time invalidate an emergency action by a political subdivision if it unnecessarily restricts a constitutional right, fundamental liberty, or statutory right; and
- Provides that an order issued by a political subdivision under s. 252.46, F.S., will automatically expire after 10 days unless extended by a majority vote of the political subdivision's governing body and that upon the expiration of an order, a political subdivision may not issue a substantially similar order to respond to the same emergency.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate

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House

The Committee on Military and Veterans Affairs, Space, and Domestic Security (Torres) recommended the following:

Senate Amendment (with title amendment)

Delete lines 185 - 191

and insert:

(4) INVALIDATION OF CERTAIN EMERGENCY MEASURES.—The Legislature, by concurrent resolution, may at any time invalidate an order, an ordinance, a proclamation, a rule, or any other measure issued by a political subdivision to address a purported emergency if the Legislature determines that such order unnecessarily restricts a constitutional right,



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fundamental liberty, or statutory right. If the Legislature is
not in session, the President of the Senate and the Speaker of
the House of Representatives may call the Legislature into
special session pursuant to s. 11.011 for the purpose of
invalidating an emergency measure issued by a political
subdivision.

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

And the title is amended as follows:

Delete line 7

and insert:

the Legislature to invalidate

By the Committee on Community Affairs; and Senator Diaz

578-02921-21

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A bill to be entitled

An act relating to emergency management powers of political subdivisions; amending s. 252.38, F.S.; specifying that a political subdivision has the burden of proving the proper exercise of its police power in the issuance of certain emergency orders; authorizing the Governor or the Legislature to invalidate emergency measures issued by a political subdivision under specified conditions; amending s. 252.46, F.S.; providing for the automatic expiration of emergency orders issued by a political subdivision; authorizing the extension of such orders if certain conditions are met; prohibiting a political subdivision from issuing a subsequent order for the same emergency that is substantially similar to the expired order; providing an effective date.

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

Section 1. Section 252.38, Florida Statutes, is amended to read:

252.38 Emergency management powers of political subdivisions.—Safeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state. However, political subdivisions are given police powers to preserve, not impair, private rights. Therefore, a political subdivision that deprives any person of a constitutional right, fundamental liberty, statutory right, or property to address a purported emergency

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bears the burden of proving that the exercise of police power is narrowly tailored, serves a compelling governmental interest, and accomplishes the intended goal through the use of the least intrusive means.

(1) COUNTIES.—

(a) In order to provide effective and orderly governmental control and coordination of emergency operations in emergencies within the scope of ss. 252.31-252.90, each county within this state shall be within the jurisdiction of, and served by, the division. Except as otherwise provided in ss. 252.31-252.90, each local emergency management agency shall have jurisdiction over and serve an entire county. Unless part of an interjurisdictional emergency management agreement entered into pursuant to paragraph (3)(b) which is recognized by the Governor by executive order or rule, each county must establish and maintain such an emergency management agency and shall develop a county emergency management plan and program that is coordinated and consistent with the state comprehensive emergency management plan and program. Counties that are part of an interjurisdictional emergency management agreement entered into pursuant to paragraph (3)(b) which is recognized by the Governor by executive order or rule shall cooperatively develop an emergency management plan and program that is coordinated and consistent with the state comprehensive emergency management plan and program.

(b) Each county emergency management agency created and established pursuant to ss. 252.31-252.90 shall have a director. The director must meet the minimum training and education qualifications established in a job description approved by the

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county. The director shall be appointed by the board of county commissioners or the chief administrative officer of the county, as described in chapter 125 or the county charter, if applicable, to serve at the pleasure of the appointing authority, in conformance with applicable resolutions, ordinances, and laws. A county constitutional officer, or an employee of a county constitutional officer, may be appointed as director following prior notification to the division. Each board of county commissioners shall promptly inform the division of the appointment of the director and other personnel. Each director has direct responsibility for the organization, administration, and operation of the county emergency management agency. The director shall coordinate emergency management activities, services, and programs within the county and shall serve as liaison to the division and other local emergency management agencies and organizations.

(c) Each county emergency management agency shall perform emergency management functions within the territorial limits of the county within which it is organized and, in addition, shall conduct such activities outside its territorial limits as are required pursuant to ss. 252.31-252.90 and in accordance with state and county emergency management plans and mutual aid agreements. Counties shall serve as liaison for and coordinator of municipalities' requests for state and federal assistance during postdisaster emergency operations.

(d) During a declared state or local emergency and upon the request of the director of a local emergency management agency, the district school board or school boards in the affected area shall participate in emergency management by providing

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facilities and necessary personnel to staff such facilities. Each school board providing transportation assistance in an emergency evacuation shall coordinate the use of its vehicles and personnel with the local emergency management agency.

(e) County emergency management agencies may charge and collect fees for the review of emergency management plans on behalf of external agencies and institutions. Fees must be reasonable and may not exceed the cost of providing a review of emergency management plans in accordance with fee schedules established by the division.

(2) MUNICIPALITIES.—Legally constituted municipalities are authorized and encouraged to create municipal emergency management programs. Municipal emergency management programs shall coordinate their activities with those of the county emergency management agency. Municipalities without emergency management programs shall be served by their respective county agencies. If a municipality elects to establish an emergency management program, it must comply with all laws, rules, and requirements applicable to county emergency management agencies. Each municipal emergency management plan must be consistent with and subject to the applicable county emergency management plan. In addition, each municipality must coordinate requests for state or federal emergency response assistance with its county. This requirement does not apply to requests for reimbursement under federal public disaster assistance programs.

(3) EMERGENCY MANAGEMENT POWERS; POLITICAL SUBDIVISIONS.—

(a) In carrying out the provisions of ss. 252.31-252.90, each political subdivision shall have the power and authority:

1. To appropriate and expend funds; make contracts; obtain

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and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency; and direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.

2. To appoint, employ, remove, or provide, with or without compensation, coordinators, rescue teams, fire and police personnel, and other emergency management workers.

3. To establish, as necessary, a primary and one or more secondary emergency operating centers to provide continuity of government and direction and control of emergency operations.

4. To assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to firefighting, engineering, rescue, health, medical and related services, police, transportation, construction, and similar items or services for emergency operation purposes, as the primary emergency management forces of the political subdivision for employment within or outside the political limits of the subdivision.

5. To request state assistance or invoke emergency-related mutual-aid assistance by declaring a state of local emergency in the event of an emergency affecting only one political subdivision. The duration of each state of emergency declared locally is limited to 7 days; it may be extended, as necessary, in 7-day increments. Further, the political subdivision has the power and authority to waive the procedures and formalities

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otherwise required of the political subdivision by law pertaining to:

a. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.

b. Entering into contracts.

c. Incurring obligations.

d. Employment of permanent and temporary workers.

e. Utilization of volunteer workers.

f. Rental of equipment.

g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.

h. Appropriation and expenditure of public funds.

(b) Upon the request of two or more adjoining counties, or if the Governor finds that two or more adjoining counties would be better served by an interjurisdictional arrangement than by maintaining separate emergency management agencies and services, the Governor may delineate by executive order or rule an interjurisdictional area adequate to plan for, prevent, mitigate, or respond to emergencies in such area and may direct steps to be taken as necessary, including the creation of an interjurisdictional relationship, a joint emergency plan, a provision for mutual aid, or an area organization for emergency planning and services. A finding of the Governor pursuant to this paragraph shall be based on one or more factors related to the difficulty of maintaining an efficient and effective emergency prevention, mitigation, preparedness, response, and recovery system on a unijurisdictional basis, such as:

1. Small or sparse population.

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175 2. Limitations on public financial resources severe enough
176 to make maintenance of a separate emergency management agency
177 and services unreasonably burdensome.

178 3. Unusual vulnerability to emergencies as evidenced by a
179 past history of emergencies, topographical features, drainage
180 characteristics, emergency potential, and presence of emergency-
181 prone facilities or operations.

182 4. The interrelated character of the counties in a
183 multicounty area.

184 5. Other relevant conditions or circumstances.

185 (4) INVALIDATION OF CERTAIN EMERGENCY MEASURES.—The
186 Governor, or the Legislature by concurrent resolution, may at
187 any time invalidate an order, an ordinance, a proclamation, a
188 rule, or any other measure issued by a political subdivision to
189 address a purported emergency if the Governor or the Legislature
190 determines that such order unnecessarily restricts a
191 constitutional right, fundamental liberty, or statutory right.

192 Section 2. Subsection (4) is added to section 252.46,
193 Florida Statutes, to read:

194 252.46 Orders and rules.—

195 (4) An order issued by a political subdivision shall
196 automatically expire 10 days after its issuance; however, such
197 an order may be extended before its expiration by a majority
198 vote of the governing body of the political subdivision if
199 deemed necessary. Upon the expiration of an order, a political
200 subdivision may not issue a substantially similar order to
201 respond to the same emergency.

202 Section 3. This act shall take effect July 1, 2021.



SENATOR MANNY DIAZ, JR.
36th District

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Health Policy Chair
Appropriations Subcommittee on
Education Vice Chair
Appropriations
Appropriations Subcommittee on Health
and Human Services
Education
Commerce and Tourism
Rules

March 17, 2021

Honorable Senator Tom A. Wright
Chair
Committee on Military and Veterans Affairs, Space, and Domestic Security

Honorable Chair Wright,

I respectfully request Senate Bill Number 1924 Emergency Management Powers of Political Subdivisions be placed on the next committee agenda.

Sincerely appreciate your support.

A handwritten signature in black ink, appearing to read "M. Diaz", is written over a horizontal line.

Senator Manny Diaz, Jr.
Florida Senate, District 36

CC: Diana Caldwell, Staff Director
Lois Graham, Committee Administrative Assistant
Carolyn Grzan, Legislative Assistant

REPLY TO:

- ☐ 10001 Northwest 87th Avenue, Hialeah Gardens, Florida 33016 (305) 364-3073
- ☐ 306 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5036

Senate's Website: www.flsenate.gov

Wilton Simpson
President of the Senate

Aaron Bean
President Pro Tempore

Senator Tom A. Wright – District 14

Florida Highway Patrol Retention Program

20 Year Overview of FHP's Imprint

Year	# Sworn FHP Troopers	Florida Population	Troopers per 100,000 Citizens	Centerline Miles
2001	1,781	16,356,966	10.98	117,300.58
2020	1,721	21,900,000	7.86	123,104.45

Over the past 20 years, the number of FHP troopers has **decreased by 60 sworn positions** while **Florida's population as increased by 5.5 million**; this has resulted in the number of FHP troopers per every 100,000 Floridians to (why wouldn't the trooper per 100,000 citizens go up since the number of troopers has decreased but the population has increased??) while required to **provide almost 6,000 more miles of coverage**.

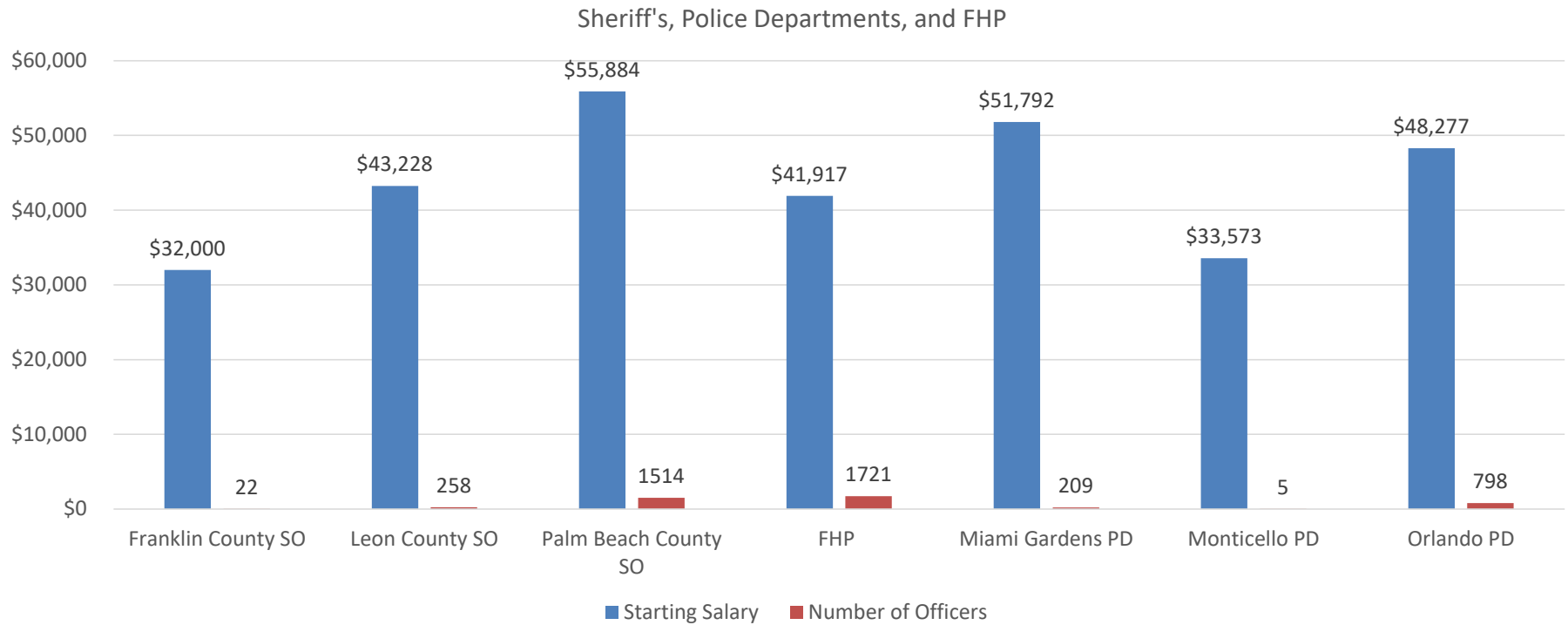
In 2020, FHP was authorized to have 1,982 Sworn Troopers, leaving 261 positions unfilled.

Retirement Comparison

New Local Law Enforcement Officer (21 years old)	New FHP Trooper (21 years old)
1 st year salary = \$47,944	1 st year salary = \$41,917
Pay increases at regular & predictable intervals	Pay increases at irregular & unpredictable intervals
Final year salary = \$79,000	Final year salary = \$54,260
Average final compensation = \$77,800	Average final compensation = \$54,084
Retires after 30 years of service	Retires after 30 years of service
Retirement = \$58,350	Retirement = \$40,563

- All sworn law enforcement officers are included in the same Special Risk Class in the Florida Retirement System (FRS) and to qualify, the law enforcement officer must have eight years of service. **Once retired, the law enforcement officer receives 75 percent of the average of the 5 highest years of salary.**
- While the FRS benefit is the same, because of the disparity of salaries between a FHP trooper and a local enforcement officer, the impact to a FHP trooper's retirement is significant, **almost \$20,000 annually**

Salary Comparison



- FHP offers a starting salary around the average for Sheriff's Deputies. The difference is each Sheriff's Office can offer regular, scheduled pay increases.

The State's Five Year Investment

- In addition to an impact to the FHP Trooper, there is a fiscal impact to the State.
 - From the time a recruit is in the FHP Academy through their 5th year of service, the state has invested **almost \$394,000**.
 - FHP pays the recruit's salaries and benefits while they are going through the seven month-long FHP Academy, as well as costs associated with recruitment and training; staffing, lodging, meals; and supplies and equipment. In total, **it costs an average of \$104,581 per Trooper**.
 - The return on the State's investment is not realized if the FHP Trooper leaves for local a law enforcement position after just five years of service.

Additional Costs for New Troopers

Payment Year	Number of Claims	Bodily Injury	Expense	Property Damage	Legal	Recovery	Total Amount
2016	127	\$414,185	\$11,142	\$258,599	\$154,979	\$2,182	\$836,724
2017	122	\$1.2 M	\$29,210	\$253,256	\$192,481	0.00	\$1.6 M
2018	112	\$690,000	\$40,299	\$207,358	\$287,933	\$1,875	\$1.2 M
2019	132	\$2.1 M	\$6,353	\$303,846	\$389,770	\$6,450	\$2.8 M
2020	124	\$1.6 M	\$11,822	\$309,043	\$537,632	\$16,154	\$2.5 M
Total	617	\$5.9 M	\$98,826	\$1.3 M	\$1.6 M	\$26,661	\$8.9 M

- If you have run a business before, you know that every time you have to train a new employee, there are mistakes that you have to pay for. For FHP, it comes from automobile insurance claims.
 - According to the Division of Risk Management, using 2020 data, there was **\$2.5 million in claims**.
 - The majority of these crashes come from Troopers in their **first 2 years of service**.
 - FHP recently surveyed their current Troopers and found that approximately 43%, or 2 in 7, have fewer than five years of service with FHP.
 - Taking these factors into account, it costs the State an extra **\$20,161 per claim**.

Costs of On-the Job Training

• Year 1 = cost per Trooper hired	\$42,441
• Year 1 = cost of Salary & Benefits in training	<u>+\$62,140</u>
Year 1 Total costs =	\$104,581
• Year 2 = Salary & Benefits \$72,456 average	
• Cruiser Repairs	\$7,260
• Year 3 = Salary & Benefits \$72,456 average	
• Cruiser Repairs	\$6,048
• Year 4 = Salary & Benefits \$72,456 average	
• Cruiser Repairs	\$6,048
• Year 5 = Salary & Benefits \$72,456 average	
• <u>Cruiser Repairs</u>	<u>\$6,048</u>
Investment in Training and on the job experience =	\$129,985
<u>Average number of Troopers hired per year =</u>	<u> x 130 Troopers</u>
Loss per year of investment =	\$16,965,895

Annual Average Claims

Average cost per claim = \$20,161

Annual average claims = 124

- Years 1 & 2 = 45 claims
- Years 1 – 5 = 75 claims
- Years 6 – 30 = 49 claims, or 2 per year

Keeping experienced Troopers should lower our average claims to only 2 per year.

2 claims x \$20,161 = \$40,322 per year

Current annual costs for 124 claims = \$2,459,703

- \$40,322

\$2,419,381 total Annual Average Claims

RECAP

Total Annual Average Claims

\$2,419,381

Loss per Year of Investment

+ \$16,965,895

\$19,385,276

To Recap, there are savings that could be realized if they had a more experienced Trooper workforce. We could be looking at a savings of \$19,385,276 per year.