

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 Community Affairs

BILL: SB 1004

INTRODUCER: Senator Hays

SUBJECT: Public Records/Video and Audio Recordings

DATE: January 15, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Present	Yeatman	CA	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 1004 expands the public records exemption for security system plans to include video and audio recordings. However, the bill provides that such information may be disclosed in furtherance of agency's official duties and responsibilities; to another governmental agency in furtherance of its official duties and responsibilities; or upon a showing of good cause before a court of competent jurisdiction. Several courts and the Attorney General have previously found that video and audio recordings are confidential and exempt from Florida's public records laws.

The bill states that it is a public necessity to disclose audio and video recordings to government entities, and in certain circumstances, to the public, in order to ensure public safety.

The provisions of the bill are subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2021, unless reenacted by the Legislature.

Section 281.301, F.S., relating to security systems, is repealed.

A two-thirds vote of each house is required for the passage of the bill.

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

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” to mean “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁵ The OGSR provides that an exemption automatically repeals on October 2 of the 5th year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁷

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁸ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.¹⁹

¹³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁴ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed; however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(a), F.S.

¹⁸ FLA. CONST., art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

Security System Exemptions from Public Access or Disclosure

Exemptions for security systems and surveillance techniques are governed by ss. 281.301 and 119.071, F.S.

Section 281.301, F.S., provides that:

Information relating to the security systems for any property owned by or leased to the state or any of its political subdivisions, and information relating to the security systems for any privately owned or leased property which is in the possession of any agency as defined in s. 119.011(2), including all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or revealing such systems or information, and all meetings relating directly to or that would reveal such systems or information are confidential and exempt from ss. 119.07(1) and 286.011 and other laws and rules requiring public access or disclosure.

Section 119.071(3)(a)2., F.S., provides that:

(3) SECURITY.—

2. A security system plan or portion thereof for:

- a. Any property owned by or leased to the state or any of its political subdivisions; or
- b. Any privately owned or leased property

held by any agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

As used in s. 119.071(3)(a), F.S., the term “security system plan” includes “all... records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems...”²⁰

Statutory Interpretation by the Courts and the Attorney General

The Attorney General and the courts have both weighed in on the issues relating to exemptions for security systems. The Attorney General concluded that the names and addresses of applicants for permits to install security systems would be information that would reveal the existence of a security system, and, therefore would be exempt from public disclosure.²¹ Furthermore, the Second District Court of Appeal, in *Critical Intervention Services, Inc. v. City of Clearwater*, cited with approval the discussion in that Attorney General Opinion finding that the identity of residential and business alarm permit holders was exempt from public disclosure.²² The court found that the plain language of ss. 281.301 and 119.071, F.S., makes confidential all records

²⁰ Section 119.071(3)(a)1.a., F.S.

²¹ Op. Atty Gen. Fla. 2004-08 (2004).

²² *Critical Intervention Services, Inc. v. City of Clearwater*, 908 So. 2d 1195 (Fla. 2d DCA 2005).

revealing a security system and stated that disclosure of such information “would imperil the safety of persons and property.”²³

The Fifth District Court of Appeal in *Central Florida Regional Transportation Authority d/b/a Lynx v. Post-Newsweek Stations, Orlando, Inc.*, considered whether security tapes from cameras installed on transit authority buses were confidential as revealing the security system.²⁴ Citing to s. 281.301, F.S., which states that records that directly relate to or reveal information about security systems are confidential, the court concluded that the video footage captured by the bus camera “directly relates to and reveals information about a security system.”²⁵ The court found that the videos “which are records, reveal the capabilities—and as a corollary, the vulnerabilities—of the current system” and therefore, are confidential and exempt from public inspection.²⁶

In similar fashion, the Attorney General opined that surveillance tapes that are made by a security system are confidential and exempt from the disclosure requirements of the public records law under ss. 281.301 and 119.071, F.S.²⁷

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., expanding the definition of the term “security system plan” to include “all...video or audio recordings from a security system camera.” Furthermore, the section broadens who may disclose information made confidential and exempt under s. 119.071(3)(a), F.S., and to whom such information may be disclosed. Information made confidential and exempt under paragraph (a) may now be disclosed:

- To the property owner or leaseholder;
- To another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism or criminal act, or to prosecute those persons who are responsible for such attempts or acts;
- In furtherance of an agency’s official duties and responsibilities;
- To another governmental agency in the furtherance of its official duties and responsibilities;
- or
- Upon a showing of good cause before a court of competent jurisdiction.

The section also provides that video or audio recordings from a security system camera for any property owned by or leased to the state or any of its political subdivisions, and for any privately owned or leased property which is in the possession of any agency as defined in s. 119.011(2), F.S., are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. This exemption is intended to apply to video and audio recordings held by an agency before, on, or after the effective date of the bill. The section provides that information made confidential and exempt under paragraph (d) may be disclosed in this same manner as paragraph (a). The bill also provides that s. 119.071(3)(d), F.S., is subject to the Open

²³ *Id.* at 1197.

²⁴ *Cent. Florida Reg’l Transp. Auth. V. Post-Newsweek Stations, Orlando, Inc.*, 157 So. 3d. 401 (Fla. 5th DCA 2015), reh’g denied (Feb. 26, 2015).

²⁵ *Id.* at 405.

²⁶ *Id.*

²⁷ Op. Atty Gen. Fla. 2015-06 (2015).

Government Sunset Review Act and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 repeals s. 281.301, F.S., relating to exemptions for security systems and records and meetings relating to security systems.

Section 3 is an unnumbered section that provides that the Legislature finds that it is a public necessity that the video and audio recordings from a security system camera be made confidential and exempt from s. 119.071(1), F.S., and s. 24(a), Art. I of the State Constitution.

The bill provides that government entities must be able to review and release video and audio recordings in order to ensure public safety and in furtherance of statutory duties. The bill goes on to provide specific situations in which video and audio recorded by a security system camera should be disclosed to state agencies, federal agencies, and the public. A court, upon a showing of good cause, may issue an order authorizing any person to view or copy video and audio from a security system camera and may prescribe any restrictions or stipulations that the court deems appropriate.

Section 4 provides that the bill is effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c) of Article I of the Florida Constitution requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public-records or public-meetings exemption. Therefore, this bill requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c) of Article I of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption.

This public necessity statement provides that disclosure of video and audio captured on security system cameras is necessary to ensure public safety and in furtherance of statutory duties. Furthermore, the bill states that video and audio recorded by a security system camera should be disclosed to other state or federal agencies to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism or criminal act, or to prosecute those persons who are responsible for such attempts or acts.

Breadth of Exemption

Section 24(c) of Article I of the Florida Constitution requires a public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.

The bill expands the public record exemption for security systems to include audio and video recordings. Generally, the exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

In response to public records requests, government entities may be required to determine whether the information should be disclosed. As a result, the government entities may incur costs related to litigation regarding its determination to protect a document as part of a “security system plan” or provide it as a public record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 119.071 and 281.301 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.
