

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 Communications, Energy, and Public Utilities

BILL: CS/SB 776

INTRODUCER: Communications, Energy, and Public Utilities Committee and Senator Bradley

SUBJECT: Public Records/Utility Agencies Information Technology Security

DATE: February 2, 2016 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sorchych-Hoffman/ Wiehle	Caldwell	CU	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 776 creates a public records exemption for certain information relating to the information technology security of utility agencies subject to ch. 119, F.S., which, if disclosed, could result in the identification of vulnerabilities that could result in a security breach or otherwise negatively impact public health and safety, the economic well-being of the state, and national security.

The bill contains a statement of public necessity as required by the Florida Constitution.

This is a new public records exemption, so a two-thirds vote by each chamber will be necessary for passage.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to access any record made or received in relation to the official business of any public body, officer, or employee of the state,

or of persons acting on their behalf.¹ The records of all three branches of state government are specifically included.²

The Florida Statutes also provide conditions under which public access must be provided to government records. The Public Records Act³ guarantees the right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption⁷ and must be no broader than necessary to accomplish the stated purpose of the law.⁸ A bill enacting an exemption may not contain other substantive provisions⁹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁰

The Open Government Sunset Review Act (“OGSR Act”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ It requires the automatic repeal of an exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹² The OGSR Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹³

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines “public records” to mean “all documents, papers, letter, 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.” The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ *Id.*

⁹ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ Section 119.15, F.S.

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

Present Security-Related Public Records Exemptions

Section 119.071(3), F.S., provides the existing public records exemptions for security-related information. It exempts records relating to:

- A security system plan¹⁴ or portion thereof which is held by an agency and is for property owned by or leased to the state or any of its political subdivisions or for privately owned or leased;
- Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency; and
- Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of an attractions and recreation facility, entertainment or resort complex, industrial complex, retail and service development, office development, or hotel or motel development and which are held by an agency.

Applicability of Public Records Requirements to Utilities

The public records laws apply to any record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf. For the public records law to apply directly to a utility, the utility would have to be a governmental entity, a municipality. However, the public records laws could apply indirectly to the records of a nongovernmental if that utility were required to file the records with a governmental agency, so that the records would become records received in connection with the agency's official business. For example, the Public Service Commission (PSC) regulates some utilities that are not governmental entities and are not directly subject to the public records laws, but that have to make numerous filings with the PSC, which thus become subject to public records laws; to protect confidential information in these records, the PSC statutes provide for confidentiality. For example, s. 366.093, F.S., provides for PSC access to regulated electric utilities' records and for confidentiality of such records when held by the PSC. The statute provides that upon request of the regulated utility or other person, any records received by the commission which are shown and found by the commission to be proprietary confidential business information shall be exempt from public records law and shall be kept confidential. The section defines the term "proprietary confidential business information" to mean information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business

¹⁴ The section defines the term "security system plan" to include 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;
- Threat assessments conducted by any agency or any private entity;
- Threat response plans;
- Emergency evacuation plans;
- Sheltering arrangements; or
- Manuals for security personnel, emergency equipment, or security training.

operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes security measures, systems, or procedures, and presumably includes the type of information covered by the bill.

III. Effect of Proposed Changes:

The bill creates a definition of the term “utility” for purposes of the public records statutes, defining the term to mean a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater.

The bill exempts from public records law information which is held by a utility owned or operated by a unit of local government and is:

- Information related to the security of the technology, processes, or practices of a utility owned or operated by a unit of local government which are designed to protect the utility’s networks, computers, programs, and data from attack, damage, or unauthorized access, which information, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology resources.
- Information, whether in physical or virtual form, related to the security of existing or proposed information technology systems or industrial control technology systems of a utility owned or operated by a unit of local government, which, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operation of the systems and the utility.

The exemption applies to these categories of information whether obtained before, on, or after the effective date of this exemption.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides legislative findings that, as utility system infrastructure becomes more connected and integrated through information and communications technology, the exposure to damage from attacks through such technology continues to grow. These attacks may result in the disruption of utility services and damage to utility systems. Maintaining safe and reliable utility systems is vital to protecting the public health and safety and ensuring the economic well-being of the state. Accordingly, many utilities have adopted technologies, processes, and practices designed to secure data, information technology systems, and industrial control technology systems. Disclosure of sensitive information related to these security measures could result in the identification of vulnerabilities that allow a security breach that damages utility systems and disrupts the safe and reliable operation of such systems, adversely impacting the public health and safety and the economic well-being of the state. Because of the interconnected nature of utility systems, a security breach may also impact national security concerns. As a result, the Legislature finds that the public and private harm in disclosing the information made exempt by this act outweighs any public benefit derived from disclosure of such information. The protection of information made exempt by this act will ensure that utilities have greater safeguards to

protect against security threats and will bolster efforts to develop more resilient information technology systems and industrial control technology systems.

The bill also contains a legislative finding of public necessity that, based on the foregoing findings, the specified information must be exempt from public records law.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution provides that every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.¹⁵ However, the Legislature may provide for the exemption of records from these requirements by general law passed by a two-thirds vote of each house, provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.¹⁶ Such laws may contain only exemptions from these requirements and much relate to one subject.¹⁷

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminable.

C. Government Sector Impact:

Government entities will have to train their staff to exclude relevant information relating to the information technology security of utility agencies from public disclosure.

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ *Id.*

¹⁷ *Id.*

In response to public records requests, the public records custodians for the municipal utilities will have to determine which information qualifies under this exemption.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- Proponents of the bill indicated that the types of information sought to be protected include:
- Information technology security reports, diagrams, PowerPoints, flowcharts, and correspondence that detail the security strategy, protective measures, and implementation plans and results, whether created by the utility or by a third party tasked with reviewing and stress-testing systems and procedures.
- Information technology software lists that detail the software used to defend security networks, provide card access to restricted areas, and provide remote access to critical systems.
- Critical Infrastructure Protection (CIP) Reports sent to the Florida Regional Coordinating Council (FRCC).
- CIP Audits, responses, recommendations, and action plans sent to FRCC.
- Correspondence related to the CIP plans with FRCC.
- Physical and virtual security plans, reports, diagrams, PowerPoints, flowcharts, and correspondence relating to defending the information technology infrastructure and other infrastructure (i.e., power plants, water plants, substations, power dispatching centers, grid operations centers, network operations centers, and data centers).

VIII. Statutes Affected:

This bill substantially amends section 119.0713, 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 Communications, Energy, and Public Utilities on February 6, 2016:

The committee substitute addresses issues raised by the First Amendment Foundation and in the bill analysis by:

- Deleting the exemption for security firm identity information;
- Deleting the undefined term “utility agency” and providing a definition of the term “utility”; and
- Rewriting throughout the bill for purposes of clarity.

- B. **Amendments:**

None.