

**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.)

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Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

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BILL: SB 776

INTRODUCER: Senator Bradley

SUBJECT: Public Records/Utility Agencies Information Technology Security

DATE: January 25, 2016

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sorchych-Hoffman/ Wiehle	Caldwell	CU	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____

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**I. Summary:**

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 personal safety, economic growth, 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.<sup>1</sup> The records of all three branches of state government are specifically included.<sup>2</sup>

The Florida Statutes also provide conditions under which public access must be provided to government records. The Public Records Act<sup>3</sup> guarantees the right to inspect and copy any state

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> Chapter 119, F.S.

or local government public record<sup>4</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>5</sup>

Only the Legislature may create an exemption to public records requirements.<sup>6</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption<sup>7</sup> and must be no broader than necessary to accomplish the stated purpose of the law.<sup>8</sup> A bill enacting an exemption may not contain other substantive provisions<sup>9</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

### **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:

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<sup>4</sup> 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)).

<sup>5</sup> Section 119.07(1)(a), F.S.

<sup>6</sup> 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).

<sup>7</sup> FLA. CONST., art. I, s. 24(c).

<sup>8</sup> *Id.*

<sup>9</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> Section 119.15, F.S.

<sup>12</sup> Section 119.15(3), F.S.

<sup>13</sup> Section 119.15(6)(b), F.S.

- A security system plan<sup>14</sup> 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 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

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<sup>14</sup> 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.

measures, systems, or procedures, and presumably includes the type of information covered by the bill.

### “Utility Agency” and “Utility”

The term “utility agency” is not used in the statutes. The term “agency” is used many times, always in the context of a state agency or other governmental agency. The term “utility” is used in the statutes in several contexts with varying meanings, as shown by the following two examples. The statutes contain several definitions relating to electric utilities, with each definition significantly different and capturing different types of entities for different statutory purposes.<sup>15</sup> The rights-of-way statutes<sup>16</sup> provide a list of types of infrastructure that is included in the term “utility”<sup>17</sup> but then use this term to refer both to infrastructure that is used in providing a service and to the entity owning the infrastructure and providing the service. These different definitions and uses show that what is included in the term “utility” in the statutes is not clear without a definition or other clarifying language and is based on policy and circumstances.

### III. Effect of Proposed Changes:

The bill protects information that relates to a utility agency and that:

- Relates to the security of the utility agency’s technologies, processes, and practices designed to protect networks, computers, programs, and data from attack, damage, or unauthorized access which, if disclosed, could facilitate the alteration, disclosure, or destruction of data or information technology resources;
- Constitutes security information, whether physical or virtual, relating to the utility agency’s existing or proposed information technology systems or industrial control systems which, if disclosed, could affect security, economic security, public health or safety, or any combination thereof; or
- Constitutes information that would disclose the identity of security firms used by the utility agency to secure and store data or provide information technology services.

The bill amends s. 119.0713, F.S. by creating a new public records exemption for information subject to ch. 119, F.S. relating to the cybersecurity of utility agencies. The bill makes this exemption subject to the Open Government Sunset Review Act and provides that it is automatically repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature prior to that date.

The bill contains a finding of public necessity for this exemption. It states that it is a public necessity that utility security information be protected from disclosure to prevent persons gaining unauthorized access into existing or proposed utility networks, computers, information technology systems, or industrial control systems. The bill states that as technology continues to

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<sup>15</sup> See, s. 366.02(1) and (2), F.S., “public utility” and “electric utility”; s. 366.82, F.S., “utility”; s. 366.8255(1)(a), F.S., “electric utility” and “utility”; s. 403.503(15), F.S., “electric utility”; and 403.522(12) electric utility.

<sup>16</sup> Sections 337.401-337.409, F.S.

<sup>17</sup> Section 337.401(1)(a), F.S., provides for use of right-of-way for utilities subject to regulation and provides for the siting of “any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section as the ‘utility.’”

evolve and utility systems become more interconnected, it is important that new public records exemptions be created to encompass information technology resources and systems as the risk of cyberattack continues to grow. The release of sensitive information relating to the administration of a utility agency's information technology security measures could result in the identification of vulnerabilities in critical infrastructure for energy and utilities that could result in a security breach or otherwise negatively impact personal safety, economic growth, and national security. Finally, the bill makes a legislative finding that the public and private harm in disclosing the information made exempt by this act outweighs any public benefit derived from the disclosure of such information.

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.<sup>18</sup> 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.<sup>19</sup> Such laws may contain only exemptions from these requirements and much relate to one subject.<sup>20</sup>

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Indeterminable.

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<sup>18</sup> FLA. CONST., art. I, s. 24(c).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

### 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.

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:

The bill refers to “utility agencies subject to ch. 119, F.S.” In order to be directly subject to the chapter, the utility must be a municipal utility.<sup>21</sup> The types of municipal utilities covered in the bill are unclear. Lines 59-60 refer to “critical infrastructure for energy and utilities” which suggests electric utilities, but may be interpreted more broadly.

The language on lines 25-29 provides a public records exemption for information which, if disclosed, could affect *security, economic security, public health or safety, or any combination thereof.*” The language on lines 61-66 provides a legislative finding that release of protected information could negatively impact *personal safety, economic growth, and national security.*” These seem to be different standards or criteria.

### 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).

The First Amendment Foundation reviewed this bill and requested that the proposed exemption for “information that would disclose the identity of security firms used by the utility agency to secure and store data or provide information technology services” be deleted from the bill as it is overly broad in that disclosure of “the identity of security system providers could not, in and of itself, result in identifying the vulnerabilities of security protocols and programs” and exempting

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<sup>21</sup> Section 119.0713, F.S.

this information from disclosure “shields information about potentially deficient security systems and precludes any opportunity for governmental oversight and accountability.”

**VIII. Statutes Affected:**

This bill substantially amends section 119.0713, F.S.

**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.

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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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