

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 Rules

BILL: CS/CS/SB 776

INTRODUCER: Governmental Oversight and Accountability Committee, Communications, Energy, and Public Utilities Committee and Senator Bradley

SUBJECT: Public Records/Utility Information or Industrial Control Technology Systems Security

DATE: February 23, 2016

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 776 exempts from public access and inspection requirements certain information relating to the information technology security of a utility owned or operated by a unit of local government, which, if disclosed, could result in the identification of vulnerabilities that could result in a security breach.

The bill contains a statement of public necessity as required by the Florida Constitution. The public necessity statement provides that information technology security should exempt from public disclosure in order to prevent security breaches and threats to utilities.

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

The bill will become effective upon becoming law.

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

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.

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

Present Security-Related Public Records Exemptions

Section 119.071(3), F.S., provides the existing public records exemptions for security-related information. The following are ‘confidential and exempt’ or ‘exempt’ from public disclosure:

- A security system plan¹⁴ or portion thereof for property owned by or leased to the state or any of its political subdivisions, as well as the security system plans of privately owned or leased property;
- 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.

Security systems are also exempt from public disclosure under s. 281.301, F.S. This exemption 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 is confidential and exempt from public disclosure. This security system exemption includes 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. Section 281.301, F.S., also provides an exemption for public meetings which include discussions about security systems.

Security information that is a trade secret are exempt from public disclosure requirements under s. 815.045, F.S.¹⁵ There is also a public records exemption for data, programs or supporting

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

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.

¹⁵ Section 815.045, F.S. states:

Trade secret information.—The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt from the public records law because it is a felony to disclose such records. Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, it is imperative

documentation that is trade secret which resides on a computer, computer system or network, as well as any electronic device. This exemption provides that such trade secrets are confidential and exempt, pursuant to s. 815.04(3)(a), F.S.

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 then become subject to public records laws.

In order to protect confidential information in these records, the PSC statutes include a public records exemption. Section 366.093, F.S., provides that proprietary confidential business information held by the PSC is confidential and therefore exempt from public disclosure. Section 366.093(3), F.S., defines the term "proprietary confidential business information," in part, 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 measures, systems, or procedures"¹⁶ and could be interpreted to include the type of information covered by the bill.

that a public records exemption be created. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing trade secrets in an agency's possession would negatively impact the business interests of those providing an agency such trade secrets by damaging them in the marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

¹⁶ Section 366.093(3)(c), F.S.

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 held before, on, or after the effective date of the 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 also includes a public necessity statement making legislative findings. The public necessity statement provides that, as utilities becomes more connected and integrated through information and communications technology, the exposure to damage from attacks through such technology increases. Disclosure of 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, as well as impact national security. The public necessity statement also provides that the public and private harm in disclosing the information technology security information outweighs any public benefit derived from disclosure of such information.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent this bill requires a city or county to expend funds to comply with its terms, the provisions of Article VII, section 18(a) of the Florida Constitution, may apply. However, Article VII, section 18(d) of the Florida Constitution exempts bills having an insignificant fiscal impact on cities and counties from the mandates provisions.

This bill makes certain information submitted to cities and counties confidential and exempt from public disclosure. As a result, cities and counties holding such information may incur costs associated with redacting such information before providing related documents to the public. However, the costs incurred by the cities and counties are anticipated to be insignificant.

B. Public Records/Open Meetings Issues:

The bill contains a statement of public necessity justifying the need for the public records exemption as required by Article I, s. 24(c), of the Florida Constitution. The exemption appears to be no broader than necessary to accomplish the purpose outlined in the public necessity statement.

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 redact relevant information relating to the information technology security of utility agencies from public disclosure if there is a public records request.

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).¹⁷

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.011 and 119.0713.

IX. Additional Information:

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

CS/CS by Governmental Oversight and Accountability on February 16, 2016:

The committee substitute does the following:

- Changes the retroactivity clause to include information “held by” utilities, which is more inclusive than “obtained by” a utility. This change will make the retroactivity clause applicable to information that a utility has in its possession or generates prior to enactment of the bill.
- Restructures the public necessity statement.

CS by Communications, Energy, and Public Utilities on February 6, 2016:

The committee substitute:

- Deletes the exemption for security firm identity information;
- Deletes the undefined term “utility agency” and provides a definition of the term “utility”; and
- Makes edits throughout the bill for purposes of clarity.

- B. **Amendments:**

None.

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

¹⁷ Security plans for physical infrastructure will be exempt from public disclosure pursuant to ss. 281.301 and 119.071(3), F.S.