

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 Governmental Oversight and Accountability

BILL: CS/CS/SB 110

INTRODUCER: Governmental Oversight and Accountability Committee; Education Committee and Senators Brandes and Rouson

SUBJECT: Public Records and Public Meetings/Information Technology/Postsecondary Education Institutions

DATE: April 4, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Benvenisty</u>	<u>Graf</u>	<u>ED</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 110 creates a new public records and meetings exemption for records of state universities and Florida College System (FCS) institutions pertaining to Information Technology (IT) security systems if the disclosure of such records would facilitate the unauthorized access to, or unauthorized modification, disclosure, or destruction of data, information, or IT resources. Specifically, the bill:

- Exempts from public records laws data or information from technology systems owned by, under contract, or maintained by a state university or FCS institution.
- Exempts from public meetings laws portions of public meetings that may reveal data or information from technology systems owned, contracted, or maintained by a state university or an FCS institution.
 - Requires an exempt portion of a public meeting to be recorded and transcribed but specifies such recording and transcript must be exempt from disclosure, unless a court determines that the meeting was not restricted to discussion of confidential and exempt data.
- Specifies the entities to whom exempt records must be provided.

The bill provides a statement of public necessity justifying the exemption as required by the Florida Constitution. Additionally, the bill provides for repeal of the public record and meeting

exemption on October 2, 2022, pursuant to the Open Government Sunset Review Acts unless reviewed and saved from repeal by the Legislature.

Article I, s. 24(c), of the Florida Constitution, requires a two-thirds vote of the members of each house of the Legislature for final passage of a bill that creates an exemption for public records or public meetings.

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

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

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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 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).

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

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

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” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.¹⁴

Public Meetings Law

Article I, s. 24(b), of the Florida Constitution sets forth the state’s public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the “Government in the Sunshine Law” or “Sunshine Law,” further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.¹⁵ The board or commission must provide reasonable notice of all public meetings.¹⁶ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.¹⁷ Minutes of a public meeting must be promptly recorded and open to public inspection.¹⁸

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

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 *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 286.011(1), F.S.

¹⁶ *Id.*

¹⁷ Section 286.011(6), F.S.

¹⁸ Section 286.011(2), F.S.

Public Records and Public Meetings Exemptions

The Legislature, however, may provide by general law for the exemption of records and meetings from the requirements of Art. I, s. 24(a) and (b), of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²⁰ The OGSR 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.²¹

The OGSR 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.²² 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²³
- 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;²⁴ or
- It protects trade or business secrets.²⁵

The OGSR also requires specified questions to be considered during the review process.²⁶ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

¹⁹ Art. I, s. 24(c), Fla. Const.

²⁰ 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 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 section 119.15(2), F.S.

²¹ Section 119.15(3), F.S.

²² Section 119.15(6)(b), F.S.

²³ Section 119.15(6)(b)1., F.S.

²⁴ Section 119.15(6)(b)2., F.S.

²⁵ Section 119.15(6)(b)3., F.S.

²⁶ Section 119.15(6)(a), F.S. The specified questions are:

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

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁷ 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 provided for by law.²⁸

State Universities and Florida College System Institutions

Records and meetings held by state universities and Florida College System (FCS) institutions regarding information security incidents, such as investigations into security breaches, security technologies, processes and practices as well as security risk assessments are currently subject to Florida public records laws.²⁹ Section 282.318, F.S., exempts from public records laws data and information from technology systems owned, contracted, or maintained by a state agency.³⁰ A “state agency” means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government; the Justice Administrative Commission; and the Public Service Commission.³¹ However, state universities and university boards of trustees are specifically excluded from the definition of “state agency.”³²

Florida College System records at the state level, as part of the Department of Education, are confidential and exempt under s. 282.318, F.S., but it is unclear the extent to which the records of FCS institutions and their boards of trustees are confidential and exempt under current law.³³

III. Effect of Proposed Changes:

The bill creates a new public records and meetings exemption for records of state universities and Florida College System (FCS) institutions pertaining to Information Technology (IT) security systems if the disclosure of such records would facilitate the unauthorized access to, or unauthorized modification, disclosure, or destruction of data, information, or IT resources.

Public Records Exemption

The bill makes confidential and exempt from public disclosure data or information from technology systems owned by, under contract, or maintained by a state university or FCS institution. Such data and information includes the following types of records and portions of documents:

- Records held by the university or college which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of data or information, whether physical or virtual, or information technology resources; and

²⁷ FLA. CONST. art. I, s. 24(c).

²⁸ Section 119.15(7), F.S.

²⁹ See FLA. CONST. art. I, s. 24(c), and Ch. 119, F.S.

³⁰ State University System of Florida, Board of Governors, *2017 Legislative Bill Analysis for SB 110* (Jan. 10, 2017), at 1.

³¹ Sections 282.0041(23) and 282.318(2), F.S.

³² Section 282.0041(23), F.S.

³³ Florida Department of Education, *2017 Legislative Bill Analysis for SB 110* (Dec. 21, 2016), at 3.

- Those portions of risk assessments, evaluations, and other reports of the university's or institution's information technology security program for its data, information, and information technology resources which are held by the university or institution. These records would be confidential and exempt if disclosure of such records would lead to the unauthorized access to or unauthorized modification, disclosure, or destruction of the data, information, or IT resources.

Public Meetings Exemption

The bill closes portions of public meetings in which confidential and exempt information is discussed. Closed portions of meetings must be recorded and transcribed. However, the bill specifies that the recording and transcript of the meeting must remain confidential and exempt from disclosure unless a court with competent jurisdiction determines the meeting was not restricted to confidential and exempt data and information. If this occurs, then the court may disclose the recordings and transcripts that do not contain confidential and exempt information.

Statement of Public Necessity

The bill provides a statement of public necessity for the proposed public record and meeting exemptions created in the bill. Specifically, the bill provides the following reasons for such exemptions:

- Records held by a state university or FCS institution that identify IT detection, investigation, or response practice for suspected or confirmed IT security incidents, including breaches, may be used in the investigation of the incident. The release of such information may interfere with and jeopardize the ongoing investigation.
- An investigation into an IT security incident, including a breach, may result in the gathering of sensitive personal information exempt from disclosure under state and federal law.³⁴ Release of such information may be used to commit identity theft or other crimes and subject potential victims of the security incident to further harm.³⁵
- Disclosure of records such as an audit or forensic analysis of a state university or FCS institutions may reveal weaknesses in the university or institutions IT security system.
- Records held by a state university or FCS institution may contain proprietary information, the release of which would provide an unfair advantage for business competitors in the market place.
- Disclosure of records may compromise and interfere with the administration of ongoing education programs.

According to the Board of Governors of the State University System (BOG) "a state university is vulnerable to the disclosure of records or information that could potentially compromise the

³⁴ 20 U.S.C. s. 1232g, and ss. 1002.225 and 1006.52, F.S.

³⁵ Florida law specifies procedures that must be taken in the event the security of personal information maintained by a government entity is breached. A government entity must give notice to each individual in the state whose personal information was, or the government entity reasonably believes to have been, accessed because of a breach of security. Section 501.171(4), F.S. Email, State University System of Florida Board of Governors (March 7, 2017). On file with the Senate Committee on Education.

confidentiality, integrity, and availability of a state university's information technology system" which contain sensitive data.³⁶

Open Government Sunset Review

The bill provides for the repeal of the exemptions created by this bill on October 2, 2022, as required by the Open Government Sunset Review Act. This timeframe for scheduled repeal appears to be consistent with the law regarding state public meeting and public record exemptions.³⁷

Application

The bill provides for retroactive application of the public records exemption. As such, all prior records pertaining to the detection, investigation, and response practices for suspected or confirmed IT security incidents and related reports will become confidential and exempt from disclosure.

All records and portions of public meeting recordings and transcripts made confidential and exempt by the bill must be available to the Auditor General, the Cybercrime Office of the Department of Law Enforcement, for the state universities, the Board of Governors, and for the FCS institutions, the State Board of Education. Additionally, such records and portions of meetings may be made available to a state or federal agency for security purposes or in furtherance of the agency's official duties.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c), of the Florida Constitution, requires a two-thirds vote of the members of each house of the Legislature for final passage of a bill that creates an exemption for public records or public meetings.

The bill creates a public record and public meeting exemption; therefore, a two-thirds vote of the members of each house of the Legislature is required for final passage of the bill.

³⁶ State University System of Florida, Board of Governors, *2017 Legislative Bill Analysis for SB 110* (Jan. 10, 2017) at 1. The Board of Governors (BOG) regulation prescribes a minimum standard for security of data and related information technology resources. Florida Board of Governors Regulation 3.0075. The president of each university is responsible for ensuring appropriate and auditable security controls are in place on his or her campus. *Id.* at (1).

³⁷ Section 119.15(2)-(3), F.S.

Public Necessity Statement

Article I, s. 24(c), of the Florida Constitution, requires that a bill creating an exemption for public records or public meetings contain a public necessity statement justifying the exemption. The bill contains statements of public necessity for the public records exemptions and the public meetings exemption. The public records exemptions and the public meetings exemption appear to be no broader than necessary to achieve the purposes set out in the public necessity statements.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill includes court procedures for disclosure of meeting records. Most public meetings exemptions do not include such provisions.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 1004.055 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/CS by Governmental Oversight and Accountability on April 3, 2017:

- Removes a definition of external audit and removes references to internal and external audits;

- Revises the public necessity statement to conform to the “information or data from technology systems” that is the subject of the public exemption. Previously, the public necessity statement centered around the types of records, risk assessments and other documents that were subsets the “information or data” that were the subject of the exemption;
- Revises the public necessity statement for the public meetings and records exemption by reiterating what subjects are not subject to public disclosure; and,
- Makes clarifying editorial changes.

CS by Education on March 21, 2017:

The committee substitute adds the State Board of Education to the entities to who exempt records and meeting transcripts for Florida’s community colleges must be made available.

B. Amendments:

None.