

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/SB 1880

INTRODUCER: Banking and Insurance Committee and Senators Broxson and Mayfield

SUBJECT: Public Records/Security of Data and Information Technology in Citizens Property Insurance Corporation

DATE: February 12, 2018 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matiyow</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1880 creates a public records exemption for data and information from information technology (IT) systems owned by, under contract with, or maintained by Citizens Property Insurance Corporation (Citizens). The bill exempts from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution the following data and information held by Citizens:

- Records that identify detection, investigation, or response practices for suspected or confirmed IT security incidents, including suspected or confirmed breaches.
- Portions of risk assessments, evaluations, audits, and other reports of Citizens' IT security program for its data, information and IT resources.

Such records are confidential and exempt if disclosure would facilitate unauthorized access to or unauthorized modification, disclosure, or destruction of data or information, or information technology resources including those related to security of IT resources.

The bill also creates a public meeting exemption for meetings and portions thereof that would reveal the above-described IT security information.

The exemptions are similar to those currently in law for state agencies.

The exemptions are retroactive and apply to records or portions of public meetings, recordings, and transcripts held by Citizens before, on, or after the effective date of the bill.

The bill has an effective date of upon becoming a law and provides for repeal of the exemptions on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the State Constitution.

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

[i]t 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 by passing a general law by a two-thirds vote of the House and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish

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 Legislature 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” 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.

⁹ FLA. CONST., art. I, s. 24(c).

the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² 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 under certain circumstances.¹³

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law”¹⁷ or the “Sunshine Law,”¹⁸ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ 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.²¹ Minutes of a public meeting must be promptly recorded and open to public

¹⁰ *Id.*

¹¹ *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.

¹² 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).

¹³ *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).

¹⁴ FLA. CONST., art. I, s. 24(b).

¹⁵ *Id.*

¹⁶ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

²¹ Section 286.011(6), F.S.

inspection.²² Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.²⁵ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.²⁶ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.²⁸ 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.²⁹ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.³⁰ 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;³¹
- 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;³² or
- It protects trade or business secrets.³³

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ *Id.*

²⁷ *See supra* note 11.

²⁸ 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.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1., F.S.

³² Section 119.15(6)(b)2., F.S.

³³ Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.³⁴ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.³⁵ 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.³⁶

Public Record Exemptions Related to Information Technology

The Information Technology (IT) Security Act³⁷ requires the Agency for State Technology and state agencies³⁸ to meet certain requirements relating to IT security. The IT Security Act provides that the following state agency information is confidential and exempt from public record requirements:

- Risk assessments;³⁹
- Evaluations;
- External audits; and
- Other reports of a state agency's IT security program.

Portions of such documents will be confidential and exempt from public disclosure only if the disclosure of such information could facilitate unauthorized access, modification, disclosure or destruction of:

- Data or information, whether physical or virtual; or
- IT resources, including protocols for protecting those resources as well as any existing or proposed IT security systems.

This confidential and exempt information must be made available to the Auditor General, the Cybercrime Office within the Department of Law Enforcement, the Agency for State Technology, and, for agencies under the jurisdiction of the Governor, the Chief Inspector

³⁴ Section 119.15(6)(a), F.S. The specified questions are:

- 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?

³⁵ FLA. CONST., art. I, s. 24(c).

³⁶ Section 119.15(7), F.S.

³⁷ Section 282.318, F.S.

³⁸ Section 282.0041(23), F.S., provides, in part, that "state agency" means any official, officer, commission, board, authority, council, committee, or department of the executive branch of government; the Justice Administrative Commission; and the Public Service Commission. The term does not include university boards of trustees, or state universities. For purposes of the Information Technology Security Act, the term "state agency" also includes the Department of Legal Affairs, the Department of Agriculture and Consumer Services, and the Department of Financial Services. *See* s. 282.318(2), F.S.

³⁹ Section 282.318(5), F.S.

General.⁴⁰ In addition, the records may be released to a local government, another state agency, or a federal agency for IT security purposes or in furtherance of the state agency's official duties.⁴¹

The IT Security Act also provides that records held by a state agency that identify detection, investigation, or response practices for suspected or confirmed IT security incidents, including suspected or confirmed breaches, are confidential and exempt.⁴²

Such confidential and exempt records must be made available to the Auditor General, the Cybercrime Office within Department of Law Enforcement, the Agency for State Technology, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General. These records may also be released to a local government, another state agency, or a federal agency for IT security purposes or in furtherance of the state agency's official duties.⁴³

Citizens Property Insurance Corporation

Citizens Property Insurance Corporation (Citizens) is a state-created, not-for-profit, tax-exempt governmental entity whose mission is to provide property insurance coverage to those unable to find affordable coverage in the private market.⁴⁴ It is not a private insurance company.⁴⁵

Records and meetings held by Citizens regarding information security incidents, such as investigations into security breaches, security technologies, processes and practices as well as security risk assessments are subject to Florida open records and meetings laws. Public disclosure of this information presents a significant security risk and would reveal weaknesses within Citizens' computer networks, raising the potential for exploitation.

Because Citizens is not created within the executive branch, it is not covered by the definition of "state agency"⁴⁶ contained in the IT Security Act. Accordingly, Citizens is not subject to the exemptions from open meetings and public records laws for data and information technology systems owned, contracted, or maintained by specified state agencies.

Therefore, Citizens is vulnerable to the disclosure of information and records which, if disclosed, could potentially compromise the confidentiality, integrity, and availability of its information technology system. Such system contains highly sensitive policyholder, insurer, claims, financial, accounting and banking, personnel, and other records.⁴⁷

⁴⁰ Section 282.318(5)(b), F.S.

⁴¹ *Id.*

⁴² Section 282.318(4)(j), F.S.

⁴³ *Id.*

⁴⁴ See Citizens Property Insurance Corporation, Who We Are, available at <https://www.citizensfla.com/who-we-are> (last viewed on Feb. 8, 2018). See also s. 627.351(6)(a), F.S.

⁴⁵ Section 627.351(6)(a).1., F.S.

⁴⁶ See *supra* note 38.

⁴⁷ Section 627.351(6)(x), F.S., requires Citizens to hold the following records as confidential and exempt from disclosure under Florida's public record laws: underwriting files, claim files, certain audit files, attorney-client privileged material, certain proprietary information licensed to Citizens, employee assistance program information, information relating to the medical condition or medical status of a Citizens employee, certain information relating to contract negotiations, and certain records related to closed meetings.

III. Effect of Proposed Changes:

Section 1 creates public record and public meeting exemptions to protect data and records pertaining to the security of the Citizens information networks from disclosure. The bill provides that records held by Citizens that identify detection, investigation, or response practices for suspected or confirmed IT security incidents, including suspected or confirmed breaches, are confidential and exempt from public record requirements. In addition, portions of risk assessments, evaluations, audits, and other reports of Citizens' IT security program for its data, information, and IT resources that are held by Citizens are confidential and exempt. Such records, and portions thereof, are only confidential and exempt if disclosure would facilitate unauthorized access to or unauthorized modification, disclosure, or destruction of:

- Physical or virtual data or information; or
- IT resources, including:
 - Information relating to the security of Citizens' technologies, processes, and practices designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or
 - Physical or virtual security information that relates to Citizens' existing or proposed IT systems.

The bill also creates a public meeting exemption for meetings and portions thereof that would reveal the above-described IT security information. Recordings or transcripts of such closed portions of meetings must be taken. Recordings or transcripts are confidential and exempt from public record requirements, unless a court, following an in-camera review, determines that the meeting was not restricted to the discussion of confidential and exempt data and information. In the event of such a judicial determination, only that portion of a transcript that reveals nonexempt data and information may be disclosed to a third party.

The bill requires the confidential and exempt records related to the public meeting exemption to be available to the Auditor General, the Cybercrime Office of Department of Law Enforcement, and the Office of Insurance Regulation. Such records and portions of meetings, recordings, and transcripts may also be available to a state or federal agency for security purposes or in furtherance of the agency's official duties.

The public record exemptions are retroactive and apply to records or portions of public meetings, recordings, and transcripts held by Citizens before, on, or after July 1, 2018.

This section is subject to the OGSR in accordance with s. 119.15, F.S., and stands repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a public necessity statement as required by the State Constitution, specifying that the public record and public meeting exemptions are necessary to ensure effective investigations of IT security breaches, to prevent identity theft and other crimes, and to prevent the disclosure of weaknesses in Citizens' data security.

Section 3 provides that the bill will take effect upon becoming a law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:**Voting Requirements**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates public record and public meeting exemptions; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that the public record and public meeting exemptions are necessary to ensure effective investigations of IT security breaches, to prevent identity theft and other crimes, and to prevent the disclosure of weaknesses in Citizens' data security.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates an exemption from public records and public meetings for data and information from IT systems owned by Citizens. The bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

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 title of the bill does not reference the open meetings exemption. A reference to the open meetings exemption should be added. Also, lines 89-90 reference July 1, 2018; this reference should be changed to upon becoming a law to be consistent with the effective date of the bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 627.352 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.)

CS by Banking and Insurance on January 30, 2018:

The CS makes a technical change correcting the 5 year sunset review date to October 2, 2023.

- B. **Amendments:**

None.