

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/SB 7008

INTRODUCER: Rules Committee; and Communications, Energy, and Public Utilities Committee

SUBJECT: OGSR/Local Government Electric Utility

DATE: March 1, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Wiehle	Caldwell		CU Submitted as Committee Bill
1.	Brown	Caldwell	GO	Favorable
2.	Wiehle	Phelps	RC	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 7008 removes the scheduled repeal of the public records exemption for proprietary confidential business information held by a local government electric utility, thus continuing the exemption from disclosure requirements under the public records laws. It also narrows the information that is considered proprietary confidential by removing the phrase “but not limited to” and clarifies the meaning of the term “trade secrets” in existing law.

The bill takes effect on October 1, 2018.

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

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

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 open meetings 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 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.

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).

¹⁰ FLA. CONST., art. I, s. 24(c).

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).

Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ 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;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote

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

¹⁴ 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ 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?

²¹ FLA. CONST. art. I, s. 24(c).

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.²²

Section 119.0713(4), F.S. – Exemption of Proprietary Confidential Business Information Held by a Local Government Electric Utility

In 2013, the Legislature created s. 119.0713(4), F.S., to exempt from the public record requirements proprietary confidential business information held by a local government electric utility in conjunction with a due diligence review of an electric project or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources. The term “proprietary confidential business information” means information, regardless of form or characteristics, which:

- is held by an electric utility that is subject to chapter 119, F.S.;
- is intended to be and is treated by the entity that provided the information to the electric utility as private in that the disclosure of the information would cause harm to the entity providing the information or its business operations; and
- has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public.

The term “proprietary confidential business information” includes, but is not limited to:

- Trade secrets.
- Internal auditing controls and reports of internal auditors.
- Security measures, systems, or procedures.
- Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the electric utility to contract for goods or services on favorable terms.
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

This public record exemption stands repealed on October 2, 2018, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act (section 119.15, F.S.).

Open Government Sunset Review of Exemption

Accordingly, in the summer of 2017, Senate and House committee staff conducted a survey of Florida local government electric utilities relating to their use of the exemption. Six entities responded: JEA (previously Jacksonville Electric Authority), Orlando Utilities Commission (OUC), Kissimmee Utility Authority (KUA), Lakeland Electric (LE), City of Leesburg Electric Department (LED), and Florida Municipal Power Agency (FMPA).^{23, 24}

²² Section 119.15(7), F.S.

²³ Responses are on file with the Senate Committee on Communications, Energy, and Public Utilities.

²⁴ While there are 34 municipal electric utilities, only 13 of these utilities generate electricity. Florida Public Service Commission, *2017 Facts and Figures of the Florida Utilities Industry*, page 11

<http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/March%202017.pdf>

Also, the projects that this public records exemption addresses involve the acquisition of large scale facilities, are very expensive, and don't happen often. Finally, the FMPA represents the collective interests of 13 municipal electric utilities, and

The statute applies to a local government electric utility that holds proprietary confidential business information in conjunction with either a due diligence review²⁵ of an electric project or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources.

An electric project includes:

- Any plant, works, system, facilities, and real property and personal property of any nature whatsoever, together with all parts thereof and appurtenances thereto, which is located within or without the state and which is used or useful in the generation, production, transmission, purchase, sale, exchange, or interchange of electric capacity and energy, including facilities and property for the acquisition, extraction, conversion, transportation, storage, reprocessing, or disposal of fuel and other materials of any kind for any such purposes.
- Any interest in, or right to, the use, services, output, or capacity of any such plant, works, system, or facilities.
- Any study to determine the feasibility or costs of any of the foregoing, including, but not limited to, engineering, legal, financial, and other services necessary or appropriate to determine the legality and financial and engineering feasibility of any project referred to above.²⁶

Types of projects include construction, acquisition, maintenance, or upgrading of electricity generating facilities, transmission or distribution power lines, operating systems, or storage facilities. Projects may involve traditional fuels or new sources, such as solar; traditional forms of transmission, distribution, and metering equipment or new equipment, such as smart meters and components of a smart grid; and new storage technologies, such as Li-Ion batteries and Vanadium Flow battery systems. Project goals may include: producing and delivering electricity to meet increased demands; increasing efficiency and cutting costs; or improving technologies to obtain purely economic or socioeconomic advantages.

A business may provide project proposals and related information to a municipal utility either pursuant to a utility announcement of a project and issuance of a Request for Proposals, or through an unsolicited business proposal. These proposals may be made by other electric utilities or designers or manufacturers of equipment or systems. Typically proposals include:

- Technical specifications, data, plans, drawings, and design information about the equipment, technology, and systems being proposed; and
- Terms and conditions, including identification and quantification of benefits to be provided and pricing information.

Much of this information is either patented, proprietary, or confidential.

The Legislature enacted the exemption statute based on a finding that it was a public necessity that this information be made confidential and exempt from public records requirements because the disclosure of this information could injure the provider in the marketplace by giving its competitors detailed insight into its financial status and strategic plans, thereby putting the

its response is considered a response for all 13 utilities. Collectively, then, 19 municipal utilities responded. Amy Zubaly, email to Diana Caldwell (September 6, 2017).

²⁵ A due diligence review is an investigation and review of the business seeking the contract and of their financial and technical resources to fulfill the contract, of the proposal itself, and of the costs associated with the proposal, including ratepayer impacts.

²⁶ Section 163.01(3)(d), F.S.

provider at a competitive disadvantage. Without this exemption, providers might be unwilling to enter into discussions with the electric utility regarding the feasibility of future contracting. This could, in turn, limit opportunities the electric utility might otherwise have for finding cost-effective or strategic solutions for providing electric service or improving the delivery, cost, or diversification of fuel or renewable energy. This would put public providers of electric utility services at a competitive disadvantage by limiting their ability to optimize services to their customers and adversely affecting the customers of those utilities by depriving them of opportunities for rate reductions or other improvements in services. The Legislature also found that the public and private harm in disclosing such proprietary confidential business information significantly outweighed any public benefit derived from disclosure of the information and that the exemption would enhance the ability of electric utilities to optimize their performance, thereby benefiting ratepayers.

The survey responses reflect that these findings are borne out in these utilities' operations. Prior to enactment of the exemption, some of the responding utilities were able to enter into contracts by using a due diligence process in which no documents came into the utility's possession, using third party providers of due diligence services, or using detailed nondisclosure agreements. They note, however, that businesses have become more willing to make proposals and enter into agreements since the exemption was enacted, particularly with new or emerging technology such as solar energy and battery storage. Respondents also stated that the protected information could not be readily obtained by alternative means and that it was not protected by any other exemption. As such, all recommend retaining the exemption in its current form.

Based on this information, the exemption both protects confidential business information related to competitiveness and allows these governmental utilities to effectively and efficiently produce and deliver electricity to their customers, and these services would be significantly impaired without the exemption. The purpose appears sufficient to override public policy favoring open government, and could not be accomplished without the exemption.

III. Effect of Proposed Changes:

The bill amends s. 119.0713(4), F.S., to remove the scheduled repeal of the public records exemption for proprietary confidential business information held by a local government electric utility. As a result, these records will remain exempt from disclosure requirements under public records law.

The bill also narrows and clarifies the information that is considered proprietary confidential. First, it removes the phrase "but not limited to" in the context of the list of types of information included in the phrase "proprietary confidential business information." Second, the bill clarifies the meaning of the term "trade secrets" by referencing s. 688.002, F.S., in existing law.

The bill takes effect October 1, 2018.

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:

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 records exemption. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

The exemption allows business entities to propose and negotiate projects with municipal utilities without the risk of disclosure of proprietary confidential business information, which allows these entities to increase their business activities.

The exemption allows municipal utility customers to benefit from anticipated improvements to utility infrastructure and systems.

C. Government Sector Impact:

The exemption allows the municipal utilities to increase the size and efficiency of their electricity generation and delivery infrastructure, utilize newer technologies, and reduce costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation conducted its annual review of exemptions from public records subject to review during the 2018 legislative session. It concluded that the public record

exemption which this bill maintains “is sufficiently narrow and the Foundation does not object to its reenactment as currently worded.”²⁷

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 Rules on March 1, 2018:

The CS:

- Strikes the current language “but not limited to” from the list of types of information that are included in the term “proprietary confidential business information,” which will narrow this term to include only the types of information in the list; and
- Clarifies the definition of the term “trade secrets” by referencing the applicable statutory definition.

- B. **Amendments:**

None.

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

²⁷ Letter from Barbara A. Peterson, President, First Amendment Foundation, to Senator Dennis Baxley, Chair, Senate Committee on Government Oversight and Accountability (Aug. 17, 2017) (on file with the Senate Governmental Oversight and Accountability Committee).