

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: SB 7016

INTRODUCER: Agriculture Committee

SUBJECT: OGSR/School Food and Nutrition Service Program

DATE: February 5, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Akhavein</u>	<u>Becker</u>		AG Submitted as Committee Bill
1.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7016 provides an Open Government Sunset Review (OGSR) of a public records exemption for certain personal identifying information of students and families who receive free or reduced cost meals during the school year, including the summer period. Specifically, the public records exemption upon which the OGSR is based makes exempt from disclosure by designated agencies personal identifying information on recipients of free or reduced cost meals.

The public records exemption is scheduled for repeal October 2, 2018, unless reviewed and saved from repeal before that date.

The original public necessity statement of the bill provided that the exemption is needed to protect information of sensitive, personal nature, the release of which could be defamatory, cause unwarranted damage to reputation, and possibly jeopardize the individual's personal safety. The justification upon which the exemption is based remains valid. Therefore, the bill deletes the repeal date of the public records exemption.

Additionally, agencies identified in the original public records exemption as holding the personal identifying information are the Department of Agriculture and Consumer Services (DACS), the Department of Children and Families (DCF), and the Department of Education (DOE). The DCF indicates, however, that the agency does not receive information related to applicants and participants in school food and nutrition programs. Therefore, the bill narrows the exemption by removing the reference to the DCF as one of the agencies that holds this personal identifying information.

As the bill continues an existing public records exemption, and narrows rather than expands the exemption, a vote of each house by simply majority for passage is required.

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

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives 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

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

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

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 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.

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 A record classified as exempt from public disclosure may be disclosed under certain circumstances. *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 s. 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:

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 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

School Food and Nutrition Service Programs

Federal law authorizes federal financial assistance to states for the operation of school food and nutrition service programs.²³ The United States Department of Agriculture annually prescribes income guidelines for determining eligibility for free and reduced price meals.²⁴ DACS is the state administrator of school food and nutrition service programs. Programs include the National School Lunch Program, the Special Milk Program, the School Breakfast Program, the Summer Food Service Program, the Fresh Fruit and Vegetable Program, and any other program that relates to school nutrition under the purview of DACS.²⁵

Applicants for, or participants in school food and nutrition service programs provide certain sensitive, personal information to DACS and the DOE. In addition, the DCF receives information from the United States Social Security Administration and determines Medicaid eligibility for Florida and forwards that information to DACS and local education agencies to determine qualification in a school food and nutrition service program. Although DCF shares certain information with DACS, DCF does not receive information related to applicants for, or participants in school food and nutrition service programs.

Public Records Exemption for School Food Programs

Current law provides a public records exemption for personal identifying information of an applicant for, or participant in a school food and nutrition service program for information held by the DACS, the DCF, and the DOE.²⁶ The public records exemption makes exempt from disclosure this information except to another governmental entity in the performance of its official duties and responsibilities, or a person with written consent of the applicant for, or

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- 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).

²² Section 119.15(7), F.S.

²³ See the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq) and the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq).

²⁴ 42 U.S.C.1758(b)(1)(A) and 42 U.S.C. 1773(e)(1)(A); see also USDA Food and Nutrition Service, *Income Eligibility Guidelines*, available at: <https://www.fns.usda.gov/school-meals/income-eligibility-guidelines> (last visited Feb. 1, 2018).

²⁵ Section 595.402(3), F.S.

²⁶ Chapter 2013-217, L.O.F.(HB 7089).

participant in the program. Additionally, a legal guardian may access certain information about participation in the program.

The public necessity statement for the bill provides that the protected information is of a sensitive, personal nature, the release of which could defame the individual, cause unwarranted damage to his or her reputation, and possibly jeopardize his or her safety. Additionally, the state's ability to effectively and efficiently administer the program would be significantly impaired without the exemption.

The bill upon which the exemption is based provides that the exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2018, unless reviewed and saved from repeal by the Legislature before that date.

Staff Review of the Exemption

The Open Government Sunset Review Act requires that a public records exemption must serve an identifiable public purpose in order to be maintained. As part of the Open Government Sunset Review, professional staff of the Senate Agriculture Committee sent a questionnaire to DACS, DOE, and DCF. DACS and DOE recommend continuing the exemption, and DCF does not oppose narrowing the application of the exemption by removing DCF from the exemption.²⁷

III. Effect of Proposed Changes:

The bill provides an Open Government Sunset Review of a public records exemption for certain personal identifying information of students and families who receive free or reduced cost meals during the school year, including the summer period. Specifically, the public records exemption upon which the OGSR is based makes exempt from disclosure by designated agencies personal identifying information on recipients of free or reduced cost meals.

The original public necessity statement of the bill provided that the exemption is needed to protect information of sensitive, personal nature, the release of which could be defamatory, cause unwarranted damage to reputation, and possibly jeopardize the individual's personal safety. The justification upon which the exemption is based remains valid. Therefore, the bill deletes the repeal date of the public records exemption.

Additionally, agencies identified in the original public records exemption as holding the personal identifying information are the DACS, the DCF, and the DOE. The DCF indicates, however, that the agency does not receive information related to applicants and participants in school food and nutrition programs. Therefore, the bill recommends narrowing the exemption by removing the reference to the DCF as one of the agencies that holds this personal identifying information.

As the bill continues an existing public records exemption, and narrows rather than expands the exemption, a vote of each house by simple majority for passage is required.

The bill takes effect October 1, 2018.

²⁷ The survey is on file with the Senate Agriculture Committee.

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, and actually narrows the existing exemption. Therefore, just a simple majority vote suffices for passage.

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:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 595.409 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.)

None.

B. Amendments:

None.

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