

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 7020

INTRODUCER: Ethics and Elections Committee

SUBJECT: OGSR/Complaints of Violations and Referrals

DATE: February 5, 2018 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Carlton</u>	<u>Ulrich</u>		EE Submitted as Committee Bill
1.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7020 is based upon an Open Government Sunset Review (OGSR) of a public records and public meetings exemption for certain information relating to complaints of violations by public officers and public employees. The public records exemption upon which the OGSR is based makes confidential and exempt from public records disclosure a complaint and records relating to a complaint or to any preliminary investigation held by:

- The Commission on Ethics (commission) or its agents;
- A Commission on Ethics and Public Trust established by a county or municipality; or
- A county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics.

The public records exemption additionally applies to written referrals and related records held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, as well as records relating to a preliminary investigation of referrals held by the commission.

A proceeding, or any portion thereof, conducted by the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established its own investigatory process, pursuant to a complaint or preliminary investigation, is exempt from public meeting requirements. Similarly, a proceeding of the commission in which a determination regarding a referral is discussed or acted upon is exempt from public meeting requirements.

The above records and meetings are exempt until:

- The complaint is dismissed;
- The alleged violator requests in writing that the records or proceedings be made public;
- The commission determines it will not investigate the referral; or

- The commission, a Commission on Ethics and Public Trust, or a county or municipality that has established its own investigatory process determines, based on the investigation, whether probable cause exists to believe that a violation has occurred.

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 as release of the information could defame or otherwise damage the reputation of the individual under investigation, or significantly impair the integrity of the investigation.

The justification upon which the exemption is based remains valid. Additionally, the exemption is time-limited. Therefore, the bill deletes the repeal date of the public records exemption.

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

The bill takes effect 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

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

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

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

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

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).

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 FLA. CONST., art. I, s. 24(b).

¹⁵ FLA. CONST., art. I, s. 24(b).

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

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 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 of Representatives 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 that 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 (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.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.

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.

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 FLA. CONST., art. I, s. 24(c).

²⁷ *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.

²⁸ 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.

²⁹ Section 119.15(3), F.S.

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

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, in reenacting an exemption, the exemption is expanded, 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 provided for by law.³⁶

Florida Commission on Ethics

The Florida Commission on Ethics (commission) serves as guardian of the standards of conduct for the officers and employees of the state and its political subdivisions.³⁷ It is an independent commission, created by the Florida Constitution,³⁸ responsible for investigating and issuing public reports on complaints of breaches of the public trust³⁹ by public officers and employees. The commission must investigate sworn complaints of violations of the Code of Ethics for Public

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.

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 112.320, F.S.

³⁸ Article II, s. 8(f), FLA. CONST.

³⁹ Section 112.312(3), F.S., defines "breach of the public trust" as a violation of a provision of the State Constitution or the Code of Ethics which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to public officers or employees in order to avoid conflicts between public duties and private interests, including, without limitation, a violation of s. 8, Art. II of the State Constitution or of the Code of Ethics.

Officers and Employees (Code of Ethics)⁴⁰ or of any other law over which it has jurisdiction.⁴¹ The commission may initiate an investigation if it receives a sworn complaint.⁴² It may also investigate an alleged violation submitted to the commission via referral from the Governor, Florida Department of Law Enforcement, a state attorney, or a U.S. Attorney.⁴³

Complaints or referrals against a candidate in any election may not be filed, nor may any intention of filing such a complaint or referral be disclosed, on the day of any such election or within the 30 days immediately preceding the date of the election, unless the complaint or referral is based upon personal information or information other than hearsay.

Current law provides that the Code of Ethics does not prohibit the governing body of a political subdivision or an agency from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in the Code of Ethics, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of the Code of Ethics.⁴⁴

Public Record and Public Meeting Exemptions under Review

Current law provides that the complaint and records relating to the complaint or to any preliminary investigation held by the commission or its agents, by a Commission on Ethics and Public Trust established by any county⁴⁵ or by any municipality,⁴⁶ or by any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics are confidential and exempt⁴⁷ from public records requirements.⁴⁸

Written referrals, and records relating thereto, held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, as well as records relating to any preliminary investigation of such referrals held by the commission, are confidential and exempt from public records requirements.⁴⁹

⁴⁰ Chapter 112, Part III, F.S.

⁴¹ Section 112.322(1), F.S.

⁴² Section 112.324(1)(a), F.S.

⁴³ Section 112.324(1)(b), F.S.

⁴⁴ Section 112.326, F.S.

⁴⁵ Section 125.011(1), F.S., defines “county” as a county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred.

⁴⁶ Section 165.031(3), F.S., defines “municipality” as a municipality created pursuant to general or special law authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution.

⁴⁷ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems 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, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683 (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 statute. (*See Attorney General Opinion 85-62*, August 1, 1985).

⁴⁸ Section 112.324(2)(a), F.S.

⁴⁹ Section 112.324(2)(b), F.S.

A proceeding, or any portion thereof, conducted by the commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process, pursuant to a complaint or preliminary investigation, is exempt from public meetings requirements.⁵⁰ Additionally, any proceeding of the commission in which a determination regarding a referral is discussed or acted upon is exempt from public meetings requirements.⁵¹

The above records and meetings are exempt until:

- The complaint is dismissed;
- The alleged violator requests in writing that such records or proceeding be made public;
- The commission determines it will not investigate the referral; or
- The commission, a Commission on Ethics and Public Trust, or a county or municipality that has established such local investigatory process determines, based on such investigation, whether probable cause exists to believe that a violation has occurred.⁵²

The 2013 public necessity statement for the public records and public meetings exemption provides as justification that release of this information could:

- Be defamatory to the individual under investigation;
- Cause unwarranted damage to the reputation of the individual under investigation; or
- Significantly impair the integrity of the investigation.

Pursuant to the Open Government Sunset Review Act, the public record and public meeting exemptions will repeal on October 2, 2018, unless reenacted by the Legislature.

Open Government Sunset Review

During the 2017 interim, committee staff sent a questionnaire to the commission and to every county and city in the state. In all, 43 responses were received.⁵³ The commission stated it has received approximately five or six public record requests for the confidential and exempt information, however, the commission has not taken a position on whether the exemptions should be reenacted.

Of those received from the counties and cities, only three attested that they either had a Commission on Ethics and Public Trust or had established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics. Those respondents stated they have received public record requests for the confidential and exempt records and each recommended reenactment of the exemptions.

III. Effect of Proposed Changes:

This bill is based upon an Open Government Sunset Review (OGSR) of a public records and public meetings exemption for certain information relating to complaints of violations by public officers and public employees. The public records exemption upon which the OGSR is based

⁵⁰ Section 112.324(2)(c), F.S.

⁵¹ Section 112.324(2)(d), F.S.

⁵² Section 112.324(2)(e), F.S.

⁵³ The questionnaire and responses are on file with the Senate Committee on Ethics and Elections.

makes confidential and exempt from public records disclosure a complaint and records relating to a complaint or to any preliminary investigation held by:

- The Commission on Ethics (commission) or its agents;
- A Commission on Ethics and Public Trust established by a county or municipality; or
- A county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements than those provided in the Code of Ethics.

The public records exemption additionally applies to written referrals and related records held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, as well as records relating to a preliminary investigation of referrals held by the commission.

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The above records and meetings are exempt until:

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- The commission determines it will not investigate the referral; or
- The commission, a Commission on Ethics and Public Trust, or a county or municipality that has established its own investigatory process determines, based on the investigation, whether probable cause exists to believe that a violation has occurred.

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 as release of the information could defame or otherwise damage the reputation of the individual under investigation, or significantly impair the integrity of the investigation.

The justification upon which the exemption is based remains valid. Additionally, the exemption is time-limited. Therefore, the bill deletes the repeal date of the public records exemption.

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

The bill takes effect October 1, 2018. 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, just a simple majority vote suffices for passage.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

V. Technical Deficiencies:

None.

VI. Related Issues:

None.

VII. Statutes Affected:

This bill substantially amends section 112.324 of the Florida Statutes.

VIII. 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.