

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 236

INTRODUCER: Criminal Justice Committee and Senator Book

SUBJECT: Public Records and Public Meetings

DATE: March 5, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Storch</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 236 creates a new public records exemption to make confidential and exempt the complaints, referrals, and reports held by any agency¹ that allege sexual harassment or sexual misconduct. The bill also creates a new public meetings exemption to exempt proceedings that would reveal records involving alleged sexual harassment or sexual misconduct.

The bill expands existing public records and public meetings exemptions to provide that a written request by the alleged violator to make records and proceedings public will not result in the loss of confidential and exempt or exempt status of these records if the complaint or referral involves allegations of sexual harassment or sexual misconduct.

The bill expands an existing public records exemption for the personal identifying information of an alleged victim in an allegation of sexual harassment to include the personal identifying information of an alleged victim of sexual harassment or sexual misconduct, or any information that could assist an individual in determining the identity of such alleged victim.

The bill provides a statement of public necessity as required by the State Constitution.

¹ Section 119.011(2), F.S., broadly defines agency to mean 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.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act, and stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the bill creates new public records and public meetings exemptions, and expands a current public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill may have an indeterminate fiscal impact on the Commission on Ethics (COE) and possibly other agencies relating to training and redaction of confidential and exempt information. See Section V. Fiscal Impact Statement.

The bill takes effect upon becoming a law.

II. Present Situation:

Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.² 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.³

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.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

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁶ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

² FLA CONST., art. I, s. 24(a).

³ *Id.*

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁷ 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.”⁸

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁹ A violation of the Public Records Act may result in civil or criminal liability.¹⁰

Only the Legislature may create an exemption to public records requirements.¹¹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹² Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹³ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁴

When creating or expanding a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹⁵ Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁶

Open Meetings Law

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁷ 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

⁷ 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.”

⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁹ Section 119.07(1)(a), F.S.

¹⁰ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Id.*

¹³ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁴ FLA. CONST., art. I, s. 24(c).

¹⁵ 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁶ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁷ FLA CONST., art. I, s. 24(b).

discussed.¹⁸ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts or special districts.¹⁹

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,”²⁰ or the “Sunshine Law,”²¹ 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.²² The board or commission must provide the public reasonable notice of such meetings.²³ 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.²⁴ Minutes of a public meeting must be promptly recorded and open to public inspection.²⁵ Failure to abide by public meetings requirements will invalidate any resolution, rule or formal action adopted at a meeting.²⁶ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁷

The Legislature may create an exemption to public meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.²⁸ 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.²⁹ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.³⁰

The following are general exemptions from the requirement that all meetings of any state agency or authority be open to the public:

- That portion of a meeting that would reveal a security or fire safety system plan; and

¹⁸ *Id.*

¹⁹ 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.”

²⁰ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

²¹ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

²² Section 286.011(1)-(2), F.S.

²³ *Id.*

²⁴ Section 286.011(6), F.S.

²⁵ Section 286.011(2), F.S.

²⁶ Section 286.011(1), F.S.

²⁷ Section 286.011(3), F.S.

²⁸ FLA CONST., art. I, s. 24(c).

²⁹ *Id.*

³⁰ *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 public records 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.

- Any portion of a team meeting at which negotiation strategies are discussed.³¹

The Commission on Ethics

The State Constitution provides that “[t]here shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.”³² Section 112.320, F.S., creates the Commission on Ethics (COE). The purpose of the COE is to serve as guardian of the standards of conduct for the officers and employees of the state, and of a county, city, or other political subdivision of the state, as defined in part III of ch. 112, F.S., and to serve as the independent commission provided for by the State Constitution.³³

The nine-member COE is responsible for investigating and issuing public reports on complaints of breach of public trust by public officers and employees.³⁴ A “breach of the public trust” is defined as a violation of a provision of the State Constitution or of part III of ch. 112, F.S., 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.³⁵ Examples of a breach of public trust include solicitation or acceptance of gifts, unauthorized compensation, or conflicting employment or contractual relationship.³⁶

The law requires the COE to investigate an alleged violation of part III of ch. 112, F.S., or other alleged breach of the public trust within its jurisdiction:

- Upon a written complaint executed on a form prescribed by the COE and signed under oath or affirmation by any person; or
- Upon receipt of a written referral of a possible violation of this part or other possible breach of the public trust from the Governor, the Department of Law Enforcement, a state attorney, or a U.S. Attorney which at least six members of the COE determine is sufficient to indicate a violation of this part or any other breach of the public trust.³⁷

A copy of the complaint or referral must be sent to the alleged violator within five days after the receipt of such complaint or a determination that the referral received is sufficient to indicate a violation of part III of ch. 112, F.S., or any other breach of the public trust.³⁸

Following receipt of a legally sufficient complaint or referral, the COE will conduct a preliminary investigation to determine whether there is probable cause to believe that a violation has occurred. If at the conclusion of such preliminary investigation the COE finds no probable cause to believe there is a violation or breach of public trust committed, the COE must dismiss

³¹ Section 286.0113, F.S.

³² FLA. CONST., art. II, s. 8(f).

³³ Section 112.320, F.S.

³⁴ Florida Commission on Ethics, *About Us*, available at <http://www.ethics.state.fl.us/AboutUs/Index.aspx> (last visited February 4, 2019).

³⁵ Section 112.312(3), F.S.

³⁶ See generally Section 112.313, F.S.

³⁷ Section 112.324(1)(a)-(b), F.S.

³⁸ Section 112.324(1), F.S.

the complaint or referral. At that point, the complaint or referral becomes a matter of public record.³⁹

In contrast, if the COE finds probable cause to believe there is a violation or breach of public trust, the complainant and the alleged violator must be notified in writing. Following such notification, the notice and all documents made or received in the disposition of the complaint or referral then become public record. Any person who the COE finds probable cause to believe has committed a violation or breach of public trust is entitled to a public hearing. On its own motion, the COE may require a public hearing, conduct such further investigation as it deems necessary, or enter into stipulations and settlements as it finds just and in the best interest of the state.⁴⁰

Exemption and Confidentiality of COE Complaint Records and Personal Identifying Information of a Victim

Section 112.324, F.S., provides that the following are confidential and exempt from public disclosure requirements:

- The complaint and records relating to the complaint or to any preliminary investigation held by the COE or its agents, by a commission on ethics and public trust established by any county defined in s. 125.011(1), F.S., or by any municipality defined in s. 165.031, F.S., or by any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements as provided in s. 112.326, F.S; and
- Written referrals and records relating to such referrals held by the COE or its agents, the Governor, the Department of Law Enforcement, or a state attorney, and records relating to any preliminary investigation of such referrals held by the COE or its agents.⁴¹

The law also provides that the following are exempt from public meetings requirement:

- Any portion of a proceeding conducted by the COE, 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; and
- Any portion of a proceeding of the COE in which a determination regarding a referral is discussed or acted upon.⁴²

The above-discussed public records and public meetings exemptions apply until:

- The complaint is dismissed as legally insufficient;
- The alleged violator requests in writing that such records and proceedings be made public;
- The COE determines that it will not investigate the referral; or
- The COE, 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.⁴³

³⁹ Section 112.324(3), F.S.

⁴⁰ *Id.*

⁴¹ Section 112.324(2)(a)-(b), F.S.

⁴² Section 112.324(2)(c)-(d), F.S.

⁴³ Section 112.324(2)(e), F.S.

The public necessity statement justifying the exemption found in s. 112.324, F.S., explained that the “release of such information could potentially be defamatory to an individual under investigation, cause unwarranted damage to the good name or reputation of such individual, or significantly impair the investigation.”⁴⁴

Section 119.071(2)(n), F.S., provides that personal identifying information of the alleged victim in an allegation of sexual harassment is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. However, such information may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities. The term “personal identifying information” is not defined for purposes of Chapter 119 nor does this provision include examples of types of personal identifying information that would be exempt under this provision.

III. Effect of Proposed Changes:

Section 1 amends s. 112.324, F.S. to continue the confidential and exempt nature of complaints or referrals that involve allegations of sexual harassment or sexual misconduct regardless of a written request by the alleged violator to make such records and proceedings public. By limiting the ability of alleged violator to remove the confidential and exempt status of the records, this exemption is expanded to protect the alleged victim as well as the alleged violator.

Section 1 also prohibits the disclosure of the personal identifying information of an alleged victim of sexual harassment or sexual misconduct or any information that could assist an individual in determining the identity of such alleged victim in a portion of a proceeding conducted by the COE or like local commission which is open to the public.

Section 2 amends s. 119.071, F.S., to expand the public records exemption to make confidential and exempt the complaints, referrals, and reports that allege sexual harassment or sexual misconduct, and any related records that are held by an agency. Such information may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities.

The bill specifies that the exemption applies until:

- The agency determines that it will not investigate the allegation;
- The agency takes disciplinary action against the subject of the allegation and determines that it will take no further action in the matter; or
- A finding is made as to whether probable cause exists.

The bill expands an existing public records exemption for the personal identifying information of an alleged victim in an allegation of sexual harassment to include the personal identifying information of an alleged victim of sexual harassment or sexual misconduct, or any information that could assist an individual in determining the identity of such alleged victim. Such personal identifying information remains confidential and exempt even in the event that the complaint, referral, or report containing the information becomes public record. The bill provides, however,

⁴⁴ Ch. 2010-130, Laws of Fla.

that such information may be disclosed to another governmental entity in the furtherance of the agency's official duties and responsibilities or to the parties to the allegation and their attorneys.

Section 3 amends s. 286.0113, F.S., to create a new public meetings exemption to make exempt any portion of a meeting that would reveal any records involving an allegation of sexual harassment or sexual misconduct until:

- The agency determines that it will not investigate the allegation;
- The agency takes disciplinary action against the subject of the allegation and determines that it will take no further action in the matter; or
- A finding is made as to whether probable cause exists.

The bill requires that the personal identifying information of an alleged victim of sexual harassment or sexual misconduct or any information that could assist an individual in determining the identity of such victim that is confidential and exempt pursuant to ch. 119, F.S., is to remain confidential and exempt during any meeting that is open to the public.

Section 4 sets forth the required public necessity statement. The statement provides as justification for the exemption of complaints, referrals, and reports alleging sexual harassment or sexual misconduct, and any related records, that the release of such information could potentially be defamatory to an individual under investigation, could subject alleged victims to further sexual harassment or retaliation, or could significantly impair the integrity of any investigation of such allegations. The public necessity statement also explains that the potential for disclosure of such information could create a disincentive for alleged victims to report instances of alleged sexual harassment or sexual misconduct.

The public necessity statement also provides justification for the exemptions of any portion of a meeting that would reveal any records involving an allegation of sexual harassment or sexual misconduct and the disclosure of personal identifying information of an alleged victim of sexual harassment or sexual misconduct, or any information that could assist an individual in determining the identity of such alleged victim, by noting that a victim may remain at risk of further harassment and retaliation, and the disclosure of the victim's identity may cause damage to his or her reputation.

Section 5 provides that the bill is effective upon becoming law.

The public records and public meetings exemptions are subject to the Act pursuant to s. 119.15, F.S., and will be repealed October 2, 2024, unless the Legislature reviews and reenacts the exemptions before that date.

Because the bill creates a new public records and public meetings exemption, and expands a current public record exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Public Meetings Issues:

Vote Requirement

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 bill creating or expanding exemptions to the public records and public meetings requirements. This bill enacts new exemptions and expands a current exemption. Thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding exemptions to the public records and public meetings requirements to state with specificity the public necessity justifying the exemption. Section 4 of the bill contains a statement of public necessity for the exemptions.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires exemptions to the public records and public meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect victims of sexual harassment or sexual misconduct. There are substantial legislative findings in the statement of public necessity in support of the public records and public meetings exemptions.

The statutory exemption seeks to protect the personal identifying information of an alleged victim of sexual harassment or sexual misconduct or *any information that could assist an individual in determining the identity of such alleged victim*. (Emphasis added) The stated purpose of the exemption is to protect from disclosure the alleged victim's identity "because a victim may remain at risk of further harassment and retaliation, and the disclosure of the victim's identity may cause damage to his or her reputation." The phrase "any information that could assist an individual in determining the identity of such alleged victim" could be interpreted as being open ended as to what type of information may be included and deemed to be covered by the exemption. In *Halifax*, the Supreme Court held that the exemption at issue was unconstitutional for facial overbreadth because the legislature failed to define "strategic plans" and specify the "critical confidential information" (as provided in the public necessity statement) not to be disclosed.⁴⁵ In finding the exemption unconstitutional, the Court noted that the legislature had created a "categorical exemption" which reach[ed] far more information than necessary to

⁴⁵ *Halifax*, 724 So. 2d at 570.

accomplish the purpose of the exemption.”⁴⁶ Similar to the exemption in *Halifax*, the phrase “any information that could assist an individual in determining the identity of such alleged victim,” may be overbroad as this phrase is undefined and may reach more information than necessary to accomplish the purpose of the exemption. If a court does find the exemption to be overly broad similar to *Halifax*, the remedy may be to strike the entire exemption as unconstitutional.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

No others identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost, to the extent imposed, associated with the agency making redactions in response to public records request.

C. Government Sector Impact:

The bill may have an indeterminate fiscal impact on the COE and possibly other agencies relating to training and redaction of confidential and exempt information. However, costs may be minimal if they can be absorbed by the COE and other agencies because training and redaction of confidential and exempt information are part of the day-to-day responsibilities of the COE and other agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁴⁶ *Id.*

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 112.324, 119.071, and 286.0113.

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 Criminal Justice on February 11, 2019:

The Committee Substitute:

- Clarifies that the Open Government Sunset Review Act applies to the public records and public meetings exemptions in s. 112.324, F.S., that are expanded by the bill; and
- Specifies that the public record exemption expanded by ch. 119, F.S., applies to the personal identifying information of an alleged victim *of sexual harassment or sexual misconduct*.

- B. **Amendments:**

None.