

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 7042

INTRODUCER: Ethics and Elections Committee

SUBJECT: Public Records/Commission on Ethics

DATE: March 25, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Mitchell</u>	<u>Roberts</u>		EE Submitted as Committee Bill
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 7042 exempts from public inspection and copying passwords held by the Commission on Ethics (Commission) for the purpose of allowing access to the electronic filing system for financial disclosures created in SB 7040, this bill's companion. The bill also exempts from public inspection and copying any information entered in the electronic filing system for purposes of financial disclosure until a disclosure of financial interests or statement of financial interests is submitted by the filer to the Commission, or in the case of a candidate, filed with a qualifying officer.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act (OGSRA), and stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

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

The bill's effective date is contingent upon, and concurrent with, passage of SB 7040 or similar legislation. SB 7040, if enacted, will take effect upon becoming a law.

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

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, Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, Florida Statutes (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 public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also, see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S.

Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” 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.”

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 *Id.*

¹¹ *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹³ 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” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.¹⁴

Historically, passwords have been treated as confidential and exempt under the security system exemptions contained in ss. 281.301 and 119.071(3), F.S.

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSRA) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁵ The OGSRA 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.¹⁶

The OGSRA 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.¹⁷ 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;¹⁸
- 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;¹⁹ or
- It protects trade or business secrets.²⁰

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

¹³ 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).

¹⁴ *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ 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 OGSRA 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.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

The OGSRA also requires specified questions to be considered during the review process.²¹ In examining an exemption, the OGSRA 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.²² 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.²³

SB 7040 (2019)

SB 7040 requires the Commission to procure and test an electronic filing system by a date certain. The system must:

- Provide access through the internet for the completion and submission of disclosures of financial interests (CE Form 6) and statements of financial interests (CE Form 1);
- Upload submitted information to the Commission;
- Allow for a procedure to make filings available in a format that is accessible by an individual using standard Internet-browsing software;
- Issue a verification or receipt that the Commission has received the submitted disclosure or statement;
- Provide security that prevents unauthorized access to the electronic filing system's functions or data; and
- Provide a method for an attorney or a certified public accountant to complete and file the disclosure or statement and certify that he or she prepared it in accordance with:
 - s. 112.3144, F.S. or s. 112.3145; and
 - the instructions for completing and filing the disclosure or statement; and that
- The information on the disclosure or statement is true and correct.

The bill establishes dates certain after which all submissions of CE Form 6 and, later, all submissions of CE Form 1 must be made to the Commission and accomplished electronically. Submission of paper forms will be discontinued. The Commission will provide notice and other communications to filers by email message. All disclosures must be for the calendar year, not the taxable year. Candidates will continue to submit required disclosures to his or her qualifying officer, but local officers will no longer submit financial statements to supervisors of elections. Beginning with required electronic submission of CE Form 1, filers must use the dollar threshold method of reporting. The percent in excess of income or value method will no longer be in use.

²¹ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

The information requested in CE Forms 1 and 6 include name, mailing address, name of office or position held or sought, sources of income, real property, liabilities, business interests, and gifts received. None of the information requested is otherwise confidential or exempt.

III. Effect of Proposed Changes:

This bill exempts from public copying and inspection requirements those passwords held by the Commission for the purpose of allowing access to the electronic filing system for financial disclosures created in SB 7040, this bill's companion. The bill also exempts from public copying and inspection requirements any information entered in the electronic filing system for purposes of financial disclosure until a disclosure of financial interests or statement of financial interests is submitted by the filer to the Commission, or in the case of a candidate, filed with a qualifying officer.

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

The bill provides a statement of public necessity as required by the Florida Constitution. It states that the public's need for access to information included in disclosures or statements of financial interests filed by reporting individuals should be balanced with the filer's interest in safeguarding personally sensitive information and that the unintentional publication of such information may subject the filer to identity theft, financial harm, or other adverse impacts. Without the public records exemption, the effective and efficient administration of the electronic filing system would be hindered.

The bill's effective date is contingent upon, and concurrent with, passage of SB 7040 or similar legislation, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law. SB 7040, if enacted, will take effect upon becoming a law.

Because the bill creates a new public records 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 spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue. Likewise, it does reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings

exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. This bill exempts passwords held by the Commission for the purpose of allowing access to the electronic filing system for financial disclosures created in SB 7040, this bill's companion. Based on the legislative findings in the statement of public necessity, the public records exemption in this bill appears to be no broader than necessary to accomplish its stated purpose.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill states that the information and passwords are "exempt from s. 119.071(1)" when in fact they are intended to be exempt from s. 119.07(1).

The bill states “all passwords held by the commission for the purpose of allowing access to the electronic filing system” are exempt. However, SB 7040, which creates the electronic filing system, references “secure login credentials” rather than passwords. On lines 20 and 37, the term “passwords” should be changed to “secure login credentials” to align with the language of SB 7040.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 112.31446 of the Florida Statutes, created in SB 7040 or similar legislation, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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.