

**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.)

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Prepared By: The Professional Staff of the Committee on Ethics and Elections

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BILL: SB 1704

INTRODUCER: Senator Broxson

SUBJECT: Public Records/County Supervisor of Elections

DATE: March 9, 2021

REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------|----------------|-----------|--------------------|
| 1. | Rey     | Roberts        | EE        | <b>Pre-meeting</b> |
| 2. |         |                | GO        |                    |
| 3. |         |                | RC        |                    |

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## **I. Summary:**

SB 1704 expands an existing public records exemption in the Information Technology (IT) Security Act for portions of records which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, to also make such information confidential and exempt when held by the supervisors of elections.

The expanded public records exemption shall stand repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

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

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

The bill takes effect upon becoming law.

## **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.<sup>1</sup> This applies to the official business of any public body, officer or employees of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.<sup>2</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a)

<sup>2</sup> *Id.*

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass a two-thirds vote of the House and Senate.<sup>10</sup> 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.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</sup> Records designated as ‘confidential and exempt’ may

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<sup>3</sup> 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.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public records” 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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *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.* 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.

<sup>13</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the person or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

be released by the records custodian only under the circumstances defined by the Legislature. Records designed as ‘exempt’ may be released at the discretion of the records custodian.<sup>14</sup>

### **Open Government Sunset Review Act**

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>15</sup> 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.<sup>16</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>17</sup> 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 otherwise provided by law.<sup>18</sup>

### **Information Technology Security Act**

The IT Security Act<sup>19</sup> requires the Department of Management Services (DMS) and the heads of state agencies<sup>20</sup> to meet certain requirements to enhance the IT<sup>21</sup> security of state agencies. Specifically, the act provides that DMS is responsible for establishing standards and processes

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<sup>14</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So.3d 379 (Fla. 2013).

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> FLA CONST., art I, s. 24(c).

<sup>18</sup> Section 119.15(7), F.S.

<sup>19</sup> Section 282.318, F.S.

<sup>20</sup> Section 282.0041(3), F.S. “State agency” means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government; the Justice Administrative Commission; and the Public Service Commission. The term does not include university boards of trustees or state universities. For purposes of the IT Security Act, the term includes the Department of Legal Affairs, the Department of Agriculture and Consumer Services, and the Department of Financial Services. Section 282.318(2), F.S.

<sup>21</sup> The term “information technology” means equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect, received, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate information of any kind or form. Section 282.0041(14), F.S.

consistent with generally accepted best practices for IT security,<sup>22</sup> including cybersecurity, and adopting rules that safeguard and agency's data, information, and IT resources to ensure availability, confidentiality, and integrity and to mitigate risks.<sup>23</sup> In addition, DMS must:

- Designate a state chief information security officer;
- Develop, and annually update, a statewide IT security strategic plan;
- Develop and publish an IT security framework for state agencies;
- Collaborate with the Cybercrime Office within the Florida Department of Law Enforcement (FDLE) in providing training for state agency information security managers; and
- Annually review the strategic and operational IT security plans of executive branch agencies.<sup>24</sup>

The IT Security Act requires the head of each state agency to designate an information security manager to administer the IT security program of the state agency.<sup>25</sup> In addition, the head of each state agency must annually submit to DMS the state agency's strategic and operational IT security plans; conduct, and update every three years, a comprehensive risk assessment to determine the security threats to data, information, and IT resources of the state agency; develop, and periodically update, written internal policies and procedures, including procedures for reporting IT security incidents and breaches; and ensure that periodic internal audits and evaluations of the agency's IT security program for the data, information, and IT resources are conducted.<sup>26</sup>

### **Public Records Exemptions under the IT Security Act**

The IT Security Act provides that state agency information is confidential and exempt from public records requirements, including:

- Portions of records held by a state agency which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, including suspected or confirmed breaches, if the disclosure of such records would facilitate unauthorized access to or the unauthorized modification, disclosure, or destruction of:
  - Physical or virtual data or information; or
  - IT resources, including information relating to the security of the state agency's technologies, processes designed to protect networks, computers, data processing software, and data from attack, damage, or unauthorized access; or physical or virtual security information that relates to the state agency's existing or proposed IT systems.<sup>27</sup>

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<sup>22</sup> The term "information technology security" means the protection afforded to an automated information system in order to attain the applicable objectives of preserving the integrity, availability, and confidentiality of data, information, and information technology resources. Section 282.0041(17), F.S.

<sup>23</sup> Section 282.318(3), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> Section 282.318(4)(a), F.S.

<sup>26</sup> Section 282.318(4), F.S.

<sup>27</sup> Section 282.318(5), F.S.

The confidential and exempt information must be available to the Auditor General, the Cybercrime Office within FDLE, the Florida Digital Service<sup>28</sup> within DMS, and, for agencies under the jurisdiction of the Governor, the Chief Inspector General.<sup>29</sup> In addition, the records may be made available to a local government, another state agency, or a federal agency for IT security purposes or in the furtherance of the state agency's official duties.<sup>30</sup>

### **III. Effect of Proposed Changes:**

The bill expands the existing public records exemption for portions of records which contain network schematics, hardware and software configurations, or encryption, or which identify detection, investigation, or response practices for suspected or confirmed information technology security incidents, to provide that the information is also confidential and exempt when held by supervisors of elections. Such information held by supervisors of elections would only be available as provided in the IT Security Act.

The IT Security Act provides for retroactive application of public records exemption for records concerning network schematics, hardware and software configurations, or encryption.

This exemption will be repealed on October 2, 2025,<sup>31</sup> 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.

### **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 a state tax shares with counties and municipalities.

#### **B. Public Records/Open Meetings Issues:**

##### **Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public record or public meeting exemption. Therefore, this bill requires a two-thirds vote for passage.

##### **Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a bill that creates or expands an exemption to public records disclosure requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

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<sup>28</sup> The Division of State Technology is a subdivision of the DMS and is charged with overseeing the state's IT resources. Section 20.22(2)(b), F.S.

<sup>29</sup> Sections 282.318(4)(d), (e), (g), (j), 282.318(5), and 282.318(6), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 282.318(10), F.S.

**Breadth of Exemption**

Article I, s. 24(c) of the Florida Constitution requires a newly created record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public records exemption to allow supervisors of elections to exempt records relating to IT security from public disclosures. If such information is released, it could result in security breaches and fraud impacting the electoral process. Thus, the bill does not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

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

None.

**B. Private Sector Impact:**

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

**C. Government Sector Impact:**

The bill may have a fiscal impact on agencies relating to training or redaction of the newly confidential and exempt information. However, costs are likely minimal.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following section of the Florida Statutes: 282.318.

**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.

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

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