

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 Regulated Industries

BILL: SPB 7078

INTRODUCER: For consideration by the Regulated Industries Committee

SUBJECT: Public Records and Public Meetings/Gaming Control Commission

DATE: April 8, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kraemer</u>	<u>Imhof</u>		Pre-meeting

I. Summary:

SPB 7078, which is linked to the passage of SPB 7076 (2021), related to Gaming Enforcement, makes confidential and exempt from public copying and inspection requirements certain information obtained by the Florida Gaming Control Commission (commission). Portions of the commission's meetings during which exempted or confidential and exempt information is discussed are also exempt from open meeting requirements.

The bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill will become effective on the same date that SPB 7076 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

Section 24(c) of Article I 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 record or public meeting exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.

II. Present Situation:

Public Records

Section 24(a) of Article I of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of section 24(a) of Article I of the State Constitution.¹ The general law must state with specificity

¹ FLA. CONST. art. I, s. 24(c).

the public necessity justifying the exemption² and must be no broader than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act⁴ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; and
- Protect trade or business secrets.⁵

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁶

Open Meetings Laws

The State Constitution also provides that the public has a right to access governmental meetings.⁷ 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.⁸ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.⁹

Public policy regarding access to government meetings is also addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the "Government in the Sunshine Law,"¹⁰ or the "Sunshine Law,"¹¹ requires all meetings of any board or commission of any state or local agency

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ FLA. CONST. art. I, s. 24(c).

⁴ Section 119.15, F.S.

⁵ Section 119.15(6)(b), F.S.

⁶ Section 119.15(3), F.S.

⁷ FLA. CONST. art. I, s. 24(b).

⁸ *Id.*

⁹ FLA. CONST. art. I, s. 24(b). Meetings of the Legislature are governed by section 4(e) of Article III of the State 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."

¹⁰ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹¹ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

or authority at which official acts are to be taken, to be open to the public.¹² The board or commission must provide the public reasonable notice of such meetings.¹³ 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.¹⁴ Minutes of a public meeting must be promptly recorded and open to public inspection.¹⁵

Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.¹⁶ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.¹⁷

The Legislature may create an exemption to open meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.¹⁸ 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.¹⁹ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁰

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 16.71(11), F.S., to make information obtained by the Florida Gaming Control Commission that is exempt or confidential and exempt²¹ from s. 119.07(1), F.S. or s. 24(a) Art I. of the State Constitution retains its exempt or confidential and exempt status. The information may be released by the commission to other governmental entities as needed in the performance of its official duties and responsibilities, but such entities must maintain the exempt or confidential and exempt status of the information.

The bill provides portions of commission meetings during which information that is exempt or confidential and exempt is discussed are exempt from s. 286.011 and s. 24(b), Art I. of the State Constitution.

Under the bill, the commission is a criminal justice agency, as defined in s. 119.011, F.S., which states a criminal justice agency is:

¹² Section 286.011(1)-(2), F.S.

¹³ *Id.*

¹⁴ Section 286.011(6), F.S.

¹⁵ Section 286.011(2), F.S.

¹⁶ Section 286.011(1), F.S.

¹⁷ Section 286.011(3), F.S.

¹⁸ FLA. CONST. art. I, s. 24(c).

¹⁹ *Id.*

²⁰ *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999).

²¹ 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. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (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 Op. Att'y Gen. Fla.* (1985).

- Any law enforcement agency, court, or prosecutor;
- Any other agency charged by law with criminal law enforcement duties;
- Any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties; or
- The Department of Corrections.

The bill authorizes the commission to close portions of meetings during which the commission will hear or discuss active criminal intelligence information or active criminal investigative information, as those terms are defined in s. 119.011(3), F.S., and such portions of meetings shall be exempt from the provisions of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, provided the following conditions are met:

- The commission chair must advise the commission at a public meeting that, in connection with the performance of a commission duty, it is necessary that the commission hear or discuss active criminal investigative information or active criminal intelligence information.
- The chair's declaration of necessity for closure and the specific reasons for such necessity must be stated in a document that is a public record that must be filed with the official records of the commission.
- The entire closed session must be recorded. The recording must be maintained by the commission and include the times of commencement and termination of the closed session, all discussion and proceedings, and the names of all persons present. No portion of the session may be off the record.

Further, only members of the commission, Department of Law Enforcement staff supporting the commission's function, and other persons whose presence has been authorized by the chair may be allowed to attend the exempted portions of the commission meetings. The commission must assure that any authorized closure of its meetings is limited, in order to maintain the general policy in Florida in favor of public meetings.

The bill provides the tape recording of, and any minutes and notes generated during a closed portion of a commission meeting are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, until the criminal investigative information or criminal intelligence information ceases to be active.

This section provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

Section 2 of the bill provides public necessity statements as required by section 24(c) of Article I of the State Constitution. As to information obtained by the commission, the public necessity statement provides in the absence of this exemption, sensitive confidential or exempt information would be disclosed. As to portions of meetings of the commission at which confidential and exempt information is discussed, the public necessity statement provides the release of

confidential and exempt information via a public meeting defeats the purpose of a public records exemption, and the harm to the public that would result from the release of such information substantially outweighs any minimal public benefit derived therefrom.

The bill provides the following findings of the Legislature:

[D]uring limited portions of the meetings of the Florida Gaming Control Commission it is necessary that the commission be presented with and discuss details, information, and documents related to active criminal intelligence information or active criminal investigative information. These presentations and discussions are necessary for the commission to make its decisions for licensing of persons for pari-mutuel and gaming activities, and for decisions related to gaming enforcement and enforcement of gambling laws as required by the Legislature under this act.

The Legislature finds that to reveal the contents of documents containing active criminal investigative or intelligence information or to allow active criminal investigative or active criminal intelligence matters to be discussed in a meeting open to the public negatively impacts the ability of law enforcement agencies to efficiently continue their investigative or intelligence gathering activities.

The Legislature finds that information coming before the commission that pertains to active criminal investigations or intelligence should remain confidential and exempt from public disclosure.

The Legislature finds that the Florida Gaming Control Commission may, by declaring only those portions of commission meetings in which active criminal investigative or active criminal intelligence information is to be presented or discussed closed to the public, assure an appropriate balance between the policy of this state that meetings be public and the policy of this state to facilitate efficient law enforcement efforts.

Accordingly, the Legislature finds that the harm to the public that would result from the release of such information substantially outweighs any minimal public benefit derived therefrom.

The bill takes effect on the same date that SPB 7076 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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:***Vote Requirement***

Section 24(c) of Article I 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 record or public meeting exemption. The bill creates new public record exemptions. Thus, the bill requires a two-thirds vote for final passage.

Public Necessity Statement

Section 24(c) of Article I of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new public record exemptions. Thus, the bill includes a public necessity statement.

Breadth of Exemption

Section 24(c) of Article I of the State Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates public record exemptions for sensitive investigative materials, which does not appear to be broader than necessary to accomplish its 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:

The commission may experience increased workload and incur associated costs in complying with the exemptions created by the bill in handling public records requests, redacting confidential and exempt information prior to releasing a record, and closing portions of commission meetings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates a new subsection (11) in section 16.71 of the Florida Statutes, which is created by the linked bill, SPB 7076.

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.