

**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 Governmental Oversight and Accountability

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BILL: CS/SB 520

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Brandes

SUBJECT: Public Records and Public Meetings

DATE: January 19, 2022      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brick</u>	<u>Bouck</u>	<u>ED</u>	<b>Favorable</b>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 520 makes confidential and exempt from public disclosure requirements any personal identifying information of an applicant for the position of president of a state university or Florida College System (FCS) institution held by a state university or an FCS institution.

The bill provides that the personal identifying information of an applicant included in a final group of applicants for president is no longer confidential and exempt from public records requirements beginning at the earlier of the date the final group of applicants to be considered for president is established or at least 21 days before either an interview of an applicant or final action on the offer of employment.

The bill also exempts from open meeting requirements any portion of a meeting held for the purpose of identifying or vetting applicants for president of a state university or FCS institution, including any portion of a meeting that would disclose personal identifying information of such applicants. However, the meeting exemption does not apply to any portion of a meeting held for the purpose of establishing qualifications for the position or establishing any compensation framework to be offered to an applicant. Additionally, any meeting held after a final group of applicants has been established must be open to the public.

The bill requires a complete recording to be made of any portion of a closed meeting, and prohibits any closed portion of a meeting from being held off the record. The recording of the closed portion of a meeting is also exempt from the public disclosure requirements.

Because this bill creates new public records exemptions and an open meeting exemption, it will require a two-thirds vote of both the Senate and the House of Representatives in order to become a law.

The bill provides that the exemptions are subject to the Open Government Sunshine Review Act and are repealed on October 2, 2027, unless saved from repeal by the Legislature.

The bill has no significant fiscal impact on state universities and FCS institutions.

The bill takes effect upon becoming a law.

## II. Present Situation:

### Access to Public Records - Generally

The State 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> The right to inspect or copy 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.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., known as the Public Records Act, provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

The Public Records Act provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

Section 119.011(12), F.S., defines “public records” to include:

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

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

<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

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

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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”<sup>6</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>9</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>10</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>11</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.<sup>13</sup> Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.<sup>14</sup> Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>15</sup>

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<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> Section 119.07(1)(a), F.S.

<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. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>11</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>12</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>13</sup> *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5<sup>th</sup> DCA 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5<sup>th</sup> DCA 1991).

## Open Meetings Laws

The State Constitution provides that the public has a right to access governmental meetings.<sup>16</sup> 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.<sup>17</sup> This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.<sup>18</sup>

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the “Government in the Sunshine Law,”<sup>19</sup> or the “Sunshine Law,”<sup>20</sup> 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.<sup>21</sup> The board or commission must provide the public reasonable notice of such meetings.<sup>22</sup> 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.<sup>23</sup> Minutes of a public meeting must be promptly recorded and open to public inspection.<sup>24</sup> Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.<sup>25</sup> A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.<sup>26</sup>

The Legislature may create an exemption to open meetings requirements by passing a general law by at least a two-thirds vote of each house of the Legislature.<sup>27</sup> 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.<sup>28</sup> A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.<sup>29</sup>

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<sup>16</sup> Art. I, s. 24(b), Fla. Const.

<sup>17</sup> Art. I, s. 24(b), Fla. Const.

<sup>18</sup> *Id.* 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.”

<sup>19</sup> *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

<sup>20</sup> *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

<sup>21</sup> Section 286.011(1)-(2), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> Section 286.011(6), F.S.

<sup>24</sup> Section 286.011(2), F.S.

<sup>25</sup> Section 286.011(1), F.S.

<sup>26</sup> Section 286.011(3), F.S.

<sup>27</sup> Art. I, s. 24(c), Fla. Const.

<sup>28</sup> *Id.*

<sup>29</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.* 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.

## Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act<sup>30</sup> (the Act), prescribe a legislative review process for newly created or substantially amended<sup>31</sup> public records or open meetings exemptions, with specified exceptions.<sup>32</sup> The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>33</sup>

The Act 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.<sup>34</sup> 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>35</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>36</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>37</sup>

The Act also requires specified questions to be considered during the review process.<sup>38</sup> In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>39</sup> If the exemption is continued without substantive changes or if

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<sup>30</sup> Section 119.15, F.S.

<sup>31</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>32</sup> Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>33</sup> Section 119.15(3), F.S.

<sup>34</sup> Section 119.15(6)(b), F.S.

<sup>35</sup> Section 119.15(6)(b)1., F.S.

<sup>36</sup> Section 119.15(6)(b)2., F.S.

<sup>37</sup> Section 119.15(6)(b)3., F.S.

<sup>38</sup> 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?

<sup>39</sup> See generally s. 119.15, F.S.

the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.<sup>40</sup>

### **State University System and Florida College System Governance**

The State University System is composed of all public state universities.<sup>41</sup> The Board of Governors (BOG) is required to operate, regulate, control, and be fully responsible for the management of the whole university system.<sup>42</sup> Each state university is governed by a local board of trustees, which is subject to public records and open meetings laws.<sup>43</sup> The BOG establishes the powers and duties of the boards of trustees and may delegate its constitutional or statutory powers and duties to the boards of trustees as its designee.<sup>44</sup> The BOG establishes the personnel system for all state university employees and confirms the selection and reappointment of presidents by state university boards of trustees.<sup>45</sup>

The Florida College System (FCS) is composed of public community and state colleges.<sup>46</sup> FCS institutions are supervised by the State Board of Education (SBE),<sup>47</sup> which establishes standards and guidelines for the FCS institutions.<sup>48</sup> A local board of trustees governs each FCS institution.<sup>49</sup>

### **State University System and Florida College System Presidential Searches**

Each state university board of trustees selects its university president, subject to confirmation of the candidate by the BOG and in accordance with BOG regulations. To locate qualified applicants, a presidential search committee is appointed to make recommendations to the full university board of trustees.<sup>50</sup>

BOG regulation specifies criteria to ensure that the search process is transparent, robust, and designed to attract highly qualified individuals.<sup>51</sup> Criteria include requirements that a search firm or consultant a search committee retains must be familiar, or demonstrate its ability to become familiar, with Florida's Sunshine laws,<sup>52</sup> and that the search committee maintain for purposes of transparency a webpage that includes search committee notices, agendas, and meetings; applicant lists; and means to provide input.<sup>53</sup>

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<sup>40</sup> Section 119.15(7), F.S.

<sup>41</sup> Art. IX, s. 7(b), Fla. Const. The State University System is made up of 12 state universities, specified in s. 1000.21(6), F.S.

<sup>42</sup> Art. IX, s. 7(d), Fla. Const. *See also* ss. 20.155(4)(a), 1001.70(3), 1001.705(2), and 1001.706(2)(a), F.S.

<sup>43</sup> Art. IX, s. 7(b)-(c), Fla. Const. *See also* s. 1001.71(1), F.S.

<sup>44</sup> Art. IX, s. 7(c), Fla. Const. *See also* s. 1001.706(2)(b), F.S.

<sup>45</sup> Sections 1001.705(2)(k) and 1001.706(6)(a), F.S.

<sup>46</sup> Art. IX, s. 8(b), Fla. Const. The Florida College System is made up of 28 community and state colleges specified in s. 1000.21(3), F.S. Such institutions constitute political subdivisions of the state operated by boards of trustees. *See* s. 1004.67 and ss. 1001.61-1001.64, F.S.

<sup>47</sup> Art. IX, s. 8(d), Fla. Const.

<sup>48</sup> Section 20.15(1), (2), and (5); *see also* s. 1001.02(1) and (6), F.S.

<sup>49</sup> Art. IX, s. 8(b), Fla. Const. *See also* ss. 1001.60(3) and 1001.64(2), F.S.

<sup>50</sup> Board of Governors (BOG) Regulation 1.001(5)(c).

<sup>51</sup> BOG Regulation 1.002(1).

<sup>52</sup> BOG Regulation 1.002(1)(b)ii.

<sup>53</sup> BOG Regulation 1.002(1)(c)i.

Each FCS institution board of trustees is authorized to appoint the president of the FCS institution.<sup>54</sup> The board of trustees is authorized to appoint a search committee to assist in the process.<sup>55</sup> Each board of trustees is required to notify the SBE of the appointment of a president immediately upon such action.<sup>56</sup>

Information obtained by a search committee or consultant, including applications and other information gathered by a committee or consultant regarding applicants, must be made available for copying and inspection upon request. In addition, any meetings associated with the search process are open to the public.<sup>57</sup>

The consultants assist by identifying and recruiting highly-talented individuals, as well as responding to all nominations, applications, and inquiries for the position. The consultants develop selection criteria and conduct preliminary screening interviews with each candidate who meets the stated criteria. The consultants provide the search committee with information gathered during the interviews along with background investigations concluded by the search firm. The search committee will identify semi-finalists and finalists for the position.

### III. Effect of Proposed Changes:

**Section 1** creates s. 1004.098, F.S., to establish exemptions from public records and open meeting requirements relating to applicants for president of a state university or a Florida College System (FCS) institution.

The bill specifies that any personal identifying information of an applicant for president of a state university or FCS institution held by a state university or a FCS institution is confidential and exempt from public records disclosure requirements.

The bill provides that the personal identifying information of an applicant included in a final group of applicants for president of a state university or FCS institution is no longer confidential and exempt from disclosure at the earlier date of the following:

- The date the final group of applicants to be considered for president is established; or
- At least 21 days before the date of a meeting at which an interview of an applicant will be conducted, or at which final action or a vote is to be taken on the offer of the employment of an applicant as president.

The bill exempts from open meetings requirements any portion of a meeting held for the purpose of identifying or vetting applicants for president of a state university or FCS institution, including any portion of a meeting that would disclose personal identifying information of such

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<sup>54</sup> Section 1001.61, F.S.

<sup>55</sup> Section 1001.64(19), F.S.

<sup>56</sup> Rule 6A-14.026, F.A.C.

<sup>57</sup> FCS institutions and state universities are considered state agencies, subject to public records and public meetings laws. See *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (holding that a University of Florida screening committee was subject to Florida's Sunshine Law); *Rhea v. District Bd. Of Trustees of Santa Fe College*, 109 So. 3d. 851 at 855, n. 1 (Fla. 1st DCA 2013) (noting that Santa Fe College, as part of the Florida College System, is a state agency having a duty to provide access to public records).

applicants. The bill provides that a complete recording must be made of any portion of a meeting that is closed and any closed portion of such meeting may not be held off the record. The recording of the closed portion of a meeting is exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution.

The bill specifies that the open meeting exemption does not apply to:

- Any portion of a meeting held for the purpose of establishing qualifications for the position or establishing any compensation framework to be offered to an applicant for president of a state university or FCS institution.
- Any meeting held after a final group of applicants for president of a state university or FCS institution has been established.

The exemptions from public records and open meetings established in the bill is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** sets forth the public necessity justifying the exemptions.<sup>58</sup> The bill asserts that applicants for president who are currently employed could jeopardize their current positions if it were known that they were seeking employment elsewhere. Further, the bill specifies that an exemption is necessary to allow a presidential search committee to access a pool of the most experienced and qualified applicants from which to fill the position of president.

The bill takes effect upon becoming a law.

#### **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, or reduce the percentage of state tax shared with counties or municipalities.

##### **B. Public Records/Open 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 an exemption to the public records or open meetings requirements. This bill enacts a new exemption for personal identifying information about applicants for the position of president at a state university or Florida College System (FCS) institution and a new exemption for certain portions of meetings that may discuss applicants for the position, thus, the bill requires a two-thirds vote to be enacted.

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<sup>58</sup> Art. I, s. 24(c), Fla. Const.



***Public Necessity Statement***

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

***Breadth of Exemption*****Public Records Exemption**

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect personal identifying information of applicants for the position of president of a state university or FCS institution. This bill exempts from inspection and copying only personal identifying information of such individuals unless the applicant is selected for the list of finalists. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**Public Meetings Exemption**

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. Like the public records exemption, the stated purpose of the law is to protect personal identifying information of applicants for the position of president of a state university or FCS institution prior to the selection of the final group. The bill appears to only exempt the portion of the meeting held for the purpose of identifying or vetting applicants, including any portion of a meeting which would disclose personal identifying information. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**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:**

The private sector may continue to be subject to the costs associated with an agency making redactions in response to a public records request.

**C. Government Sector Impact:**

State universities and FCS institutions may incur costs related to the redaction of records in responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 1004.098 of the Florida Statutes.

This bill creates an unnumbered section of law.

**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 Governmental Oversight and Accountability on January 19, 2022:**

The CS makes the bill effective upon becoming a law rather than delaying it until July 1, 2022.

**B. Amendments:**

None.