

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 Rules

BILL: SB 7004

INTRODUCER: Education Committee

SUBJECT: OGSR/Technology Systems/State University or a Florida College System Institution

DATE: January 11, 2022 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Jahnke</u>	<u>Bouck</u>		ED Submitted as Comm. Bill/Fav
1. <u>Jahnke</u>	<u>Phelps</u>	<u>RC</u>	Favorable

I. Summary:

SB 7004 saves from repeal the public records and public meetings exemption for certain information held by a state university or Florida College System institution related to information technology (IT) security or potential breaches of security, as well as IT security program risk assessments, evaluations, and audits held by the institution.

The exemption from public records and public meetings requirements stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature.

This bill is effective October 1, 2022.

II. Present Situation:

Access to Public Records - Generally

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 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.²

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the

¹ Art. I, s. 24(a), Fla. Const.

² *Id.*

Legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as 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.⁵

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

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.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

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.¹⁰ 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.¹¹

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

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

⁵ 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.”

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.”

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

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ Art. I, s. 24(c), Fla. Const.

¹¹ *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).

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

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.²⁰ 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;²¹
- 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;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

¹² 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).

¹³ 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).

¹⁴ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ 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.

¹⁸ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully 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.²⁵ If the exemption is continued without substantive changes or if 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 sunset, the previously exempt records will remain exempt unless provided for by law.²⁶

State Universities and Florida College System Institutions

In 2017, the Legislature approved an exemption from public records and public meetings requirements for the security of data and information technology (IT) in state postsecondary education institutions.²⁷

The law makes confidential and exempt from public disclosure data or information from technology systems owned by, under contract, or maintained by a state university or Florida College System (FCS) institution. Such data and information includes the following types of records and portions of documents:

- Records held by the university or college which identify detection, investigation, or response practices for suspected or confirmed IT 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 data or information, whether physical or virtual, or IT resources; and
- Those portions of risk assessments, evaluations, and other reports of the institution's IT security program for its data, information, and IT resources which are held by the university or college. These records would be confidential and exempt if disclosure of such records would lead to the unauthorized access to or unauthorized modification, disclosure, or destruction of the data, information, or IT resources.²⁸

The law closes portions of public meetings in which confidential and exempt information is discussed. Closed portions of meetings must be recorded and transcribed. However, the law specifies that the recording and transcript of the meeting must remain confidential and exempt from disclosure unless a court with competent jurisdiction determines the meeting was not

²⁴ 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Section 1004.055, F.S.

²⁸ Section 1004.055(1), F.S.

restricted to confidential and exempt data and information. If this occurs, then the court may disclose the recordings and transcripts that do not contain confidential and exempt information.²⁹

The records and portions of public meeting recordings and transcripts made confidential and exempt must be available to the Auditor General; the Cybercrime Office of the Department of Law Enforcement; for a state university, the Board of Governors; and for a Florida College System institution, the State Board of Education. Such records and portions of meetings, recordings, and transcripts may be made available to a state or federal agency for security purposes or in furtherance of the agency's official duties.³⁰

The exemption from public records and public meetings requirements is subject to the requirements of the Act and is repealed on October 2, 2022, unless reviewed and reenacted by the Legislature.³¹

Chapter 2017-109, L.O.F., which established the exemption from public records disclosure requirements for certain data or information from technology systems owned by, under contract, or maintained by a state university or FCS institution, included a public necessity statement that provided a rationale for the exemption. This rationale recognized that:

- Records held by a state university or FCS institution that identify IT detection, investigation, or response practice for suspected or confirmed IT security incidents, including breaches, may be used in the investigation of the incident or breach. The release of such information may interfere with and jeopardize the ongoing investigation.
- An investigation into an IT security incident, including a breach, may result in the gathering of sensitive personal information exempt from disclosure under state and federal law. Release of such information may be used to commit identity theft or other crimes and subject potential victims of the security incident to further harm.
- Disclosure of records such as an audit or forensic analysis of a state university or FCS institution may reveal weaknesses in the institution's IT security system.
- Records held by a state university or FCS institution may contain proprietary information, the release of which would provide an unfair advantage for business competitors in the marketplace.
- Disclosure of records may compromise and interfere with the administration of ongoing education programs.³²

Open Government Sunset Review Findings

In August 2021, the Senate Education Committee and the House Government Operations Subcommittee jointly sent an Open Government Sunset Review Questionnaire to each state university and FCS institution regarding the need to maintain the public records and public meetings exemption for certain data and information held by a state university or FCS institution related to IT security or potential breaches of security, as well as, IT security program risk assessments, evaluations, and audits held by the institution.

²⁹ Section 1004.055(2), F.S.

³⁰ Section 1004.055(3), F.S.

³¹ Section 1004.055(5), F.S.

³² Ch. 2017-109, L.O.F.

All 12 state universities and 16 of the 28 FCS institutions responded to the questionnaire. All institutions requested that the exemption be retained, with an overwhelming majority requesting to reenact the exemption as is.

III. Effect of Proposed Changes:

The bill saves from repeal the public records and public meetings exemption in s. 1004.055, F.S., for certain information held by a state university or FCS institution related to IT security or potential breaches of security, as well as IT security program risk assessments, evaluations, and audits held by the institution.

This bill is effective October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 creating or expanded public records exemption. If an 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. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill continues the current public records exemptions under sunset review; it does not expand this exemption or create a new exemption. Therefore, the bill does not require a public necessity statement.

Breadth of 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 exemptions is to protect the records of state university and FCS institutions pertaining to IT security systems if the disclosure of such records would facilitate the unauthorized access to, or unauthorized modification, disclosure, or destruction of data, information, or IT resources. 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 1004.055 of the Florida Statutes.

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.