

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 934

INTRODUCER: Senator Gruters

SUBJECT: Public Records/Homelessness Counts and Information Systems

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Cox</u>	<u>CF</u>	Favorable
2.	<u>Limonis-Borja</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 934 makes confidential and exempt from public inspection and copying requirements individual identifying information of a person contained in a Point-In-Time Count and Survey or data in a Homeless Management Information System collected pursuant to federal law and regulations. "Individual identifying information" is defined as information that directly or indirectly identifies a specific person, or can be linked with other available information to identify a specific person. The bill provides for retroactive application of the exemption to protect similar information collected prior to the bill becoming a law.

The bill does not prohibit the release of aggregate information from a Point-In-Time Count and Survey or data in a Homeless Management Information System that does not disclose individual identifying information of a person.

The exemption is subject to the Open Government Sunset Review Act (act) and will stand repealed on October 2, 2027, unless reviewed and reenacted by the Legislature.

The bill creates a new public records exemption and, therefore, requires a two-thirds vote of the members present and voting for final passage.

The bill is anticipated to have limited fiscal impact on state and local governments. See Section V. Fiscal Impact Statement.

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.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, 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.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ 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.⁵

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

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.”⁶

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ 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)

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

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.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

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.⁹ 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.¹⁰

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

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*.¹³ 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.¹⁴ Records designated as "exempt" may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of

⁷ Section 119.07(1)(a), F.S.

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. 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).

¹¹ *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).

¹² *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).

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

¹⁴ *Id.*

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

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., 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.

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

The Act also requires specified questions to be considered during the review process.²⁴ 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.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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

Federal Homelessness Grants

Homeless Assistance Grants, administered by the federal Department of Housing and Urban Development (HUD), were first authorized by Congress in 1987 as part of the Stewart B.

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.

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.

McKinney Homeless Assistance Act²⁷ to address the needs of the homeless, including food, shelter, health care, and education.²⁸ In 2000, the Act was renamed the McKinney-Vento Homeless Assistance Act.²⁹ At that time, the McKinney-Vento Act's definition of "homeless"³⁰ was sometimes described as requiring an individual to be literally homeless in order to receive assistance.³¹ In 2009, Congress enacted the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act. The HEARTH Act broadened the definition of "homeless" to include people at imminent risk of homelessness, previously homeless people temporarily in institutional settings, unaccompanied youth and families with persistent housing instability, and people fleeing or attempting to flee domestic violence.³² This is in addition to the original definition used by the U.S. Department of Housing and Urban Development (HUD): "An individual or family who lacks a fixed, regular, and adequate nighttime residence."

There are two main federal programs which distribute federal homelessness grant funding (1) the Emergency Solutions Grants (ESG) program and (2) the Continuum of Care (CoC) program. The ESG program distributes grant funds primarily for emergency sheltering of the homeless. The CoC program distributes grant funds to assist with the longer-term housing and service needs of the homeless. To be a recipient or subrecipient of the CoC program and ESG program funds, participation and administration of the Homeless Management Information System (HMIS) is required. The purpose of the HMIS is to collect data in order to better inform homeless policy and decision making at the federal, state and local levels.

ESG Program

HUD distributes funds from the ESG program to grantee states and local communities to assist those experiencing homelessness. ESG funds may be used for five program components:

- Street outreach;³³
- Emergency shelter;³⁴
- Homelessness prevention;³⁵
- Rapid rehousing assistance;³⁶ and

²⁷ The Stewart B. McKinney Homeless Assistance Act of 1987, Pub. L. 100-77, July 22, 1987, 101 Stat. 482, 42 U.S.C. § 11301.

²⁸ *Id.*

²⁹ The McKinney-Vento Homeless Assistance Act Pub. L. 106-400, October 30, 2000, 114 Stat. 1675, 42 U.S.C. § 11301.

³⁰ 42 U.S.C. § 11302 (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and (2) an individual who has a primary nighttime residence that is—(A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill); (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

³¹ See, for example, the Department of Housing and Urban Development, *The Third Annual Homeless Assessment Report to Congress*, July 2008, p. 2, footnote 5, <http://www.hudhre.info/documents/3rdHomelessAssessmentReport.pdf> (last visited January 24, 2022).

³² 42 U.S.C. § 11302(a).

³³ 24 C.F.R. § 576.101(a) authorizes ESG funds to be used for costs of providing essential services necessary to reach out to unsheltered homeless people; connect them with emergency shelter, housing, or critical services; and provide urgent, nonfacility-based care to unsheltered homeless people who are unwilling or unable to access emergency shelter, housing, or an appropriate health facility.

³⁴ 24 C.F.R. § 576.102 authorizes ESG funds to be used for costs of providing essential services to homeless families and individuals in emergency shelters, renovating buildings to be used as emergency shelter for homeless families and individuals, and operating emergency shelters.

³⁵ 24 C.F.R. § 576.103 authorizes ESG funds to be used to provide housing relocation and stabilization services and short- and/or medium-term rental assistance necessary to prevent an individual or family from moving into an emergency shelter.

³⁶ 24 C.F.R. § 576.104 authorizes ESG funds to be used to provide housing relocation and stabilization services and short- and/or medium-term rental assistance as necessary to help a homeless individual or family move as quickly as possible into permanent housing and achieve stability in that housing.

- HMIS and administrative activities.³⁷

CoC Program - Point-In-time Count and Survey

HUD's data collection efforts are built into its CoC program. A CoC is a regional or local planning body that coordinates homeless response funding, provides homelessness services, and applies for CoC program grants in a geographical area. The HUD requires that state homeless CoCs³⁸ conduct an annual census of persons who are experiencing homelessness, including those who are sheltered in emergency shelters, transitional housing units, and safe havens on a single night during the last week of January.³⁹ This annual count is titled a point-in-time (PIT) count.

Point-In Time Count

The PIT count is an unduplicated count on a single night of the people in a community who are experiencing homelessness that includes both sheltered and unsheltered populations.⁴⁰ Further, HUD requires that the CoCs conduct a count of the unsheltered homeless population in odd-numbered years.⁴¹ Although HUD requires CoCs gather survey data, federal privacy laws do not necessarily extend to non-federal agencies that receive federal funds.⁴²

While CoCs typically perform annual counts of both sheltered and unsheltered individuals, in 2021 only six of the 27 CoCs conducted such counts due to COVID-19 related safety concerns.⁴³ All 27 CoCs conducted a sheltered PIT count.⁴⁴ Ten CoCs did not conduct an unsheltered count, while others conducted a modified form of the unsheltered count.⁴⁵ For those that did not conduct an unsheltered count, the CoCs reported zero unsheltered persons, resulting in an undercount of homelessness.⁴⁶

The 2021 PIT Survey reports indicate that 21,218 persons met the HUD definition of homeless in Florida on a given day in January 2021.⁴⁷ The Florida Department of Education reports that 79,949 public school students were homeless in Florida during the 2019-2020 school year.⁴⁸

³⁷ 24 C.F.R. § 576.107 authorizes ESG funds to be used to pay the costs of contributing data to the HMIS designated by the Continuum of Care for the area; and 24 C.F.R. § 576.108 authorizes recipients to use of to 7.5 percent of its ESG grant for the payment of administrative costs related to the planning and execution of ESG activities.

³⁸ The U.S. Department of Housing and Urban Development (the HUD) designed the Homeless Continuums of Care to promote communitywide commitment and planning toward the goal of preventing and ending homelessness. In Florida there are 27 Continuum of Care lead agencies serving 64 of 67 counties, according to the Department of Children and Families (the DCF) Council on Homelessness. The DCF, *2021 Annual Report*, p. 6, June 2021, available at <https://www.myflfamilies.com/service-programs/homelessness/docs/2021CouncilReport.pdf> (last visited January 12, 2022) (hereinafter cited as "The Council Report").

³⁹ *Id.*

⁴⁰ The National Alliance to End Homelessness, *What is a Point-in-Time Count?*, available at <https://endhomelessness.org/resource/what-is-a-point-in-time-count/> (last visited January 12, 2022).

⁴¹ *Id.*

⁴² *Housing Authority of City of Daytona Beach v. Gomillion*, 639 So.2d 117 (Fla. 5th DCA 1994).

⁴³ The Council Report at p. 6 and 50.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at p. 14.

⁴⁸ The Council Report at p. 15 and 60-61.

The intent of the PIT Survey is to identify those individuals who meet HUD's definition of a homeless person. This is limited to individuals in the following four categories:

- **Literally Homeless:** Individuals and families who live in a place not meant for human habitation (including outdoors or in their car), emergency shelter, transitional housing, and motels paid for by a government or charitable organization.
- **Imminent Risk of Homelessness:** Individuals and families who will lose their primary nighttime residence within 14 days and have no other resources or support networks to obtain other permanent housing.
- **Homeless Under other Federal Statutes:** Unaccompanied youth under 25 years of age, or families with children and youth, who do not meet any of the other categories are homeless under other federal statutes, have had a lease, and have moved two or more times in the past 60 days, and are likely to remain unstable because of their special needs or barriers.
- **Fleeing or Attempting to Flee Domestic Violence:** Individuals or families who are fleeing or attempting to flee domestic violence, dating violence, sexual assault, or stalking, and who lack resources and support networks to obtain other permanent housing.⁴⁹

The homeless needs assessment requirements for local governments, including the requirement to use PIT count data, are stated in 24 CFR 91.205(c)(1).⁵⁰

Homeless Management Information Systems

PIT Surveys request personal information, such as a person's name, date of birth, social security number, race, ethnicity, disability (including personal health information), veteran status, and prior living situation.⁵¹ Data collected through PIT Surveys⁵² and during other counts is managed through the HMIS, a software application designed to record and store client-level information on the characteristics and service needs of homeless persons.⁵³ Each CoC is responsible for selecting an HMIS software solution that complies with the HUD's data collection, management, and reporting standards.⁵⁴ An HMIS is typically a web-based software application that homeless

⁴⁹ *Id.* at p. 13.

⁵⁰ 24 CFR 91.205(c)(1) states, in pertinent part: "The plan must describe, in a form prescribed by HUD, the nature and extent of unsheltered and sheltered homelessness, including rural homelessness, within the jurisdiction. At a minimum, the recipient must use data from the Homeless Management Information System (HMIS) and data from the Point-In-Time (PIT) count conducted in accordance with HUD standards; (i) The description must include, for each category of homeless persons specified by HUD (including chronically homeless individuals and families, families with children, veterans and their families, and unaccompanied youth), the number of persons experiencing homelessness on a given night, the number of persons who experience homelessness each year, the number of persons who lose their housing and become homeless each year, the number of persons who exit homelessness each year, the number of days that persons experience homelessness, and other measures specified by HUD.; (ii) The plan also must contain a brief narrative description of the nature and extent of homelessness by racial and ethnic group, to the extent information is available."

⁵¹ The HUD, Sheltered PIT Count and HMIS Data Crosswalk, p. 2, available at <https://files.hudexchange.info/resources/documents/Sheltered-PIT-Count-and-HMIS-Data-Element-Crosswalk.pdf> (last visited January 5, 2022).

⁵² Sample surveys are available at <https://www.pointintime.info/simtechsolutions/assets/File/PIT%202018%20Unsheltered%20Survey.pdf> and <https://files.hudexchange.info/resources/documents/PIT-Count-Youth-Survey-Comprehensive.pdf> (all sites last visited January 24, 2022).

⁵³ The HUD, *Homeless Management Information System*, available at <https://www.hudexchange.info/programs/hmis/> (last visited January 24, 2022).

⁵⁴ *Id.*

assistance providers use to coordinate care, manage their operations, and better serve their clients.⁵⁵

III. Effect of Proposed Changes:

Section 1 creates s. 420.6231, F.S., to make confidential and exempt from public inspection and copying requirements individual identifying information of a person contained in a PIT Count and Survey or data in an HMIS collected pursuant to federal law and regulations. The exemption applies retroactively to information that is currently held related to such PIT counts. The section provides that the exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2027, unless the Legislature reviews and renews the exemption before that date.

Section 1 does not preclude aggregate information from being released so long as an individual cannot be identified.

Section 1 provides the following definitions:

- “Individual identifying information” means “information that directly or indirectly identifies a specific person, can be manipulated to identify a specific person, or can be linked with other available information to identify a specific person.”
- “Point-in-Time Count” means “an unduplicated count of both the sheltered and unsheltered people in a community who are experiencing homelessness.” The bill specifies that the term includes all survey information received from persons experiencing homelessness.

Section 2 provides a statement of public necessity. The bill states that it is a public necessity to keep confidential and exempt from public disclosure identifying information of a person contained in a PIT Count and Survey or data in a HMIS collected pursuant to federal law and regulations. Further, the public necessity statement provides that public knowledge of such sensitive information:

- Could lead to discrimination against or ridicule of such individuals and could make them reluctant to seek assistance for themselves or their family members;
- May put affected individuals at greater risk of injury as a significant proportion of such individuals are survivors of domestic violence or suffer from mental illness or substance abuse; and
- May put affected individuals at a heightened risk for fraud and identity theft.

The section further provides that the harm from disclosing the identity of individuals included outweighs potential benefits to be derived widespread and unfettered access to such information and that federal law requires victim service providers to protect the personal identifying information of clients and prohibits the disclosure of such information for HMIS purposes.⁵⁶

⁵⁵ The HUD Exchange Homeless Management Information System, available at <https://www.hudexchange.info/hmis> (last visited January 24, 2022).

⁵⁶ In the course of awarding grants or implementing programs, the HUD Secretary is required to instruct any victim service provider that is a recipient or subgrantee not to disclose, for purposes of the HMIS, any personally identifying information about any client. The Secretary may, after public notice and comment, require or ask such recipients and subgrantees to disclose, for purposes of the HMIS, non-personally identifying information that has been de-identified, encrypted, or otherwise encoded. *See* 42 U.S.C. s. 11363.

Section 3 directs the Division of Law Revision to replace the phrase “the effective date of this act” wherever it occurs with the date the bill becomes a law.

Section 4 provides that the bill is effective upon becoming 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, nor 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 requirements. This bill enacts a new exemption for individual identifying information obtained during annual counts of persons who are homeless. Thus, the bill requires a two-thirds vote to be enacted.

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. Section 2 of the bill contains a statement of public necessity for the exemption.

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 law is to protect personal identifying information of individuals whose information is recorded as part of a PIT Count and Survey. This bill exempts only such personal identifying information from the public records requirements. 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 will be subject to the cost, to the extent imposed, associated with making the redactions in response to a public records request.

C. Government Sector Impact:

The Department of Children and Families (DCF) and local service providers which collect PIT Surveys and HMIS information may have to expend resources to train their staff and perform redactions when a public records request is made. The cost of such tasks to the DCF and local service providers is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 420.6231 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.