

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 Governmental Oversight and Accountability Committee

BILL: SB 874

INTRODUCER: Senator Hays

SUBJECT: Public Records/Emergency Notification Information

DATE: April 1, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	Favorable
2.	Naf	Roberts	GO	Favorable
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill creates an exemption from public-records requirements for any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency, including the person’s name, address, telephone number, e-mail address, or other electronic communication address. The bill provides for retroactive application of the exemption, and for legislative review and repeal under the provisions of the Open Government Sunset Review Act.

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

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends section 119.071 of the Florida Statutes.

II. Present Situation:

Florida’s Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), Art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “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 connection 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 which are “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

¹ Section 119.011(12), F.S.

² Section 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, 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.”

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁷ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Section 24(c), Art. I of the State Constitution.

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ sets forth a legislative review process for newly-created or substantially-amended public-records or public-meetings exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public-records or public-meetings exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.

The Act also requires consideration of six questions regarding the scope of the exemption and related protections.¹²

Emergency Notifications

State agencies are required by law to have emergency plans in place in case of a natural disaster.¹³ These emergency plans are not required to have any sort of associated notification system. The Department of Health has taken steps to keep the public health community informed of public health emergencies using the Florida Department of Health Emergency Notification System or FDENS.¹⁴

Sheriff's offices, universities, public utilities and other entities throughout Florida have in place emergency notification systems. For example, the Sumter County Sheriff's Office uses the CodeRED Emergency Notification System. It is a high-speed telephone communication service for emergency notifications that works off of a database compiled from the phone database maintained for the Sheriff's office by the purveyors of the CodeRED system. "This system

⁹ Op. Att'y Gen. Fla. 85-62 (1985).

¹⁰ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), review denied, 589 So. 2d 289 (Fla. 1991).

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(a), F.S.

¹³ *See, e.g.*, s. 252.35, F.S.

¹⁴ Florida Health Alert Network, <http://www.doh.state.fl.us/fdens/index.html> (last visited March 01, 2011).

allows [the Sumter County Sheriff's Office] to telephone all or targeted areas of the County in case of an emergency situation that requires immediate action (such as a boil-water notice, missing child or evacuation notices).¹⁵ Brevard County has in place a similar emergency alert notification system for natural emergencies.¹⁶ Florida State University has a more comprehensive alert system that includes text messages, voice-mail messages, email messages, facebook messages, indoor and outdoor sirens, a hotline and more.¹⁷

A limited public records exemption already exists for persons requesting emergency assistance through E911. The exemption applies only to the name, address, telephone number or personal information about, or information which may identify any person requesting emergency services or reporting an emergency while such information is in the custody of the public agency or public safety agency providing emergency services.¹⁸

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S. to provide that any information furnished for the purpose of being provided with emergency notification by the agency, including the person's name, address, telephone number, e-mail address, or other electronic communication address, is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption applies to information held by an agency, before, on, or after the effective date of this exemption.¹⁹

The exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 creates an undesignated section of law providing a statement of Legislative intent supporting the constitutionally required public necessity statement. The bill states that using current technology, agencies may contact members of the public by a variety of electronic means, including cellular telephones and electronic mail, to alert them of imminent natural and manmade disasters, medical emergencies, criminal emergencies, and other dangerous conditions. Public safety is significantly enhanced through the use of such emergency notification programs, and expansion of such programs further increases public safety. The exemption is designed to alleviate concerns about disclosure of information in these circumstances that could be used for criminal purposes. Therefore, the bill states that the public-records exemption necessary for the effective implementation of and broad participation in emergency notification programs conducted by agencies.

¹⁵ Sumter County, Florida, Sheriff's Office, <http://www.sumtercountysheriff.org/emergencymanagement/codered.asp> (last visited March 01, 2011).

¹⁶ Brevard County Emergency Management Office, <http://embrevard.com/> (last visited March 01, 2011).

¹⁷ Florida State University ALERT, Emergency Notification System, <http://www.safety.fsu.edu/emergencymanagement/fsualert.html> (last visited March 01, 2011) see generally, Florida Department of Law Enforcement, State Working Group On Domestic Preparedness Ad Hoc Committee on University and College Emergency Notification Systems, <http://www.fdle.state.fl.us/Content/getdoc/c2c4f5df-1fa5-4b26-adad-4d3e23665c43/SWGUniversityCollegeEmergencyNotificationSystems.aspx>.

¹⁸ Section 365.171(12), F.S.

¹⁹ The Supreme Court of Florida ruled that a public-records exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).

Section 3 provides that the act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement: Section 24(c), Art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Subject Requirement: Section 24(c), Art. I of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement: Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

Breadth: A public records exemption must be no broader than necessary to accomplish the stated purpose of the law.²⁰ This bill does not specify what agencies²¹ it applies to or what emergency notification programs it is intended to include. To survive constitutional scrutiny, the bill must be narrowly tailored to alleviate concerns about disclosure of information in these circumstances that could be used for criminal purposes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁰ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

²¹ By default it will apply to “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.” Section 119.011, F.S.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.