

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1025 Public Records/Utility Security Information

**SPONSOR(S):** State Affairs Committee; Energy & Utilities Subcommittee; Antone; and Cortes, B.

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 776

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	12 Y, 0 N, As CS	Whittier	Keating
2) State Affairs Committee	18 Y, 0 N, As CS	Williamson	Camechis
3) Regulatory Affairs Committee	14 Y, 0 N	Whittier	Hamon

### SUMMARY ANALYSIS

This bill creates a public record exemption for the following information held by a local government utility:

- Information related to the security of the utility's technology, processes, and practices designed to protect the utility's networks, computers, programs, and data from attack, damage, or unauthorized access that, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology resources.
- Information related to the security of the utility's existing or proposed information technology systems or industrial control technology systems that, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operation of the systems and the utility.

The bill provides for retroactive application of the public record exemption. The bill provides that this public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

For purposes of the Public Records Act, the bill defines the term "utility" to mean a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater.

The bill does not appear to have a fiscal impact on the state; however, it may have a minimal fiscal impact on local government utilities.

The bill provides that the act takes effect upon becoming a law.

**Article I, section 24(c) of the Florida 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 a new public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Present Situation**

##### Public Records

Article I, section 24(a) of the Florida 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 article I, section 24(a) of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1)(a), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> 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 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.<sup>3</sup>

The Act also requires the automatic repeal of a public record or public meeting exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>4</sup>

##### Local Government Utilities

Pursuant to article VIII, section 2(b) of the Florida Constitution, municipalities have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

Municipalities are authorized by general law to provide water and sewer utility services.<sup>5</sup> According to a 2014 staff analysis, 254 municipalities provide water services and 222 municipalities provide wastewater service.<sup>6</sup>

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<sup>1</sup> FLA. CONST. art. I, s. 24(c).

<sup>2</sup> s. 119.15, F.S.

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

<sup>4</sup> s. 119.15(3), F.S.

<sup>5</sup> Pursuant to s. 180.06, F.S., a municipality may "provide water and alternative water supplies;" "provide for the collection and disposal of sewage, including wastewater reuse, and other liquid wastes;" and "construct reservoirs, sewerage systems, trunk sewers, intercepting sewers, pumping stations, wells, siphons, intakes, pipelines, distribution systems, purification works, collection systems, treatment and disposal works" to accomplish these purposes.

<sup>6</sup> Florida House of Representatives Staff Analysis of HB 813 (2014), p. 3 (Mar. 18, 2014).

Public power utilities in the state are composed of 34 municipally owned electric utilities<sup>7</sup> that serve approximately 15 percent of the state's population (3.0 million consumers).<sup>8</sup> Collectively, they are the third largest source of power in the state.<sup>9</sup>

According to the Florida Municipal Electric Association, "Each month, the Orlando Utilities Commission sees about 2 million 'hits' from foreign countries, mostly from the Middle East and Asia. These 'hits' are described as an attempt to connect to any resource on the utility's cyber network."<sup>10</sup> The chief information officer for the Orlando Utilities Commission states that, "[a]ttacks are daily, they are unrelenting and they are evolving...[There are] a bunch of rogue nations that are attacking our system on a daily basis in what used to be in the neighborhood of 30,000 probes into our firewalls and now has gone into the millions."<sup>11</sup>

Recent events have illuminated the threat to the electric power grid. For example:

- In December 2015, cyber hackers remotely attacked the power grid in western Ukraine and caused a blackout that left over 80,000 customers without power for six hours.<sup>12</sup>
- In October 2015, CNN Money reported that ISIS hackers had been attempting to penetrate the U.S. energy grid through cyberattacks to take down parts of the country's energy supply.<sup>13</sup>
- In October 2015, Iranian attackers hacked into a University of California housing system and opened a pathway into the utility networks that run into the U.S. power grid. The hackers stole passwords and engineering drawings of dozens of power plants that could have been used to knock out electricity flowing to millions of homes.<sup>14</sup>

### Public Record and Public Meeting Exemptions Related to Security Systems

Current law provides public record and public meeting exemptions for certain information related to security systems. The law specifies the circumstances under which the information may be disclosed and to whom it may be disclosed.

#### *Security System Plans*

Section 119.071(3)(a)1., F.S., defines "security system plan" to include all:

- Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems;
- Threat assessments conducted by any agency or any private entity;
- Threat response plans;
- Emergency evacuation plans;
- Sheltering arrangements; or
- Manuals for security personnel, emergency equipment, or security training.

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<sup>7</sup> Florida Public Service Commission, *Facts & Figures of the Florida Utility Industry*, p.1 (Mar. 2015).

<sup>8</sup> Florida Municipal Electric Association, *Who is FMEA?*, <http://publicpower.com/who-is-fmea/> (last visited Feb. 14, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> Email from Joseph Salzverg, representative of the Florida Municipal Electric Association, RE: the public records exemption for cyber security systems of municipal utilities (Jan. 21, 2016).

<sup>11</sup> Orlando Sentinel, *Orlando's electric utility fights cyber war*, <http://www.orlandosentinel.com/news/os-cyber-war-ouc-20140927-story.html> (last visited Jan. 23, 2016).

<sup>12</sup> CBCnews, *Cyberattack that crippled Ukrainian power grid was highly coordinated*, <http://www.cbc.ca/news/technology/ukraine-cyberattack-1.3398492> (last visited Jan. 23, 2016).

<sup>13</sup> CNN Money, *ISIS is attacking the U.S. energy grid (and failing)*, <http://money.cnn.com/2015/10/15/technology/isis-energy-grid/index.html> (last visited Jan. 23, 2016).

<sup>14</sup> The Journal, *Investigation finds U.S. power grid vulnerable to foreign hacks*, <http://journal-news.net/page/content.detail/id/648485/Investigation-finds-US-power-grid-vulnerable-to-foreign-hacks.html?nav=5006> (last visited Jan. 23, 2016).

A security system plan or any portion thereof that is held by an agency<sup>15</sup> is confidential and exempt<sup>16</sup> from public record requirements if the plan is for:

- Any property owned by or leased to the state or any of its political subdivisions; or
- Any privately owned or leased property.<sup>17</sup>

An agency's custodian of public records<sup>18</sup> may disclose the confidential and exempt information to:

- The property owner or leaseholder; or
- Another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those persons who are responsible for such attempts or acts.<sup>19</sup>

### *Other Information Related to Security Systems*

Section 281.301, F.S., provides that information relating to security systems that is in the possession of an agency and all meetings relating directly to or that would reveal such security systems or information are confidential and exempt from public record and public meeting requirements if the security systems are for:

- Any property owned by or leased to the state or any of its political subdivisions; or
- Any privately owned or leased property.

The law specifies that the protected information includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or revealing such systems or information. There are no exceptions provided to authorize an agency to disclose the information under certain circumstances.

### **Effect of Proposed Changes**

The bill creates a public record exemption for the following information held by a utility owned or operated by a unit of local government:

- Information related to the security of a local government utility's technology, processes, and practices designed to protect the utility's networks, computers, programs, and data from attack, damage, or unauthorized access that, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology resources.
- Information related to the security of a local government utility's existing or proposed information technology systems or industrial control technology systems that, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operations of the systems and the utility.

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<sup>15</sup> Section 119.011(2), F.S., defines the term "agency" to mean 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 chapter 119, F.S., 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.

<sup>16</sup> There is a difference between records the Legislature designates as 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. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 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 Attorney General Opinion 85-62 (August 1, 1985).

<sup>17</sup> Section 119.071(3)(a)2., F.S.

<sup>18</sup> Section 119.011(5), F.S., defines "custodian of public records" as the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.

<sup>19</sup> Section 119.071(3)(a)3., F.S.

The bill provides for retroactive application of the public record exemption.<sup>20</sup>

For purposes of the Public Records Act,<sup>21</sup> the bill defines the term “utility” to mean a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater.

The bill provides a statement of public necessity as required by the Florida Constitution, which provides the following legislative findings:

- The increased interconnection and integration of utility system infrastructure exposes such systems to attacks that may result in the disruption of utility services and damage to utility systems.
- Maintaining safe and reliable utility systems is vital to protecting the public health and welfare and ensuring the economic well-being of the state.
- Disclosure of sensitive information related to the measures undertaken by utilities to secure their data, information technology systems, and industrial control technology systems could allow a security breach that damages utility systems and disrupts the safe and reliable operations of such systems, adversely impacting the public health and safety and the economic well-being of the state and potentially impacting national security concerns.
- The public and private harm in disclosing information related to such security measures outweighs any public benefit derived from disclosure of the information.

In accordance with s. 119.15, F.S, the exemption is subject to the Open Government Sunset Review Act and it stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 119.011, F.S., to define the term “utility.”

**Section 2.** Amends s. 119.0713, F.S., relating to local government agency public records exemptions.

**Section 3.** Provides a statement of public necessity.

**Section 4.** Provides that the act takes effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

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<sup>20</sup> In 2001, the Florida Supreme Court ruled that a public record exemption does not apply retroactively unless the legislation clearly expresses such intent. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).

<sup>21</sup> Chapter 119, F.S.

None.

2. Expenditures:

The bill could have a minimal fiscal impact on local government utilities because staff responsible for complying with public record requests may require training related to creation of the public record exemption. In addition, local government utilities could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the local government utility.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or to take an 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 a state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption, and it includes a public necessity statement.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for information related to the security of a local government utility's technology, processes, and practices designed to protect data and information technology resources from attack, damage, or unauthorized access. It also protects information related to the security of its existing or proposed information technology systems or industrial control technology systems, if the disclosure of such information would facilitate unauthorized access to, and alteration or destruction of, data, information technology systems, and industrial control technology systems. As such, the exemption does not appear to be in conflict with the constitutional requirement that it be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 25, 2016, the Energy & Utilities Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Removed a provision of the bill that created a public record exemption for the identity of security firms used by a utility to secure and store data or provide information technology to the utility;
- Provided a definition for the term “utility” and replaced references to “utility agency” with the phrase “utility owned or operated by a local government unit;” and
- Identified the specific harm that the bill intends to prevent – unauthorized access to utility systems that could adversely affect safe and reliable utility operations – and made corresponding changes to the public necessity statement included in the bill.

On February 10, 2016, the State Affairs Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed unnecessary and duplicative language;
- Clarified that the retroactivity clause applied to exempt information *held by* the local government utility instead of information *obtained by* such utility; and
- Restructured the public necessity statement to mirror the standard format of all public necessity statements.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.