

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: CS/SB 624

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Hays

SUBJECT: Public Records/State Agency Information Technology Security Programs

DATE: December 3, 2015 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 624 provides a public records exemption for information relating to information technology (IT) security incidents or breaches. Such information will be confidential and exempt if the information could facilitate unauthorized access, modification, disclosure or destruction of data, information or IT resources.

The bill also provides that portions of risk assessments, external audits, evaluations or other reports of a state agency's IT security program are confidential and exempt from public disclosure. The portions of such documents will be confidential and exempt if the information they contain would facilitate unauthorized modification, disclosure or destruction of data, information, or IT resources.

The bill provides a public necessity statement for both exemptions.

The bill will go into effect upon becoming law and applies the exemptions to records in existence prior to and after the effective date.

This is a new public records exemption, so a two-thirds vote by each chamber will be necessary for passage.

II. Present Situation:

Public Records Law

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 This 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

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, 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 public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

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.” Section 119.011(2), F.S., defines “agency” to mean 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.”

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

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 FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁷ If the 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. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.¹⁸

¹² *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 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.

¹³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁴ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

¹⁷ FLA. CONST., art. I, s. 24(c).

¹⁸ Section 119.15(7), F.S.

Agency for State Technology

The Agency for State Technology (AST) is responsible for establishing standards for information technology (IT) security for state agencies.¹⁹ AST is responsible for assisting agencies in performing the following functions:

- Completing risk assessments and IT security audits, which must be submitted to AST;²⁰
- Establishing procedures for accessing information to ensure confidentiality and integrity of the data;²¹
- Responding to and recovering from security breaches;²²

In addition, each state agency head is required to perform the following functions:²³

- Designate an information security manager;
- Annually submit to AST the agency's IT security plan consistent with AST rules and guidelines;
- Conduct a comprehensive risk assessment every three years consistent with AST risk assessment methodology;
- Develop protocols for reporting IT security incidents and breaches to the Cybercrime Office of the Department of Law Enforcement (FDLE) and AST;
- Implement safeguards established by AST to address risk to the agency's information and technology;
- Ensure internal audits and evaluations of the agency's IT are conducted;
- Include IT security requirements consistent with AST and Department of Management Services protocols in solicitations for procurements;
- Train employees about IT security risks and protocols; and
- Develop a process for detecting, responding to and reporting information security breaches. State agencies must report each security incidents and breaches to AST, as well as the Department of Legal Affairs, individuals whose personal information was involved, and credit reporting agencies under certain circumstances.²⁴

The following information is confidential and exempt from public records laws:

- Comprehensive risk assessments pursuant to s. 282.318(4)(c), F.S.;
- Internal policy and procedures that could facilitate the unauthorized modification, disclosure or destruction of data or IT resources, pursuant s. 282.318(4)(d), F.S.; and
- Internal audit reports and evaluations of an agency's IT security resources, pursuant to s. 282.318(4)(f), F.S.

These documents must be released to the Auditor General, the Cybercrime Office of FDLE, AST. If an agency is under the Governor's jurisdiction, then the documents must be provided to the Chief Inspector General.

¹⁹ Section 282.318(3), F.S.

²⁰ Section 282.381(3)(b)3., F.S.

²¹ Section 282.381(3)(b)5., F.S.

²² Section 282.381(3)(b)7. and 8., F.S.

²³ Section 282.318(4), F.S.

²⁴ Section 282.318(4)(i), F.S. and s. 501.171, F.S.

III. Effect of Proposed Changes:

Section 1 makes confidential and exempt those records held by a state agency related to the detection, investigation or response to a security incident. Currently, agency heads are required to perform certain IT-related duties under s. 282.318(4), F.S. In particular, agency heads are required to develop and implement IT security protocols consistent with AST guidelines. If there is a security breach, an agency head must notify AST and the individual whose information was compromised.²⁵ The bill creates a new public records exemption for information that an agency generates while carrying out its duties. Records relating to an agency's detection, investigation or response to suspected or confirmed security incidents or breaches will be confidential and exempt if the records would facilitate the unauthorized access, modification, disclosure or destruction of:

- Physical or virtual data or information; or
- IT resources, including protocols for protecting those resources as well as any existing or proposed IT security methods.

The bill also creates a new public records exemption applicable to information held by all agencies, independent of any duties imposed on an agency head by s. 282.318(4), F.S. The exemption will protect portions of risk assessments, evaluations, external audits and other reports of a state agency's IT security program. External audits are defined as any audit conducted by an entity other than the state agency subject to the audit. This will make an audit performed by a private company or another agency, such as AST, confidential and exempt.²⁶

Portions of such documents will be confidential and exempt from public disclosure only if the disclosure of such information could facilitate unauthorized access, modification, disclosure or destruction of:

- Physical or virtual data or information; or
- IT resources, including protocols for protecting those resources as well as any existing or proposed IT security methods.

Both exemptions provide that a state agency must to share confidential and exempt information with the Auditor General, AST and the Cybercrimes Office of the FDLE. State agencies under the Governor's jurisdiction are required to release the confidential and exempt information to the Chief Inspector General. The bill permits agencies to share confidential and exempt information with local governments, other state agencies, and federal agencies for IT purposes or in furtherance of the agency's official duties. The bill permits a state agency to have some flexibility in sharing confidential and exempt information with other governmental entities without the requiring an agency to get a court order to do so. For example, AST has some local government clients and may need to share IT security information with them. In addition, AST may need to share IT security information with federal agencies that fund state-administered programs.

²⁵ Section 282.318(4)(i)1. and 2. F.S.

²⁶ Currently, agency heads are required to perform internal audits, which are currently confidential and exempt pursuant to s. 282.318(4)(f), F.S. As the law currently reads, it is not explicitly clear if an audit performed by AST or a private company hired by a state agency qualifies as an 'internal audit.'

The bill provides for retroactive application for both public records exemptions; thus information held by a state agency before these exemptions becomes law will become confidential and exempt. These exemptions will be subject to review and repeal on October 2, 2021, pursuant to the OGSR.

Section 2 provides the public necessity statements for both public records exemptions, as required by the Florida Constitution.

Subsection 1 address the public necessity for records relating to the detection, investigation or response to security incidents or breaches.

Subparagraph (1)(b)1. states that releasing information related to security incidents and breaches could impede and impair investigations and that releasing such information before it is complete could jeopardize the investigation.

Subparagraph (1)(b)2. states that investigations of security incidents is likely to include gathering sensitive personal information (such as financial or health information) that is not otherwise protected under a public records exemption. Such information could be used for purposes of identity theft or other crimes and should not be released.

Subparagraph (1)(b)3. provides that the release of a records, including computer forensic reports, or other information that would reveal the weakness of a state agency's date security upon the conclusion of an investigation could reveal security weaknesses that could compromise the agency in the future, as well compromise other agencies.

Subparagraph (1)(b)4. provides that information held by an agency relating to a security breach or incident may contain proprietary information. Disclosure of such information could result in identification of vulnerabilities and result in further breaches. The public necessity statement goes on to state that the release of proprietary information could cause financial loss and give a business's competitors an unfair advantage.

Subparagraph (1)(b)5. states that disclosure of records could compromise the integrity of state agency data and IT resources and impair the administration of government programs. This paragraph also states that the exemption should be retroactive because it is remedial in nature.

Subsection 2 contains the public necessity statement for risk assessments, evaluations, external audits and other reports of a state agency's IT security system. The bill states that the Legislature finds that reviews of an agency's IT system are valuable. Risk assessments, evaluations, external audits and other reports would identify vulnerabilities in systems and make recommendations for remedies, therefore disclosure of such information would compromise the integrity of an agency's IT resources and impair the administration of government. The bill goes on to state that the exemption is remedial in nature, and should be given retroactive application.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

There is no known private sector impact from this bill. However, the public necessity statement suggests that this bill will help private sector businesses.²⁷

C. Government Sector Impact:

Unknown. Presumably, the redactions will create additional work for records custodians, however, this most likely will be absorbed by existing agency resources.²⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 282.318 of the Florida Statutes.

²⁷ 2015 Agency Legislative Bill analysis by the State Agency by AST dated November 3, 2015. FDLE and the Auditor General did not comment on this issue in the bill analyses.

²⁸ The bill analyses provided by AST, FDLE and the Auditor General indicate that this bill will not impact their agencies.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

CS by Governmental Oversight on December 1, 2015:

- Reorganizes the structure of the exemptions.
- Provides clearer definition of what information is subject to the exemptions.
- Provides that information related the physical and virtual security is confidential and exempt.
- Provides additional description of information technology resources.
- Clarifies that the exemptions apply to all agencies, thereby reducing ambiguity as to whether information is exempt only in the hands of AST.
- Adds a definition of external audit.
- Expands the general agency exemption to include risk assessments, and other reports of a state agency's IT security program.
- Provides that confidential and exempt information may be shared with local governments, other state agencies, and the federal government.
- Removes portions of the public necessity statement which were related to existing public records exemptions or were otherwise not directly related to the new exemptions.

B. Amendments:

None.