

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 7004

INTRODUCER: Governmental Oversight and Accountability Committee and Community Affairs Committee

SUBJECT: OGSR/Emergency Notification Information

DATE: January 12, 2016

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Present</u>	<u>Yeatman</u>		<b>CA Submitted as Committee Bill</b>
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<b>Fav/CS</b>
2.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

CS/SB 7004 eliminates the scheduled repeal of the current public records exemption for any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency. As a result, this information will continue to be exempt from public disclosure.

The bill requires a majority vote for passage. This bill goes into effect October 1, 2016.

**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.<sup>1</sup> 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.<sup>2</sup>

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

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

<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> 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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

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.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> 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.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</sup> 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.<sup>14</sup>

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<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> 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.”

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

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

<sup>12</sup> *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.

<sup>13</sup> 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).

<sup>14</sup> 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).

## 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.

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.<sup>15</sup> 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.<sup>16</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. Specific questions are enumerated for consideration under the review.<sup>17</sup> 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>18</sup> 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.<sup>19</sup>

## Emergency Notification Systems

The Division of Emergency Management is tasked with maintaining a comprehensive emergency management system for the state, as well as coordinating efforts with the federal government, local governments, school boards and private agencies.<sup>20</sup> The Division of Emergency Management is also responsible for establishing a communication system with the

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<sup>15</sup> 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).

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(a), F.S.

<sup>18</sup> FLA. CONST., art. I, s. 24(c).

<sup>19</sup> Section 119.15(7), F.S.

<sup>20</sup> Section 252.35(1), F.S.

public and emergency management agencies.<sup>21</sup> The Division is currently trying to procure a statewide emergency alert and notification system.<sup>22</sup>

A centralized statewide alert system for all emergencies, however, currently does not exist. Some agencies have statewide alert programs that are related to their specialization. For example, the Florida Department of Transportation provides traffic-related emails or text messages to the public through their My Florida 511 program.<sup>23</sup> The Department of Health keeps the public health community informed of public health emergencies using the Florida Health Alert Network (HAN).<sup>24</sup>

Most local governmental entities have some type of emergency notification system for their communities. Sheriffs' 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 allows [the Sumter County Sheriff's Office] to telephone all or targeted areas of Sumter County in case of an emergency situation that requires immediate action (such as a boil-water notice, missing child or evacuation notices)."<sup>25</sup> Brevard County has in place a similar emergency alert notification system for natural disasters.<sup>26</sup> Florida State University has a comprehensive alert system that includes text messages, voice-mail messages, email messages, Facebook messages, indoor and outdoor sirens, a hotline and more.<sup>27</sup>

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.<sup>28</sup>

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<sup>21</sup> Section 252.35(2)(a)6., F.S.

<sup>22</sup> "Notice of Public Meeting Request for Proposal RFP-DEM-15-16-037 Florida Statewide Emergency Alert and Notification System, <http://www.floridadisaster.org/eoc/PressReleases/FAR%20Advertisement%20RFP-DEM-15-16-037.pdf> (last visited December 16, 2015).

<sup>23</sup> <http://www.fl511.com/> (last visited November 3, 2015).

<sup>24</sup> State Emergency Responders and <http://www.servfl.com/> (last visited November 3, 2015). Florida Dep't of Health, Health Alert Network Policy, available at <http://www.servfl.com/HomepageUploads/126HAN%20Policy%202015.pdf> (last visited September 22, 2015).

<sup>25</sup> Sumter County Sheriff's Office, <http://www.sumtercountysheriff.org/publicsvc/codered.php> (last visited September 22, 2015).

<sup>26</sup> Brevard County Emergency Management Office, <http://embrevard.com/> (last visited December 16, 2015).

<sup>27</sup> Florida State University ALERT, Emergency Notification System, <http://emergency.fsu.edu/services/FSUAlert> (last visited December 16, 2015). See generally, Florida Department of Law Enforcement, State Working Group On Domestic Preparedness Ad Hoc Committee on University and College Emergency Notification Systems, <https://www.fdle.state.fl.us/Content/getdoc/c2c4f5df-1fa5-4b26-adad-4d3e23665c43/SWGUniversityCollegeEmergencyNotificationSystems.aspx>. (last visited December 16, 2015).

<sup>28</sup> Section 365.171(12), F.S.

## **OGSR Survey and Results**

In June and July of 2015, Senate and House professional staff sent out a survey to cities, counties and state agencies to ascertain if s. 119.071(5)(j), F.S., remains necessary, pursuant to the OGSR.<sup>29</sup> The surveys revealed that governmental entities sent warnings to the public on a variety of topics, including but not limited to: boil water orders, severe weather, sexual predator notification, missing persons, hazardous materials, flood warning, evacuations, terrorist activities, mass shootings, utility outages, school closures and road closures.

Most governmental entities appeared to collect only contact information from the public, such as their name, address, phone number, email address or social media user names. Some governmental entities also request additional information, such as whether a notification address is a home, or a mobile or manufactured home, whether the home is the primary or secondary residence, as well as the geolocation of the home on the property. In addition to the phone number, one governmental entity asks if the number is a telecommunications device for the deaf or a telephone typewriter, teletype device (TTD/TDY).

A majority of governmental entities stated that the public records exemption should be continued. Several governmental entities asserted that people would be less likely to sign up for warnings if they thought that their information was open to disclosure. A lack of public participation would defeat the purpose of having public warning systems and place more people in danger according to some survey responses.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 119.071, F.S., to delete the scheduled repeal of the public records exemption. As a result, the covered records will continue to be exempt from disclosure.

**Section 2** provides an effective date of October 1, 2016.

### **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:**

Article I, s. 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 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

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<sup>29</sup> The surveys are on file with the Senate Committee on Community Affairs.

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

C. Trust Funds Restrictions:

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 119.071 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.)

**CS by Governmental Oversight and Accountability on January 11, 2016:**

The CS removes the list of different types of information which are exempt. The list was superfluous because “any information” included all the items in the list.

B. Amendments:

None.