

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 1224

INTRODUCER: Military and Veterans Affairs, Space, and Domestic Security Committee and Senator Passidomo

SUBJECT: Public Records and Public Meetings/Campus Emergency Response for Public Postsecondary Institutions

DATE: April 14, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sanders</u>	<u>Ryon</u>	<u>MS</u>	<u>Fav/CS</u>
2.	<u>Benvenisty</u>	<u>Graf</u>	<u>ED</u>	<u>Favorable</u>
3.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Favorable</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1224 provides a public record exemption for portions of a plan addressing a public postsecondary institution's response to an act of terrorism or other public safety crisis or emergency. The exemption applies to state agencies, law enforcement agencies, and public postsecondary institutions that hold such plans. The bill also provides a public meeting exemption for portions of a meeting where such plans are discussed.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

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

Because this bill creates a public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

The bill takes effect July 1, 2017.

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 provide 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 *Id.*

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 *Id.*

¹¹ *Id.*

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” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.¹⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.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

The OGSR 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.¹⁷ 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁸
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁹ or
- It protects trade or business secrets.²⁰

The OGSR also requires specified questions to be considered during the review process.²¹ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

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 *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 section 119.15(2), F.S.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²² 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 provided for by law.²³

Public Records Exemptions for Emergency Plans

The primary public records exemptions applicable to emergency plans are those addressing agency investigations²⁴ and a security system plan.²⁵ These exemptions may apply to some, but not all emergency plans.

Agency Investigations (s. 119.071(2)(d), F.S.)

The agency investigations exemption provides that any comprehensive policy or plan compiled by a criminal justice agency²⁶ pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency²⁷ are exempt and unavailable for inspection.²⁸ This exemption generally applies to any criminal justice agency and does not distinguish between a state or local law enforcement agency level.²⁹

Security System Plan (s. 119.071(3)(a), F.S.)

The exemption for a security system plan provides that such a plan or portion thereof for any property owned by or leased to the state or any of its political subdivisions, or any privately owned or leased property is exempt from the public records requirements. A security system plan includes:

- 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;

3. What is the identifiable public purpose or goal of the exemption?

4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
If so, how?

5. Is the record or meeting protected by another exemption?

6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ See s. 119.071(2)(d), F.S.

²⁵ See s. 119.071(3), F.S.

²⁶ A criminal justice agency is any law enforcement agency, court, or prosecutor; any other agency charged by law with criminal law enforcement duties; any agency having custody of criminal intelligence information or criminal investigative information; or the Department of Corrections. See s. 119.011(4), F.S.

²⁷ An emergency is any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property. See s. 252.34(4), F.S.

²⁸ *Supra* note 38.

²⁹ This would include a certified law enforcement agency at a state university and subsequently the policies or plans held by those institutions. See e-mail correspondence from FDLE on March 9, 2017 (on file with Military and Veterans Affairs, Space and Domestic Security Committee).

- Threat response plans;
- Emergency evacuation plans;
- Sheltering arrangements; or
- Manuals for security personnel, emergency equipment, or security training.³⁰

Emergency Planning

Emergency planning is a fundamental pillar of emergency management that makes it possible for response agencies to manage the entire life cycle of a potential crisis.³¹ In concurrence with federal guidance, state and local emergency planning in Florida takes an all-hazards approach. As such, each plan produced is based on the premise that the consequences of disasters are the same regardless of the hazard,³² and most of the functions performed during emergencies are not hazard-specific.³³

Comprehensive Emergency Management Plans

The Florida Division of Emergency Management (FDEM) is required by s. 252.35, F.S., to prepare a state comprehensive emergency management plan (CEMP). The CEMP³⁴ serves as the master operations document for Florida and is the framework through which the state handles emergencies and disasters.³⁵ The state CEMP is a general all-hazards plan and does not fall under the agency investigations or security system plan exemptions.³⁶

The CEMP must contain provisions to ensure that the state is prepared for emergencies and minor, major, and catastrophic disasters.³⁷ Those provisions include:

- An evacuation component;
- A shelter component;
- A post-disaster response and recovery component;
- Additional provisions addressing aspects of preparedness, response, recovery, and mitigation as determined necessary by the FDEM;

³⁰ Section 119.071(3)(a)1., F.S.

³¹ Federal Emergency Management Agency, *Plan, Introduction*, available at <https://www.fema.gov/plan> (last visited March 23, 2017).

³² A hazard is any event or condition with the potential to cause fatalities, injuries, property damage, infrastructure damage, agricultural loss, environmental damage, business interruption, or other structural and financial loss. Hazards are categorized as either natural, technological, or human-caused. See FDEM, *State of Florida Enhanced Hazard Mitigation Plan, Executive Summary*, 4 (Aug. 2013), available at <http://www.floridadisaster.org/mitigation/State/Index.htm> (last visited March 23, 2017).

³³ FDEM, *Florida CEMP, Basic Plan*, 7 (2014), available at <http://www.floridadisaster.org/documents/CEMP/2014/2014%20State%20CEMP%20Basic%20Plan.pdf> (last visited March 20, 2017).

³⁴ The state CEMP defines the responsibilities of the government, private, volunteer, and non-governmental organizations that comprise the State Emergency Response Team. The CEMP ensures that all levels of government are able to mobilize as a unified emergency organization to safeguard the well-being of the state's residents and visitors. It is the plan to which Florida's other disaster response plans are aligned. *Supra* note 40.

³⁵ FDEM, *CEMP*, available at <http://www.floridadisaster.org/cemp.htm> (last visited March 20, 2017).

³⁶ FDEM, *Senate Bill 1224 Analysis* (March 6, 2017) (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).

³⁷ Section 252.35(2)(a), F.S.

- A section addressing the need for coordinated and expeditious deployment of state resources, including the Florida National Guard;
- A section establishing a system of communications and warning;
- A section establishing guidelines and schedules for annual exercises; and
- Assignments for lead and support responsibilities to state agencies and personnel.³⁸

The CEMP is developed in coordination with members of the State Emergency Response Team³⁹ (SERT) that have emergency management responsibilities.⁴⁰ Members of the SERT also participate in an annual review of the CEMP to document changes in procedures, lessons learned, identification of improved capabilities, and deficiencies for corrective action.⁴¹

As part of the SERT, the Department of Education (DOE) and Board of Governors (BOG) of the State University System⁴² each contribute to the state CEMP.

The Florida Department of Education and the Board of Governors require each Florida College System (FCS) institution⁴³ and state university,⁴⁴ respectively, to produce and maintain its own CEMP. The type and level of detail contained in a college or university's CEMP and the official custodian of the CEMP would determine if portions of these plans may qualify for the agency investigations or security system plan public record exemptions.

Additionally, each county is required to establish and maintain an emergency management program and develop a county CEMP that is consistent with the state emergency management program and state CEMP.⁴⁵ Municipalities may also elect to establish an emergency management program and in doing so must comply with the guidelines for a county CEMP.⁴⁶ A county or municipality may choose to be more specific in portions of its CEMP.⁴⁷ The type and level of detail contained in a county or municipality's CEMP would determine if portions of the plan may qualify for the security system plan public record exemption.⁴⁸

Continuity of Operations Plans

Each state agency and facility, such as a prison, office building, or university, is required to have a disaster preparedness plan that is coordinated with the applicable local emergency management agency and approved by the FDEM.⁴⁹ This plan is known as a continuity of operations plan

³⁸ Id.

³⁹ The SERT is comprised of FDEM staff, other state agencies, private volunteer organizations, and non-governmental agencies. The state CEMP defines the responsibilities of each member of the SERT. Supra note 40 at 5.

⁴⁰ Supra note 47 at 50.

⁴¹ Supra note 47 at 51.

⁴² See Fla. Board of Governors. Regulation 3.001(2)(b).

⁴³ See e-mail correspondence from DOE on March 21, 2017 (on file with Military and Veterans Affairs, Space and Domestic Security Committee).

⁴⁴ Fla. Board of Governors. Regulation 3.001(2)(c).

⁴⁵ Section 252.38(1)(a), F.S. The FDEM is required to adopt standards and requirements for county CEMPs, assist local governments in preparing and maintaining their CEMP's, and periodically review local government CEMPs for consistency with the state CEMP and the standards and requirements adopted by the FDEM. See s. 252.35(2)(b), F.S.

⁴⁶ Section 252.38(2), F.S.

⁴⁷ Supra note 50.

⁴⁸ Id.

⁴⁹ Section 252.365(3), F.S.

(COOP). A COOP must outline a comprehensive and effective program to ensure the continuity of essential state functions under all circumstances.⁵⁰ It must include, at a minimum, the following elements:

- Identification of essential functions, programs, and personnel;
- Procedures to implement the plan and personnel notification and accountability;
- Delegations of authority and lines of succession;
- Identification of alternative facilities and related infrastructure, including those for communications;
- Identification and protection of vital records and databases; and
- Schedules and procedures for periodic tests, training, and exercises.⁵¹

As required in statute, the DOE maintains an agency COOP. The BOG maintains a COOP as well that contributes to the DOE's agency COOP.⁵² Both the DOE and BOG require FCS institutions and state universities, respectively, to develop and maintain a COOP.⁵³

The FDEM considers the state COOP to be exempt under the security systems exemption in s. 119.071(3), F.S.⁵⁴ Continuity of operations plans developed by state agencies and facilities, to include state colleges and universities, may also be exempt under this security systems public record exemption.

Other Emergency Plans

Emergency plans are not limited to a CEMP or a COOP. Plans such as a CEMP are often supported by a number of annexes or other plans and procedures.⁵⁵ These documents may contain information addressing specific hazards or providing details on how an agency will respond to an emergency. Each plan would need to be analyzed individually to determine whether or not a public record exemption applies.

III. Effect of Proposed Changes:

CS/SB 1224 creates s. 1004.0962, F.S., to provide a public record exemption for portions of a plan addressing a public postsecondary institution's response to an act of terrorism or other public safety crisis or emergency, and a public meeting exemption for portions of a public meeting where such plans are discussed.

⁵⁰ Section 252.365(3)(a), F.S.

⁵¹ Section 252.365(3)(b), F.S.

⁵² Supra note 56.

⁵³ Supra notes 57 and 58.

⁵⁴ Supra note 50.

⁵⁵ See supra note 47 at 55. The state CEMP is supported by nine other plans and procedures and nine annexes.

Definitions

The bill defines the following terms:

“Campus emergency response” means a public postsecondary educational institution’s response to an act of terrorism, as defined in s. 775.30, F.S.,⁵⁶ or other public safety crisis or emergency.

“Campus emergency response plan” means a plan addressing a campus emergency response which includes information relating to:

- Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof;
- Threat assessments conducted by any agency or private entity;
- Threat response plans;
- Emergency evacuation plans;
- Sheltering arrangements;
- Manuals for security personnel, emergency equipment, or security training;
- Security systems or plans;
- Vulnerability analyses;
- Postdisaster activities, including provisions for emergency power, communications, food, and water;
- Postdisaster transportation;
- Supplies, including drug caches;
- Staffing;
- Emergency equipment; or
- Individual identification of students, faculty, and staff; the transfer of records; and methods of responding to family inquiries.

“Custodial agency” includes:

- A public postsecondary institution;
- A state or local law enforcement agency;
- A county or municipal emergency management agency;
- The Executive Office of the Governor;
- The Department of Education;
- The Board of Governors of the State University System; and
- The Division of Emergency Management.

Public Record and Public Meeting Exemptions

The bill provides that any portion of a campus emergency response plan addressing the items defined in the term “campus emergency response plan” that is held by a custodial agency is exempt from s. 119.07(1), F.S., and Article I, section 24(a) of the State Constitution. The public

⁵⁶ Section 775.30, F.S., defines terrorism as a violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States that intends to intimidate, injure, or coerce a civilian population; influence the policy of a government by intimidation or coercion; or affect the conduct of a government through destruction of property; assassination, murder, kidnapping, or aircraft piracy.

record exemption provided in the bill is remedial in nature and applies to plans held by a custodial agency before, on, or after the effective date of the bill.

Information made exempt by the bill may be disclosed to another government entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities, or upon showing of good cause before a court of competent jurisdiction.

The bill also provides that any portion of a public meeting which would reveal information related to a campus emergency response plan is exempt from s. 286.011, F.S. and Article I, section 24(b) of the State Constitution.

The public record and public meeting exemptions created by this bill are subject to the Open Government Sunset Review Act and will stand repealed on October, 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

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

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 newly created or expanded public record or public meeting exemption. CS/SB 1244 creates a public record and public meeting exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State 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 exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a minimal fiscal impact on agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill defines “campus emergency response” to mean a public postsecondary education institution’s response to an act of terrorism or other public safety crisis or emergency. The Florida Statutes nor the bill define the term “public safety crisis.”

VIII. Statutes Affected:

This bill creates section 1004.0962 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Military and Veterans Affairs, Space, and Domestic Security on March 22, 2017:

The CS:

- Places the public records and meeting exemption in ch. 1004, F.S., as opposed to in ch. 250, F.S.;
- Defines the terms “campus emergency response,” “campus emergency response plan,” and “custodial agency;”
- Removes private postsecondary institutions from the bill;
- Broadens the exemption to include portions of a campus emergency response plan that address a public safety crisis or emergency;
- Expands the list of items addressed in a campus emergency response plan that are to be exempt from public disclosure;
- Makes certain custodial agencies exempt from public records laws rather than confidential and exempt; and
- Allows exempt information to be disclosed to another governmental entity or upon showing of good cause before a court of competent jurisdiction.

- B. **Amendments:**

None.