

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 Military and Veterans Affairs, Space, and Domestic Security

BILL: SB 1224

INTRODUCER: Senator Passidomo

SUBJECT: Public Records and Public Meetings/Responses to Acts of Terrorism

DATE: March 21, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sanders	Ryon	MS	Pre-meeting
2.	_____	_____	ED	_____
3.	_____	_____	GO	_____

I. Summary:

SB 1224 creates a public records exemption for portions of an emergency plan that address a public or nonpublic postsecondary educational institution's response to an act of terrorism.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.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

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

In addition to the State 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 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.

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.*

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).

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 Meetings Laws

The State Constitution provides that the public has a right to access governmental meetings.¹⁵ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁶ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts or special districts.¹⁷

The Florida Statutes also provide that governmental meetings must be open to the public. Section 286.011, F.S., which is also known as the ‘Government in the Sunshine Law,’¹⁸ or the ‘Sunshine Law’¹⁹ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be open to the public.²⁰ The board or commission must provide the public reasonable notice of such meetings.²¹ A failure to abide by open meetings requirements will invalidate any resolution, rule or formal action adopted at a meeting.²² The minutes of a board or commission meeting also must be made available to the public.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

The Legislature may create an exemption to open meetings requirements.²⁵ An exemption must pass by a two-thirds vote of the House and the Senate.²⁶ 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.²⁷ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁸

¹⁴ *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ FLA. CONST., art. I, s. 24(b).

¹⁶ FLA. CONST., art. I, s. 24(b).

¹⁷ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the State Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁸ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁹ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

²⁰ Section 286.011(1)-(2), F.S.

²¹ Section 268.011(1), F.S.

²² Section 286.011(1), F.S.

²³ Section 286.011(2), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ FLA. CONST., art. I, s. 24(c).

²⁷ FLA. CONST., art. I, s. 24(c).

²⁸ *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

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.²⁹ 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.³⁰

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.³¹ 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;³²
- 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;³³ or
- It protects trade or business secrets.³⁴

The OGSR also requires specified questions to be considered during the review process.³⁵ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.³⁶ 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.³⁷

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.

²⁹ 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.

³⁰ Section 119.15(3), F.S.

³¹ Section 119.15(6)(b), F.S.

³² Section 119.15(6)(b)1., F.S.

³³ Section 119.15(6)(b)2., F.S.

³⁴ Section 119.15(6)(b)3., F.S.

³⁵ 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?
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?

³⁶ FLA. CONST. art. I, s. 24(c).

³⁷ Section 119.15(7), F.S.

Public Records Exemptions for Emergency Plans

Agency Investigations

Section 119.071(2)(d), F.S., provides that any comprehensive policy or plan compiled by a criminal justice agency³⁸ pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency³⁹ are exempt from the public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and unavailable for inspection. This exemption generally applies to any criminal justice agency and does not distinguish between a state or local law enforcement agency level.⁴⁰ This would include a certified law enforcement agency at a state university and subsequently the policies or plans held by those institutions.⁴¹

Security System Plans

Section 119.071(3), F.S., provides an exemption from the public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution for a security system 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.

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;
- Threat response plans;
- Emergency evacuation plans;
- Sheltering arrangements; or
- Manuals for security personnel, emergency equipment, or security training.⁴²

Emergency Planning

The National Response Framework⁴³ identifies planning as a guiding principal of emergency management that makes it possible for response agencies to manage the entire life cycle of a potential crisis.⁴⁴ State and local emergency planning in Florida aligns with the framework and in doing so takes an all-hazards approach to emergency planning. As such, each plan produced is

³⁸ 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.

³⁹ As defined in s. 252.34(4), F.S.

⁴⁰ E-mail correspondence from FDLE on March 9, 2017 (on file with Military and Veterans Affairs, Space and Domestic Security Committee).

⁴¹ Id.

⁴² Section 119.071(3)(a)1., F.S.

⁴³ The National Response Framework is a guide to how the Nation responds to all types of disasters and emergencies. See FEMA, *National Response Framework*, i (June 2016), available at https://www.fema.gov/media-library-data/1466014682982-9bcf8245ba4c60c120aa915abe74e15d/National_Response_Framework3rd.pdf (last visited March 20, 2017).

⁴⁴ Federal Emergency Management Agency, *Plan*, available at <https://www.fema.gov/plan> (last visited March 20, 2017).

based on the premise that the consequences of disasters are the same regardless of the hazard.⁴⁵ Public records exemptions may apply to some, but not all such emergency plans.

State Comprehensive Emergency Management Plan

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 CEMP⁴⁶ serves as the master operations document for Florida and is the framework through which the state handles emergencies and disasters.⁴⁷

The CEMP must contain provisions to ensure that the state is prepared for emergencies and minor, major, and catastrophic disasters.⁴⁸ 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;
- 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.⁴⁹

The CEMP is developed in coordination with members of the State Emergency Response Team (SERT)⁵⁰ that have emergency management responsibilities.⁵¹ 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.⁵²

The state CEMP is a general all-hazards plan and does not fall under the agency investigations or security system plans exemptions.⁵³

⁴⁵ 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).

⁴⁶ 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.

⁴⁷ FDEM, *CEMP*, available at <http://www.floridadisaster.org/cemp.htm> (last visited March 20, 2017).

⁴⁸ Section 252.35(2)(a), F.S.

⁴⁹ *Id.*

⁵⁰ 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.

⁵¹ *Supra* note 40 at 50.

⁵² *Supra* note 40 at 51.

⁵³ FDEM, *Senate Bill 1224 Analysis* (March 6, 2017) (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).

Local Comprehensive Emergency Management Plans

In addition to developing the state CEMP, the FDEM is required to:

- Adopt standards and requirements for county CEMPs;
- Assist local governments in preparing and maintaining their CEMPs; and
- Periodically review local government CEMPs for consistency with the state CEMP and the standards and requirements adopted by the FDEM.⁵⁴

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.⁵⁵ Municipalities may elect to establish an emergency management program as well and in doing so must comply with the guidelines for a county CEMP.⁵⁶

A county or municipality may choose to be more specific in portions of its CEMP relating to terrorism and other technical threats.⁵⁷ It is unclear if the inclusion of such specific details qualify portions of a local CEMP to be exempt under the security systems exemption in s. 119.071(3), F.S.⁵⁸

Continuity of Operations Plans

All state agencies are required to designate an emergency coordinating officer (ECO) and an alternate ECO to serve as the agency's liaisons to the SERT.⁵⁹ The ECO must ensure that each state agency and facility, such as a prison, office building, or university, has a disaster preparedness plan that is coordinated with the applicable local emergency management agency and approved by the FDEM.⁶⁰ These plans are known as a continuity of operations plan (COOP).

A COOP must outline a comprehensive and effective program to ensure the continuity of essential state functions under all circumstances, to include terrorism and other technical threats.⁶¹ The COOP 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.⁶²

⁵⁴ Section 252.35(2)(b), F.S.

⁵⁵ Section 252.38(1)(a), F.S. A local emergency management agency has jurisdiction over and serves an entire county.

⁵⁶ Section 252.38(2), F.S.

⁵⁷ Supra note 53.

⁵⁸ Supra note 53.

⁵⁹ Section 252.365(1), F.S.

⁶⁰ Section 252.365(3), F.S.

⁶¹ Section 252.365(3)(a), F.S.

⁶² Section 252.365(3)(b), F.S.

The FDEM considers the state COOP to be exempt under the security systems exemption in s. 119.071(3), F.S.⁶³

Emergency Management Programs at Postsecondary Educational Institutions

Board of Governors and the State University System

Pursuant to s. 252.365, F.S., the Chancellor of the Florida Board of Governors (BOG) designates an ECO and an alternate to represent the BOG and the State University System in the SERT. The ECO is directed to maintain a CEMP for the BOG as a part of the state CEMP, which is a general all-hazards plan that does not fall under either the agency investigations or security system plans exemptions.⁶⁴ The ECO must also maintain a COOP for the BOG, which is part of the Department of Education's COOP, and may be considered exempt under the security systems exemption in s. 119.071(3), F.S.⁶⁵ It is not clear the extent to which the BOG's plans address terrorism.

The BOG requires universities to develop a campus emergency management program. It is policy of the BOG that each university must identify an emergency management point of contact who is responsible for:

- Implementing policies for the development and maintenance of an all-hazards based comprehensive emergency management program;
- Developing and maintaining a CEMP; and
- Developing a COOP.⁶⁶

A public postsecondary institution may choose to be more specific in portions of its CEMP relating to terrorism and other technical threats.⁶⁷ It is unclear if the inclusion of such specific details qualify portions of a university's CEMP to be exempt under the security systems exemption in s. 119.071(3), F.S.⁶⁸

If the emergency management point of contact for a state university is a campus law enforcement agency, emergency plans held by such criminal justice agency may be exempt under the agency investigations exemption in s. 119.071(2)(d), F.S.⁶⁹

III. Effect of Proposed Changes:

The bill creates s. 252.64, F.S., to provide an exemption from public records and public meeting requirements for portions of a comprehensive emergency management plan (CEMP) which address the response of a public or nonpublic postsecondary educational institution to an act of terrorism, as defined in s. 775.30, F.S.⁷⁰ The public records exemptions provided in the bill are

⁶³ Supra note 53.

⁶⁴ Fla. Board of Governors. Regulation 3.001(2)(b) and supra note 53.

⁶⁵ Fla. Board of Governors. Regulation 3.001(2)(b).

⁶⁶ Fla. Board of Governors. Regulation 3.001.

⁶⁷ Supra note 53.

⁶⁸ Supra note 53.

⁶⁹ Supra note 40.

⁷⁰ 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

remedial in nature and apply to plans held by a custodial agency before, on, or after the effective date of the bill.

Portions of a CEMP which address the response of a public or nonpublic postsecondary educational institution's response to an act of terrorism are confidential and exempt from s. 119.07(1) and Article I, s. 24(a) of the State Constitution if held by:

- The Division of Emergency Management;
- A state or local law enforcement agency;
- A county or municipal emergency management agency;
- The Executive Office of the Governor; or
- The Department of Education.

Information made confidential and exempt for these agencies may be disclosed to another state or a 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.

Additionally, the bill specifically exempts from public records requirements portions of a CEMP held by a public postsecondary institution that address the institution's response to an act of terrorism.

The portions of a CEMP that are exempt by the bill include those addressing:

- Security systems or plans;
- Vulnerability analyses;
- Emergency evacuation transportation;
- Sheltering arrangements;
- Post-disaster activities, including provisions for emergency power, communications, food, and water;
- Post-disaster transportation;
- Supplies;
- Staffing;
- Emergency equipment; and
- Individual identification of students, transfer of records, and methods of responding to family inquiries.

Any portion of a meeting at which information contained in a CEMP addressing a postsecondary educational institution's response to an act of terrorism is discussed is exempt from s. 286.011, F.S. and s. 24(b), Art. I of the State Constitution.

The certification by the Governor, in coordination with the Department of Education, of the sufficiency of a comprehensive emergency management plan that addresses the response of a postsecondary educational institution to an act of terrorism is not exempt.

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.

This exemption is subject to the Open Government Sunset Review Act and will stand repealed on October, 2, 2022, unless reviewed and reenacted by the Legislature.

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

The bill provides an effective date of 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. The bill creates a public record 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 exemption and 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:

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

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:

None.

VIII. Statutes Affected:

This bill creates section 252.64 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.)

None.

B. Amendments:

None.