

**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: SB 248

INTRODUCER: Senators Broxson and Passidomo

SUBJECT: Public Records/Office of Financial Regulation

DATE: April 14, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matiyow</u>	<u>Knudson</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 248 exempts from public inspection and disclosure certain personal identifying information of nonsworn investigative employees of the Office of Financial Regulation (Office). The exemption applies to all current or former employees as well as their spouses and children. The exemption also covers an employee's spouse's place of employment and his or her child's school or daycare facility.

The bill states it is a public necessity to protect such information because the employees' investigative duties can result in arrests and prosecutions for crimes up to and including first degree felony violations and can also result in the loss of commerce and property, the assessment of monetary fines, or the suspension or loss of professional licenses. The Office has documented several instances where their nonsworn investigators have been intimidated and threatened, including the brandishing of firearms.

The provisions of the bill are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2022, unless reenacted by the Legislature. The bill goes into effect upon becoming law.

The bill requires a two-thirds vote of each chamber in order to pass because it creates a public records exemption.

The bill is effective upon becoming law.

## 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

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> 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.<sup>11</sup> A statutory

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

<sup>2</sup> *Id.*

<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 Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

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

<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> *Id.*

<sup>11</sup> *Id.*

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

### **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.<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>

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.<sup>17</sup> 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;<sup>18</sup>
- 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;<sup>19</sup> or
- It protects trade or business secrets.<sup>20</sup>

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

<sup>12</sup> *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).

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

<sup>15</sup> 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.

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

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

<sup>18</sup> Section 119.15(6)(b)1., F.S.

<sup>19</sup> Section 119.15(6)(b)2., F.S.

<sup>20</sup> Section 119.15(6)(b)3., F.S.

<sup>21</sup> 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.<sup>22</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 provided for by law.<sup>23</sup>

### **Office of Financial Regulation**

The Office provides regulatory oversight for Florida's financial services providers. The nonsworn investigators for the Office work under the Bureau of Financial Investigations (bureau). The bureau has 39 employees, 35 of which would be covered by this exemption.<sup>24</sup> The bureau's nonsworn investigators are housed in satellite offices throughout the state (Tallahassee, Tampa, Orlando, West Palm Beach, and Miami). Although the investigators are nonsworn, they work on criminal and civil cases independently and collaboratively with law enforcement and prosecutorial agencies. The nonsworn investigators also provide investigative assistance to those agencies, including testimony at trial.<sup>25</sup>

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

SB 248 amends s. 119.071, F.S., to exempt from public inspection and disclosure laws the home address, telephone numbers, dates of birth, and photographs of any current or former nonsworn investigative employee of the Office.

The bill also exempts from public inspection and disclosure the employee's spouse's and children's home address, telephone numbers, dates of birth, and photographs. A spouse's place of employment as well as the school or daycare of an employee's children are also exempt.

The bill states that it is a public necessity to protect such information because these employees and their families may be subject to revenge perpetrated by people who have been investigated. The bill states such investigations can result in arrests and prosecutions for crimes up to and including first degree felony violations and can also result in the loss of commerce and property, the assessment of monetary fines, or the suspension or loss of professional licenses. The Office has documented several instances where their nonsworn investigative personal and their families have been intimidated or threatened as a result of their work.<sup>26</sup>

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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?

<sup>22</sup> FLA. CONST. art. I, s. 24(c).

<sup>23</sup> Section 119.15(7), F.S.

<sup>24</sup> Office of Financial Regulation, Senate Bill 248 Bill Analysis (Jan. 9, 2017) (On file with the Senate Committee on Banking and Insurance).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

- A person associated with an investigation appeared at an investigator’s former residence, where his young children still resided. The visit put the investigator and his family at great unease.
- An investigator’s name appeared on a credible hit list found by U.S. Marshals during the search of a suspect’s home. Other evidence, including photos of the investigator’s residence and children were also found during the search.
- Two investigators conducting surveillance of a suspected illegal banking operation were seen by suspects and were chased by vehicle through the streets of Miami and Liberty City. The suspects were observed brandishing firearms before the investigators were able to escape.
- While investigators were reviewing records obtained via subpoena, notes were found by the investigators indicating that the suspects hired private investigators to collect personal background information on the investigators working the case.
- The suspect of an investment fraud case learned of the time and location of a deposition taken by an investigator. The suspect arrived at the location and waited outside for the deposition to conclude. As the investigator emerged from the deposition room, the suspect approached and verbally confronted the investigator loudly and in a threatening way. As a result, the investigator took personal time from his job to work with his local property appraiser’s office to conceal his personal information from any public search of his records.
- An investigator received verbal threats from a suspect while conducting an advance fee investigation. In one instance, the suspect told her that “if he went down, she would go down, too.” In a subsequent instance, the suspect threatened that if he went to prison, “she would not be around any longer.” The investigator felt endangered to the point that she reported the matter to law enforcement and purchased a firearm for her personal protection.<sup>27</sup>

The Office believes these documented instances of nonsworn investigative personal and their families being intimidated or threatened for completing their work warrants their identification and location information being exempt from public inspection and copying.

The provisions of the bill are subject to the OGSR and will be automatically repealed on October 2, 2022, unless reenacted by the Legislature.

The bill goes in to effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

##### **Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created or

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<sup>27</sup> *Id.*

expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

**Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly-created or expanded public records or public meetings exemption. The public necessity statement in this bill appears to support the breadth of this public records exemption.

**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.)

None.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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