

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: SB 1078

INTRODUCER: Senator Perry

SUBJECT: Public Records/United States Census Bureau

DATE: January 12, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>RC</u>	_____

I. Summary:

Senate Bill 1078 creates a public records exemption for certain address information maintained by the United States Census Bureau and held by an agency. Specifically, the bill makes confidential and exempt the following information held by an agency pursuant to the federal Local Update of Census Addresses Program (LUCA):

- United States Census Bureau address information, including maps showing structure location points;
- Agency records that verify addresses; and
- Agency records that identify address errors or omissions.

The bill authorizes release of the information to another agency or governmental entity in furtherance of its duties and responsibilities under the program. Additionally, the bill authorizes agencies operating at the direction of the program to access any other confidential or exempt information held by another agency if necessary for the agency, to perform its program duties and responsibilities.

The public necessity statement provides as justification for the exemption that the federal LUCA requires this address information to be kept confidential. As such, all individuals directly involved in reviewing the information or who otherwise have access to the information must sign a confidentiality agreement. Without the exemption, agencies would be denied participation in the program, which could result in a negative fiscal impact for the state.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and will repeal October 2, 2023, unless the Legislature reviews and reenacts the exemption by that date.

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

An agency is defined 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 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 a public agency.⁶

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.⁷ 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.”⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

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 Legislature 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(2), F.S.

⁷ 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” 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.”

⁸ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.¹⁰ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these two 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 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 In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

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 683 (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 s. 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.

- 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.

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

United States Census Bureau

The United States Census Bureau (USCB), based in Maryland, is part of the United States Department of Commerce.²⁴ Amongst its other research duties, the USCB conducts the decennial census. The decennial census is the comprehensive population and housing count of all 50 states, the District of Columbia, Puerto Rico, and the U.S. islands. Thomas Jefferson ordered the first census in 1790, and the federal government has conducted it every 10 years since.

Results of the decennial census determine the number of seats for each state in the U.S. House of Representatives and are relied upon in drawing congressional and state legislative districts. The census is critical to the annual distribution of more than \$675 billion in federal funds.²⁵ Moreover, information collected during the census are used not only by all levels of government, but also by businesses, non-profits, and policy makers.²⁶

Federal law protects the confidentiality of any and all information collected during the census.²⁷

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?
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 U.S. Census Bureau, *Who We Are*, available at: <https://www.census.gov/about/who.html> (last visited Jan. 11, 2018).

²⁵ U.S. Census Bureau, *About the Bureau, U.S. Census Bureau at a Glance*, available at: <https://www.census.gov/about/what/census-at-a-glance.html#censuses> (last visited Jan. 11, 2018).

²⁶ Patrick R. Potyondy, National Conference of State Legislatures, *LegisBrief: The 2020 Census, What You Need to Know About the 2020 Census* (Nov. 2017), available at: <http://www.ncsl.org/research/redistricting/what-you-need-to-know-about-the-2020-census.aspx> (last visited Jan. 11, 2018).

²⁷ U.S. Census Bureau, *supra* note 25.

Local Update of Census Addresses Program (LUCA)

LUCA is a program offered once every ten years to state and local governments by the United States Census Bureau in preparation for the decennial census. Specifically, LUCA enables states and local entities to update address information on a master list maintained by the LUCA, to make the decennial census as accurate as possible. Participants must sign a confidentiality agreement.

Entities eligible to participate in LUCA are:

- States;
- Counties;
- Cities;
- Townships; and
- Federally recognized tribes with a reservation and/or off-reservation trust lands.²⁸

Census 2000 provided the first opportunity for tribal and local governments to access individual residential, rather than block address lists, provided they signed the confidentiality agreement.²⁹

On June 29, 2017, the United States Census Bureau announced that starting in July of 2017 governments across the country could initiate the process of sharing address information through the 2020 Census Local Update of Census Addresses operation.³⁰ All entities intending to participate must sign the Confidentiality Agreement Form provided by the LUCA.³¹

Public Records Law on United States Census Bureau Address Information

The 2007 Legislature passed a public records bill³² to provide an exemption for U.S. Census Bureau address information.³³ The bill made confidential and exempt from disclosure United States Census Bureau address information held by an agency pursuant to the federal LUCA. Included in the bill was a provision that made the exemption subject to the Open Government Sunset Review Act. As such, the exemption would repeal October 2, 2012, unless the Legislature reviewed and reenacted the exemption by that date. The 2012 Legislature approved an Open Government Sunset Review in 2012, and based on the review, voted to repeal the public records exemption. The bill analyses of the OGSR stated that the LUCA program, upon which the

²⁸ United States Census Bureau, *2020 Census Local Update of Census Addresses Operation (LUCA)*, available at <https://www.census.gov/geo/partnerships/luca.html> (last visited Jan. 11, 2018).

²⁹ United States Census Bureau, *The Census Address List Improvement Act of 1994 (P.L. 103-430)(LUCA)*, available at: <https://www.census.gov/geo/partnerships/luca-pl-103-430.html> (last visited Jan. 11, 2018).

³⁰ United States Census Bureau, *2020 Census Local Update of Census Addresses Operation to Begin* (June 29, 2017), available at: <https://www.census.gov/newsroom/press-releases/2017/cb17-109-luca.html> (last visited Jan. 10, 2018).

³¹ The Confidentiality Agreement Form requires signators to agree to keep confidential all information provided through LUCA, including maps that contain structure points showing the location of living quarters. A signature on the form acknowledges recognition that the penalty for a wrongful disclosure is punishable by up to 5 years in prison and a \$250,000 fine. Further, the signator must agree to destroy or return all materials received from the Census Bureau at the conclusion of LUCA. United States Census 2020, Form D-2005, *Confidentiality Agreement Form, 2020 Census Local Update of Census Addresses Operation (LUCA)*(on file with the Senate Committee on Governmental Oversight and Accountability).

³² House Bill 7193.

³³ Chapter 2007-250, L.O.F.

exemption was based, expired March 31, 2010.³⁴ Based on there no longer being a need for the exemption, staff recommended, and the Legislature approved, a repeal of the public records exemption. Therefore, the public records exemption repealed on October 12, 2012.³⁵

III. Effect of Proposed Changes:

This bill creates a public records exemption for certain address information maintained by the United States Census Bureau and held by an agency. Specifically, the bill makes confidential and exempt the following information held by an agency pursuant to the Local Update of Census Addresses Program (LUCA):

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The public necessity statement provides as justification for the exemption that the LUCA program requires this address information to be kept confidential. As such, all individuals directly involved in reviewing the information or who otherwise have access to the information must sign a confidentiality agreement. Without the exemption, agencies would be denied participation in the program, which could result in a negative fiscal impact for the state.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and will repeal October 2, 2023, unless the Legislature reviews and reenacts the exemption by that date.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for a public records exemption to pass.

³⁴ Florida House of Representatives, *Staff Analysis for HB 7013* (2012); Florida Senate, *Staff Analysis for SB 2078* (2012).

³⁵ Chapter 2012-216, L.O.F.; House Bill 7013.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts certain address information maintained by the United States Census Bureau and provided to an agency. The public necessity statement for the exemption provides that the federal LUCA requires this information to be kept confidential. Without the exemption, agencies would be denied participation in LUCA, which could result in a negative fiscal impact for the state. This bill appears to be no broader than necessary to accomplish the public necessity for 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:

Florida's Level of Participation in the 2010 LUCA

The history of Florida's participation in the last U.S. Census Bureau LUCA in preparation for the 2010 Census is significant. Overall, 252 Florida governmental units registered for LUCA. In total, Florida's participants added, submitted, or modified over 4 million addresses. In fact, in its final report, LUCA specifically acknowledged Florida for its substantial level of participation:

After the drop out phase, 57 of the 66 eligible counties or 86.4 percent remained active. Of the 57 counties, 54 or 94.7 percent returned files with 3,244,186 address records processed of the 3,275,790 records submitted.³⁶

Florida's Level of Participation in the 2020 LUCA

Due to the natural disaster that affected Florida, the federal government extended the deadline to January 31, 2018 for entities to sign up for LUCA. Currently, 42 Florida counties and 118 Florida cities have indicated participation in the 2020 LUCA program.³⁷

³⁶ United States Census Bureau, *2010 Census Local Update of Census Addresses Assessment*, No. 199 (Reissue), pg. 62 (Sept. 11, 2012)(on file with the Senate Committee on Governmental Oversight and Accountability).

³⁷ Florida Office of Economic & Demographic Research, *Fiscal Year 2017-2018, Adjustments in Responsibilities Issue, Local Update of Census Addresses Program* (on file with the Senate Committee on Governmental Oversight and Accountability).

Although fiscal impact is unknown at this time, to the extent that the public records exemption makes Florida entities eligible to participate in LUCA and add address information to the master list, the state would likely financially benefit from the provisions of this bill.

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.