

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 278

INTRODUCER: Senators Hutson and Baxley

SUBJECT: Public Records/Department of State

DATE: December 4, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Carlton</u>	<u>Ulrich</u>	<u>EE</u>	Favorable
2.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 278 creates a public records exemption for voter registration information received by the Department of State, pursuant to an interstate agreement or membership in a nongovernmental entity as authorized in SB 276, from another state in which the information is confidential or exempt pursuant to the laws of that state.

The bill provides a statement of public necessity as required by the Florida Constitution. The bill's effective date is contingent upon, and concurrent with, passage of SB 276, which will take effect on January 1, 2019.

The bill provides that the exemption is subject to the Open Government Sunset Review Act, and stands repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

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

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

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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:

[i]t 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

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(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). 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).

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.

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

¹⁴ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁵ 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.

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).

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 Record Exemptions for Voter Registration Information

Current law provides a public records exemption for certain information held by an agency for purposes of voter registration.²⁴ Specifically, the following information is confidential and exempt from public records requirements:

- All declinations to register to vote made pursuant to ss. 97.057 and 97.058, F.S.
- Information relating to the place where a person registered to vote or where a person updated a voter registration.
- The social security number, driver's license number, and Florida identification number of a voter registration applicant or voter.

Further, the signature of a voter registration applicant or a voter is exempt from *copying* requirements.²⁵

Also, the law allows voters who fall into a number of high-risk professional classes to request that certain information such as their address and phone numbers and dates of birth be exempt for themselves and their spouses and children.²⁶

The names, addresses, and telephone numbers of victims of domestic violence who participate in the Attorney General's Address Confidentiality Program for Victims of Domestic Violence, as well as people who are victims of stalking may be exempt from public disclosure.²⁷

Florida Voter List Maintenance Information

The Secretary of State is head of the Department of State²⁸ (Department) and acts as the chief election officer of the State and is responsible for the operation and maintenance of the statewide voter registration system implemented as part of the Help America Vote Act of 2002.²⁹ The 67 county Supervisors of Elections (Supervisors) are primarily responsible for the registration of voters under s. 98.045, F.S., and records maintenance activities including removal of voters pursuant to ss. 98.065 and 98.075, F.S. Supervisors are the only election officials with authority who may register and remove voters from the registration rolls.

Each Supervisor is required to retain all records concerning implementation of registration list maintenance programs and activities conducted pursuant to ss. 98.065 and 98.075, F.S., and

²³ Section 119.15(7), F.S.

²⁴ Section 97.0585, F.S.

²⁵ Section 97.0585(2), F.S.

²⁶ Section 119.071(4)(d), F.S.

²⁷ Sections 741.465 and 741.4651, F.S.

²⁸ Section 20.10, F.S. The Secretary of State is appointed by the Governor, subject to confirmation by the Senate, and serves at the pleasure of the Governor. The Secretary of State also performs functions conferred by the State Constitution upon the custodian of state records. The Department of State is composed of the following divisions: Elections, Historical Resources, Corporations, Library and Information Services, Cultural Affairs, and Administration.

²⁹ See s. 98.035, F.S.

make them available for public inspection and copying.³⁰ The records must include a list containing the name and address of each person to whom a notice of potential ineligibility³¹ was sent and information as to whether each such person responded to the mailing, but may not include any information that is otherwise confidential or exempt from public inspection.³²

These ongoing records maintenance activities are conducted to protect the integrity of the electoral process through current and accurate records and to ensure only eligible voters are registered in the statewide voter registration system. By law, any maintenance program or activity must be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002.³³

SB 276 (2018)

SB 276 authorizes the Department of State (Department) to enter into an interstate agreement or become a member of a nongovernmental entity to share voter registration information with other states to maintain the integrity of the statewide Florida Voter Registration System (FVRS). That bill also directs the Department to use that information to identify registered voters or voter registration applicants who would be potentially ineligible to vote, and directs the Department to share such information with Supervisors to conduct registration list maintenance activities.

SB 276 also requires all states and nongovernmental entities that receive any voter registration information to maintain the confidentiality of such information given as part of the agreement, if that information was confidential in its state of origin. The bill also requires an annual report to the Governor, President of the Senate, and Speaker of the House of Representatives describing the interstate agreement or membership, and providing information on the number of registered voters removed from the FVRS as a result of the agreement or membership and the reasons for their removal.

III. Effect of Proposed Changes:

Section 1 of the bill creates a public records exemption for voter registration information received by the Department, pursuant to an interstate agreement or membership in a nongovernmental entity as authorized in a yet to be numbered senate bill,³⁴ from another state in which the information is confidential or exempt pursuant to the laws of that state.

This section further provides that the exemption is subject to the OGSR, and stands repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

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

³⁰ Section 98.045(3), F.S.

³¹ See s. 98.075(7), F.S. Supervisors are required to notify by mail the registered voter of his or her potential ineligibility to be registered to vote.

³² *Supra* note 30.

³³ Sections 98.065(1) and 98.075(1), F.S.

³⁴ See discussion under technical deficiencies.

Section 2 of the bill provides a statement of public necessity as required by the Florida Constitution. It states that without the exemption, the Department would not be able to receive information from other states that might otherwise be confidential and exempt pursuant to the laws of those states. This would impair the ability of the Department and Supervisors to maintain accurate voter rolls, which is critical to fair elections in this state.

Section 3 of the bill provides an effective date that is contingent upon, and concurrent with, passage of a yet to be numbered senate bill,³⁵ which will take effect on January 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final 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 bill creates a new public records exemption and includes a public necessity statement.

Breadth of Exemption

Article I, s. 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. Based on the legislative findings in the statement of public necessity, the public records exemption in this bill appears to be no broader than necessary to accomplish its stated purpose.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

³⁵ *Id.*

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Public records exemptions are considered as stand-alone bills and are linked to a substantive bill. Lines 16 and 58 of the bill refer to an unnamed companion bill that proposes additional amendments to s. 98.075, F.S. The bill requires an amendment to refer to SB 276, which is the linked substantive bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 98.075 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.