

**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 Children, Families, and Elder Affairs

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BILL: SB 424

INTRODUCER: Senator Gibson

SUBJECT: Public Records and Public Meetings/Elder Abuse Fatality Review Team

DATE: November 9, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hendon	Hendon	CF	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	AP	_____

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**I. Summary:**

SB 424 provides that it is a public necessity that there be an exemption from public records requests for certain information obtained by an elder abuse fatality review team conducting a review. This includes information contained in a record created by an elder abuse fatality review team that reveals the identity of a victim of elder abuse.

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Government Sunset Review Act and unless reviewed and saved from repeal through reenactment by the Legislature shall be repealed on October 2, 2023.

The bill is effective if and when SB 422 becomes law. The bill is not expected to have a fiscal impact.

**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>

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

<sup>2</sup> FLA. CONST., art. I, s. 24(a).

In addition to the Florida Constitution, the Florida Statutes provides 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 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

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

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

<sup>12</sup> *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.

<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).

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.<sup>14</sup>

### **Public Meetings**

Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, including meetings with or attended by any person elected to such board or commission at which official acts are to be taken are public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken at such meeting.<sup>15</sup>

The elder abuse fatality review teams would have access to review confidential records, including possible information gathered in a criminal investigation, in order to carry out their duties. In Chapter 2000-219, Laws of Florida, the Legislature found, in the creation of domestic violence fatality review teams, that sensitive information concerning victims and family members would be discussed at team meetings and the harm that would result from the release of such information substantially outweighs any minimal public benefit derived therefrom.<sup>16</sup> Additionally, the Legislature found that proceedings and meetings of any domestic violence fatality review team regarding domestic violence fatalities and their prevention during which the identity of the victim is discussed are exempt from s. 286.011 and s. 24(b) of Art. I of the State Constitution.<sup>17</sup>

### **Open Government Sunset Review Act**

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>18</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>19</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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<sup>14</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 286.011(1), F.S.

<sup>16</sup> Chapter 2000-219, s. 2, Laws of Fla.

<sup>17</sup> *Id.*

<sup>18</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

<sup>19</sup> Section 119.15(3), F.S.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:<sup>20</sup>

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</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 otherwise provided for by law.<sup>22</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 415.1103, F.S., created under SB 422, to provide that any information that is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and is obtained by an elder abuse fatality review team conducting a review retains its confidential or exempt status when held by the review team. Additionally, any information created by a review team that reveals the identity of a victim of elder abuse is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

This section also provides that portions of meetings of a review team at which confidential or exempt information or the identify of a victim of elder abuse is discussed is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution.

The exemption is subject to the Open Government Sunset Review Act pursuant to s. 119.15, F.S., and will be repealed October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** states that the Legislature finds it is a public necessity that the information that is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution remain confidential and exempt when held by an elder abuse fatality review team or contained in a record created by the review team that reveals the identity of a victim of elder abuse. Otherwise, sensitive personal information concerning victims of elder abuse would be disclosed and open communication and coordination between the parties involved in the review would be hampered.

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

<sup>21</sup> FLA. CONST., art. I, s. 24(c).

<sup>22</sup> Section 119.15(7), F.S.

The Legislature further finds that it is a public necessity that portions of meetings of an elder abuse fatality review team at which confidential or exempt information or the identify of a victim of elder abuse is discuss be exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. The failure to close public meetings at which confidential or exempt information or the identity of the victim of elder abuse are discussed would defeat the purpose of the public records exemption.

**Section 3** provides an effective date to be the same date that SB 422 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes 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 the Legislature for public records exemptions to pass.

###### **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 state purpose of the law. The bill provides that information that is confidential and exempt from s, 119.07(1), F.S., remain confidential and exempt when held by an elder abuse fatality review team. The bill also allows that a record created by a review team that identifies the victim of elder abuse remain confidential and exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

Portions of meetings of an elder abuse fatality review team at which confidential or exempt information or the identify of a victim of elder abuse is discussed would be exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

##### **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 s. 415.1103 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.