

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 424

INTRODUCER: Senator Gibson

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

DATE: January 9, 2018

REVISED: _____

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

I. Summary:

SB 424 creates a public records exemption for certain information obtained by an elder abuse fatality review team as authorized by SB 422. 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 exempts from public meetings requirements those portions of a meeting that would reveal information that is made confidential and exempt by this bill.

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 422, which will take effect on July 1, 2018.

The bill provides that the exemption is subject to the Open Government Sunset Review Act, and stands repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.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

[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

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 “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.

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” 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 Florida 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

Public policy regarding access to government meetings also is addressed in the Florida Statutes. 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 Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.²² Minutes of a public meeting must be promptly recorded and open to public inspection.²³ Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²⁴ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁵

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.²⁶ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to

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

¹⁵ FLA. CONST., art. I, s. 24(b).

¹⁶ *Id.*

¹⁷ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida 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 *Id.*

²² Section 286.011(6), F.S.

²³ Section 286.011(2), F.S.

²⁴ Section 286.011(1), F.S.

²⁵ Section 286.011(3), F.S.

²⁶ FLA. CONST., art. I, s. 24(c).

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

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.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 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.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 the Legislature expands an exemption, 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

²⁷ *Id.*

²⁸ *See supra* note 12.

²⁹ 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.

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:

- 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?

³⁶ FLA. CONST., art. I, s. 24(c).

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.³⁷

SB 422 (2018)

The bill authorizes the establishment of elder abuse fatality review teams to review fatal incidents of elder abuse. The membership of elder abuse fatality review teams include numerous state and local agencies as well as community partners. The fatality review teams are established in each of the 20 judicial circuits to review fatal or near-fatal incidents of abuse, neglect, or violence against the elderly. The review may include a review of events leading up to the incident, available community resources, current laws and policies, and actions taken by systems and individuals related to the incident. The review team is directed to make policy and other recommendations as to how incidents of elder abuse deaths may be prevented.

The bill also prevents monetary liability on the part of any member of the elder abuse fatality review team. Additionally, all information and records acquired by an elder abuse fatality review team are not subject to discovery or introduction into evidence in any civil or criminal action. The elder abuse fatality review teams are assigned to the Department of Elder Affairs for administrative purposes.

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 415.1103, F.S., to provide that any information that is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution that is obtained by an elder abuse fatality review team conducting a review retains its confidential or exempt status when held by the review team. The bill creates a public records exemption for information contained in a record created by an elder abuse fatality review team which reveals the identity of a victim of elder abuse as authorized in a yet to be numbered senate bill.³⁸

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

The exemption is subject to the OGSF 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.

Section 2 of the bill provides a statement of public necessity as required by the Florida Constitution. It states that without the exemption, sensitive personal information concerning victims of elder abuse would be disclosed and open communication and coordination between the parties involved in the elder abuse fatality review would be hampered.

³⁷ Section 119.15(7), F.S.

³⁸ See discussion under technical deficiencies.

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 identity of a victim of elder abuse is discussed 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.

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.³⁹ 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, F.S., and s. 24(b) of Art. I of the State Constitution.⁴⁰

Section 3 provides an effective date that is contingent upon, and concurrent with, passage of a yet to be number senate bill,⁴¹ which shall take effect on July 1, 2018.

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.

³⁹ Chapter 2000-219, s. 2, Laws of Fla.

⁴⁰ *Id.*

⁴¹ *Id.*

Portions of meetings of an elder abuse fatality review team at which confidential or exempt information or the identity 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:

Public records exemptions are considered to be stand-alone bills and are linked to a substantive bill. Lines 21 and 70 of the bill refer to an unnamed companion bill that proposes additional amendments to s. 415.1103, F.S. The bill requires an amendment to refer to SB 422, which is the linked substantive bill.

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.