

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 Rules

BILL: CS/SB 906

INTRODUCER: Health Policy Committee and Senator Young

SUBJECT: Public Records/Health Care Facilities

DATE: February 6, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|-----------------|-----------|--------------------|
| 1. | <u>Looke</u> | <u>Stovall</u> | <u>HP</u> | Fav/CS |
| 2. | <u>Brown</u> | <u>Caldwell</u> | <u>GO</u> | Favorable |
| 3. | <u>Looke</u> | <u>Phelps</u> | <u>RC</u> | Pre-meeting |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 906 provides a public records exemption for certain building plans, blueprints, and other construction documents received by an agency. Current law makes exempt from public records disclosure building plans, blueprints, schematic drawings, and diagrams of an attractions and recreation facility, entertainment or resort complex, industrial complex, retail and service development, office development, and a hotel or motel development. The bill applies the existing public records exemption to building plans and other construction documents provided by a health care facility to, in this case, the Agency for Health Care Administration (AHCA).

A health care facility is defined as a hospital, ambulatory surgical center, nursing home, hospice, or intermediate care facility for the developmentally disabled.

In the required statement of public necessity, the bill provides as justification for the exemption that the exemption is needed to ensure the safety of staff, patients, and visitors, due to recent security threats against health care facilities. Building plans include diagrams and details depicting the internal layout and structural elements of the facility, release of which could be misappropriated by terrorists and other criminals in planning an attack on a facility.

The bill includes a provision for an Open Government Sunset Review and provides an automatic repeal date of October 2, 2023, unless reviewed and saved from repeal before that time by the Legislature.

A two-thirds vote of each chamber is required for passage because the bill creates a public records exemption.

The bill takes effect 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.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

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 open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must

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(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.”

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).

explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² 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.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ 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;¹⁷

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *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.

¹² 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).

¹³ 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).

¹⁴ 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ 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.²¹ 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.²²

General Public Records Exemption from Inspection or Copying of Public Records

Current law provides a general public records exemption for building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of designated facilities and which are held by an agency.

Facilities to which the exemption applies are:

- An attraction and recreation facility;
- An entertainment or resort complex;
- An industrial complex;
- A retail and service development;
- An office development; and
- A hotel or motel development.²³

Agency for Health Care Administration (AHCA) Review of Health Care Facility Building Plans

The Office of Plans and Construction (Office) within the AHCA is primarily responsible for ensuring that hospitals, nursing homes, ambulatory surgical centers, and Intermediate Care

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ 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?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Section 119.071(3)(c)1., F.S.

Facilities for the Developmentally Disabled are safe, functional, and provide safety-to-life for the patients and residents. The Office reviews and approves facilities' plans and specifications and surveys their construction. These licensed health care facilities must notify the Office in writing before any equipment replacements, renovations, additions, or new facilities are created. Plans and specifications for these activities must be approved before any construction begins. Architects, engineers, and other plans and construction personnel survey facilities under construction and, when necessary, write reports for required corrections to the construction before approval of the project is given.²⁴

Schematics, preliminary plans and construction documents received by the AHCA and other government agencies for hospitals, ambulatory surgical centers, nursing homes and intermediate care facilities for the developmentally disabled are subject to release as public records. These plans include building floor plans, communication systems, medical gas systems, electrical systems, and other physical plant and security details. Recent security threats have been shared by state and federal security and emergency preparedness officials that describe the targeting of health care facilities by terrorists. Because architectural and engineering plans reviewed and held by government agencies include information regarding emergency egress, locking arrangements, critical life safety systems, and restricted areas, these plans could be used by criminals or terrorists to examine the physical plant for vulnerabilities.²⁵

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., to exempt building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of a health care facility. The bill defines "health care facility" as a hospital, ambulatory surgical center, nursing home, hospice, or intermediate care facility for the developmentally disabled. This exemption currently exists for an attraction and recreation facility, entertainment or resort complex, industrial complex, retail and services development, office development, and hotel and motel development.

As the bill makes the information exempt, rather than confidential and exempt from disclosure, the AHCA may have some discretion in releasing the information.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and establishes an automatic repeal date of October 2, 2023, unless saved from repeal before that time by the Legislature.

Section 2 of the bill provides the required public necessity statement. The bill provides that, because the plans and blueprints of health care facilities are held by the AHCA, they are subject to public records laws and may be obtained by criminals and terrorists who plan to exploit vulnerabilities in the health care facilities' physical plants. These documents should be made exempt from disclosure to ensure the safety of the health care facility's staff, patients, and visitors. The bill states that it is a public necessity to exempt these records from public records

²⁴ AHCA, Office of Plans and Construction, available at: <http://ahca.myflorida.com/MCHQ/Plans/> (last visited Jan. 25, 2018).

²⁵ AHCA, *HB 551 Legislative Bill Analysis* (Nov. 28, 2017) (on file with the Senate Committee on Governmental Oversight and Accountability and the Senate Committee on Health Policy).

laws in order to prevent possible terrorist or criminal actions and to reduce these facilities' exposure to security threats.

Section 3 provides that the bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

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 public records exemptions to pass.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that the exemption is needed to protect the safety of the health care facility's staff, patients, and visitors, to prevent possible terrorist or criminal actions, and to reduce these facilities' exposure to security threats against health care facilities.

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 only building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of a health care facility. This exemption already applies to other specified structures and facilities. Therefore, the bill appears to be no broader than necessary to accomplish the public necessity of the 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 Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on January 16, 2018:

The CS rewords the public necessity statement to make grammatical changes and to eliminate a reference to information on emergency generators being made exempt from public records laws.

B. Amendments:

None.