

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: CS/CS/SB 450

INTRODUCER: Governmental Oversight and Accountability Committee; Innovation, Industry, and Technology Committee and Senator Gibson and others

SUBJECT: Public Records and Public Meetings/Local Government Utility

DATE: March 27, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Imhof</u>	<u>IT</u>	<u>Fav/CS</u>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 450 amends s. 286.0113, F.S., to create a new public meetings exemption. Current law exempts information held by a utility owned or operated by a unit of local government that relates to:

- The security of the technology, processes, or practices of the utility and that are designed to protect the utility's networks, computers, programs, and data from attack, damage, or unauthorized access, and which, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology resources; and
- The security of existing or proposed information technology systems or industrial control technology systems of the utility, which, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operation of the systems and the utility.¹

The bill exempts from public meetings law that portion of a meeting held by the utility at which this information under s. 119.0713(5), F.S., is discussed or may otherwise be revealed. The exempt portions of the meeting must be recorded and transcribed, and the recording and transcript of the meeting are exempt from disclosure unless a court of competent jurisdiction, following an in-camera review, determines that the meeting was not restricted to the discussion of data and information made exempt by this section. In the event of such a judicial

¹ Section 119.0713(5), F.S.

determination, only the portion of the recording or transcript which reveals nonexempt data and information may be disclosed to a third party.

The bill provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded exemption for public records and public meetings. The bill creates a public meeting exemption, therefore it requires a two-thirds vote for final passage.

The bill takes effect July 1, 2019.

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.² 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.³

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.⁴ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁵ 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.⁶

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

² FLA. CONST. art. I, s. 24(a).

³ *Id.*

⁴ 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.

⁵ Public records laws are found throughout the Florida Statutes.

⁶ Section 119.01(1), 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

“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

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹² A bill enacting an exemption may not contain other substantive provisions¹³ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹⁴ Records designated “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.¹⁵

Open Meetings Laws

The Florida Constitution also provides that the public has a right to access governmental meetings.¹⁶ 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.¹⁷ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁸

Public policy regarding access to government meetings is also addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”¹⁹ or the

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.

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *Id.*

¹² *Id.*

¹³ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁴ 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).

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ FLA. CONST. art. I, s. 24(b).

¹⁷ *Id.*

¹⁸ 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.”

¹⁹ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

“Sunshine Law,”²⁰ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken, to be open to the public.²¹ The board or commission must provide the public reasonable notice of such meetings.²² 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.²³ Minutes of a public meeting must be promptly recorded and open to public inspection.²⁴

Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²⁵ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁶

The Legislature may create an exemption to open meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.²⁷ 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.²⁸ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,³⁰ with specified exceptions.³¹ The Act 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 or repeal the sunset date.³² In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

²⁰ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

²¹ Section 286.011(1)-(2), F.S.

²² *Id.*

²³ Section 286.011(6), F.S.

²⁴ Section 286.011(2), F.S.

²⁵ Section 286.011(1), F.S.

²⁶ Section 286.011(3), F.S.

²⁷ FLA. CONST. art. I, s. 24(c).

²⁸ *Id.*

²⁹ *Halifax Hosp. Medical Center v. News-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 public records 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.

³⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

³¹ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

³² Section 119.15(3), F.S.

The Act 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.³³ 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;³⁴
- 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;³⁵ or
- It protects trade or business secrets.³⁶

The Act also requires specified questions to be considered during the review process.³⁷ In examining an exemption, the Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.³⁸ If the exemption is reenacted or saved from repeal 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.³⁹

Current Public Records Exemption for Specified Types of Information Held by a Utility Owned or Operated by a Unit of Local Government

Section 119.011, F.S., defines the term “utility” to mean a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater.

Subsection 119.0713(5), F.S., exempts the following information held by a utility owned or operated by a unit of local government:

- Information related to the security of the technology, processes, or practices of a utility owned or operated by a unit of local government that are designed to protect the utility's

³³ Section 119.15(6)(b), F.S.

³⁴ Section 119.15(6)(b)1., F.S.

³⁵ Section 119.15(6)(b)2., F.S.

³⁶ Section 119.15(6)(b)3., F.S.

³⁷ 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?

³⁸ FLA. CONST. art. I, s. 24(c).

³⁹ Section 119.15(7), F.S.

networks, computers, programs, and data from attack, damage, or unauthorized access, which information, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology resources.

- Information related to the security of existing or proposed information technology systems or industrial control technology systems of a utility owned or operated by a unit of local government, which, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operation of the systems and the utility.

The exemption applies to such information before, on, or after the effective date of this exemption, March 24, 2016. The exemption is subject to the Act and stands repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

Current Exemption for Records of a Public Utility and Protection during Public Meetings

Section 366.093, F.S., provides for an exemption from public record disclosure requirements for certain types of information in public utility records, including the protection of the information when the records are used in a meeting or hearing. The Florida Public Service Commission (commission) has reasonable access to all public utility records and records of the utility's affiliated companies, including its parent company, regarding transactions or cost allocations among the utility and such affiliated companies, and such records necessary to ensure that a utility's ratepayers do not subsidize nonutility activities. However, upon request of the public utility or other person, any records received by the commission which are shown and found by the commission to be proprietary confidential business information must be kept confidential and are exempt from public records law.

During any proceeding before the commission, upon a showing by a utility or other person and a finding by the commission that discovery will require the disclosure of proprietary confidential business information, the commission must issue appropriate protective orders designating the manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding. The proprietary confidential business information is exempt from public records law and any records provided pursuant to a discovery request for which proprietary confidential business information status is requested must be treated by the commission, the office of the Public Counsel, and any other party subject to the public records law as confidential and are exempt from public records law pending a formal ruling on such request by the commission or the return of the records to the person providing the records.

Any record which has been determined to be proprietary confidential business information and is not entered into the official record of the proceeding must be returned to the person providing the record within 60 days after the final order, unless the final order is appealed. If the final order is appealed, any such record must be returned within 30 days after the decision on appeal. The commission shall adopt the necessary rules to implement this provision.

For these purposes, proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information

would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

- Trade secrets;
- Internal auditing controls and reports of internal auditors;
- Security measures, systems, or procedures;
- Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms;
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information; and
- Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.

Any finding by the commission that records contain proprietary confidential business information is effective for a period set by the commission not to exceed 18 months, unless the commission finds, for good cause, that the protection from disclosure must be for a specified longer period. The commission must order the return of records containing proprietary confidential business information when such records are no longer necessary for the commission to conduct its business. At that time, the commission must order any other person holding such records to return them to the person providing the records. Records containing proprietary confidential business information which have not been returned at the conclusion of the period set pursuant to this subsection are no longer be exempt from public records law unless the public utility or affected person shows, and the commission finds, that the records continue to contain proprietary confidential business information. Upon such finding, the commission may extend the period for confidential treatment for a period not to exceed 18 months unless the commission finds, for good cause, that the protection from disclosure must be for a specified longer period. During commission consideration of an extension, the records in question will remain exempt from public records law. The commission must adopt rules to implement this provision, which must include notice to the public utility or affected person regarding the expiration of confidential treatment.

III. Effect of Proposed Changes:

Section 1 amends s. 286.0113, F.S., to create a new public meetings exemption to make exempt that portion of a local government utility meeting at which information currently exempt from disclosure under s. 119.0713(5), F.S., relating to the security of the utility's data and information technology and industrial control technology systems is to be discussed or may otherwise be revealed. The exempt portions of the meeting must be recorded and transcribed. The recording and transcript of the meeting are exempt from disclosure unless a court of competent jurisdiction, following an in-camera review, determines that the meeting was not restricted to the discussion of data and information made exempt by this section. In the event of such a judicial determination, only the portion of the recording or transcript which reveals nonexempt data and information may be disclosed to a third party.

The exemption is subject to the Act and stands repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 sets forth the required public necessity statement. The Legislature finds that it is a public necessity that the portion of a meeting relating directly to or that would reveal specified information which is exempt under s. 119.0113(5), F.S., be made exempt from public meetings law, and that the recording and transcript of such a meeting be made exempt public records law.

The public necessity statement explains that, as utility system infrastructure becomes more connected and integrated through information and communications technology, the exposure to damage from attacks through such technology grows. These attacks may result in the disruption of utility services and damage to utility systems. Maintaining safe and reliable utility systems is vital to protecting the public health and safety and to ensuring the economic well-being of this state. The statement further provides that the protection of information and communications made exempt by this act will ensure that utilities have greater safeguards to protect against security threats and will bolster efforts to develop more resilient information technology systems and industrial control technology systems.

Section 3 provides that the bill takes effect July 1, 2019.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill requires utilities owned or operated by a unit of local government to incur costs associated with recording and transcribing a portion of a meeting held by the utility that would reveal information that is exempt under s. 119.0713(5), F.S. To the extent a utility owned or operated by a unit of local government is deemed to be part of a municipality, the mandate provision may apply. However, the costs incurred by utilities owned or operated by a unit of local government are anticipated to be insignificant, thus exempting the bill from the mandates requirements.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding exemptions to the public records and public meetings requirements. This bill creates a new public meeting exemption, therefore it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding exemptions to the public records and public meetings requirements to state with

specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemptions.

Breadth of Exemption

Article I, s. 24 (c) of the State Constitution requires exemptions to the public records and public meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect from disclosure (i) that portion of a meeting by a utility owned or operated by a unit of local government which would reveal information that is currently exempt under s. 119.0713(5), F.S.; and (ii) the recording and transcript of the meeting, unless a court of competent jurisdiction, following an in-cameral review, determines the meeting was not restricted to the discussion of data and information made exempt by this section.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Utilities owned or operated by a unit of local government are expected to incur some costs recording and transcribing the portion of the board meeting exempt from the public meetings requirements. However, the costs are anticipated to be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 286.0113 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/CS by Governmental Oversight and Accountability on March 26, 2019:

The committee substitute changes all mentions of “confidential and exempt” to “exempt” as the data and information covered under s. 119.0713(5), F.S. is made exempt and not confidential and exempt.

CS by Innovation, Industry, and Technology on March 6, 2019:

The committee substitute:

- Requires that the portion of meetings being made exempt from public meetings law be recorded and transcribed so the information is preserved;
- Provides that the recording and transcription are exempt from public records requirements unless there is a judicial determination that the meeting was not restricted due to discussion of the information sought to be protected; and
- Revises the legislative findings and public necessity statements to conform to these changes and to provide more detail.

- B. **Amendments:**

None.