

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 Commerce and Tourism

BILL: SPB 7084

INTRODUCER: Commerce and Tourism Committee

SUBJECT: Public Records and Public Meetings/Consumer Fraud, Identity Theft, and Skimmer Working Group

DATE: March 18, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay		CM Submitted as Comm. Bill/Fav.

I. Summary:

SPB 7084 creates a public records and open meetings exemption for certain information obtained by and discussed at the Consumer Fraud, Identity Theft, and Skimmer Working Group as created by SB 1652. The bill repeals the exemption on October 2, 2024, unless reenacted by the Legislature.

The bill takes effect upon passage of SB 1652 or similar legislation, if adopted in the same legislative session or an extension thereof.

II. Present Situation:

Public Records Law

The Florida Constitution provides the public 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. The Public Records Act states:

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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.

[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.⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or the method of transmission.⁵ 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.”⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

The Legislature may create an exemption to public records requirements.⁸ An exemption must pass by a two-thirds vote of the House and the Senate.⁹ 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.¹⁰ A statutory exemption that does not meet these 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” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.¹³

⁴ Section 119.01(1), F.S.

⁵ 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.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁸ FLA. CONST., art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

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

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting where official acts are taken or public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Section 286.011, F.S., which is known as the “Government in the Sunshine Law,”¹⁷ or the “Sunshine Law,”¹⁸ requires all meetings of any board or commission of any state or local agency or authority where official acts are to be taken be open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ 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 operates in a manner that unreasonably restricts the public’s access to the facility.²¹ Minutes of a public meeting must be promptly recorded and open to public inspection.²² Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

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.²⁵ 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.²⁶ A statutory exemption that does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

¹⁴ FLA. CONST., art. I, s. 24(b).

¹⁵ *Id.*

¹⁶ 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.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

²¹ Section 286.011(6), F.S.

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ *Id.*

²⁷ *See supra* note 12.

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 exemptions.²⁸ The OGSR provides that an exemption automatically repeals on October 2 of the fifth year after creation or substantial amendment. The Legislature must reenact an exemption in order to save the exemption from repeal.²⁹ 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 necessary to accomplish the stated purpose of the exemption.³⁰ The Legislature must find that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. An exemption serves an identifiable purpose if it meets one of the following criteria:

- Allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;³¹
- Prevents the release of sensitive personal information that would be defamatory or would jeopardize an individual's safety;^{32,33} or
- Protects trade or business secrets.³⁴

The OGSR requires specific questions be considered during the review process.³⁵ The OGSR asks the Legislature to question carefully the purpose and necessity of reenacting the exemption.

A public necessity statement and a two-thirds vote of the members present and voting in each house of the Legislature are required for final passage if the Legislature expands an exemption.³⁶ A public necessity statement and a two-thirds vote of the members present and voting in each house of the Legislature are not required for final passage if the exemption is reenacted without substantive changes or if the exemption is narrowed. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.³⁷

²⁸ 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.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1., F.S.

³² Section 119.15(6)(b)2., F.S.

³³ Only personal identifying information is exempt if this public purpose is cited as the basis of an exemption.

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).

³⁷ Section 119.15(7), F.S.

Consumer Fraud, Identity Theft, and Skimmer Working Group

The Consumer Fraud, Identity Theft, and Skimmer Working Group (Working Group), is created by SB 1652 (2019 Regular Session) adjunct to the Department of Agriculture and Consumer Services (Department). The Working Group is tasked with studying identity theft, credit card fraud, and consumer financial fraud at Florida gas stations, and creating a plan to combat such crime. The Working Group's membership includes law enforcement officials and at least one assistant state attorney.

Florida's public records laws currently make most information obtained by the Department open to the public.³⁸ Additionally, an "ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law."³⁹ Most recently, the Legislature created an exemption for information held by the Department as part of a joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency, which is confidential or exempt under the laws of that state or federal agency.⁴⁰ However, this exemption does not apply to investigations made by a new advisory committee.

As created, then, any information obtained or discussed by the Working Group is subject to disclosure under chs. 119 and 286, F.S. The Florida Department of Law Enforcement suggests that this presents a hurdle to the Working Group's mission because it will stifle the disclosure of pertinent information from law enforcement to the Working Group.⁴¹

Law Enforcement Records

Section 119.071(2), F.S., exempts various records and information often held by law enforcement agencies from public inspection, including the following information:

- Active criminal intelligence information;⁴²
- Active criminal investigative information;⁴³
- Surveillance techniques, procedures, or personnel;⁴⁴
- Information that reveals the identity, telephone number, address, or personal assets of a victim of a crime and that also identifies that person as the victim of a crime,⁴⁵ and

³⁸ See *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th DCA 1977), *cert. denied* 360 So. 2d 1247 (Fla. 1978).

³⁹ *Spillis Candela & Partners Inc. v. Centrust Savings Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988).

⁴⁰ Section 570.077, F.S. (2016).

⁴¹ Florida Department of Law Enforcement, HB 1239 Agency Analysis (Mar. 6, 2019), on file with the Senate Committee on Commerce and Tourism).

⁴² Section 199.071(2)(c)1., F.S. "Criminal intelligence information" includes information concerning "an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." Section 119.011(3)(a), F.S.

⁴³ Section 199.071(2)(c)1., F.S. "Criminal investigative information" is information relating to "an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory test reports of investigators or informants, or any type of surveillance." Section 119.011(3)(b), F.S.

⁴⁴ Section 119.071(2)(d), F.S.

⁴⁵ Section 119.071(2)(j), F.S.

- The personal assets of a victim of a crime, other than the property that was stolen or destroyed during the criminal activity.⁴⁶

These exemptions apply only while the information is in a law enforcement record, and therefore do not apply to agency investigations.

III. Effect of Proposed Changes:

Section 1 amends s. 570.233, F.S., to provide that any criminal intelligence information, investigative information, and surveillance techniques, procedures, or personnel, and any other information held by a law enforcement agency that is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and that is obtained by the Consumer Fraud, Identity Theft, and Skimmer Working Group during its development of the plan required under s. 570.233, F.S., retains its exempt or confidential or exempt status when held by the Working Group.

This section also provides that portions of meetings of the Working Group where confidential or exempt information 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 OGSR and stands repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

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

Section 2 provides a statement of public necessity as required by the Florida Constitution. It states that sensitive law enforcement and personal information of victims of financial crimes would be disclosed and open communication and coordination between the parties involved in the Working Group's development of its plan would be hampered without the exemption. Additionally, it states that the public record and open meeting exemptions are required to preserve the exempt or confidential and exempt status of information that is currently classified as such.

Section 3 provides an effective date that is contingent upon, and concurrent with, passage of SB 1652, which has an effective date of July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁴⁶ Section 119.071(2)(i), F.S.

B. Public Records/Open Meetings Issues:**Voting Requirement**

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for a public records exemption 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 or public meetings exemption. The State Constitution provides that an exemption must state with specificity the public necessity of the exemption. The bill appears to articulate the public policy necessitating the public records exemption with sufficient specificity.

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 provides that information that is confidential and exempt from s. 119.07(1), F.S., remain confidential and exempt when held by the Working Group. The bill allows a record created by the Working Group that identifies the victim of identity theft, credit card fraud, or consumer financial fraud to 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.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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 570.233 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.