

**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 Rules

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BILL: SB 7100

INTRODUCER: Innovation, Industry, and Technology Committee

SUBJECT: Public Records/Department of the Lottery

DATE: April 22, 2019

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

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Kraemer</u>	<u>Imhof</u>		<b>IT Submitted as Comm. Bill/Fav</b>
1. <u>Kraemer</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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## I. Summary:

SB 7100 amends ss. 24.105(12) and 24.118(4), F.S., relating to confidential and exempt information, to create public records exemptions for specified information related to the operations and processes of the Department of the Lottery (department). The exemptions are necessary to protect the security and integrity of lottery operations, and to allow the department to participate in multistate lottery games. Information held by the department is designated as confidential and exempt, but may be disclosed under certain circumstances.

The exemptions are subject to the Open Government Sunset Review Act (OGSR) and will stand repealed on October 2, 2024, unless reviewed and reenacted by the Legislature.

The bill creates public records exemptions, and therefore it requires a two-thirds vote of the members present and voting for final passage.

The bill takes effect upon becoming a 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.<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> In addition to the Florida Constitution, the Florida Statutes provide that the public may access

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

<sup>2</sup> *Id.*

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:

[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.<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 by passing a general law by a two-thirds vote of each of the House and the Senate.<sup>9</sup> 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.<sup>10</sup> A statutory exemption, which does not meet these two criteria, may be unconstitutional and may not be judicially saved.<sup>11</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>12</sup> Records designated “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.

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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., and FLA. CONST. art. I, s. 24(b). Public records exemptions for the Legislature 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” 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> *Id.*

<sup>11</sup> *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.

<sup>12</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).

Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>13</sup>

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

The OGSR prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>14</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 or repeal the sunset date.<sup>15</sup> 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.<sup>16</sup> 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;<sup>17</sup>
- 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;<sup>18</sup> or
- It protects trade or business secrets.<sup>19</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>20</sup> 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 or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</sup> If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>14</sup> 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 records or 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.

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> Section 119.15(6)(b)1., F.S.

<sup>18</sup> Section 119.15(6)(b)2., F.S.

<sup>19</sup> Section 119.15(6)(b)3., F.S.

<sup>20</sup> 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?

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

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.<sup>22</sup>

### **Department of the Lottery**

Section 15 of Article X of the State Constitution allows lotteries to be operated by the state. Section 24.102(2), F.S., provides:

- The net proceeds of lottery games shall be used to support improvements in public education;
- Lottery operations shall be undertaken as an entrepreneurial business enterprise; and
- The department shall be accountable through audits, financial disclosure, open meetings, and public records laws.

The department operates the Florida Lottery to maximize revenues “consonant with the dignity of the state and the welfare of its citizens”<sup>23</sup> for the benefit of public education.<sup>24</sup>

Section 24.105(12), F.S., provides that the department may determine by rule information relating to the operation of the lottery which is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if necessary to the security and integrity of the lottery. Such information includes trade secrets; security measures and reports; bid and contractual information that, if disclosed, would impair the department to contract for goods or services on favorable terms, and personnel information unrelated to compensation, duties, qualifications, or responsibilities. Confidential information may be released to other governmental entities as needed in connection with the performance of their duties, but the recipient must retain the confidentiality of the information provided.

Penalties for the improper disclosure of information lottery information that is designated as confidential and exempt are addressed in s. 24.118(4), F.S. A person who, with intent to defraud or to provide a financial or other advantage to himself, herself, or another, knowingly and willfully discloses such confidential and exempt information, commits a felony of the first degree.<sup>25</sup>

### **III. Effect of Proposed Changes:**

This bill amends s. 24.105(12), F.S., to create s. 24.1051(1), F.S., relating to exemptions from inspection or copying of public records, relating to the following information held by the department:

- Information that, if released, could harm the security or integrity of the department, including information:
  - Relating to the security of the department’s technologies and practices to protect networks, software, and data systems from attack, damage, or unauthorized access;

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

<sup>23</sup> See s. 24.104, F.S.

<sup>24</sup> See s. 24.121(2), F.S.

<sup>25</sup> Section 775.082, F.S., provides a felony of the first degree is punishable by a term of imprisonment not to exceed thirty years. Section 775.083, F.S., provides a felony of the first degree is punishable by a fine not to exceed \$10,000.

- Relating to security information and measures of the department, whether physical or virtual;
- About lottery games, promotions, and tickets, such as description, design, production, printing, packaging, shipping, delivery, storage, and validation processes; and
- Concerning terminals and devices that issue tickets;
- Information required to be maintained as confidential in order for the department to participate in multistate lottery associations or games;
- Personal identifying information obtained by the department when processing background investigations of current or potential retailers or vendors; and
- Financial information about a vendor or lottery ticket retailer which is not publicly available and is provided for review of the entity's financial responsibility,<sup>26</sup> provided that the entity marks such information as confidential. However, financial information related to any contract, agreement, or addendum with the department, including the amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, and penalties, are public record.

The bill provides the exemption is remedial in nature, and states the legislative purpose and intent for the exemption to apply to information held by the department before, on, or after the effective date of the act.

Information that is made confidential and exempt under the bill may be released by the department to other governmental entities as needed for the performance of their duties, but recipients must maintain the confidential and exempt status of the information provided.

The bill states the legislative intent for creating the public records exemptions in the bill and overriding the strong public policy of open government, so that effective, efficient administration of the lottery may be maintained, and the department may participate in multistate games to generate revenue for public education, based upon the following compelling purposes:

- Ensuring the security and integrity of lottery operations to safeguard against players gaining an unfair advantage over other players and to enable the department to operate consistent with the dignity of the state lottery;
- Preventing the public disclosure of security information that would jeopardize the integrity and efficiency of the lottery and impair administration of the lottery;
- Allowing compliance with contracts requiring information to be held confidential as part of the operation and promotion of a multistate lottery with other states;
- Protecting personal identifying information of current or potential retailers and vendors for processing background investigations, as the release of sensitive personal information could cause great financial harm, cause unwarranted damage to reputations, and increase the risk of identity theft; and
- Preventing the disclosure of financial information of a vendor or retailer that is not publicly available and is provided to the department for review of financial responsibility of the entity, as the release of such information could harm the business operations of those the department seeks to contract with, cause them injury in the marketplace, and decrease the likelihood that they will contract with the department.

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<sup>26</sup> See s. 24.111, F.S., relating to vendors that contract with the department, and s. 24.112, F.S., relating to lottery ticket retailers.

Section 24.1051(1)(d), F.S., provides for the repeal of the exemptions pursuant to the OGSR on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill transfers s. 24.118(4), F.S., relating to the penalties for the improper disclosure of lottery information that is designated as confidential and exempt, to s. 24.1051(4), F.S.

The bill includes technical drafting changes, conforming changes, elimination of obsolete language, and a directive to the Division of Law Revision.

The bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

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. If an 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. The bill creates a public records exemption, therefore it requires a two-thirds vote for final passage.

##### **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:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 24.105 and 24.118.

This bill creates section 24.1051 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.