

**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 Governmental Oversight and Accountability

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BILL: SB 7002

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: OGSR/State Child Abuse Death Review Committee

DATE: January 24, 2020

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Delia</u>	<u>Hendon</u>		<b>CF Submitted as Committee Bill</b>
1.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
2.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>

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**I. Summary:**

SB 7002 amends s. 383.412, F.S., to save from repeal the current public records and public meetings exemptions for certain identifying information held by the State Child Abuse Death Review Committee or a local child abuse death review committee. Section 383.412, F.S., provides that any information that reveals the identity of the surviving siblings, family members, or others living in the home of a deceased child who is the subject of review by and which information is held by the State Child Abuse Death Review Committee or a local committee is confidential and exempt from public disclosure. Portions of meetings of the State Child Abuse Death Review Committee or a local committee at which this confidential and exempt information is discussed are exempt from public meeting requirements. The bill removes the scheduled repeal date, resulting in the continuation of the public records and public meetings exemptions.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2020.

**II. Present Situation:**

**Access to Public Records - Generally**

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> The right to inspect or copy 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>

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

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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S. 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>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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### Open Meetings Laws

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

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the “Government in the Sunshine Law,”<sup>19</sup> or the “Sunshine Law,”<sup>20</sup> 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.<sup>21</sup> The board or commission must provide the public reasonable notice of such meetings.<sup>22</sup> 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.<sup>23</sup> Minutes of a public meeting must be promptly recorded and open to public

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not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> FLA. CONST., art. I, s. 24(b).

<sup>17</sup> *Id.*

<sup>18</sup> 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.”

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

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

<sup>21</sup> Section 286.011(1)-(2), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> Section 286.011(6), F.S.

inspection.<sup>24</sup> Failure to abide by open meetings requirements will invalidate any resolution, rule or formal action adopted at a meeting.<sup>25</sup> A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.<sup>26</sup>

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

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records exemptions,<sup>30</sup> with specified exceptions.<sup>31</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>32</sup> The Act provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.<sup>33</sup>

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

The Open Government Sunset Review Act<sup>34</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>35</sup> public records or open meetings exemptions, with specified exceptions.<sup>36</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>37</sup>

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<sup>24</sup> Section 286.011(2), F.S.

<sup>25</sup> Section 286.011(1), F.S.

<sup>26</sup> Section 286.011(3), F.S.

<sup>27</sup> FLA. CONST., art. I, s. 24(c).

<sup>28</sup> *Id.*

<sup>29</sup> *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 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>30</sup> 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.).

<sup>31</sup> 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.

<sup>32</sup> Section 119.15(3), F.S.

<sup>33</sup> Section 119.15(6)(b), F.S.

<sup>34</sup> Section 119.15, F.S.

<sup>35</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>36</sup> 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.

<sup>37</sup> 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.<sup>38</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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>39</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>40</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>41</sup>

The Act also requires specified questions to be considered during the review process.<sup>42</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>43</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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.<sup>44</sup>

### **Child Abuse Death Review**

Current law establishes the State Child Abuse Death Review Committee (State Committee) and local child abuse review committees (Local Committees) (collectively, the Committees) within the Department of Health.<sup>45</sup> The Committees must review the facts and circumstances of all

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<sup>38</sup> Section 119.15(6)(b), F.S.

<sup>39</sup> Section 119.15(6)(b)1., F.S.

<sup>40</sup> Section 119.15(6)(b)2., F.S.

<sup>41</sup> Section 119.15(6)(b)3., F.S.

<sup>42</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>43</sup> See *generally* s. 119.15, F.S.

<sup>44</sup> Section 119.15(7), F.S.

<sup>45</sup> Section 383.402, F.S.

deaths of children from birth to age 18 which occur in this state and are reported to the central abuse hotline of the Department of Children and Families.<sup>46</sup>

The State Committee must prepare a comprehensive annual statistical report regarding deaths from child abuse.<sup>47</sup> The report, at a minimum, must include:

- Descriptive statistics, including demographic information regarding victims and caregivers, and the causes and nature of deaths;
- A detailed statistical analysis of the incidence and causes of deaths;
- Specific issues identified within current policy, procedure, rule, or statute and recommendations to address those issues from both the state and local committees; and
- Other recommendations to prevent deaths from child abuse based on an analysis of the data presented in the report.<sup>48</sup>

The law provides the Committees with broad access to and use of information related to a child whose death is under review and that is necessary for the Committee to carry out its duties, including:

- Medical, dental or mental health treatment records;
- Records in in possession of a state agency or political subdivision; and
- Records of law enforcement which are not part of an active investigation.<sup>49</sup>

### **Exemptions Under Review**

Current law provides both a public records and a public meetings exemption for the State Committee and a Local Committee.<sup>50</sup>

Information that reveals the identity of the surviving siblings, family members, or others living in the home of a deceased child who is the subject of review by the State Committee or a Local Committee is confidential and exempt from public records requirements.<sup>51</sup> In addition, confidential or exempt information obtained by the Committee or a Local Committee retains its confidential or exempt status.<sup>52</sup> The State and Local Committees may share with each other any relevant confidential or exempt information regarding case reviews.<sup>53</sup> Any person who knowingly or willfully violates the public records exemption commits a misdemeanor of the first degree.<sup>54,55</sup>

Portions of meetings of the State Committee or a Local Committee at which confidential and exempt information is discussed are exempt from open meetings requirements.<sup>56</sup> The closed

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<sup>46</sup> Section 383.402(1), F.S.

<sup>47</sup> Section 383.402(4), F.S.

<sup>48</sup> Section 383.402(5), F.S.

<sup>49</sup> Section 383.402(5)(a) and (b), F.S.

<sup>50</sup> Section 383.412, F.S.

<sup>51</sup> Section 383.412(2)(a), F.S.

<sup>52</sup> Section 383.412(2)(b), F.S.

<sup>53</sup> Section 383.412(4), F.S.

<sup>54</sup> Section 383.412(5), F.S.

<sup>55</sup> A misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year and a fine not to exceed \$1,000. *See* 775.082(4)(a) and 775.083(1)(d), F.S.

<sup>56</sup> Section 383.412(3), F.S.

portion of a meeting must continue to be recorded and no portion of the closed meeting is permitted to be off the record.<sup>57</sup> The recording of a closed meeting is exempt from public records requirements.<sup>58</sup>

Pursuant to the Act, these exemptions are repealed October 2, 2020, unless saved from repeal by the Legislature.<sup>59</sup>

The public records and public meetings exemptions were initially enacted by the Legislature in 1999 and amended and reenacted, thereafter in 2005, 2010, and 2015.<sup>60, 61</sup> The 2015 amendment narrowed the public records exemption for identifying information related to cases of verified abuse and neglect to information that identifies the deceased child's siblings.<sup>62</sup> It also expanded the public records exemption to include information held by the State Committee or a Local Committee which reveals the identity of a deceased child whose death is not the result of verified abuse or neglect as well as the identity of the surviving siblings, family members, or others living in the home.<sup>63</sup> This amendment also authorized the release of confidential information to a governmental agency in furtherance of its duties or a person or entity for research or statistical purposes.<sup>64</sup>

The Legislature's stated purpose for the public records exemption was "to increase the potential for reduced morbidity or mortality of children and reduce the potential for poor outcomes for children, thereby improving the overall quality of life for children."<sup>65</sup> Additionally, the Legislature found it was a public necessity for portions of the Committees' meetings, wherein confidential and exempt information is discussed, to be made exempt from the public meetings requirements.<sup>66</sup> Without such an exemption, the Legislature found the open communication and coordination among the parties would be hampered, and the release of confidential and exempt information in a public meeting would defeat the purpose of the public records exemption.<sup>67</sup> Thus, the Legislature found the harm resulting from the release of such information substantially outweighed any public benefit.<sup>68</sup>

### **Senate Review of s. 383.412, F.S.**

In the course of conducting the Open Government Sunset Review of s. 383.412, F.S., the Senate Children, Families, and Elder Affairs Committee staff met with representatives from the

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Section 383.412(6), F.S.

<sup>60</sup> See Chs. 99-210, 2005-190, 2010-40, and 2015-77, Laws of Fla.

<sup>61</sup> The initial act sunset in 2004 when legislation to reenact the exemption failed to pass both chambers of the Legislature. See Florida Senate, *Website Archive*, Senate 0462: Relating to Child Fatalities/Pub. Rec./OGSR [http://archive.flsenate.gov/session/index.cfm?BI\\_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2004&billnum=462](http://archive.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2004&billnum=462) (last visited Oct. 31, 2019).

<sup>62</sup> Ch. 2015-77, Laws of Fla.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Ch. 99-210, s. 2, Laws of Fla.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Department of Health (DOH) and the Department of Children and Families (DCF) and conducted surveys of each of the 23 Local Committees.

DOH and DCF staff stated that the exemptions have been effective and recommended making no changes to the public records and public meeting exemptions. Similarly, surveys of the 23 Local Committees showed near unanimous support for keeping the exemptions in place and unchanged.<sup>69</sup>

Based upon a review of the public records and public meetings exemptions found in s. 383.412, F.S., under the Open Government Sunset Review Act, as well as discussions with and recommendations of DOH and DCF and survey results from the 23 local committees, the professional staff of the Senate Children, Families, and Elder Affairs Committee recommends the Legislature retain both the public records and public meetings exemptions established in s. 383.412, F.S.

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

The bill is based on an Open Government Sunset Review of a public records and public meetings exemption for personal identifying information held by the DOH and by the Committees, and for portions of meetings of the Committees at which such confidential and exempt information is discussed.

The bill amends s. 383.412, F.S., to continue the current public records and public meetings exemptions. Records containing the specified personal identifying information will continue to be exempt from public disclosure. Additionally, those portions of meetings of the State Committee or a Local Committee at which such confidential and exempt information is discussed will continue to be exempt from the public meetings requirement.<sup>70</sup>

By removing the scheduled repeal of the exemptions, the exemptions are no longer subject to review under the Open Government Sunset Review Act.

The bill takes effect October 1, 2020.

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

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

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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<sup>69</sup> Summary of 2019 Local Child Abuse Death Review Committee Surveys. On file with the Senate Committee on Children, Families, and Elder Affairs.

<sup>70</sup> Section 383.412(3)(a), F.S.



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

Article I, s. 24(c) of the State Constitution requires two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. The bill continues a current public records and public meetings exemption beyond its current date of repeal. The bill does not create or expand an exemption. Thus, the bill does not require an extraordinary vote for enactment.

***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements or the open meeting requirements to state with specificity the public necessity justifying the exemption. The bill continues a current public records and public meetings exemption without an expansion. Thus, a statement of public necessity is not required.

***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements and the open meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the exemptions is to protect personal identifying information related to the surviving family members in child abuse-related death cases. The exemptions do not appear to be broader than necessary to accomplish the purpose of the law.

**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:**

The private sector will continue to be subject to the cost associated with an agency making redactions in response to a public records request.

**C. Government Sector Impact:**

Governmental agencies will continue to incur costs related to the redaction of records in responding to public records requests. Additionally, governmental agencies will continue to incur costs associated with recording the closed portion of meetings held by the Committees wherein confidential and exempt information is discussed.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 383.412 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.