

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 812

INTRODUCER: Governmental Oversight and Accountability Committee; Environment and Natural Resources Committee and Senator Hutson

SUBJECT: Public Records/Endangered and Threatened Species

DATE: February 3, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Rogers</u>	<u>Rogers</u>	<u>EN</u>	<u>Fav/CS</u>
2.	<u>Hackett</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 812 creates a new public records exemption to exempt site-specific location information for endangered and threatened species from public inspection and copying requirements. The exemption does not apply to location information for animals held in captivity.

The exemption is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

The bill contains legislative findings, including that “the release of such location information would jeopardize the continued existence of protected species by putting them in danger from wildlife poachers or by threatening the integrity of the site due to increased use of or traffic within the site. This exemption protects private property owners from potential trespass and related liability issues when endangered or threatened species are found on their properties and encourages the landowners, as well as researchers, to provide information to the agencies which they would not otherwise provide if the information could be made public.”

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

The bill takes effect July 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.¹ 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.²

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.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ 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.⁵

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted 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.”⁷

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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ 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).

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

⁵ 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.”

⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

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

custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

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.¹⁰ 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.¹¹

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

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.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ 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.¹⁹

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.²⁰

⁸ Section 119.07(1)(a), F.S.

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.*; 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 not justify the breadth of the exemption); see *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).

¹² 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).

¹³ 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).

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

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

¹⁶ Section 119.15, F.S.

¹⁷ 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.

¹⁸ 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.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

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;²¹
- 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;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ 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.²⁵ 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.²⁶

Florida's Management of Endangered Species

Pursuant to s. 9, Art. IV of the State Constitution, the Florida Fish and Wildlife Conservation Commission (FWC) exercises the regulatory and executive powers of the state with respect to wild animal life, fresh water aquatic life, and marine life.²⁷ Under the Florida Endangered and Threatened Species Act, FWC is responsible for research and management of freshwater and upland species and for research and management of marine species.²⁸ "Endangered species" includes any species of fish and wildlife naturally occurring in Florida, whose prospects of survival are in jeopardy due to modification or loss of habitat; overutilization for commercial, sporting, scientific, or educational purposes; disease; predation; inadequacy of regulatory

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ FLA. CONST. art. IV, s. 9.

²⁸ Section 379.2291(4), F.S.

mechanisms; or other natural or manmade factors affecting its continued existence.²⁹ “Threatened species” are defined by statute as any species of fish and wildlife naturally occurring in Florida which may not be in immediate danger of extinction, but which exists in such small populations as to become endangered if it is subjected to increased stress as a result of further modification of its environment.³⁰

At the federal level, the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NOAA–Fisheries) is responsible for listing most marine species and the U.S. Fish and Wildlife Service (USFWS) is responsible for other species.³¹ FWC rules clarify that Florida endangered and threatened species include federally-designated endangered and threatened species and state-designated threatened species.³²

The current listing status of all of Florida's federal and state listed species is found in FWC’s publication “Florida's Endangered and Threatened Species List” and in agency rules.³³ Intentionally killing or wounding any fish or wildlife of a species designated by FWC as endangered, threatened, or of special concern is a felony.³⁴ This also applies to intentionally destroying the eggs or nest of any such fish or wildlife.³⁵ While the USFWS has primary responsibility for Florida species that are federally endangered or threatened, like the sand skink or the Florida scrub-jay, FWC works in partnership with USFWS to help conserve these species.³⁶

FWC’s mission is “managing fish and wildlife resources for their long–term well–being and the benefit of people.”³⁷ Management of listed species includes surveying and monitoring of species, habitat improvement and restoration, development and implementation of management plans, conservation planning, agency commenting on potential impacts to species and citizen awareness. Research is a systematic means of generating the scientific information necessary to support and guide management. Research also leads to a better understanding of how wildlife managers may alter populations through management actions, as well as leading to management actions that have aided in species stabilization and conservation.³⁸ FWC developed the “Imperiled Species Management Plan” to address the needs of state listed species that did not already have a management plan or specific program in place.³⁹ The plan focuses primarily on improving the conservation status of Florida’s imperiled wildlife through reducing the risk of

²⁹ Section 379.2291(3)(b), F.S.

³⁰ Section 379.2291(3)(c), F.S.

³¹ 50 C.F.R. 17 (animals); 50 C.F.R. 23 (plants); 50 C.F.R. 223 and 224 (marine species).

³² Fla. Admin. Code R. 68A-27.001.

³³ Fla. Admin. Code R.s 68A–27.003 and 68A–27.0031; FWC, *Florida’s Endangered and Threatened Species*, available at <https://myfwc.com/media/1945/threatend-endangered-species.pdf>.

³⁴ Section 379.411, F.S.

³⁵ *Id.*

³⁶ FWC, *Wildlife Conservation*, <https://myfwc.com/wildlifehabitats/wildlife/> (last visited Dec. 26, 2019).

³⁷ FWC, *Endangered and Threatened Species Management and Conservation Plan Progress Report Fiscal Year 2018-2019*, available at <https://myfwc.com/media/22264/2018-19-legislative-report.pdf>.

³⁸ *Id.*

³⁹ FWC, *Florida’s Imperiled Species Management Plan 2016-2026*, available at <https://myfwc.com/media/2030/imperiled-species-management-plan.pdf>.

extinction, maintaining sufficient habitat, and improving public and partner support of conservation efforts.⁴⁰

Habitat restoration is often a key aspect of a species management plan.⁴¹ This includes reestablishment of native habitat and ecological functions after disturbance and as enhancement (improving habitat features) and rehabilitation (accelerating natural recovery of habitat after disturbance). A crucial element for habitat restoration and enhancement is a well-organized framework for research, monitoring, and evaluation. The analysis of information helps to identify the most effective types of restoration, improves cost effectiveness, and improves models that guide managers as they decide on future habitat improvement projects and maintenance after restoration.⁴²

Site-specific Species Information

FWC has the following concerns relating to the disclosure of species-specific information:

Current public records laws require Florida state agencies to disclose data and research, including those data that originated from the Commission and data connected with research conducted by outside parties that have their information stored within the Commission.

This research data includes, but is not limited to: population trends, migratory patterns, reproductive ecology, distribution data, den locations, satellite telemetry, point localities for artificial reefs, and mark-recapture data. Collaboration with nongovernmental organizations (NGO's), universities, other management agencies, and private consultants is extremely beneficial when making management decisions for species that the Commission is tasked with conserving.

Additionally, for landowners that are currently enrolled in the Commission's management plan, there is no exemption that protects private property owners from potential trespass and related liability issues when endangered or threatened species are found on their properties. This is cause for private land owners not to allow research or allow for the Commission to develop wildlife management plans that would assist with species management.⁴³

The primary concerns raised by FWC include:

- Withholding of data by the federal government, universities, and researchers due to concerns that stakeholders with such information may interfere with species, harm species, or damage species habitat if the location of the species was made public.
- Safety concerns relating to the public putting themselves in harm's way to view species such as bears and panthers.

⁴⁰ *Id.* at iv.

⁴¹ *Id.* at 106.

⁴² *Id.*

⁴³ FWC, *Agency Analysis of SB 812* (Dec. 26, 2019) (on file with the Senate Committee on Environment and Natural Resources).

- Illegal activity for the taking of species that have value on the black market.⁴⁴

III. Effect of Proposed Changes:

Section 1 creates s. 379.1026, F.S., creating a public records exemption for site-specific location information for threatened and endangered species.

The bill provides that site-specific location information held by an agency concerning an endangered or threatened species as defined in Florida law or as listed by a federal agency is exempt from the constitutional and statutory provisions relating to public records. The exemption does not apply to animals held in captivity.

The exemption is subject to the Act and is subject to repeal on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

Section 2 creates legislative findings that it is a public necessity that the site-specific location information held by an agency concerning a species that is listed federally as an endangered species or a threatened species or is listed by the Fish and Wildlife Conservation Commission as a threatened species be made exempt from disclosure as a public record. Specific findings include that:

- The release of such location information would jeopardize the continued existence of protected species by putting them in danger from wildlife poachers or by threatening the integrity of the site due to increased use of or traffic within the site.
- The exemption protects private property owners from potential trespass and related liability issues when endangered or threatened species are found on their properties and encourages the landowners, as well as researchers, to provide information to the agencies which they would not otherwise provide if the information could be made public.
- The harm that may result from the release of such site-specific location information outweighs any public benefit that may be derived from the disclosure of the information.

Section 3 provides that the bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

⁴⁴ FWC, *Examples Table 1* (Dec. 26, 2019) (on file with the Senate Committee on Environment and Natural Resources) (including specific examples that have raised these concerns).

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 an exemption to the public records requirements. This bill enacts a new exemption for site-specific information relating to endangered or threatened species, thus, the bill requires a two-thirds vote to be enacted.

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 to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect endangered and threatened species and the general public. This bill exempts only site-specific information relating to endangered or threatened species from the public records requirements. The exemption does 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 be subject to the cost associated with an agency making redactions in response to a public records request.

C. **Government Sector Impact:**

Indeterminate. The custodian will incur minor costs relating to the redaction of exempt records.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill creates s. 379.1026 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 February 3, 2020:

The CS amends the bill to remove the stipulation that the exemption is not waived by the release of such location information to another agency or to an educational institution or scientific facility for research purposes. The CS shifts the definitions into the same section as the exemption for clarity. The CS clarifies that the exemption does not apply to *the site-specific location information of animals held in captivity.*

CS by Environment and Natural Resources on January 13, 2020:

The amendment adds a provision specifying that the exemption does not apply to animals held in captivity.

- B. **Amendments:**

None.