

**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: CS/SB 966

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Gainer

SUBJECT: Public Records/Disaster Recovery Assistance

DATE: February 11, 2020      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Proctor</u>	<u>Miller</u>	<u>IS</u>	<b>Favorable</b>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 966 makes confidential and exempt from public disclosure requirements property photographs and applicant financial documentation provided to the Department of Economic Opportunity (DEO); the Florida Housing Finance Corporation (FHFC), a county; a municipality; or a local housing finance agency by or on behalf of an applicant for or a participant in a federal, state, or local housing assistance programs for the purposes of disaster recovery assistance for a presidentially declared disaster.

The bill provides for the disclosure of such confidential and exempt information to a governmental entity or its agents for specified purposes.

The bill is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2025, unless reviewed and reenacted by the Legislature. The bill contains a public necessity statement as required by the Florida Constitution. Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

The bill may have a minimal negative fiscal impact on the governmental sector.

The bill has an effective date of 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.<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>

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

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

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

<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).

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>

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 Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</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>19</sup>

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>20</sup>

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<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 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> Section 119.15, F.S.

<sup>17</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>18</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>19</sup> Section 119.15(3), F.S.

<sup>20</sup> 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;<sup>21</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>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

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

### **Department of Economic Opportunity**

The DEO was created to assist the Governor in working with the Legislature, state agencies, business leaders, and economic development professionals to formulate and implement coherent and consistent policies and strategies designed to promote economic opportunities for all Floridians.<sup>27</sup> The head of the DEO is the executive director, who is appointed by the Governor, subject to confirmation by the Senate. The executive director serves at the pleasure of and reports to the Governor.<sup>28</sup> The executive director manages all activities and responsibilities of the DEO, and serves as the manager for the state with respect to contracts with Enterprise Florida Inc., and

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<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</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>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 20.60(4), F.S.

<sup>28</sup> Section 20.60(2), F.S.

all applicable direct-support organizations.<sup>29</sup> Within the DEO, the Office of Disaster Recovery “supports communities following disasters by addressing long-term recovery needs for housing, infrastructure and economic development.”<sup>30</sup>

### **Florida Housing Corporation**

The Florida Housing Finance Corporation Act provides that the FHFC is created within the Department of Economic Opportunity and is a public corporation.<sup>31</sup> The FHFC is responsible for increasing the amount of affordable housing available to individuals and families by stimulating investment of private capital and encouraging public and private sector housing partnerships. To accomplish this, the FHFC uses federal and state resources to finance the development of safe, affordable homes and rental housing and to assist first-time homebuyers.<sup>32</sup>

### **Disaster Recovery Housing Assistance Programs**

The DEO, FHFC, counties, municipalities, and local housing finance agencies have various housing programs that are designed to assist those who have been impacted by a disaster. One such program, the Community Development Block Grant - Disaster Recovery Program (CDBG-DR) is funded by the U.S. Department of Housing and Urban Development (HUD) and supports communities following disasters by addressing long-term recovery needs. In response to a presidentially declared disaster, Congress may appropriate additional funding for the CDBG-DR Program as “grants to rebuild the affected areas and provide crucial seed money to start the recovery process.”<sup>33</sup>

Rebuild Florida is program funded through HUD and the CDBG-DR Program which focuses on long-term recovery after all other assistance has been exhausted, including private insurance and other forms of federal assistance.<sup>34</sup> DEO administers the Rebuild Program which was approved by the HUD after the 2017 hurricane season. In 2017, following Hurricane Irma, HUD allocated a total of \$616 million in funding to support long-term recovery efforts via the CDBG-DR Program.<sup>35</sup>

CDBG-DR funds are typically used for recovery efforts involving housing, economic development, infrastructure repair, and prevention of further damage to affected areas.<sup>36</sup> Eligible activities include, but are not limited to, the following:

- Purchasing damaged properties in a flood plain and relocating residents to safer areas;

<sup>29</sup> Section 20.60(9), F.S.

<sup>30</sup> Department of Economic Opportunity, *Office of Disaster Recovery*, <http://www.floridajobs.org/community-planning-anddevelopment/assistance-for-governments-and-organizations/disaster-recovery-initiative> (last visited Feb. 4, 2020).

<sup>31</sup> Section 420.504(1), F.S.

<sup>32</sup> See ss. 420.502 and 420.507, F.S.

<sup>33</sup> U.S. Department of Housing and Urban Development, *Community Development Block Grant Disaster Recovery Program*, <https://www.hudexchange.info/programs/cdbg-dr/> (last visited Feb. 4, 2020).

<sup>34</sup> Department of Economic Opportunity, *Rebuild Florida Housing Repair and Replacement Program Frequently Asked Questions*, <http://floridajobs.org/rebuildflorida/faqs> (last visited February 4, 2019).

<sup>35</sup> Department of Economic Opportunity, *Office of Disaster Recovery Policy Manual*, [http://www.floridajobs.org/docs/default-source/office-of-disaster-recovery/office-of-disaster-recovery-main-page/odr-comprehensive-policies-and-procedures-11-21-19.pdf?sfvrsn=24e441b0\\_8](http://www.floridajobs.org/docs/default-source/office-of-disaster-recovery/office-of-disaster-recovery-main-page/odr-comprehensive-policies-and-procedures-11-21-19.pdf?sfvrsn=24e441b0_8) (last visited January 31, 2020).

<sup>36</sup> *Id.*

- Providing Relocation payments for people and businesses displaced by the disaster;
- Removing debris not covered by the Federal Emergency Management Agency;
- Rehabilitating homes and buildings damaged by the disaster; and
- Providing homeownership activities such as down payment assistance, interest rate subsidies and loan guarantees for disaster victims.<sup>37</sup>

Applicants seeking assistance from DEO's CDBG-DR programs are required to provide personal information and supporting documentation. For example, damage assessment data collected during property inspections to determine remaining needed repairs may include the applicant's name, address, telephone numbers, photo identification, and interior and exterior photographs of their residence.<sup>38</sup> Other commonly needed personal identifying information includes, proof of home ownership, tax returns, and salary or wage statements. DEO maintains all files containing such personally identifiable information in a secure manner.<sup>39</sup>

### **The Robert T. Stafford Disaster Relief Act and a Presidential Disaster Declaration**

Congress enacted the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act")<sup>40</sup> "to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from disasters."<sup>41</sup> The Stafford Act is triggered when the State Governor determines that State and local resources are insufficient to respond to a disaster, asks the President to declare an area a "major disaster," and the President does so.<sup>42</sup> The President's declaration designates the areas within a State where Federal assistance may be made available and what specific types of Federal assistance are authorized.

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

**Section 1** amends s. 119.071, F.S., to make confidential and exempt from public disclosure property photographs and applicant financial documentation provided to the DEO, FHFC, a county, a municipality, or a local housing finance agency by or on behalf of an applicant for or a participant in a federal, state, or local housing assistance program for the purpose of disaster recovery assistance for a presidentially declared disaster.

The bill does not specify which federal, state, or local housing assistance programs to which the records and an information may pertain.

The bill provides that DEO, FHFC, a county, a municipality or a local finance agency may release the records made confidential and exempt to a governmental entity or its agents for the purpose of auditing federal, state, or local housing programs or housing assistance programs. The entities receiving such confidential information must maintain the confidential and exempt status

<sup>37</sup> *Id.*

<sup>38</sup> Department of Economic Opportunity, *Senate Bill 966 Analysis* (December 2, 2020)(on file with the Senate Committee on Governmental Oversight and Accountability).

<sup>39</sup> *See Supra* note 27 at 117.

<sup>40</sup> 42 U.S.C. §§ 5121 *et seq.*

<sup>41</sup> 42 U.S.C. §§ 5121(b).

<sup>42</sup> *Id.* at § 5171.

of such records. Such confidential and exempt records may be used in any administrative or judicial proceeding, provided such records are kept confidential and exempt unless otherwise ordered by a court.

The bill is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2025, unless reviewed and reenacted by the Legislature. The bill contains a public necessity statement as required by the Florida Constitution. Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

The bill contains a statement of public necessity, which includes:

- The Legislature finds that it is a public necessity that property photographs and applicant financial documentation provided to the Department of Economic Opportunity, the Florida Housing Finance Corporation, a county, a municipality, or a local housing finance agency by or on behalf of an applicant for or a participant in a federal, state, or local housing assistance program for the purpose of disaster recovery assistance for a presidentially declared disaster be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24 (a), Article I of the State Constitution; and
- In response to a disaster, in an effort to determine storm damage and ascertain the estimated cost of rehabilitation, an agency may conduct a property inspection to observe and record the presence of damage. The damage assessment data collected may include interior and exterior photographs of such individual's residence. This information may be used to locate the damaged property and identify and contact the property owner or tenant. If released, this information may be used by fraudulent contractors, predatory lenders, thieves, or individuals seeking to impose on the vulnerability of a distressed property owner or tenant following a disaster. Therefore, it is necessary that this information be protected to ensure that people impacted by a disaster do not have sensitive information released.

The bill has an effective date of July 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.

##### **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 property photographs and applicant financial documentation provided to the DEO, FHFC, a county, a municipality, or a local housing finance agency by or on behalf of an applicant for or

participation in a federal, state, or local housing assistance program for the purpose of disaster recovery assistance for a presidentially declared disaster. 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 property photographs and applicant financial documentation provided to the DEO, FHFC, a county, a municipality, or a local housing finance agency by or on behalf of an applicant for or a participant in a federal, state or local housing assistance program for the purpose of disaster recovery assistance for a presidentially declared disaster. This bill exempts only property photographs and applicant financial documentation and provides for their release to a governmental entity or its agents for the purpose of auditing federal, state, or local housing programs or housing assistance programs. 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, to the extent one is imposed, associated with an agency making redactions in response to a public records requests.

C. **Government Sector Impact:**

Government agencies will incur costs related to the redaction of records in responding to public records requests.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 119.071.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on February 10, 2020:**

The committee substitute defines the term “financial documentation” and narrows the exemption by making only property photographs and applicant financial documentation confidential and exempt. Specifies that the exemption relates only to disaster recovery assistance for a presidentially declared disaster. Additionally, it makes technical changes to the provisions providing for disclosure of the confidential and exempt information in certain circumstances.

B. **Amendments:**

None.