

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 1069 Pub. Rec./Department of Military Affairs

SPONSOR(S): State Affairs Committee, Government Operations Subcommittee, Local Administration & Veterans Affairs Subcommittee, Payne

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 654

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee	15 Y, 0 N, As CS	Renner	Miller
2) Government Operations Subcommittee	17 Y, 0 N, As CS	Roth	Smith
3) State Affairs Committee	24 Y, 0 N, As CS	Renner	Williamson

SUMMARY ANALYSIS

The Florida Department of Military Affairs (DMA) is a state agency created to provide management oversight and administrative support to the Florida National Guard. DMA employees who have official computer accounts work on the U.S. Department of Defense (DoD) network. When authorized to do so, the Secretary of Defense may conduct military cyber activities or operations in cyberspace, including clandestine military activities or operations in cyberspace, to defend the United States and its allies, including in response to malicious cyber activity carried out against the United States. This network includes an email system provided by DoD. Any information requested from the email system must go through the federal Freedom of Information Act process.

The bill creates a public record exemption for information held by DMA that is stored in a DoD system of records, transmitted using a DoD network or communications device, or pertaining to the DoD pursuant to federal law. Any information not made exempt by this provision may be disclosed only after DMA makes any redactions in accordance with applicable federal and state laws. The bill provides that the exemption applies retroactively.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless reviewed and saved from repeal by the Legislature. The bill also provides a public necessity statement as required by the Florida Constitution.

The bill does not appear to have a fiscal impact on the state or local government.

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 public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of art. I, s. 24(a).¹ The general law must state with specificity the public necessity justifying the exemption² and must be no more broad than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁴ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.⁵

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁶

An agency is prohibited from entering into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records that are online or stored in an electronic recordkeeping system used by the agency.⁷

Department of Military Affairs

The Florida Department of Military Affairs (DMA) is a state agency created to provide management oversight and administrative support to the Florida National Guard (FLNG).⁸ DMA is responsible for:

- Combat readiness and emergency preparedness of the FLNG;
- Responding to disasters and civil disturbances;
- Drug interdiction operations; and

¹ Art. I, s. 24(c), Fla. Const.

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ Art. I, s. 24(c), Fla. Const.

⁴ S. 119.15, F.S.

⁵ S. 119.15(6)(b), F.S.

⁶ S. 119.15(3), F.S.

⁷ S. 119.01(2)(c), F.S.

⁸ Florida Department of Military Affairs, <https://dma.myflorida.com/> (last visited March 5, 2021).

- Assisting Floridians at risk.⁹

The Adjutant General, who is a federally recognized general officer, is an appointee of the Governor¹⁰ and serves as both the agency head of DMA¹¹ and the commanding officer of the FLNG. Under the Adjutant General's command are over 11,000 FLNG members and 2,300 full-time military personnel.¹² Military personnel of the DMA includes any person who is required to wear a military uniform in performing his or her official duties and who is required to serve in the FLNG as a condition of his or her employment by DMA.¹³ Members of the FLNG may be called to state active duty by the Governor¹⁴ or activated by the federal government.¹⁵

DMA employees who have official computer accounts work on the U.S. Department of Defense (DoD) network. When authorized to do so, the Secretary of Defense may conduct military cyber activities or operations in cyberspace, including clandestine military activities or operations in cyberspace, to defend the United States and its allies, including in response to malicious cyber activity carried out against the United States.¹⁶ This network includes an email system provided by DoD. Any information requested from the email system must go through the federal Freedom of Information Act (FOIA) process.¹⁷

Federal Freedom of Information Act & Privacy Act

The FOIA provides the public the right to request access to records from any federal agency.¹⁸ Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of the following nine exemptions:

1. Information that is classified to protect national security.
2. Information related solely to the internal personnel rules and practices of an agency.
3. Information that is prohibited from disclosure by another federal law.
4. Trade secrets or commercial or financial information that is confidential or privileged.
5. Privileged communications within or between agencies, including those protected by deliberative process privilege (provided the records were created less than 25 years before the date on which they were requested), attorney-work product privilege, and attorney-client privilege.
6. Information that, if disclosed, would invade another individual's personal privacy.
7. Information compiled for certain law enforcement purposes.
8. Information that concerns the supervision of financial institutions.
9. Geological information on wells.¹⁹

The DoD frequently uses exemption numbers 1, 2, 5, 6, and 7.²⁰

Effect of the Bill

The bill creates a public record exemption for information held by DMA that is stored in a DoD system of records, transmitted using a DoD network or communications device, or pertaining to the DoD

⁹ Office of Program Policy Analysis and Government Accountability, Florida Legislature, *Government Program Summaries: Department of Military Affairs*, <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=4109> (last visited March 5, 2021).

¹⁰ S. 250.07, F.S.

¹¹ S. 250.05(3), F.S.

¹² *Supra* note 16.

¹³ S. 250.05(2), F.S.

¹⁴ *See* s. 250.01(21), F.S.

¹⁵ *Supra* note 17.

¹⁶ 10 U.S.C. s. 394.

¹⁷ 5 U.S.C. s. 552. *See also* DoD Directive 5400.07 for DoD FOIA requests, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/540007p.pdf> (last visited March 23, 2021).

¹⁸ 5 U.S.C. s. 552.

¹⁹ 5 U.S.C. s. 552(8).

²⁰ Email from DMA (Feb. 26, 2021). On file with Local Administration & Veterans Affairs.

pursuant to federal law. Such information is made exempt²¹ from public record requirements. Any information not made exempt by this provision may be disclosed only after DMA makes any redactions in accordance with applicable federal and state laws. The bill provides that the exemption applies retroactively.

The bill provides a statement of public necessity as required by the Florida Constitution. In part, the public necessity statement provides that the disclosure of sensitive military information, such as information on military missions, units, personnel, deployments, and troop concentration could adversely affect military members and national security.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless reviewed and saved from repeal by the Legislature.

B. SECTION DIRECTORY:

Section 1. Amends s. 119.0712, F.S., creating a public record exemption for certain information held by DMA.

Section 2. Provides a public necessity statement.

Section 3. Provides that the bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state government revenues.

2. Expenditures:

The bill does not appear to impact state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

²¹ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Op. Att’y Gen. Fla. 85-62 (1985).

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

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 newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for information received or maintained by DMA and stored within a DoD system of records, transmitted using a DoD network or communications device, or pertaining to DoD.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2021, the Local Administration & Veterans Affairs Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment specified that information received or maintained by DMA that is stored or transmitted on a DoD network or communications device, or pertaining to DoD, is exempt from Florida public records requirements.

On March 30, 2021, the Government Operations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment more closely aligned the public necessity statement with the information that is being exempted.

On April 19, 2021, the State Affairs Committee adopted one strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment specified that certain information held by DMA, rather than received or maintained, is exempt from Florida public records requirements, and clarified in the public necessity statement the necessity for providing retroactive application of the public record exemption.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.