

HOUSE OF REPRESENTATIVES STAFF FINAL BILL 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 and others

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

FINAL HOUSE FLOOR ACTION: 116 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/CS/HB 1069 passed the House on April 23, 2021, and subsequently passed the Senate on April 26, 2021.

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.

The bill was approved by the Governor on June 11, 2021, ch. 2021-86, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 assisting Floridians at risk.⁹

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).

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).

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 pursuant to federal law. Such information is made exempt²¹ from public record requirements. Any

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.

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

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.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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).