

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: SB 1456

INTRODUCER: Senator Rodrigues

SUBJECT: Public Records/Examination and Assessment Instruments

DATE: April 5, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brick</u>	<u>Bouck</u>	<u>ED</u>	Favorable
2.	<u>Candelaria</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1456 makes confidential and exempt from public inspection and copying requirements records related to certain examinations and assessments, including developmental materials and workpapers that are prepared, prescribed, or administered by Florida College System institutions, state universities, or the Department of Education. The bill grants authority to the State Board of Education and the Board of Governors of the State University System to make rules and regulations, respectively, governing the appropriate management of the protected materials.

The bill provides that the public records exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

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

The bill takes effect on July 1, 2021.

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

¹ Art. I, s. 24(a), Fla. Const.

² *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.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 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

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).

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 Art. I, s. 24(c), Fla. Const.

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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

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 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

(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.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

- 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

Exempt Educational Assessment Instruments

Education records, as defined in the Family Educational Rights and Privacy Act (FERPA),²⁷ are confidential and exempt from the requirement to provide public access to public records.²⁸ Also specifically confidential and exempt are examination and assessment instruments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered pursuant to s. 1008.22, F.S., which relates to the student assessment program for public schools, and 1008.25, F.S., which relates to public school student progression, student support, and reporting requirements. Assessments and examinations covered by this exemption include the statewide, standardized comprehensive assessments, end-of-course assessments, and the Florida Alternate Assessment.²⁹ The State Board of Education (SBE) is responsible for adopting rules governing access, maintenance, and destruction of the instruments and related materials.³⁰

The SBE is also responsible for adopting rules governing access, maintenance, and the destruction of examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered pursuant to educator certification requirements. The teacher certification assessments and examinations are also confidential and exempt from public records disclosure requirements.³¹

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 FERPA applies to records created for an educational purpose and maintained by an educational agency. 20 U.S.C. s. 1232g.

²⁸ Section 1002.221(1), F.S.

²⁹ Sections 1008.22, 1008.23 and 1008.25, F.S.

³⁰ Section 1008.23, F.S.

³¹ Sections 1008.23 and 1012.56, F.S.

Other Required Assessments

In addition to the assessments required by ss. 1008.22 and 1008.25, F.S., the law requires:

- A statewide kindergarten screening assessment.³²
- An assessment to measure learning gains of those students in a Department of Juvenile Justice education program.³³
- An assessment for the identification of limited English proficient students.³⁴
- A civic literacy assessment to be administered by Florida College System institutions and state universities to all incoming students.³⁵
- The Preliminary SAT/National Merit Scholar Qualifying Test (PSAT/NMSQT) and the PreACT assessments administered under the Florida Partnership for Minority and Underrepresented Student Achievement.³⁶

III. Effect of Proposed Changes:

The bill expands the scope of the existing public records exemption that covers examination and assessment instruments relating to statewide, standardized assessments and student progression. The bill makes confidential and exempt from public access:

- The statewide kindergarten screening assessment.
- The assessment of learning gains for students in a Department of Juvenile Justice education program.
- Assessments for the identification of limited English proficient students.
- The civic literacy assessment administered by Florida College System (FCS) institutions and state universities.
- Teacher certification assessments.
- The Preliminary SAT/National Merit Scholar Qualifying Test and the PreACT assessments administered under the Florida Partnership for Minority and Underrepresented Student Achievement.

The bill creates a new public records exemption that covers all examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered by an FCS institution, a state university, or the Florida Department of Education. The bill provides that the FCS, Board of Governors of the State University System, and the State Board of Education are responsible for implementing rules or regulations governing access, maintenance, and destruction of the assessments and related records.

The bill provides a statement of public necessity as required by the Florida Constitution. The bill makes legislative findings that the exemptions are necessary in order to:

- Maintain the security of proprietary information included in assessment instruments.
- Prevent cheating, plagiarism, and academic dishonesty in education.

³² Section 1002.69, F.S.

³³ Section 1003.52, F.S.

³⁴ Section 1003.56, F.S.

³⁵ Section 1007.25, F.S.

³⁶ Section 1007.35(5), F.S.

- Ensure the validity of the results derived from the administration of examinations and assessments.
- Maintain the state's ability to objectively assess educational progress and performance
- Protect a student's privacy and his or her ability to protect his or her personal information and educational records.

The bill provides that the public records exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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.

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 creates a new exemption for records relating to certain examinations and assessments, 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:

- Maintain the security of proprietary information included in assessment instruments.
- Prevent cheating, plagiarism, and academic dishonesty in education.
- Ensure the validity of the results derived from the administration of examinations and assessments.
- Maintain the state's ability to objectively assess educational progress and performance.

- Protect a student's privacy and his or her ability to protect his or her personal information and educational records.

This bill exempts from public inspection and copying requirements only examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered by a Florida College System institution, a state university, or the Florida Department of Education. 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:

None.

C. Government Sector Impact:

The test security requirements in the bill for postsecondary and K-12 assessments may have a positive fiscal impact associated with preventing the compromise of test items, which requires a redevelopment of test items. Additionally, it will likely strengthen the Department of Education's ability to collect damages from entities charged and convicted of such violations and theft.³⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁷ Florida Department of Education, *2021 Agency Legislative Bill Analysis of SB 1456* (Jan. 22, 2021), at 3.

VIII. Statutes Affected:

This bill substantially amends section 1008.23 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
