

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 Rules

BILL: CS/SB 1488

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Stargel

SUBJECT: Public Records/Members of the Legislature

DATE: April 19, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Biehl</u>	<u>Roberts</u>	<u>EE</u>	Favorable
2.	<u>Candelaria</u>	<u>McVaney</u>	<u>GO</u>	Fav/CS
3.	<u>Biehl</u>	<u>Phelps</u>	<u>RC</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1488 exempts from public inspection and copying requirements certain identifying and location information held by an agency of current legislators, along with their spouses and children.

The bill defines the term “identification and location information” to mean the:

- Home address and telephone numbers of a current member of the Senate or House of Representatives;
- Name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
- Names and locations of schools and day care facilities attended by the child of a current legislator.

The identification and location information held by an agency is exempt from public inspection and copying requirements if such legislator submits to an agency a written request to exempt such information, and a written statement that such legislator has made a reasonable effort to protect the identification and location information from being accessible through other means.

The bill provides a public necessity statement for the new public records exemption. Passage of the bill requires a two-thirds vote of members present and voting in each house of the Legislature.

The bill takes effect 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, 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, ch. 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 records” 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* (2020-2022), and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1 (2020-2022).

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 records” 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

Exemptions to Public Disclosure Requirements

The Legislature may exempt public records from public disclosure 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 public disclosure 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

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). Such law shall contain only exemptions from public records or open meetings requirements and provisions governing the enforcement of those requirements, and shall relate to one subject.

¹¹ FLA. CONST. art. I, s. 24(c). *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).

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.

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 to meet the purpose.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 may be exempted;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

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

Public Records Exemptions for Certain Public Officers/Employees in Sensitive Roles

There is currently no general public records exemption for personal identifying and location information of Cabinet officers, legislators, and/or their spouses and children.

Such protection does exist for a wide range of other public officers and employees who in the course of their official duties make decisions that could subject them to threats or harassment, such as justices and judges, state attorneys and statewide prosecutors, public defenders, and

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.

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.

certain agency investigative personnel.²⁷ For example, with respect to justices and judges, Florida law exempts the following public records from inspection and copying:²⁸

(e) The home addresses, dates of birth, and telephone numbers of current or former justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the names, home addresses, telephone numbers, dates of birth, and places of employment of the spouses and children of current or former justices or judges; and the name and locations of schools and day care facilities attended by the children of current or former justices and judges.

Penalties for Violations of Public Records Laws

Current law provides general penalties for violations of the Public Records Act. Any public officer who:

- Violates any provision of the Act commits a noncriminal infraction, punishable by fine not exceeding \$500; and
- Knowingly violates the provisions of s. 119.07(1), F.S., is subject to suspension and removal or impeachment and, in addition, commits a first degree misdemeanor.²⁹

Any person who willfully and knowingly violates:

- Any of the provisions of the Act commits a first degree misdemeanor; and
- Section 119.105, F.S.,³⁰ commits a third degree felony.³¹

In addition to the general penalties, a number of individual public records exemptions provide penalties for disclosing the protected information. For example, the exemption for personal identifying information of an enrollee or participant in the Florida Health Choice Program makes it a second degree misdemeanor to knowingly and willfully violate the exemption's confidentiality provisions.³²

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., to exempt certain identifying and location information held by an agency of current legislators, along with their spouses and children.

This section defines the term "identification and location information" to mean the:

- Home address and telephone numbers of a current member of the Senate or House of Representatives;

²⁷ See s. 119.071(4), F.S. (detailing public records protections for a list of public officers and employees and their immediate families).

²⁸ Section 119.071(4)(d)2.e., F.S.

²⁹ Section 119.10(1), F.S.

³⁰ Section 119.105, F.S., provides that a person who comes into possession of exempt or confidential information contained in police reports may not use that information for any commercial solicitation of the victims or relatives of the victims of the reported crimes or accidents and may not knowingly disclose such information to any third party for the purpose of such solicitation during the period of time that information remains exempt or confidential.

³¹ Section 119.10(2), F.S.

³² Section 408.910(14), F.S.

- Name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
- Names and locations of schools and day care facilities attended by the child of a current legislator.

Identification and location information held by an agency is exempt from public inspection and copying requirements if such legislator submits to an agency that has custody of the identification and location information:

- A written request to exempt such information from public disclosure; and
- A written statement that he or she has made a reasonable effort to protect the identification and location information from being accessible through other means available to the public.

Section 2 provides the requisite public necessity statement that identifies potential retribution against legislators (and their families) for making necessary and impactful policy decisions as one justification for the bill. It also cites such threats, harassment, and intimidation as potentially discouraging residents from seeking elective office.

Section 3 provides that 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 in each house of the Legislature for final passage of a bill creating or expanding an exemption to public records disclosure requirements. This bill creates a new exemption for certain identifying and location information of legislators, their spouses, and their children. Therefore, the bill requires a two-thirds vote of members present and voting to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to public records disclosure requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill provides a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to public records disclosure requirements to be no broader than necessary to accomplish the stated purpose

of the law. The stated purpose of the law is to protect legislators and their spouses and children from threats, harassment, and intimidation that may result from their necessary and impactful policy decisions. To a large degree, it mirrors (and is even more limited than some) existing exemptions for other public officers and employees. Thus, the exemption does not appear to be broader than necessary to accomplish the stated 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 imposed, associated with the state making redactions in response to public records requests.

C. Government Sector Impact:

The state may incur costs, and additional workload, 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 section 119.071 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 by Governmental Oversight and Accountability on March 31, 2021:

The CS:

- Defines the term “identification and location information” to mean:
 - The home address and telephone number of a current member of the Senate or House of Representatives;
 - The name, home address, telephone number, and place of employment of the spouse or child of a current legislator; and
 - The name and location of a school or day care facility attended by the child of a current legislator.
- Establishes that identification and location information held by an agency is exempt if such legislator submits to an agency a written request to exempt such information, and a written statement that such legislator has made a reasonable effort to protect the identification and location information from being accessible through other means.
- Removes penalties for any person who knowingly, and with intent to intimidate, disseminates the information protected from disclosure without express authorization of such legislators.

- B. **Amendments:**

None.