

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 1824

INTRODUCER: Senator Powell

SUBJECT: Public Records/Division of Emergency Management or a Local Emergency Management Agency

DATE: April 5, 2021 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Caldwell</u>	<u>MS</u>	<u>Favorable</u>
2.	<u>Candelaria</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1824 expands the current public records exemption relating to any information furnished by a person or business to the Division of Emergency Management or a local emergency management agency for the purpose of receiving assistance with emergency planning to exempt from public inspection and copying requirements the following information held by the Division of Emergency Management or a local emergency management agency:

- All data and records contained in an “emergency management electronic collaboration system”;
- Emergency response assessment reports prepared by the division or a local emergency management agency;
- Evaluation tools prepared by the division or a local emergency management agency; and
- After-action reports prepared by the division or a local emergency management agency.

The bill provides a public necessity statement as required by the Florida Constitution. According to this statement, the exemption is necessary to protect sensitive information regarding the state’s vulnerabilities in responding to emergencies. The public necessity statement also asserts that the exemption is needed to allow agencies to make candid written assessments of their responses to emergencies without making a public record of the assessments, which could be misunderstood or misinterpreted by the public.

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

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

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, 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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

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).

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

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

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).

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 (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.

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
- 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

Information Furnished to the Division of Emergency Management

Information furnished by a person or a business to the Division of Emergency Management for the purpose of being provided assistance with emergency planning is exempt from disclosure under this state's public records laws.²⁷

III. Effect of Proposed Changes:

The bill expands the current public records exemption relating to any information furnished by a person or business to the Division of Emergency Management or a local emergency management agency for the purpose of receiving assistance with emergency planning to exempt from public

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.

²⁷ Section 252.905, F.S.

inspection and copying requirements the following information held by the Division of Emergency Management or a local emergency management agency:

- All data and records contained in an “emergency management electronic collaboration system”;
- Emergency response assessment reports prepared by the division or a local emergency management agency;
- Evaluation tools prepared by the division or a local emergency management agency; and
- After-action reports prepared by the division or a local emergency management agency.

The bill defines the following terms. The term “Emergency management electronic collaboration system” is defined to mean:

A web-based collaborative application designed to support a shared relational database used by the division or a local emergency management agency to store and update transactional data related to an emergency or a disaster which is input and used by multiple sources.

The term “Emergency response assessment report” is defined to mean:

A report containing analysis and evaluation of collected data and information pertinent to the response actions taken by first responders and disaster response stakeholders before, during, or after a disaster or an emergency. For the purposes of this definition, response actions include, but are not limited to, saving lives or relieving suffering, protecting the health and safety of the public, preventing the escalation of an incident, mitigating further damage, maintaining or restoring critical functions, safeguarding the environment, and restoring normal services.

The term “Evaluation tool” is defined to mean:

An instrument or technique used to measure and evaluate the quality or efficacy of disaster response actions or interventions.

The term “after-action report” is defined to mean:

A report containing observations of a disaster, an incident, an emergency, or an exercise and recommendations identifying specific corrective actions for post-event improvements.

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

The bill’s public necessity statement reads as follows:

The Legislature finds it is a public necessity that emergency response assessment reports, evaluation tools, and after-action reports relied upon by emergency management agencies to evaluate the effectiveness of a response and used to

improve that response be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Such assessments, tools, and reports cover a cross-section of agencies and entities and may include protected information, such as threat, vulnerability, and capability assessment information. This protected information must be exempt from public records requirements not only because of its sensitive nature, but to assure participating agencies that their candid assessments of response techniques or procedures will not be misunderstood or misinterpreted, but instead be the basis for meaningful evaluation and improvement of existing response systems. This need outweighs the value of publicly disclosing these emergency response assessment reports, evaluations tools, and after-action reports.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the State Constitution.

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 public records exemption, and thus 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 after-action reports, emergency response assessment reports, and evaluation tools from public disclosure. The bill exempts these records in part because they include information that could be exploited and because agencies may be hesitant to include candid assessments of what went wrong in responding to an emergency in the records if the agencies know that the assessments are going to be subjected to public scrutiny.

The bill exempts all data and records contained in an emergency management electronic collaboration system. The data and records contained in the system are most likely broader than the information described in the public necessity statement. Thus, the information exempted by the bill may 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 division or a local emergency management agency may incur a minimal fiscal impact associated with training staff responsible for complying with public records requests related to the creation of the public records exemptions. Costs associated with redacting the exempt information prior to releasing a record may be incurred. The costs, however, would be absorbed by existing resources, as they are part of day-to-day responsibilities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill exempts from public inspection and copying requirements all data and records contained in an emergency management electronic collaboration system. The bill provides in the public necessity statement that the exemption to emergency response assessment reports, evaluation tools, and after-action reports is necessary to protect sensitive information regarding the state's vulnerabilities in responding to emergencies. To address the potential that the public records exemption is broader than necessary to accomplish the purpose of the law, and to align the

exempted information with the public necessity statement, the Legislature should consider an amendment removing the exemption for “all data and records contained in an emergency management electronic collaboration system.”

VIII. Statutes Affected:

This bill substantially amends section 252.905 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.
