

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/CS/SB 654

INTRODUCER: Rules Committee; Military and Veterans Affairs, Space, and Domestic Security Committee; and Senator Bradley

SUBJECT: Public Records/Department of Military Affairs

DATE: April 20, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Caldwell</u>	<u>MS</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 654 creates a public records exemption for records held by the Department of Military Affairs which:

- Are stored in a United States Department of Defense (DoD) system of records;
- Are transmitted using a DoD network or communication device; or
- Pertains to the DoD pursuant to 10 U.S.C. s. 394.¹

These records are made exempt from disclosure.

In the required public necessity statement, the bill provides as justification for the exemption that it is a public necessity that this information be made exempt from disclosure as national security and the safety of servicemembers and their families could otherwise be compromised.

The exemption applies to information made exempt which is held by the department before, on, or after the effective date of the exemption. Therefore, the exemption applies retroactively.

As this is a public records bill, a two-thirds vote of each House of the Legislature is required for passage.

¹ Federal law 10 U.S.C. s. 394(a), which addresses military cybersecurity operations, provides for the Secretary of Defense to develop, prepare, and coordinate; make ready all armed forces for purposes of; and, when appropriately authorized to do so, conduct, military cyber activities or operations in cyberspace, including clandestine military activities or operations in cyberspace.

The public records exemption is subject to an Open Government Sunset Review and is scheduled for repeal October 2, 2026, unless the Legislature reviews and saves the exemption from repeal before that date.

The bill takes effect upon becoming law.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.² This 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.³

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.⁴ The Public Records Act states that

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁶ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁷ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁸

² FLA. CONST., art. I, s. 24(a).

³ *Id.*

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁷ 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.” 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.”

⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁹ A violation of the Public Records Act may result in civil or criminal liability.¹⁰

Only the Legislature may create an exemption to public records requirements.¹¹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹² Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹³ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁴

When creating or expanding a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'¹⁵ Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.¹⁶

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁷ with specified exceptions.¹⁸ The Act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption or repeal the sunset date.¹⁹ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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

⁹ Section 119.07(1)(a), F.S.

¹⁰ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Id.*

¹³ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁴ FLA. CONST., art. I, s. 24(c)

¹⁵ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁶ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁷ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.

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.

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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²¹
- Releasing sensitive personal information would be defamatory or would jeopardize an 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 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, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is 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

Federal System of Records

The Privacy Act of 1974²⁷ establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals maintained in systems of records by federal agencies. A system of records is a group of records under agency control from which information is retrieved by name or other identifier assigned to an individual.

The Privacy Act requires agencies to give the public notice of their systems of records by publication in the Federal Register. The Privacy Act prohibits the disclosure of a record about an individual from a system of records unless the individual has consented in writing, or the

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 FLA. CONST. art. I, s. 24(c).

²⁶ Section 119.15(7), F.S.

²⁷ 5 U.S.C. s. 552(a).

disclosure qualifies under one of 12 statutory exceptions.²⁸ The Privacy Act authorizes disclosure in the following instances:

- To the officers and employees of the agency which maintains the record, who need the record in the performance of their duties;
- When the disclosure is made under the Freedom of Information Act;
- For an established routine use;
- To the Census Bureau to carry out a census or survey;
- For statistical research or reporting without release of individually identifying data, provided that adequate notice is given;
- To the National Archives and Records Administration as a record of historical value;
- To another agency or an instrumentality of the government for a civil or criminal law enforcement activity;
- To an individual under a compelling circumstance affecting health or safety, and the person whose health or safety is affected is sent a notification of the disclosure;
- To either House of Congress, or one of its committees or subcommittees;
- To the Comptroller General in the course of duties of the General Accountability Office;
- Pursuant to the order of a court of competent jurisdiction; or
- To a consumer reporting agency.²⁹

Applicability of Confidentiality Pursuant to Federal Law on State Agencies

A record that is exempt from disclosure under federal law is not automatically protected from disclosure pursuant to state law. In *Wallace v. Guzman*, the court held that an exemption from disclosure provided in the Freedom of Information Act applies to federal, but not to state agencies.³⁰ The records in question, personal income tax returns and personal financial statements submitted in an application for a loan, are maintained by the state housing authority. These records, which would be protected from disclosure under federal law, are not protected under state law.³¹

Likewise, tenant records of a state public housing authority which would be exempt from disclosure pursuant to the Federal Privacy Act are not protected from disclosure by Florida Public Records Law.³² Here, the public housing authority asserted that it is considered a federal agency for purposes of the mandates of the Federal Privacy Act, as the authority receives funding from the federal government.³³ In refuting this, the court determined:

²⁸ Department of Justice, *Privacy Act of 1974*, available at <https://www.justice.gov/opcl/privacy-act-1974#:~:text=The%20Privacy%20Act%20of%201974,of%20records%20by%20federal%20agencies>. (last visited March 23, 2021).

²⁹ United States Department of Legal Affairs, *Privacy Reminders, Privacy Act “Exceptions”*, available at https://www.dla.mil/Portals/104/Documents/GeneralCounsel/FOIA/PrivacyReminders/FOIA_Reminder12.pdf?ver=pmD36CFRR8zarytVh_aWCg%3d%3d (last visited March 24, 2021).

³⁰ *Wallace v. Guzman*, 687 So.2d 1351, 1353 (Fla. 3d DCA 1997).

³¹ *Id.*

³² *Housing Authority of the City of Daytona Beach v. Gomillion*, 639 So. 2d 117, 118 (Fla. 5th DCA 1994).

³³ *Id.* at 121.

On the basis of the foregoing authority the Court finds that the Housing Authority is not an agency for purposes of the Federal Privacy Act. The Housing Authority is a public body created by state statute. It would be an overly broad reading of the state statute to suggest that the authorization to receive funds from the Federal Government and the requirement to be monitored by the Federal Government thereby renders a public housing authority a federally chartered corporation or federal “agency.” Although the Federal Government funds the Housing Authority and requires compliance with federally mandated standards, it does not provide extensive, detailed or virtually day-to-day supervision over the Housing Authority’s business.³⁴

Exemptions to Public Records Disclosure in Florida Law

Public Records Exemption for Social Security Numbers

A Social Security Number of Agency Personnel

Social security numbers of current and former agency personnel held by an employing agency are confidential and exempt from disclosure.³⁵ However, social security numbers of current and former agency employees may be disclosed by the employing agency if:

- Disclosure of the social security number is expressly required by federal or state law or a court order;
- Disclosure is necessary to another agency or governmental entity for the receiving agency or entity to perform its duties and responsibilities; or
- The employee expressly consents in writing to the disclosure.³⁶

A Social Security Number of a Member of the Public

Additionally, an exemption applies generally to social security numbers held by an agency other than for personnel, in which case, this information is also confidential and exempt from public disclosure. This exemption applies to social security numbers held by an agency before, on, or after the effective date of this exemption. The exemption does not supersede any federal law prohibiting the release of social security numbers or any other applicable public records exemption for social security numbers existing prior to May 13, 2002, or created after that date.³⁷

However, a social security number held by an agency may be disclosed if:

- Disclosure is expressly required by federal or state law or a court order.
- Disclosure is necessary for the receiving agency or governmental entity to perform its duties and responsibilities.
- The individual expressly consents in writing to disclosure.

³⁴ *Id.*

³⁵ Section 119.071(4)(a)1., F.S.

³⁶ Section 119.071(4)(a)2., F.S.

³⁷ Section 119.071(5)(a)5., F.S.

- The disclosure of the social security number is made to comply with the USA Patriot Act of 2001, or Presidential Executive Order 13224³⁸.
- The disclosure is made to a commercial entity for the permissible uses set forth in the federal Driver's Privacy Protection Act of 1994; the Fair Credit Reporting Act; or the Financial Services Modernization Act of 1999.
- The disclosure is for the purpose of the administration of health benefits for an agency employee or his or her dependents.³⁹
- The disclosure of the social security number is for the purpose of the administration of a pension fund administered for the agency employee's retirement fund, deferred compensation plan, or defined contribution plan.
- The disclosure of the social security number is for the purpose of the administration of the Uniform Commercial Code by the office of the Secretary of State.

Public Records Exemption for Medical Information

Medical information pertaining to a prospective, current, or former officer or employee of an agency which, if disclosed, would identify that officer or employee is exempt from disclosure. However, the information may be disclosed if the person to whom the information pertains or the person's legal representative provides written permission or pursuant to court order.⁴⁰

Public Records Exemption for Personal Identifying Information

Personal identifying information required to be maintained for an agency group insurance plan of a dependent child of a current or former agency officer or employee, is exempt from disclosure.⁴¹

Military Cybersecurity Operations

Federal law 10 U.S.C. s. 394(a), authorizes the Secretary of Defense for defense purposes to develop, prepare, and coordinate; make ready all armed forces for purposes of; and, when appropriately authorized to do so, conduct military cyber activities or operations in cyberspace, including clandestine military activities or operations. A "clandestine military activity or operation in cyberspace" is a military activity or operation carried out in cyberspace, authorized by the President or Secretary that is marked by, held in, or conducted with secrecy, to deter, safeguard, or defend against attacks or malicious cyber activities against the DoD information, networks, systems, installations, facilities, or other assets in support of information related capabilities.⁴² A clandestine military activity or operation in cyberspace is considered a traditional military activity.⁴³

³⁸ Presidential Executive Order 13224, signed September 23, 2001, is an anti-terrorism order aimed at blocking financial assets of networks that fund terrorism. U.S. Dep't of State, Bureau of Counterterrorism, *Executive Order 13224*, <https://www.state.gov/executive-order-13224/>

³⁹ Section 119.071(5)(a)6., F.S.

⁴⁰ Section 119.071(4)(b)1., F.S.

⁴¹ Section 119.071(4)(b)2.a., F.S.

⁴² 10 U.S.C. s. 394(f)(1)

⁴³ 10 U.S.C. s. 394(c)

Information Maintained by the Department of Military Affairs

Records held by the Department of Military Affairs include information on military missions, units, deployments, troop concentrations, rules on the use of force, highly deployable units, personal identifying information of servicemembers and their families, and certain identifying information of employees of the Department of Defense.⁴⁴

III. Effect of Proposed Changes:

CS/CS/SB 654 creates a public records exemption for records held by the Department of Military Affairs which:

- Are stored in a United States Department of Defense (DoD) system of records;
- Are transmitted using a DoD network or communication device; or
- Pertains to the DoD pursuant to 10 U.S.C. s. 394.⁴⁵

These records are made exempt from disclosure.

In the required public necessity statement, the bill provides as justification for the exemption that it is a public necessity that this information be made exempt from disclosure as national security and the safety of servicemembers and their families could otherwise be compromised.

The exemption applies to information made exempt which is held by the department before, on, or after the effective date of the exemption. Therefore, the exemption applies retroactively.

As this is a public records bill, a two-thirds vote of each House of the Legislature is required for passage.

This public records exemption is subject to an Open Government Sunset Review and is scheduled for repeal October 2, 2026, unless the Legislature reviews and saves the exemption from repeal before that date.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. 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 shared tax shared with counties and municipalities.

⁴⁴ Department of Military Affairs, *2021 Agency Legislative Bill Analysis* (Jan. 21, 2021) (on file with the Senate Committee on Military and Veterans Affairs, Space, and Domestic Security).

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 public records exemption; thus, the bill requires an extraordinary vote for enactment.

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. This bill includes a statement of public necessity. The statement provides as justification for the exemption that it is a public necessity that this information be made exempt, as disclosure could adversely affect national security and the safety of servicemembers and their families.

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 records held by the Department of Military Affairs which are stored in a United States Department of Defense (DoD) system of records; transmitted using a DoD network or communication device; or pertain to the DoD pursuant to federal law 10 U.S.C. s. 394, that addresses military cybersecurity. As the exemption does not protect specific categories of information, 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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.0712 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/CS by Rules on April 20, 2021:

The committee substitute:

- Changes references to records “held by” from records that are “received or maintained by” the Department of Military Affairs; and
- Clarifies in the public necessity statement that the public records exemption applies retroactively.

CS by Military and Veterans Affairs, Space, and Domestic Security on March 30, 2021:

The committee substitute:

- Replaces information currently provided in the bill as protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974, with that of information stored in a United States Department of Defense (DoD) system of records; transmitted using a DoD network or communications device; or pertaining to the DoD, pursuant to 10 U.S.C. s. 394 on military cybersecurity operations;
- Removes language that provided that any information not made exempt may be disclosed only after the department makes redactions in accordance with applicable federal and state laws, as this is unnecessary.

B. Amendments:

None.

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