

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 7031 PCB SAC 22-01 OGSR/Alleged Victim or Victim of Sexual Harassment

**SPONSOR(S):** State Affairs Committee, Chaney

**TIED BILLS:** IDEN./SIM. BILLS: SB 7024

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: State Affairs Committee	21 Y, 0 N	Mwakyanjala	Williamson
1) Public Integrity & Elections Committee	15 Y, 0 N	Roy	Rubottom

**SUMMARY ANALYSIS**

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful to discriminate against someone on the basis of race, color, national origin, sex, or religion. The Equal Employment Opportunity Commission has defined harassment on the basis of sex as a violation of Title VII. The Florida Civil Rights Act also protects against sexual harassment in the workplace.

Current law provides a public records exemption for personal identifying information of the alleged victim in an allegation of sexual harassment.

The bill expands the public record exemption to include personal identifying information of a victim of sexual harassment. It clarifies that such information is only confidential and exempt if it identifies the person as an alleged victim or victim of sexual harassment. The bill allows the alleged victim or victim to waive confidentiality in writing.

The bill may have a minimal fiscal impact on state or local governments.

The bill has an effective date of October 1, 2022.

**Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands an existing public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The Act 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.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

##### Sexual Harassment

##### *Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful to discriminate against someone on the basis of race, color, national origin, sex, or religion.<sup>5</sup> The Equal Employment Opportunity Commission has defined harassment on the basis of sex as a violation of Title VII.<sup>6</sup> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.<sup>7</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

<sup>3</sup> Section 119.15(6)(b), F.S.

<sup>4</sup> Section 24(c), Art. I, FLA. CONST.

<sup>5</sup> U.S. Department of Justice, *Laws Enforced by the Employment Litigation Section, Title VII of the Civil Rights Act of 1964*, available at <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> (last visited January 15, 2022).

<sup>6</sup> 29 C.F.R. Section 1604.11(a); *see also* U.S. Equal Employment Opportunity Commission, *Sexual Harassment*, available at [https://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](https://www.eeoc.gov/laws/types/sexual_harassment.cfm). (last visited January 22, 2022).

<sup>7</sup> *Id.*

The Florida Civil Rights Act also protects against sexual harassment. The Florida Civil Rights Act makes it an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.<sup>8</sup> This right against sexual discrimination in the workplace has been extended to include protection against sexual harassment in the workplace.<sup>9</sup>

### *State Agency Sexual Harassment Policies*

Current law regarding employment at state agencies declares sexual harassment a form of discrimination.<sup>10</sup> The Department of Management Services, which is the state's personnel agency, adopted rules on sexual harassment that are applicable to all state agencies. Rule 60L-40.001, F.A.C., provides that:

Sexual harassment means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature from any person directed towards or in the presence of an employee or applicant when:

- (a) Submission to such conduct is either explicitly or implicitly a term or condition of an individual's employment;
- (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

### Public Record Exemption under Review

In 2017, the Legislature created a public records exemption for personal identifying information of the alleged victim in an allegation of sexual harassment.<sup>11</sup> Such records are confidential and exempt from public record requirements.<sup>12</sup> The personal identifying information of the alleged victim in an allegation of sexual harassment may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities.<sup>13</sup>

The 2017 public necessity statement<sup>14</sup> for the exemption provides that the Legislature finds that:

The disclosure of such information could harm alleged victims by placing them at risk of further harassment and retaliation. Additionally, the potential for disclosure of such information could create a disincentive for alleged victims to report instances of alleged harassment. The Legislature finds that the potential harm that may result from the release of such information outweighs any public benefit that may be derived from the disclosure of such information.<sup>15</sup>

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<sup>8</sup> Section 760.10(1)(a), F.S.

<sup>9</sup> *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099, 1102 (Fla. 1989).

<sup>10</sup> Section 110.1221, F.S.

<sup>11</sup> Chapter 2017-103, L.O.F., codified in s. 119.071(2)(n), F.S.

<sup>12</sup> There is a difference between records the Legislature designates as 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. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 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 custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>13</sup> Section 119.071(2)(n), F.S.

<sup>14</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

<sup>15</sup> Section 2, Ch. 2017-103, L.O.F.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless reenacted by the Legislature.<sup>16</sup>

During the 2021 interim, subcommittee staff sent questionnaires to state agencies, as well as each county and municipality, concerning the exemption.<sup>17</sup> The majority of entities recommended reenacting the public record exemption as is.<sup>18</sup> Three entities recommended reenacting the exemption with varying degrees of changes and<sup>19</sup> one entity recommended repealing the exemption.<sup>20</sup>

### **Effect of the Bill**

The bill expands the public record exemption to include personal identifying information of a victim of sexual harassment. It clarifies that such information is only confidential and exempt if the information identifies the person as an alleged victim or victim of sexual harassment. The bill allows the alleged victim or victim to waive his or her confidentiality in writing.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of October 1, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

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<sup>16</sup> Section 119.071(2)(n), F.S.

<sup>17</sup> Open Government Sunset Review Questionnaire, Alleged Victims of Sexual Harassment, responses on file with the Government Operations Subcommittee.

<sup>18</sup> *Id.*

<sup>19</sup> One entity recommended clarifying whether the alleged victim's personal identifying information is confidential and exempt in all contexts or only when used to identify the person as the alleged victim. Two of the three entities recommended clarifying whether the alleged victim's personal identifying information remains confidential and exempt once an investigation is concluded and the allegations are unsubstantiated or unfounded. One entity recommended the exemption be merged with s. 119.071(2)(h)1.b., F.S. *Id.*

<sup>20</sup> This entity believed current exemptions for active investigations are adequate to protect alleged victims of sexual harassment. This entity also recommended that if the law is reenacted, the exemption should be clarified as applying only to allegations that constitute unlawful sexual harassment. *Id.*

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on agencies as agency staff responsible for complying with public record requests may require additional training related to the expansion of the public record exemption. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agencies.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. This bill expands an existing public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands an existing public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands an existing public record exemption to include the personal identifying information of a victim of sexual harassment. The bill also clarifies that such information is only confidential and exempt if it identifies that person as an alleged victim or victim of sexual harassment and allows such person to waive confidentiality. As such, the exemption does not appear to be in conflict with the constitutional requirement that it be no broader than necessary to accomplish its stated purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.