

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: CS/SB 552

INTRODUCER: Commerce and Tourism Committee and Senator Hooper

SUBJECT: Public Records/Broadband Opportunity Program

DATE: March 28, 2023 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Renner</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
2.	<u>Limonos-Borja</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:
COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 552 makes confidential and exempt from public record inspection and copying requirements certain information relating to communications services locations, project proposals, and challenges submitted to the Department of Economic Opportunity (department) under the Broadband Opportunity Program, or pursuant to a federal broadband access grant program implemented by the department.

The bill provides that that the exemption does not apply to the department’s requirement to publish a description of proposed unserved areas to be served and proposed broadband Internet speeds of the areas to be served on the department’s website.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2028, unless reviewed and reenacted by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution.

The bill creates a new public records exemption and, therefore, requires a two-thirds vote of the members present and voting for final passage.

The bill may have a minimal fiscal impact on the department for incurring costs related to the redaction of records in responding to public records requests.

The bill takes effect July 1, 2023.

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 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., known as the Public Records Act, provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

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

Section 119.011(12), F.S., defines “public records” to include:

[a]ll 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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2022-2024) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2022-2024)

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 *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 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.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

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.⁹ 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.¹⁰

General exemptions from the public records requirements are contained in the Public Records Act.¹¹ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹²

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as "confidential and exempt" are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as "exempt" may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ *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).

¹¹ *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).

¹² *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).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

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., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

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 the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption *and* it meets one of the following purposes:

- 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 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

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.

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.

Broadband Internet Deployment

High-speed broadband can be essential to innovation, economic opportunity, healthcare, and civic engagement.²⁷ Access to a sufficient internet connection has only grown more important during the COVID-19 pandemic, which required many Americans to connect to their family and friends, schooling, work, and even medical appointments over the internet.²⁸

Broadband internet is a high speed internet that is faster than dial-up access and is always on; in 2015, the Federal Communications Commission (FCC) defined broadband as 25/3 megabits per second (Mbps), i.e., 25 Mbps (download rate) and 3 Mbps (upload rate).²⁹ Consumers can receive Broadband internet through several different technologies, including a digital subscriber line (DSL), a cable modem, fiber, wireless, satellite, and broadband over power lines.³⁰

While Florida's urban areas are served at a fixed broadband coverage rate of 96 percent, its rural areas are served at a rate of 78.6 percent.³¹ This disparity is caused primarily by high per-unit construction costs required to build broadband infrastructure across larger swaths of rural geographic areas.³²

Florida's Office of Broadband

In 2020 the Legislature created the Florida Office of Broadband (Office) within the department.³³ The Office is tasked with developing, marketing, and promoting broadband Internet service in the state.³⁴

Specifically, the Office must:³⁵

- Create a strategic plan for increasing the availability and use of broadband Internet service in Florida which must incorporate federal broadband initiatives and also include a process to review and verify public input regarding transmission speeds and availability of broadband Internet service throughout the state;

²⁷ U.S. Federal Communications Commission (FCC), *2020 Broadband Deployment Report*, at 1 (April 24, 2020), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2020-broadband-deployment-report> (last visited Mar. 23, 2023).

²⁸ FCC, *Emergency Broadband Benefit Report and Order*, at 2-3 (Feb. 26, 2021), <https://docs.fcc.gov/public/attachments/FCC-21-29A1.pdf> (last visited Mar. 23, 2023).

²⁹ Congressional Research Service (CRS), *State Broadband Initiatives: Selected State and Local Approaches as Potential Models for Federal Initiatives to Address the Digital Divide*, at 2-3 (Apr. 6, 2020), <https://crsreports.congress.gov/product/pdf/R/R46307> (last visited Mar. 23, 2023).

³⁰ CRS, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs*, at 1 (Oct. 25, 2019), <https://fas.org/sgp/crs/misc/RL30719.pdf> (last visited Mar. 23, 2023).

³¹ FCC, *2021 Broadband Deployment Report*, at 58 (Jan. 19, 2021), <https://www.fcc.gov/document/fcc-annual-broadband-report-shows-digital-divide-rapidly-closing> (last visited March 10, 2023). For purposes of this data, "fixed broadband services" are measured at 25 megabits per second downstream and 3 megabits per second upstream.

³² National Telecommunications and Information Administration, American Broadband Initiative, *Milestones Report*, at 11 (Feb. 13, 2019), <https://www.ntia.doc.gov/report/2019/american-broadband-initiative-milestones-report> (last visited Mar. 23, 2023). See also CRS, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs*, at 7.

³³ Chapter 2020-26, Laws of Fla.

³⁴ Section 288.9961(4), F.S. See also, Florida Department of Economic Opportunity, Office of Broadband, *About Us*, <https://floridajobs.org/community-planning-and-development/broadband/office-of-broadband> (last visited Mar. 23, 2023).

³⁵ Section 288.9961(4), F.S.

- Build local technology planning teams representing, among others, libraries, schools, colleges and universities, local health care providers, private businesses, community organizations, economic development organizations, local governments, tourism, parks and recreation, and agriculture in order to identify needs and resources to reduce barriers to the deployment of broadband Internet services;
- Encourage the use of broadband Internet service, especially in rural, unserved, and underserved areas of the state through grant programs;³⁶
- Monitor, participate in, and provide input in proceedings of the FCC and other federal agencies related to the geographic availability and deployment of broadband Internet service as necessary to ensure that Florida’s rural, unserved, and underserved areas are best positioned to benefit from federal and state broadband deployment programs; and
- Administer Florida’s Broadband Opportunity Program.

The department may apply for and accept federal grant funds, enter into necessary or useful contracts, and establish any committee or workgroup to further the above goals. Additionally, the department has rulemaking authority to implement sections 288.9961-288.9963, F.S., relating to the Office.³⁷

In November 2022, the Office received \$247.8 million from the U.S. Treasury for the Capital Projects Fund Broadband Infrastructure Program. The Office was also awarded \$2.4 million for their Digital Equity Planning Grant, and \$5 million for the BEAD 5-year action plan.³⁸

Broadband Opportunity Program

The Office administers the Broadband Opportunity Program to award grants in order to expand broadband Internet service to unserved areas of Florida.³⁹ Grant funds may not be used to provide broadband Internet service to a geographic area where broadband Internet is already deployed by at least one provider.⁴⁰ Applicants eligible for grant awards include corporations, limited liability companies, general partnerships, limited partnerships, political subdivisions, and Indian tribes.⁴¹ To operate the program, the Florida Legislature appropriated \$400 million in federally funded State and Local Fiscal Recovery Funds (SLERF) to increase Floridians’ access to reliable, affordable, and high-speed internet service.⁴²

An eligible applicant may submit a grant application to the Office which must include the following:

- A description of the project area;

³⁶ Section 288.9961(2)(f), F.S., defines the term “underserved” to mean a geographic area of this state in which there is no provider of broadband Internet service that offers a connection to the Internet with a capacity for transmission at a consistent speed of at least 100 Mbps downstream and at least 10 Mbps upstream. Section 288.9961(2)(g), F.S., defines the term “unserved” as a geographic area in which there is no broadband Internet service provider.

³⁷ Section 288.9961(5), F.S.

³⁸ Florida Department of Economic Opportunity, Office of Broadband, *About Us*, <https://floridajobs.org/community-planning-and-development/broadband/office-of-broadband> (last visited Mar. 23, 2023).

³⁹ Section 288.9962(1), F.S.

⁴⁰ Section 288.9962(2), F.S.

⁴¹ Section 288.9962(3), F.S.

⁴² Florida Department of Economic Opportunity, *Broadband Opportunity Program*, <https://www.floridajobs.org/community-planning-and-development/broadband/broadband-opportunity-program> (last visited March 10, 2023).

- A description of the kind and amount of broadband Internet service infrastructure that is proposed to be deployed;
- Evidence demonstrating the unserved nature of the project area;
- The number of households and businesses that would have access to broadband Internet service as a result of the grant;
- A list of significant community institutions that would benefit from the grant;
- The total cost of the project and the timeframe in which it would be completed;
- A list identifying sources of funding or in-kind contributions that would supplement any awarded grant; and
- Any other information required by the Office.⁴³

The Office must annually publish on its website the specific criteria and quantitative scoring system it will use to evaluate or rank grant applications.⁴⁴ Within 3 business days after the close of the grant application process, the Office must publish on its website, from each grant application submitted, the proposed unserved areas to be served as well as the proposed broadband Internet speeds of the areas to be served, and a service map of the proposed project areas.⁴⁵ For the 2023 grant cycle, the application window closed on December 9, 2022. The Office receive 110 applications⁴⁶ and made 58 awards⁴⁷ pursuant to the Program.

A broadband Internet service provider that provides existing service in or adjacent to a proposed project area may submit to the Office, within 45 days after publication of the information, a written challenge to an application.⁴⁸ The Office must evaluate each challenge and if the Office determines that the provider currently provides, has begun construction to provide, or commits to provide broadband Internet service in the proposed project area, the Office may not fund the challenged project.⁴⁹

III. Effect of Proposed Changes:

The bill creates a public record exemption for certain information relating to communications services locations, project proposals, and challenges submitted to the department under the Broadband Opportunity Program, or pursuant to a federal broadband access grant program implemented by the department.

Section 1 provides certain information is confidential and exempt if such information is not otherwise publicly available and the release of such information would reveal:

- The location or capacity of communications network facilities;

⁴³ Section 288.9962(5), F.S.

⁴⁴ Section 299.9962(6)(a), F.S.

⁴⁵ Section 288.9962(6)(b), F.S. *See also* Rule 73C-50.004(1), F.A.C.

⁴⁶ Florida DEO, *2022 Submitted Applications*, available at <https://www.floridajobs.org/community-planning-and-development/broadband/broadband-opportunity-program/2022-submitted-applications> (last visited Mar. 23, 2023).

⁴⁷ Florida DEO, *Broadband Opportunity Awards* (Feb. 3, 2023), available at https://www.floridajobs.org/docs/default-source/community-planning-development-and-services/broadband/bop-awards-2-2-2023.pdf?sfvrsn=a0ed56b0_2 (last visited Mar. 23, 2023).

⁴⁸ Section 288.9962(6)(c), F.S.

⁴⁹ Section 288.9962(6)(e), F.S.

- Communications network areas, including geographical maps indicating actual or proposed locations of network infrastructure or facilities;
- The features, functions, and capabilities of communications network infrastructures and facilities;
- Security, including cybersecurity, of the design, construction, and operation of the communications network and associated services and products;
- Specific customer locations; or
- Sources of funding or in-kind contributions for a project.

Section 1 provides that that the exemption does not apply to the department's requirement to publish a description of proposed unserved areas to be served and proposed broadband Internet speeds of the areas to be served on the department's website.

The exemption is subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2028, unless the Legislature reenacts the exemption.

Section 2 provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution. The public necessity statement provides that the disclosure of sensitive information relating to the location, capacity, features, functions, and security of communications services providers could result in the identification of vulnerabilities in such networks and allow a security breach that could damage the networks or disrupt the networks' safe and reliable operation, adversely impacting the public health and safety of the state.

Section 3 provides the bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or 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 record exemption; 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. The bill creates a new public records exemption. Thus, the bill includes a public necessity statement.

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 bill creates a public record exemption for information relating to communications services locations, project proposals, and challenges submitted to the department under the Broadband Opportunity Program. 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:

The private sector will continue to be subject to the cost associated with an agency's review and redactions of exempt records in response to a public records request.

C. Government Sector Impact:

The bill may have a minimal fiscal impact on the department for incurring costs 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 Commerce and Tourism on March 13, 2023:

The amendment provides that information submitted to the department pursuant to a federal broadband access grant program is exempt from public records. The amendment further provides that the exemption does not apply to the department's requirement to publish a description of proposed unserved areas to be served and proposed broadband Internet speeds of the areas to be served on the department's website.

- B. **Amendments:**

None.