

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 Ethics and Elections

BILL: SPB 7012

INTRODUCER: Ethics and Elections Committee

SUBJECT: OGSR/Secure Login Credentials Held by the Commission on Ethics

DATE: December 13, 2023 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---------------------------------------|
| 1. | Cleary | Roberts | | EE Submitted as Comm. Bill/Fav |

I. Summary:

SPB 7012 saves from repeal current public records exemptions for all secure login credentials held by the Commission on Ethics for the purpose of allowing access to the electronic financial disclosure filing system, as well as information entered into the system for purposes of making the disclosure.

Pursuant to the Open Government Sunset Review Act, these exemptions will repeal on October 2, 2024, unless reenacted by the Legislature. This bill saves the exemptions from repeal by deleting the scheduled repeal date.

This bill takes effect October 1, 2024.

II. Present Situation:

Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ 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.²

¹ FLA. CONST. art. I, s. 24(a)

² *Id.* See also, *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762-763 (Fla. 2010).

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ 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.⁴

The Public Records Act does not apply to legislative or judicial records.⁵ 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.

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 which are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

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 records 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

Only the Legislature may create an exemption to public records requirements.⁹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ 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 provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.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

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32, 34 (Fla. 1992); see also *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

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.*

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST. art. I, s. 24(c).

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 Act (the OGSR Act), prescribe a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ The OGSR Act requires the repeal of such exemptions 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.¹⁸ In practice, many exemptions are continued by repealing the sunset date, rather than reenacting the exemption.

The OGSR 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.¹⁹ 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁰
- It protects sensitive, personal information, the release of which 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;²¹ or
- It protects trade or business secrets.²²

The OGSR Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the OGSR Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

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. 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.

¹⁷ 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.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

²³ 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?

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 again required.²⁴ 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁵

The Code of Ethics for Public Officers and Employees

The Code of Ethics for Public Officers and Employees (Code of Ethics)²⁶ establishes ethical standards for public officials and is intended to “ensure that public officials conduct themselves independently and impartially, not using their office for private gain other than compensation provided by law.”²⁷ The Code of Ethics pertains to various ethical issues, such as ethics trainings, voting conflicts, full and public disclosure of financial interests, standards of conduct, and the Commission on Ethics (commission).²⁸

Commission on Ethics

The State Constitution requires the creation of an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within jurisdiction of the judicial qualifications commission.²⁹ The commission was created by the Legislature in 1974 “to serve as guardian of the standards of conduct” for state and local public officials and employees.³⁰ In addition to its constitutional duties, the commission, in part:

- Renders advisory opinions to public officials.³¹
- Makes recommendations to disciplinary officials when appropriate for violations of ethics and disclosure laws.³²
- Administers the executive branch lobbying registration and reporting law.³³
- Maintains financial disclosure filings of constitutional officers and state officers and employees.³⁴

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- 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?

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ Section 119.15(7), F.S.

²⁶ See Pt. III, Ch. 112, F.S.; see also Art. II, s. 8(h)(1), FLA. CONST.

²⁷ Florida Commission on Ethics, *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, available at <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (last visited December 13, 2023).

²⁸ See Pt. III, Ch. 112, F.S.

²⁹ Article III, s. 8(g), FLA. CONST.

³⁰ Florida Commission on Ethics, *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, available at <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (last visited December 13, 2023); see also s. 112.320, F.S.

³¹ Section 112.322(3)(a), F.S.

³² Section 112.322(2)(b), F.S.

³³ Sections 112.3215 and 112.32155, F.S.

³⁴ Section 112.3144, F.S.

- Administers automatic fines for public offices and employees who fail to timely file required annual financial disclosure.³⁵

Disclosure of Financial Interests

The State Constitution requires elected constitutional officers, candidates for such offices, and statewide elected officers to file “full and public disclosure of their financial interests.”³⁶ Other public officers, candidates, and public employees may be required to file a full and public disclosure of their financial interests as determined by law.³⁷

The term “full and public disclosure of financial interests” means the reporting individual must disclose his or her net worth and the value of each asset and liability in excess of \$1,000.³⁸ The disclosure must be accompanied by either a copy of the filer’s most recent federal income tax return or a sworn statement that identifies each separate source and amount of income that exceeds \$1,000.³⁹ The commission has created by rule CE Form 6 (Form 6) to be used to make the required full and public financial disclosure.⁴⁰

Currently, individuals holding the following positions must file Form 6:⁴¹

- Governor.
- Lieutenant Governor.
- Cabinet members.
- Legislators.
- State attorneys.
- Public defenders.
- Clerks of circuit court.
- Sheriffs.
- Tax collectors.
- Property appraisers.
- Supervisors of elections.
- County commissioners.
- Mayors and elected members of a municipal governing body.
- Each Member on the Commission of Ethics.
- Elected Superintendents of schools.
- District school board members.
- Jacksonville City Council members, including the mayor.
- Judges of compensation claims.

³⁵ Section 112.31455, F.S.; *see also Florida Commission on Ethics, Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, available at <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (last visited December 13, 2023).

³⁶ Article II, s. 8(a), FLA. CONST.

³⁷ *See* s. 112.3144(1), F.S.

³⁸ Article II, s. 8(j)(1), FLA. CONST.

³⁹ *Id.*; *see also* s. 112.3144, F.S.

⁴⁰ Section 112.3144(8), F.S.; *see also* r. 34-7.010, F.A.C.

⁴¹ Rule 34-8.003, F.A.C.; *see also* Commission on Ethics, *Filing Information*, available at https://www.ethics.state.fl.us/Documents/Forms/Form1.html#form_6 (last visited December 13, 2023).

- Duval County Superintendent of Schools.
- Florida Housing Finance Corporation board members.
- Each member of a large-hub commercial service airport.
- Each member of an expressway authority, a transportation authority (except the Jacksonville Transportation Authority), a bridge authority, or a toll authority created pursuant to chapter 348 or Chapter 343, F.S., or any other general law.

Reporting individuals must file Form 6 annually with the commission by 11:59 p.m. on July 1.⁴² Additionally, candidates for a constitutional office must make a full and public disclosure of their financial interests at the time of qualifying.

Current law requires a less detailed disclosure of financial interests using the commission's CE Form 1 (Form 1) for certain local officers, including certain officers holding elected positions in political subdivisions of the state, as well as specified appointive officers.⁴³ Other persons filing Form 1 include specified state officers and employees as well as persons seeking to qualify as candidates for state or local office.⁴⁴

Form 1 requires those individual to disclose their primary sources of income, other than their public position, secondary sources of income, real property, intangible personal property, liabilities, and interests in specific businesses.⁴⁵

Although no specified dollar values of incomes, property or liabilities are required to be reported, the filer must report which assets or liabilities exceed certain dollar thresholds.⁴⁶ Form 1 filers must disclose all sources of income in excess of \$2,500, excluding public salary, all sources of income from a business entity that the filers had a material interest in where their gross income was in excess of \$5,000 and in excess of 10 percent of the business' gross income. Form 1 filers must also disclose any property, except for their residence or vacation home, in which the person owns more than five percent of the value of the property, as well as any intangible property in excess of \$10,000 and any liability in excess of \$10,000.⁴⁷ Form 1 must be filed annually with the commission by 11:59 p.m. on July 1.⁴⁸

Electronic Financial Disclosure

In 2015, the commission began the process of implementing an electronic filing system for financial disclosures.⁴⁹ That system was procured and testing began in 2022.⁵⁰ Form 6 filers began filing electronically as of January 1, 2023.⁵¹ Form 1 filers will beginning filing using the electronic filing system as of January 1, 2024.⁵²

⁴² Section 112.3144(8)(d), F.S.

⁴³ Section 112.3145, F.S.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Section 112.3145(3), F.S.

⁴⁷ Section 112.3145(3)(b), F.S.

⁴⁸ Section 112.3145(2)(b), F.S.

⁴⁹ Section 112.31445, F.S.

⁵⁰ Section 112.31446(2), F.S.

⁵¹ Section 112.3144(8)(b)2., F.S.

⁵² Section 112.3145(2)(e), F.S.

Public Record Exemption under Review

In 2019, the Legislature created two public records exemptions to facilitate the use of the electronic financial disclosure system.⁵³ The first exemption protects all secure login credentials held by the commission for the purpose of allowing access to the electronic financial disclosure filing system. The second exemption protects information entered into the system prior to submission for the purpose of making the disclosure.⁵⁴ Once information entered into the system is submitted to the commission or filed with a qualifying officer, the information loses its exempt status and becomes public.⁵⁵

The 2019 public necessity statement⁵⁶ provides that:

The Legislature finds that the public's need for access to information included in the full and public disclosures of financial interests or statements of financial interests filed by reporting individuals be balanced with the filer's interest in safeguarding personally sensitive information. The Legislature further finds that the unemotional publication of such information may subject the filer to identity theft, financial harm, or other adverse impacts.⁵⁷

Pursuant to the OGSR Act, the exemptions will repeal on October 2, 2024, unless reenacted by the Legislature.

During the 2023 interim, House and Senate staff met with commission staff regarding the public record exemptions under review. Commission staff emphasized the importance of the exemptions as it protects secure login credentials to the electronic filing system itself as well as personally sensitive information that may subject the filer to identity theft, financial harm, or other adverse impacts if not protected. Therefore, commission staff recommended the exemptions be reenacted as is.

III. Effect of Proposed Changes:

The bill removes the scheduled repeal date of the public record exemptions, thereby maintaining the public record exemptions for all secure login credentials used to access the electronic financial disclosure filing system, as well as information entered into the system for the purpose of making disclosure prior to submission.

The bill takes effect October 1, 2024.

⁵³ Section 112.31446(6), F.S.

⁵⁴ Section 112.31446(6)(a), F.S.

⁵⁵ Section 112.31446(6)(b), F.S.

⁵⁶ Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the necessity justifying the exemption."

⁵⁷ Chapter 2019-40, L.O.F.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 does not create or expand an exemption, so it does not require a two-thirds 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 does not create or expand an exemption, so it does not require a public necessity statement.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

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 112.31446, 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.