

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1069 Pub. Rec./Department of Military Affairs

SPONSOR(S): Payne

TIED BILLS: **IDEN./SIM. BILLS:** SB 654

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Administration & Veterans Affairs Subcommittee		Renner	Miller
2) Government Operations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The Freedom of Information Act (FOIA) provides the public the right to request access to records from any federal agency. Federal agencies are required to disclose any information requested under the FOIA unless it falls under certain exemptions. The Privacy Act of 1974 establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.

Current law provides three general public records exemptions that apply to all state agency personnel: disclosure of an employee's social security number, medical information, and personal identifying information of dependent children who are insured by an agency group insurance plan.

Current law also provides that the identification and location information of current or former active duty servicemembers of the United States Armed Forces, their reserve components, or the National Guard who served after September 11, 2001, and their spouses and dependents are exempt from public records.

The bill provides an exemption from Florida public records requirements for records in the custody of DMA which contain information that is protected from disclosure under the FOIA and the Privacy Act of 1974. Any information not made exempt under this provision may be disclosed only after DMA makes any redactions in accordance with the applicable federal and state laws. The bill provides that the exemption is retroactive.

The bill provides for repeal of the exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides public necessity statements as required by the Florida Constitution.

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 newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a).¹ The general law must state with specificity the public necessity justifying the exemption² and must be no more broad than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁴ 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.⁵

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁶

General Public Records Exemptions for State Agency Personnel

There are three general public records exemptions that apply to all state agency personnel: disclosure of an employee's social security number, medical information, and personal identifying information of dependent children who are insured by an agency group insurance plan.⁷

Social Security Numbers

Social security numbers of all current and former agency personnel are confidential and exempt when held by the employing agency.⁸ An employing agency may only release social security numbers for the following reasons:

- It is required by federal or state law, or court order;
- A receiving government agency needs the social security number to perform its duties; or
- The employee consents to disclose his or her social security number.⁹

¹ Art. I, s. 24(c), Fla. Const.

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ Art. I, s. 24(c), Fla. Const.

⁴ S. 119.15, F.S.

⁵ S. 119.15(6)(b), F.S.

⁶ S. 119.15(3), F.S.

⁷ S. 119.071(4)(a) and (b), F.S.

⁸ S. 119.071(4)(a)1., F.S.

⁹ S. 119.071(4)(a), F.S.

In addition, there is a general exemption for social security numbers which applies to the public that makes social security numbers confidential and exempt.¹⁰ This exemption applies to any agency that holds anyone's social security number, including those belonging to the personnel of that agency. This exemption, however, permits the agency to disclose social security numbers of agency personnel in order to administer health or retirement benefits.¹¹

Medical Information

A prospective, current, or former agency employee's medical information is also exempt from public disclosure if the medical information could identify the employee. Such information may be disclosed if the person to whom the information pertains or the person's legal representative provides written permission pursuant to a court order.¹²

Personal Identifying Information

The personal identifying information of a dependent child of an agency employee who is insured by an agency group insurance plan is exempt from public disclosure. This exemption applies to the dependent children of current and former employees and is also retroactively applied.¹³

Public Records Exemption for Identification and Location Information of Current or Former Servicemembers¹⁴

The identification and location information of current or former active duty servicemembers of the United States Armed Forces, their reserve components, or the National Guard who served after September 11, 2001, and their spouses and dependents are exempt from public records. In order for the exemption to apply, the current or former servicemember must submit to the custodial agency a written request and a written statement that reasonable efforts had been made to protect the identification and location information from being accessible through other means available to the public.

Federal Freedom of Information Act & Privacy Act

The Freedom of Information Act (FOIA) provides the public the right to request access to records from any federal agency.¹⁵ Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of the following nine exemptions:¹⁶

1. Information that is classified to protect national security.
2. Information related solely to the internal personnel rules and practices of an agency.
3. Information that is prohibited from disclosure by another federal law.
4. Trade secrets or commercial or financial information that is confidential or privileged.
5. Privileged communications within or between agencies, including those protected by:
 - a. Deliberative process privilege (provided the records were created less than 25 years before the date on which they were requested)
 - b. Attorney-work product privilege
 - c. Attorney-client privilege
6. Information that, if disclosed, would invade another individual's personal privacy.
7. Information compiled for certain law enforcement purposes;
8. Information that concerns the supervision of financial institutions.
9. Geological information on wells.

¹⁰ S. 119.071(5)(a)5., F.S.

¹¹ S. 119.071(5)(a)6.f. and g., F.S.

¹² S. 119.071(4)(b)1., F.S.

¹³ S. 119.017(4)(b)2., F.S.

¹⁴ S. 119.071(5)(k), F.S.

¹⁵ 5 U.S.C. s. 552

¹⁶ 5 U.S.C. s. 552(8)

The Department of Defense frequently uses exemption numbers 1, 2, 5, 6 and 7.¹⁷

The Privacy Act of 1974¹⁸ establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies. The Privacy Act requires agencies to give public notice of their systems of records by publication in the Federal Register.¹⁹ The Privacy Act prohibits the disclosure of a record about an individual from a system of records absent the written consent of the individual, unless the disclosure is pursuant to one of the following 12 statutory exceptions:²⁰

- Need to know within the agency;
- Required FOIA disclosure;
- Routine uses;
- Bureau of the Census;
- Statistical research;
- National Archives;
- Law enforcement request;
- Health or safety of an individual;
- Congress;
- General Accounting Office;
- Court order; or
- Debt Collection Act.

Department of Military Affairs

The Florida Department of Military Affairs (DMA) is a state agency created to provide management oversight and administrative support to the Florida National Guard (FLNG).²¹ DMA is responsible for:

- Combat readiness and emergency preparedness of the FLNG;
- Responding to disasters and civil disturbances;
- Drug interdiction operations; and
- Assisting Floridians at risk.²²

The Adjutant General, who is a federally recognized general officer, is an appointee of the Governor²³ and serves as both the agency head of DMA²⁴ and the commanding officer of the FLNG. Under the Adjutant General's command are over 11,000 FLNG members and 2,300 full-time military personnel.²⁵ Military personnel of the DMA includes any person who is required to wear a military uniform in performing his or her official duties and who is required to serve in the FLNG as a condition of his or her employment by DMA.²⁶ Members of the FLNG may be called to state active duty by the Governor²⁷ or activated by the federal government.²⁸

Effect of the Bill

¹⁷ Email from Florida Department of Military Affairs (Feb. 26, 2021). On file with Local Administration & Veterans Affairs.

¹⁸ 5 U.S.C., s. 552a

¹⁹ U.S. Department of Justice, *Privacy Act of 1974*, <https://www.justice.gov/opcl/privacy-act-1974> (last visited Feb. 25 2021).

²⁰ U.S. Department of Justice, *Overview of the Privacy Act of 1974 (2020 Edition)*, <https://www.justice.gov/opcl/privacy-act-1974> (last visited March 5, 2021).

²¹ Florida Department of Military Affairs, <https://dma.myflorida.com/> (last visited March 5, 2021).

²² Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, *Government Program Summaries: Department of Military Affairs*, <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=4109> (last visited March 5, 2021).

²³ S. 250.07, F.S.

²⁴ S. 250.05(3), F.S.

²⁵ *Supra* note 21.

²⁶ S. 250.05(2), F.S.

²⁷ See s. 250.01(21), F.S.

²⁸ *Supra* note 22.

The bill provides an exemption from public records requirements for records in the custody of DMA which contain information that is protected from disclosure under the FOIA and the Privacy Act of 1974. Any information not made exempt under this provision may be disclosed only after DMA makes any redactions in accordance with the applicable federal and state laws. The bill provides that the exemption is retroactive.

The bill provides a statement of public necessity as required by the Florida Constitution. The public necessity statement provides that the disclosure of certain military records in custody of DMA could adversely affect national security and the safety of servicemembers and their families and that a servicemember's information should only be disclosed by consent as provided in the Privacy act of 1974. The statement further provides that it is necessary that such sensitive information in the custody of DMA be protected from disclosure to the same degree that is required under federal law.

B. SECTION DIRECTORY:

Section 1. Amends s. 119.0712, F.S., providing an exemption from public records requirement for certain records in the custody of DMA which are protected from disclosure under specified federal laws.

Section 2. Provides a public necessity statement.

Section 3. Provides that the bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state government revenues.

2. Expenditures:

The bill does not appear to impact state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

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 newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for records in the custody of DMA that are protected from disclosure under the Freedom of Information Act and the Privacy Act of 1974. As such, the exemption may be overly broad because all records would be exempt under federal law even if a military person is performing state duties.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.