

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 968

INTRODUCER: Senator Gainer

SUBJECT: Public Records/Economic Development Agency

DATE: March 29, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Reeve</u>	<u>McKay</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Candelaria</u>	<u>McVaney</u>	<u>GO</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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## I. Summary:

SB 968 exempts from public inspection and copying requirements certain identifying information held by an economic development agency, including the Department of Economic Opportunity, pursuant to the administration of a state- or federally-funded small business loan program.

The bill provides for the automatic repeal of the public records exemption on October 2, 2026, unless reenacted by the Legislature under the Open Government Sunset Review Act.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect July 1, 2021.

## 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.<sup>1</sup> 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.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as 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.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

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.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> 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.”

<sup>6</sup> 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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *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).

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>19</sup>

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.<sup>20</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- 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;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully 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.<sup>25</sup> 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 sunset, the previously exempt records will remain exempt unless provided for by law.<sup>26</sup>

### **Economic Development Agencies**

Section 288.075, F.S., defines an “economic development agency” as:

- The Department of Economic Opportunity (DEO);
- Any industrial development authority created in accordance with part III of chapter 159 of the Florida Statutes, or by special law;
- Space Florida;
- The public economic development agency of a county or municipality;
- Any research and development authority created in accordance of part v of chapter 159 of the Florida Statutes; or
- Any private agency, person, partnership, corporation, or business entity authorized by the state, a municipality, or a county to promote the general business or industrial interests of the state or that municipality or county (e.g. Enterprise Florida, Inc.<sup>27</sup>).

### ***Small Business Loan Programs***

The DEO administers a number of state and federally funded small business loan programs, including:<sup>28</sup>

- Small Business Emergency Bridge Loan Program;
- Rebuild Florida Business Loan Fund;
- Rural Community Development Revolving Loan Program;
- Small Business Loan Program;

<sup>24</sup> 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?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> See s. 288.901, F.S.

<sup>28</sup> Department of Economic Opportunity, *Small and Minority Business Programs*, available at <https://floridajobs.org/community-planning-and-development/Small-and-Minority-Business-Development-Resources/Small-and-Minority-Business-Programs> (last visited Mar. 30, 2021).

- Microfinance Guarantee Program; and
- Black Business Loan Program.

### **Existing Public Records Exemptions for Economic Development Agencies**

Section 288.075, F.S., provides for a number of temporary public records exemptions for information held by an economic development agency, including:

- Information concerning a corporation's plans to relocate or expand any of its business activities in the state for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed;
- Proprietary confidential business information, until the information becomes publicly available or is no longer treated by the proprietor as confidential; and
- Specific sales, employee wage, and tax information the administration of an economic incentive program for qualified businesses for the duration of the incentive agreement or upon termination of the agreement.

Trade secrets, federal employer identification numbers, reemployment assistance account numbers, and Florida sales tax registration numbers are permanently exempt from public records.<sup>29</sup>

An employee of an economic development agency who violates the provisions of s. 288.075, F.S., commits a second degree misdemeanor, punishable by a maximum penalty of 60 days in jail or a \$500 fine.<sup>30</sup>

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 288.075, F.S., to exempt certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program from inspection by the public. Specifically, the bill exempts:

- The home address, telephone number, and e-mail address of a person who submits an application for a loan on behalf of a business;
- Tax returns;
- Bank and financial statements; and
- Credit history information, credit reports, and credit scores.

The bill does not prohibit the disclosure of such exempt information in an aggregated and anonymized format.

The public records exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** provides a public necessity statement. Economic development agencies may obtain sensitive locating and identifying information about borrowers that, if released, could be used by

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<sup>29</sup> Sections 288.075(3) and (5), F.S.

<sup>30</sup> Section 288.075(7), F.S.

fraudulent contractors, predatory lenders, thieves, or individuals seeking to impose on the borrower. The statement specifies that the public records exemption is necessary to ensure borrowers are not harassed, intimidated, or potentially defrauded.

**Section 3** provides an effective date of July 1, 2021.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

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 a state tax shares with counties and 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 public records exemption for certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan program. Thus the bill requires 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 creates a new public records exemption. Thus, the bill contains a statement of public necessity.

###### ***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. This bill creates a public records exemption for certain information held by an economic development agency pursuant to its administration of a state or federally funded small business loan 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 be subject to the cost associated with the state making redactions in response to public records requests.

C. Government Sector Impact:

The DEO and other economic development agencies may experience additional workload and incur costs associated with the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

Line 30 establishes that this “section” does not prohibit the disclosure of information held by an economic development agency pursuant to its administration of a small business loan program in an aggregated and anonymized format. The Legislature should consider an amendment revising the term “section” with the term “subsection”, in order to fulfill the intent of the bill.

VII. Related Issues:

The bill provides in the public necessity statement that in order to process and disburse loan funds, an economic development agency may obtain sensitive information needed to assess viability and that this information may be used to locate and identify and contact the borrow. However, the contact information of a person is provided to an economic development agency in the application for a loan, not during the processing and disbursement of loan funds. The Legislature may want to consider an amendment to align the public necessity statement with the information exempted in the bill.

VIII. Statutes Affected:

This bill substantially amends section 288.075 of the 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.

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

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