

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GAC 18-05 Public Record Exemption/Sexual Harassment

SPONSOR(S): Government Accountability Committee

TIED BILLS: CS/HB 7007 **IDEN./SIM. BILLS:** SB 1916

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Accountability Committee		Toliver	Williamson

SUMMARY ANALYSIS

Current law provides that the personal identifying information of the alleged victim in an allegation of sexual harassment is confidential and exempt from public record requirements. However, such information may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities.

In part, CS/HB 7007 (2018) addresses public officer, employee, and third party conduct regarding sexual harassment. CS/HB 7007 creates a detailed process, with which agencies must comply, for receiving complaints of sexual harassment and investigating those complaints. During the investigation, the agency may conduct witness interviews and collect other information relevant to the allegation. Upon conclusion of the investigation, the agency determines whether probable cause exists. The determination of probable cause is documented in written findings, which are required to be sufficiently specific to support the validity of the findings but may omit information that discloses the identity of the complainant or information that is unnecessarily embarrassing.

This bill, which is linked to the passage of CS/HB 7007, creates a public record exemption for a complaint alleging sexual harassment and any information related to the complaint held by an agency. The complaint is no longer confidential and exempt if the agency determines that probable cause exists. However, the information related to the complaint and the personal identifying information of a witness to or alleged victim of sexual harassment remains confidential and exempt despite the release of the complaint.

The bill allows the confidential and exempt information to be shared, upon request, with another governmental entity in the furtherance of its lawful duties and responsibilities or, following a determination that probable cause exists, with the alleged victim or the subject of the complaint and their attorneys.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a public necessity statement as required by the State Constitution.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments section.

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 public record or public meeting exemption. The bill creates a new 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 Art. I, s. 24(a). The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

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 Act² provides that a public record 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.³

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.⁴

Exemption for Alleged Victims of Sexual Harassment

Current law provides that the personal identifying information of the alleged victim in an allegation of sexual harassment is confidential and exempt⁵ from public record requirements.⁶ However, such information may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities.⁷

CS/HB 7007 (2018)

In part, CS/HB 7007 addresses public officer, employee, and third party conduct regarding sexual harassment. CS/HB 7007 defines the term "sexual harassment" to mean any conduct defined as sexual

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 119.15(3), F.S.

⁵ There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as 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 (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 2004); and *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, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See 85-62 Fla. Op. Att'y Gen. (1985).

⁶ Section 119.071(2)(n), F.S.

⁷ *Id.*

harassment under state or federal law or an unwelcome sexual advance, request for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature directed at an individual when:

- Submission to such conduct is explicitly or implicitly made a condition of employment;
- Submission to or rejection of such conduct is used as the basis for official action; or
- Such conduct has the purpose or effect of creating a persistently intimidating and hostile environment, as that term is defined in state and federal law.

The sexual harassment provisions of CS/HB 7007 apply to all public employees, public officers, and private persons who interact with public employees and public officers.

Reports of sexual harassment may be made verbally or through a written complaint and the agency, through a designated official recipient, is required to respond promptly. Each investigation into an allegation of sexual harassment must be completed within a reasonable timeframe. The investigation may include a brief, preliminary review with the complainant and a limited number of witnesses prior to the initiation of a full investigation. Once the preliminary review is completed, the individual accused of sexual harassment must be provided with a copy of the written complaint and given an opportunity to offer evidence. After completing the investigation, the person conducting the investigation within the agency issues a determination of probable cause, which must be documented in written findings sufficiently specific to support the validity of the findings. However, the investigator may omit information that discloses the identity of the complainant or any information that is unnecessarily embarrassing. Following the written findings, the individual accused of sexual harassment may request a hearing and the agency's policies and procedures must ensure due process for the individual, an opportunity for legal representation, and reasonable accommodations to protect the complainant and the witnesses from retaliation.

After the investigation process is over, written findings issued, and the hearing is completed, the agency must determine what disciplinary actions need to be imposed on the individual determined to have committed sexual harassment. If an investigation or a report of sexual harassment produces evidence supporting a reasonable suspicion of a criminal violation, the agency must promptly refer the evidence to the appropriate law enforcement agency.

Effect of Proposed Changes

The bill, which is linked to the passage of CS/HB 7007, creates a public record exemption for a complaint alleging sexual harassment and any information related to the complaint held by an agency.⁸ The complaint is no longer confidential and exempt if the agency determines that probable cause exists. However, the information related to the complaint and the personal identifying information of a witness to or victim of sexual harassment remains confidential and exempt despite the release of the complaint.

The bill allows the confidential and exempt information to be shared, upon request, with another governmental entity in the furtherance of its lawful duties and responsibilities or, following a determination that probable cause exists, with the alleged victim or the subject of the complaint and their attorneys.

The bill provides a public necessity statement as required by the State Constitution, specifying that the exemption protects information of a sensitive personal nature which could be defamatory or cause unwarranted damage to the good name or reputation of individuals if released. Furthermore, disclosure of personal identifying information of any witness to or alleged victim of sexual harassment could place those individuals at further risk of harassment and retaliation and could result in the individuals being hesitant to cooperate in a forthcoming manner with an investigation.

⁸ Section 112.312(2), F.S., defines the term "agency" to mean any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision; any public school, community college, or state university; or any special district.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

B. SECTION DIRECTORY:

Section 1 creates subsection (7) within s. 112.3132, F.S, as created by CS/HB 7007 (2018), to create a public record exemption for certain information related to sexual harassment investigations.

Section 2 provides a public necessity statement.

Section 3 provides an effective date that is contingent upon the passage of CS/HB 7007 or similar legislation.

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.

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on agencies because agency staff responsible for complying with public record requests may require training related to the creation of the public record exemption. In addition, agencies could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of 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 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.

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 public record or public meeting exemption. The bill creates a new 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 new 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 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 a complaint alleging sexual harassment, any information related to the complaint held by an agency, and the personal identifying information of any witness to or alleged victim of sexual harassment. The bill provides that upon a finding that probable cause exists the complaint becomes a public record. Additionally, the bill allows another governmental agency, or, upon a finding of probable cause, the alleged victim and the subject of the complaint, to have access to the records.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.