

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB EEG 24-07 OGSR/Utility Owned or Operated by a Unit of Local Government

**SPONSOR(S):** Ethics, Elections & Open Government Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Ethics, Elections & Open Government Subcommittee	16 Y, 0 N	Poreda	Toliver

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2<sup>nd</sup> of the fifth year after enactment.

Municipalities are authorized by general law to provide water and sewer utility services, as well natural gas services and electric and gas utilities. Counties are authorized to provide water and sewer utility services both within their individual boundaries and in adjoining counties.

Current law provides public record exemptions for the following information held by a utility owned or operated by a unit of local government (local government utility):

- Information related to the security of a local government utility's technology, processes, and practices designed to protect the utility's networks, computers, programs, and data from attack, damage, or unauthorized access that, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or information technology (I.T.) resources.
- Information related to the security of a local government utility's existing or proposed I.T. systems or industrial control technology systems that, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operations of the systems and the utility.
- Customer meter-derived data and billing information in increments of less than one billing cycle held by a local government utility.

Current law also provides a corresponding public meeting exemption for the portions of meetings held by a local government utility that would reveal the information exempt from disclosure by the public records exemptions discussed above. The exemption requires that all closed portions such meeting be recorded and transcribed and that such recordings and transcripts are confidential and exempt from disclosure as public records.

In 2022, the Legislature passed CS/HB 7057, which created a general public record exemption — applicable to all agencies — for certain information related to cybersecurity. Pursuant to the OGSR act, the exemption for cybersecurity information will repeal on October 2, 2027, unless reviewed and saved from repeal by the Legislature.

The bill extends the repeal date for the public record exemptions related to I.T. security and the public meeting exemption to October 2, 2027, to coincide with the future OGSR repeal date of the general cybersecurity exemption in statute. The bill saves from repeal the public record exemption related to customer meter-derived data and billing information. Each of the exemptions will repeal on October 2, 2024, if this bill does not become law.

The bill does not appear to have a fiscal impact on state government or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR Act)<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The OGSR Act 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.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created, then a public necessity statement and a two-thirds vote are not required.<sup>4</sup>

##### Local Government Utilities

The Florida Constitution grants municipalities the governmental, corporate, and proprietary powers necessary to enable them to conduct municipal government, perform municipal functions, and render municipal services, and permits them to exercise any power for municipal purposes, except when expressly prohibited by law.<sup>5</sup>

Counties not operating under a charter have the power of self-government as provided by general or special law, while charter counties have all powers of self-government not inconsistent with general law or with special law approved by the county electors.<sup>6</sup> Counties are authorized by general law to provide water and sewer utility services both within their individual boundaries and in adjoining counties.<sup>7</sup> Municipalities are authorized by general law to provide water and sewer utility services<sup>8</sup> as well natural gas services<sup>9</sup> and electric and gas utilities<sup>10</sup>

##### Florida Public Service Commission

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Article I, s. 24(c), FLA. CONST.

<sup>5</sup> Article VIII, s. 2(b), FLA. CONST.

<sup>6</sup> Article VIII, s. 1(f)-(g), FLA. CONST.

<sup>7</sup> Sections 125.01(1)(k)1., F.S. and 153.03, F.S.

<sup>8</sup> Pursuant to s. 180.06, F.S., a municipality may "provide water and alternative water supplies;" "provide for the collection and disposal of sewage, including wastewater reuse, and other liquid wastes;" and "construct reservoirs, sewerage systems, trunk sewers, intercepting sewers, pumping stations, wells, siphons, intakes, pipelines, distribution systems, purification works, collection systems, treatment and disposal works" to accomplish these purposes.

<sup>9</sup> Section 180.06(8), F.S.

<sup>10</sup> Chapter 366, F.S.

The Florida Public Service Commission (PSC) ensures Florida’s consumers receive utility services, including electric, natural gas, telephone, water, and wastewater, “in a safe, affordable, and reliable manner.”<sup>11</sup> The PSC primarily regulates investor owned utilities but is able to exercise limited authority over publicly owned utilities in the following areas:<sup>12</sup>

- Rate base or economic regulation.
- Competitive market oversight.
- Monitoring of safety, reliability and service.

#### Utility Customer Consumption Data

Traditional, analog utility meters record consumption at a utility customer’s premises. On a regular, periodic basis, the meter is “read” in person by a utility employee to determine how much of the utility’s service — electric, natural gas, or water/wastewater — was used at the premises since the last meter reading. This data is used by the utility for purposes of customer billing. In recent years, utilities have deployed, to varying degrees, newer “smart meter”<sup>13</sup> technologies that measure a utility customer’s consumption on a more frequent basis (e.g., hourly) and transmit this data automatically and wirelessly to the utility. The utility still uses this data for billing purposes but can also use it to monitor its system and identify and locate problems more quickly.<sup>14</sup>

#### Cybersecurity Public Record Exemption

In 2022, the Legislature passed CS/HB 7057, which created a general public record exemption — applicable to all agencies<sup>15</sup> — for the certain information related to cybersecurity.<sup>16</sup> Specifically, CS/HB 7057, which was codified as s. 119.0725, F.S., protected the following information:

- Information related to critical infrastructure.<sup>17</sup>
- Network schematics, hardware and software configurations, or encryption information or information that identifies detection, investigation, or response practices for suspected or confirmed cybersecurity incidents, including suspected or confirmed breaches, if the disclosure of such information would facilitate unauthorized access to or unauthorized modification, disclosure, or destruction of:
  - Data or information, whether physical or virtual; or
  - Information technology (I.T.) resources, which include an agency’s existing or proposed I.T. systems.
- Coverage limits and deductible or self-insurance amounts of insurance or other risk mitigation coverages acquired for the protection of I.T. systems, operational technology systems, or data of an agency.
- Cybersecurity incident information contained in certain reports.

CS/HB 7057 (2022) also created a public meeting exemption for any portion of a meeting that would reveal the confidential and exempt information; however, any portion of an exempt meeting must be recorded and transcribed.<sup>18</sup> The recording and transcript are confidential and exempt from public record requirements.<sup>19</sup>

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<sup>11</sup> Florida Public Service Commission, *About*, available at <https://www.psc.state.fl.us/about> (last visited Jan. 15, 2024).

<sup>12</sup> Florida Public Service Commission, *2022 Annual Report*, available at <https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Reports/General/AnnualReports/2022.pdf> (last visited January 16, 2024)

<sup>13</sup> See Florida Public Service Commission, *Smart Meters*, available at <https://www.floridapsc.com/pscfiles/website-files/pdf/Utilities/Electricgas/SmartMeters/SmartMeter.pdf> (last visited January 16, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> “Agency” means 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 ch. 119, F.S., 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. Section 119.011(2), F.S.

<sup>16</sup> See s. 119.0725, F.S.

<sup>17</sup> “Critical infrastructure” means existing and proposed information technology and operation technology systems and assets, whether physical and virtual, the incapacity or destruction of which would negatively affect security, economic security, public health, or public safety. Section 119.0725(1)(b), F.S.

<sup>18</sup> Section 119.0725(3), F.S.

<sup>19</sup> *Id.*

## Public Record and Public Meeting Exemptions under Review

In 2016, the Legislature created a public record exemption that made the following information held by a utility<sup>20</sup> owned or operated by a unit of local government (local government utility) confidential and exempt<sup>21</sup> from public record requirements:

- Information related to the security of a local government utility's technology, processes, and practices designed to protect the utility's networks, computers, programs, and data from attack, damage, or unauthorized access that, if disclosed, would facilitate the alteration, disclosure, or destruction of such data or I.T. resources.
- Information related to the security of a local government utility's existing or proposed I.T. systems or industrial control technology systems that, if disclosed, would facilitate unauthorized access to, and alteration or destruction of, such systems in a manner that would adversely impact the safe and reliable operations of the systems and the utility.<sup>22</sup>

In 2019, the Legislature created a public record exemption that made customer meter-derived data and billing information in increments of less than one billing cycle held by a local government utility confidential and exempt from public record requirements.<sup>23</sup> Additionally, in that same year, the Legislature created a public meeting exemption for any portion of a meeting held by a local government utility that would reveal information made exempt pursuant to the local government utility's public record exemption.<sup>24</sup> All closed portions of such a meeting must be recorded and transcribed and such recording or transcription are exempt from public record requirements.<sup>25</sup>

The 2016 public necessity statement<sup>26</sup> for the public record exemptions for certain I.T. security information provided that:

[M]any utilities have adopted technologies, processes, and practices designed to secure data, information technology systems, and industrial control technology systems. Disclosure of sensitive information related to these security measures could result in the identification of vulnerabilities that allow a security breach that damages utility systems and disrupts the safe and reliable operation of such systems, adversely impacting the public health and safety and the economic well-being of the state. Because of the interconnected nature of utility systems, a security breach may also impact national security concerns.<sup>27</sup>

The 2019 public necessity statement for the public record exemption for customer meter-derived data and billing information provided that:

Smart meters, which can record and transmit detailed data on a customer's use of utility services, present unique security concerns. These concerns were addressed in a report released in October 2010 by the United States Department of Energy

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<sup>20</sup> "Utility" means a person or entity that provides electricity, natural gas, telecommunications, water, chilled water, reuse water, or wastewater. Section 119.011(15), F.S.

<sup>21</sup> There is a difference between records the Legislature designates *exempt* from public record requirements and those the Legislature designates *confidential and exempt*. A record classified as *exempt* from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004); *State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Op. Att'y Gen. Fla. 04- 09 (2004).

<sup>22</sup> Chapter 2016-95, L.O.F., codified as s. 119.0713(5), F.S.

<sup>23</sup> Chapter 2019-38, L.O.F., codified as s. 119.0713(5)(a)3., F.S.

<sup>24</sup> Chapter 2019-37, L.O.F., codified as s. 286.0113(3), F.S.

<sup>25</sup> Section 286.0113(3)(a), F.S. However, a court of competent jurisdiction, following an in-camera review, may determine that the meeting was not restricted to the discussion of data and information made exempt, and in that event, the portion of the recording or transcript which reveals nonexempt data and information may be disclosed to a third party.

<sup>26</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

<sup>27</sup> Chapter 2016-95, L.O.F.

titled "Data Access and Privacy Issues related to Smart Grid Technologies." The report recommended that customer data be protected from release to third parties. This detailed customer data can be used to specifically identify minute-by-minute usage patterns, including the exact appliance or service being used. This information creates significant security issues for both businesses and homeowners.<sup>28</sup>

The 2019 public necessity statement for the public meeting exemption provided that:

[A]s utility system infrastructure becomes more connected and integrated through information and communications technology, the exposure to damage from attacks through such technology grows. These attacks may result in the disruption of utility services and damage to utility systems. Maintaining safe and reliable utility systems is vital to protecting the public health and safety and to ensuring the economic well-being of this state.<sup>29</sup>

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

During the 2023 interim, House and Senate committee staff jointly developed a questionnaire and sent the questionnaires to city and county governments. In total, staff received 39 responses from those entities.<sup>30</sup> Most respondents indicated that they were unaware of any litigation concerning the exemptions and had not encountered any issues interpreting or applying the exemptions. The vast majority of respondents indicated that the exemptions be reenacted as is and no respondent recommended eliminating the public record or public meeting exemptions. As a part of the questionnaire, respondents were asked to consider whether the local government utility I.T. security exemptions were duplicative of the general cybersecurity exemption in s. 119.0725, F.S. Some respondents noted that there may be some overlap between the exemption.

### **Effect of the Bill**

The bill extends the repeal date for the public record exemptions related to local government utility I.T. security and the public meeting exemption to October 2, 2027, to coincide with the future OGSR repeal date of the general cybersecurity exemption in s. 119.0725, F.S. The bill saves from repeal the public record exemption for customer meter-derived data and billing information in increments of less than one billing cycle held by a local government utility. Each of the exemptions under review will repeal on October 2, 2024, if this bill does not become law

### **B. SECTION DIRECTORY:**

Section 1 amends s. 119.0713, F.S., relating to local government agency exemptions from inspection or copying of public records.

Section 2 amends s. 286.0113, F.S., relating to general exemptions from public meetings.

Section 3 provides an effective date of October 1, 2024.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

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<sup>28</sup> Chapter 2019-38, L.O.F.

<sup>29</sup> Chapter 2019-37, L.O.F.

<sup>30</sup> Open Government Sunset Review Questionnaire, Public Records and Public Meetings Related to utilities owned or operated by a unit of local government, responses on file with the Ethics, Elections & Open Government Subcommittee.

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties and municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not require rulemaking nor confer rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Not applicable.