HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1311 Public Records and Public Meetings/Public Service Commission
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 7066

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee		Keating	Hamon

SUMMARY ANALYSIS

Current law provides public record exemptions for proprietary confidential business information provided to and held by the Public Service Commission (PSC). The PSC has established practices and procedures to ensure that this information is protected from disclosure during evidentiary hearings that must be held in compliance with the Sunshine Law. Rarely, however, the PSC may find that a case is so heavily intertwined with confidential information, or the volume of that information so substantial, that its practices and procedures are not sufficient to allow it conduct a public hearing while also protecting the confidential information. In this circumstance, the PSC may forward the matter for a formal administrative hearing before the Division of Administrative Hearings (DOAH), which is authorized to hold a closed hearing.

The bill creates a public meeting exemption for those portions of a hearing held by the PSC in which proprietary confidential business information that is confidential or exempt from disclosure as a public record is discussed. The bill provides that no exempt portion of a hearing may be off the record and that all exempt portions must be recorded and transcribed.

The bill also creates a public record exemption for these recordings and transcriptions. Each such recording or transcription is confidential and exempt from disclosure as a public record unless a court of competent jurisdiction determines that the relevant portion of the hearing was not restricted to the discussion of proprietary confidential business information that is confidential or exempt from disclosure as a public record. If the court makes such a determination, only that portion of the recording and transcript which reveals nonexempt information may be disclosed to a third party.

These exemptions will allow the PSC to close those portions of a hearing in which information that is confidential or exempt from disclosure as a public record is discussed. This may avoid the need for the PSC to send certain cases to DOAH for a closed hearing when those cases are heavily intertwined with or involve a substantial volume of confidential or exempt information.

The bill provides a statement of public necessity as required by the Florida Constitution. The bill provides that this public meeting and public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

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

The bill provides an effective date of upon becoming law.

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public meeting or public record exemption. The bill creates a new public meeting and public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Records

Article I, section 24(a) of the Florida 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; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or the Florida Constitution. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, section 24(a) of the Florida Constitution.[1] The general law must state with specificity the public necessity justifying the exemption[2] and must be no broader than necessary to accomplish its purpose.[3]

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act[4] 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 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 public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[6]

Public Meetings

The Florida Constitution requires all meetings of any collegial public body of the executive branch of state government or any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.[7] Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the "Government in the Sunshine Law" or "Sunshine Law," further requires all meetings of any board or commission of any state agency or authority, or of any agency or authority of any county, municipality, or political subdivision, at which official acts are to be taken must be open to the public at all times.[8] The board or commission must provide reasonable notice of all public meetings.[9] Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status or that operates in a manner that unreasonably restricts the public's access to the facility.[10] Minutes of a public meeting must be promptly recorded and open to public inspection.[11]

[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] Art. 1, s. 24(b), FLA. CONST.
[8] S. 286.011(1), F.S.
[9] S. 286.011(1), F.S.
[10] S. 286.011(6), F.S.
[11] S. 286.011(2), F.S.

Failure to abide by public requirements will invalidate any resolution, rule, or formal action adopted at a meeting.[12] A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.[13]

Proceedings before the Public Service Commission

The Public Service Commission (PSC) is an arm of the legislative branch of government.[14] The role of the PSC is to ensure that Florida's consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner. In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.[15] The PSC possesses extensive expertise in the unique legal and policy considerations applicable to Florida's regulated utilities and their ratepayers and employs this expertise when it conducts administrative hearings and independently weighs the evidence presented.[16]

Each meeting, workshop, hearing, or other proceeding attended by two or more PSC commissioners, and each proceeding where a decision that concerns the rights or obligations of any person is made, must be streamed live on the Internet.[17] Further, a recorded copy of each such meeting, workshop, hearing, or proceeding must be made available on the commission's website.[18]

Although it is authorized to refer matters to the Division of Administrative Hearings (DOAH) for formal evidentiary hearings and fact finding,[19] the PSC is unique among state agencies in that it conducts most of its own formal evidentiary hearings.[20] In these hearings, commissioners rule on procedural matters, establish evidence of record, weigh the record evidence, and apply the law to the facts of the case. Many of these hearings involve some amount of proprietary confidential business information that is exempted by statute from public disclosure,[21] as described below.

All formal administrative hearings conducted by the PSC are noticed and open to the public, consistent with the Sunshine Law. The PSC has established practices and procedures that allow these hearings to be conducted in a manner that complies with the Sunshine Law and protects proprietary confidential business information from disclosure. In these hearings, confidential material typically plays a minor role in the resolution of any particular issue, and the parties avoid public disclosure of this material by stipulating to certain matters and keeping discussions of confidential matters, which generally occur during cross examination, minimal and without mention of critical details. Recently, however, the PSC has found certain dockets where fact-finding on one or more issues is so intertwined with confidential information, and the volume of that information is so substantial, that it cannot afford the parties a full and fair hearing in the public and also protect the confidential information.[22]

Public Record Exemptions for Proprietary Confidential Business Information held by the PSC

Current law provides that any records received by the PSC which are shown and found by the PSC to be proprietary confidential business information must be kept confidential and are exempt from public disclosure.[23] For these purposes, the law defines proprietary confidential business information as "information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or

[12] S. 286.011(1), F.S.
[13] S. 286.011(3), F.S. Penalties include a fine of up to $500 or a second degree misdemeanor.
[14] S. 350.001, F.S.
[15] Florida Public Service Commission, http://www.psc.state.fl.us/ (last visited March 11, 2021).
[16] Florida Public Service Commission, Agency Analysis of 2021 House Bill 1311, p. 1 (March 4, 2021).
[17] S. 350.01(8), F.S.
[18] *Id.*
[19] Ss. 350.125 and 120.569(2), F.S.
[20] FPSC, *supra* note 16, at 1. These formal evidentiary hearings consist of hearings conducted pursuant to ss. 120.569 and 120.57, F.S.
[21] *Id.*
[22] FPSC, *supra* note 16, at 1.
[23] *See* ss. 366.093, 367.156, and 368.108, F.S. Records obtained under ch. 364 must be kept confidential by the PSC and are exempt from public disclosure upon a claim by the person providing the records. S. 364.183, F.S.

administrative body, or private agreement that provides that the information will not be released to the public." This information includes, but is not limited to:

- Trade secrets.
- Internal auditing controls and reports of internal auditors.
- Security measures, systems, or procedures.
- Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.
- Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities.[24]

Any PSC finding that records contain proprietary confidential business information is effective for a period set by the PSC not to exceed 18 months, unless the PSC finds, for good cause, that the protection from disclosure should be for a specified longer period.[25]

Effect of the Bill

The bill creates a public meeting exemption for those portions of a hearing held by the PSC wherein proprietary confidential business information that is confidential or exempt from disclosure as a public record is discussed. The bill provides that no exempt portion of a hearing may be off the record and that all exempt portions must be recorded and transcribed.

The bill also creates a public record exemption for these recordings and transcriptions. Each such recording or transcription is confidential and exempt from disclosure as a public record unless a court of competent jurisdiction determines that the relevant portion of the hearing was not restricted to the discussion of proprietary confidential business information that is confidential or exempt from disclosure as a public record. If the court makes such a determination, only that portion of the recording and transcript which reveals nonexempt information may be disclosed to a third party.

These exemptions will allow the PSC to close those portions of a hearing in which information that is confidential or exempt from disclosure as a public record is discussed. This may avoid the need for the PSC to send certain cases to DOAH for a closed hearing when those cases are heavily intertwined with or involve a substantial volume of confidential or exempt information.

The bill provides a statement of public necessity as required by the Florida Constitution, which provides the following legislative findings:

- The PSC is charged by statute with establishing just, fair, and compensatory utility rates, and the fact-finding role of the PSC is integral in its decision making, as all PSC decisions must be supported by a record of competent, substantial evidence.
- Under certain circumstances, the PSC must be able to evaluate and discuss proprietary confidential business information in order to make a determination in the public interest, and parties must be able to conduct cross-examination on such information in formal evidentiary proceedings.
- It is a public necessity that those portions of formal administrative hearings before the PSC at which proprietary confidential business information is discussed, and the associated portions of hearing transcripts, be made exempt from the Sunshine Law to allow parties to conduct cross-examination on such information and the PSC to evaluate the information and make a determination in the public interest.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

B. SECTION DIRECTORY:

[24] *See* ss. 364.183, 366.093, 367.156, and 368.108, F.S.
[25] *Id.*

Section 1 Amends s. 350.01, F.S., to create a public record and public meeting exemption.

Section 2 Provides a statement of public necessity.

Section 3 Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
   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. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public meeting or public record exemption. The bill creates a new public meeting and public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public meeting or public record exemption. The bill creates a new public meeting and public record exemption and includes a statement supporting the public necessity for these exemptions.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created public meeting or public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public meeting exemption for only those portions of a hearing held by the PSC in which confidential proprietary business information that is confidential or exempt from disclosure under existing public record exemptions in ss. 364.183, 366.093, 367.156, and 368.108, F.S., is discussed. The bill creates a public record exemption for only those portions of the associated hearing recordings and transcripts that reveal such information. As such, these exemptions do not appear to be in conflict with the constitutional requirement that they be no broader than necessary to accomplish their purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.