

**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 Criminal Justice Committee

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BILL: SB 602

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Biometric Identification Information

DATE: February 25, 2011

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	<b>Pre-meeting</b>
2.			GO	
3.			RC	
4.				
5.				
6.				

## **I. Summary:**

Section 119.071(5)(g), F.S., exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of the exemption (July 1, 2006).<sup>1</sup> Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

This exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. The bill reenacts the exemption. The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote.

This bill reenacts section 119.071(5)(g) of the Florida Statutes.

## **II. Present Situation:**

### **Constitutional Requirements Regarding Public Records**

Article I, section 24 of the Florida Constitution, as it relates to records, provides that every person has the right to inspect or copy any public record that is made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by the Florida Constitution. This section is self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of this section provided such law: (1) states with

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<sup>1</sup> Section 3, ch. 2006-181, L.O.F.

specificity the public necessity justifying the exemption and is no broader than necessary; (2) contains only exemptions from the requirements of this section and provisions governing the enforcement of this section; and (3) relates to one subject. A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

The Legislature is also required by this section to enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the Legislature may adopt rules governing enforcement of this section in relation to records of the legislative branch.

### **The Public Records Act**

The general purpose of the Public Records Act (ch. 119, F.S.) is to open public records to allow Florida's citizens to discover the actions of their government.<sup>2</sup> The act specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>3</sup> records are available for public inspection. The term "public record" is broadly defined 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>4</sup>

The Florida Supreme Court has interpreted this definition to encompass "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."<sup>5</sup> Materials which "are not, in themselves, intended as final evidence of the knowledge to be recorded" are not public records.<sup>6</sup> "It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis."<sup>7</sup>

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<sup>2</sup> See *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

<sup>3</sup> The term "agency" is defined in s. 119.011(2), F.S., to mean "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>4</sup> Section 119.011(12), F.S.

<sup>5</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla.1980).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

There is a difference between records the Legislature has made exempt from public inspection and those made confidential and exempt. If the Legislature makes a record confidential and exempt, the exempted record may not be released by an agency to anyone other than to the persons or entities designated by law.

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

Section 119.15, F.S., the Open Government Sunset Review Act, establishes a process for the review and repeal or reenactment of public records exemptions. The act provides that in the fifth year after enactment of a new exemption or substantial amendment<sup>8</sup> of an existing exemption, the exemption is repealed on October 2nd of the fifth year, unless the Legislature reenacts the exemption.<sup>9</sup> An exemption may be created, revised, or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves.<sup>10</sup> An identifiable public purpose is served if the exemption meets one the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

- 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 information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety;<sup>11</sup> or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>12</sup>

The Legislature must also consider the following as part of the sunset review process:

- 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>13</sup>

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<sup>8</sup> An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(4)(b), F.S.

<sup>9</sup> Section 119.15(3), F.S.

<sup>10</sup> Art. I, s. 24(c), Fla. Const; s. 119.15(6), F.S.

<sup>11</sup> Only information that would identify the individuals may be exempted for this purpose.

<sup>12</sup> Section 119.15(6)(b), F.S.

<sup>13</sup> Section 119.15(6)(a), F.S.

**Biometric Identification Exemption (s. 119.071(5), F.S.)**

In 2006, the Legislature created s. 119.071(5)(g), F.S.,<sup>14</sup> which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006).<sup>15</sup> Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

The Legislature provided the following statement of public necessity for enacting the exemption:

The Legislature finds that it is a public necessity that biometric identification information held by an agency before, on, or after the effective date of this exemption be made exempt from public records requirements. Biometric identification information is used to verify the identity of persons and by its very nature involves matters uniquely related to individual persons. The use of multiple methods of biometric identification is a growing technology in detecting and solving crime, in preventing identity theft, and in providing enhanced levels of security in agency and other operations. Given existing technological capabilities for duplicating, enhancing, modifying, and transferring records, the availability of biometric identification information creates the opportunity for improper, illegal, or otherwise harmful use of such information. At the same time, use of biometric identification information by agencies is a useful and increasingly valuable tool. Thus, the Legislature finds that it is a public necessity to protect biometric identification information held by an agency before, on, or after the effective date of this act.<sup>16</sup>

Section 119.071(5)(g), F.S., stands repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature. *The Florida Department of Law Enforcement (FDLE), one of the agencies most affected by retention or repeal of the exemption, recommends retention of the exemption. Senate professional staff concurs with this recommendation.*

The FDLE indicates that the identifiable public purpose or goal of the exemption in s. 119.071(5)(g), F.S., is to prevent fingerprints and other biometric identification information from being used for improper purposes, such as identity theft and fraud as well as security breaches.<sup>17</sup> Disclosure of the information also has the potential to hinder, compromise, or prevent criminal intelligence gathering, a criminal investigation, or a criminal prosecution, if the information were used, for example, to create phony or altered fingerprint cards or create false evidence of fingerprint impressions at a crime scene. The efficient and effective administration of the FDLE would be significantly impaired by public disclosure because the biometric identification information could be demanded for an unlawful purpose. An agency cannot inquire as to the purpose or proposed use for which an entity makes a public records request.

Persons most uniquely affected by the exemption (as opposed to the general public) are those persons whose fingerprints have been submitted to an agency for any reason, which includes

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<sup>14</sup> Ch. 2006-181, L.O.F.

<sup>15</sup> Section 3, ch. 2006-181, L.O.F.

<sup>16</sup> Section 2, ch. 2006-181, L.O.F.

<sup>17</sup> Response of the FDLE to the *Senate Committee on Criminal Justice Open Government Sunset Review Questionnaire to the Florida Department of Law Enforcement*, dated September 22, 2010 (on file with the Senate Committee on Criminal Justice). All information in the remainder of the "Present Situation" section of this analysis is from this source, unless otherwise indicated.

arrest prints and applicant prints (i.e., criminal history background checks for employment, licensing, name change, sealing/expungement, eligibility, etc.). Other forms of biometric identification may be taken as latent lifts from a crime scene.

Fingerprints are taken and submitted to the FDLE by agencies and fingerprint scanning services. These fingerprints may be inked impressions or electronic submissions, which include applicant prints, arrest prints (from criminal justice agencies), or latent lifts from crime scenes.<sup>18</sup> Applicant prints are taken as required or authorized by law; arrest prints and latent lifts are taken as needed for criminal justice purposes. Arrest prints and, as authorized, applicant prints are stored in the Automated Fingerprint Identification System (AFIS) authorized under s. 943.05(2), F.S.<sup>19</sup>

The purposes for which the FDLE collects, receives, maintains, or shares the biometric identification information covered by the exemption include:

- Positive identification, usually against criminal records;
- Criminal justice or forensic purposes (e.g., latent lifts are compared to known standards for crime scene analysis and to identify unknown, missing, and deceased persons);
- Employment or licensing background checks; and
- As otherwise required by law (e.g., for comparison with criminal records).

The FDLE shares arrest prints and latent lifts with other criminal justice agencies (covered by the exemption) for criminal justice purposes. These receiving agencies also protect against public disclosure of the biometric identification information.

Other law enforcement agencies may retain copies of the fingerprints of persons the agencies have arrested or booked. Other criminal justice agencies which have local AFIS maintain arrest fingerprints. Crime scene fingerprints (and other biometric identification information) are collected and maintained as part of criminal investigations and may be shared with other agencies that engage in forensic identification as well as prosecution of criminal defendants. Courts may collect fingerprints to identify judgments in criminal cases.

Federal law prohibits public disclosure of the biometric identification information in s. 119.071(5)(g), F.S., to the extent such information is considered a part of a national criminal history record.<sup>20</sup>

According to the FDLE, the biometric identification information exempted pursuant to s. 119.07(5)(g), F.S., is also protected to a limited extent by s. 937.028(1), F.S., which applies only to “fingerprints [which] have been taken for the purpose of identifying a child, in the event a child becomes missing.” Biometric identification information associated with a criminal investigation may be protected as active criminal investigative information under s. 119.07(2)(c)1., F.S. Arrest fingerprints which identify the subject of a criminal history record

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<sup>18</sup> The FDLE indicates that the fingerprints and other biometric identification information are not readily obtainable by alternative means.

<sup>19</sup> Pursuant to s. 943.051(4), F.S., criminal history records must be based on fingerprints.

<sup>20</sup> Florida Attorney General Opinion 99-01 (January 6, 1999) and 28 C.F.R. § 20.33.

that has been expunged or sealed are confidential pursuant to s. 943.0585(4) and s. 943.059(4), F.S. The FDLE states that these described exemptions do not duplicate s. 119.07(5)(g), F.S., but serve different and distinct purpose. Consequently, these exemptions do not appear appropriate to merge.

Senate professional staff have reviewed these exemptions and other exemptions and none of them appear to be appropriate for merger or repeal (as clearly being duplicative of or completely subsumed within the exemption in s. 119.07(5)(g), F.S.).

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

The bill reenacts s. 119.071(5)(g), F.S., which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006). The biometric identification information consists of the following information:

- Any record of friction ridge detail;
- Fingerprints;
- Palm prints; and
- Footprints.

The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote.

The effective date of the bill is October 1, 2011.

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

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

None.

#### **B. Public Records/Open Meetings Issues:**

Article I, section 24 of the Florida Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.

If a reenactment of an exemption does not expand the scope of the exemption, it does not require a new repealer date, public necessity statement, or a two-thirds vote.<sup>21</sup> It is only when the exemption is expanded (i.e., more records are exempt, records are exempt for a longer period of time, etc.) that these three requirements come into play, because that is tantamount to creating a new exemption.

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<sup>21</sup> See Art. I, s. 24(c), Fla. Const., and s. 119.15, F.S.

The reenactment of the exemption in s. 119.071(5)(g), F.S., does not expand the exemption.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.