

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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: PCS/SB 248 (268366)

INTRODUCER: Criminal Justice Committee

SUBJECT: Public Records/Recordings by Law Enforcement Officers

DATE: February 13, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Pre-meeting
2.			CA	
3.			ACJ	
4.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/SB 248 creates a public records exemption for an audio or video recording made by a law enforcement officer in the course of the officer performing his or her official duties and responsibilities, if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where a person recorded or depicted in the recording has a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school or on school property; or
- Shows a child younger than 14 years of age at any location.

If the audio or video recording or a portion of such recording is exempt or confidential and exempt pursuant to another exemption in s. 119.071, F.S., that exemption applies and determines under which circumstances, if any, the recording or a portion of the recording may be disclosed to the public.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a statement of public necessity for the exemption.

The bill authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities and specifies persons who may inspect the recording.

This bill creates a new public record exemption; therefore, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

II. Present Situation:

Body-Worn Cameras and Public Records

Body-Worn Cameras (BWCs) or "body cameras" are currently being used or considered for use by many law enforcement agencies.¹ "BWCs are mobile audio and video capture devices that allow officers to record what they see and hear. Devices can be attached to various body areas, including the head, by helmet, glasses or other means, or to the body by pocket, badge, or other means of attachment (such as in-car on the dash). They have the capability to record officer interactions that previously could only be captured by in-car interrogation room camera systems."²

The Florida Police Chiefs Association staff is aware of 13 Florida police departments that currently use BWCs³ and 9 Florida police departments that have implemented pilot programs to test the use of BWCs.⁴ The media have reported that the Flagler County Sheriff's Office is using BWC⁵ and the Pasco County Sheriff has indicated an intent to purchase BWCs.⁶ Other Florida sheriffs' offices may be considering whether to use BWCs.

On December 1, 2014, the White House announced that President Barack Obama was proposing "a three-year \$263 million investment package that will increase use of body-worn cameras, expand training for law enforcement agencies (LEAs), add more resources for police department reform, and multiply the number of cities where DOJ facilitates community and local LEA engagement. As part of this initiative, a new Body Worn Camera Partnership Program would provide a 50 percent match to States/localities who purchase body worn cameras and requisite

¹ The bill uses the language "audio or video recording by a law enforcement officer" in the new exemption. The staff analysis focuses on BWCs because it appears that BWCs are the most recent recording devices being used by law enforcement agencies and some of the BWC recordings would be covered by the new exemption. However, an audio or video recording made by another recording device, such as a hand-held video camera or cellphone, should also be covered by the new exemption.

² Sensor, Surveillance, and Biometric Technologies Center of Excellence. September 2012. *A Primer on Body-Worn Cameras for Law Enforcement*. National Institute of Justice. The quoted text is from page 5 of the report, which is available at <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

³ Police departments: Eustis; City of Miami; Cocoa; Daytona Beach; Daytona Beach Shores; Florida State University (motorcycle officers); Gulfport; Palm Bay (SWAT Officers); Pensacola; West Melbourne; Windermere; Miami Beach; and Rockledge.

⁴ Police departments: Clearwater; Ft. Myers; Marianna; Orlando (University of South Florida study); Plant City; Sarasota; St. Petersburg; Tampa; and West Palm Beach.

⁵ Metz, Claire. "Flagler County deputies fitted with new body cameras. WESH.com (Orlando). August 28, 2014. The news broadcast video is available at <http://www.wesh.com/flagler-county-deputies-fitted-with-new-body-cameras/27779830>.

⁶ Behrman, Elizabeth. "Local law enforcement split on body cameras." *The Tampa Tribune*. December 14, 2014. The article is available at <http://tbo.com/news/crime/-20141226/>.

storage. Overall, the proposed \$75 million investment over three years could help purchase 50,000 body worn cameras.”⁷

In a recently released report on BWCs it was noted:

State public disclosure laws, often known as freedom of information laws, govern when footage from body-worn cameras is subject to public release. However, most of these laws were written long before law enforcement agencies began deploying body-worn cameras, so the laws do not necessarily account for all of the considerations that must be made when police departments undertake a body-worn camera program.

Although broad disclosure policies can promote police agency transparency and accountability, some videos—especially recordings of victims or from inside people’s homes—will raise privacy concerns if they are released to the public or the news media. When determining how to approach public disclosure issues, law enforcement agencies must balance the legitimate interest of openness with protecting privacy rights.

In most state public disclosure laws, exceptions are outlined that may exempt body-worn camera footage from public release. For example, even the broadest disclosure laws typically contain an exception for video that contains evidence or is part of an ongoing investigation. Some state disclosure laws, such as those in North Carolina, also exempt personnel records from public release. Body-worn camera videos used to monitor officer performance may fall under this type of exception.⁸

Depending upon the content recorded by a BWC, the recording or particular information in the recording may be subject to a public records exemption in current Florida law. If not subject to an exemption, the recording would be a public record. Some of the current public records exemptions that may be relevant to a BWC recording include:

- Active criminal intelligence information and active criminal investigative information (exempt);⁹
- Information revealing surveillance techniques or procedures or personnel (exempt);¹⁰
- Information revealing the substance of a confession of a person arrested (exempt);¹¹
- Information revealing the identity of a confidential informant or a confidential source (exempt);¹²
- Criminal intelligence information or criminal investigative information that reveals the identity of the victim of the crime of child abuse or any sexual offense or a videotape or

⁷ “FACT SHEET: Strengthening Community Policing,” Office of the Press Secretary, The White House. December 1, 2014. The document is available at <http://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

⁸ Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services. The quoted text is from page 17 (footnote omitted) of the report, which is available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

⁹ Section 119.071(2)(a), F.S.

¹⁰ Section 119.071(2)(d), F.S.

¹¹ Section 119.071(2)(e), F.S.

¹² Section 119.071(2)(f), F.S.

image of any part of the body of the victim of a statutorily-specified sexual offense (confidential and exempt);¹³

- Any information in a videotaped statement of a minor who is alleged to be or who is a victim of a statutorily-specified sexual offense, which reveals that minor's identity, home, school, etc. (confidential and exempt);¹⁴ or
- Information revealing undercover personnel of any criminal justice agency (exempt).¹⁵

Public Records Laws

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹⁶ The records of the legislative, executive, and judicial branches are specifically included.¹⁷

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act¹⁸ guarantees every person's right to inspect and copy any state or local government public record¹⁹ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.²⁰

Only the Legislature may create an exemption to public records requirements.²¹ This exemption must be created by general law and must specifically state the public necessity justifying the exemption.²² Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions²³

¹³ Section 119.071(2)(h), F.S.

¹⁴ Section 119.071(2)(j)2.a, F.S.

¹⁵ Section 119.071(4)(c), F.S.

¹⁶ FLA. CONST., art. I, s. 24(a).

¹⁷ *Id.*

¹⁸ Chapter 119, F.S.

¹⁹ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" 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." The Public Records Act does not apply to legislative or judicial records *Locke v. Hawkes*, 595 So.2d 32 (Fla.1992).

²⁰ Section 119.07(1)(a), F.S.

²¹ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature designates confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *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, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. Attorney General Opinion 85-62, (August 1, 1985).

²² FLA. CONST., art. I, s. 24(c).

²³ However, the bill may contain multiple exemptions that relate to one subject.

and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.²⁴

The Open Government Sunset Review Act²⁵ requires a newly created or expanded public records exemption to be repealed on October 2 of the fifth year after enactment, unless reviewed and reenacted by the Legislature.²⁶ It further provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet the public purpose it serves.²⁷

III. Effect of Proposed Changes:

The bill creates a public records exemption for an audio or video recording made by a law enforcement officer in the course of the officer performing his or her official duties and responsibilities, if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where a person recorded or depicted in the recording has a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school, as defined in s. 1003.01, F.S., or on school property, as defined in s. 810.095, F.S.; or
- Shows a child younger than 14 years of age at any location.

If the audio or video recording or a portion of such recording is exempt or confidential and exempt pursuant to another exemption in s. 119.071, F.S., that exemption applies and determines under which circumstances, if any, the recording or a portion of the recording may be disclosed to the public.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also provides a statement of public necessity for the exemption. The specific findings relevant to the public necessity for the exemption are as follows:

The Legislature finds that information recorded by these devices in these circumstances is significantly more likely to include highly sensitive personal information regarding the persons recorded than in other circumstances. The Legislature finds that public disclosure of these recordings could have an undesirable, chilling effect: persons who know sensitive personal information about them is being or may be recorded may be unwilling to cooperate with law enforcement officers and make calls for the services of law enforcement officers. In the case of minors, information about those minors could

²⁴ FLA. CONST., art. I, s. 24(c).

²⁵ Section 119.15, F.S.

²⁶ Section 119.15(3), F.S.

²⁷ Section 119.15(5)(b), F.S.

jeopardize their safety. The Legislature finds that these interests or concerns not only necessitate the exemption of the recordings but outweigh any public benefit that may be derived from their disclosure.

The bill also authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities.

The bill also specifies that the following persons may inspect the recording:

- A person recorded or depicted in the recording;
- The agent or attorney of a person recorded or depicted in the recording, if inspection is authorized by that person; and
- A person not recorded or depicted in the recording, if inspection is authorized by all persons recorded or depicted in the recording.²⁸

The described inspection of the recording does not apply to information in the recording that is exempt or confidential and exempt pursuant to another provision of s. 119.071, F.S.

The bill also conforms cross-references in other statutes.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

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 record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

²⁸ Other exemptions provide for limited disclosure of exempted information to specific persons. For example, s. 119.071(2)(d), F.S., exempts any comprehensive inventory of state and local law enforcement resources compiled pursuant to part 1, ch. 293, F.S., and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency. This information is unavailable for inspection except by personnel authorized by the state or local law enforcement agency, the Office of the Governor, the Department of Legal Affairs, the Department of Law Enforcement, or the Division of Emergency Management as having an official need for access to this information. Further, s. 119.071(3)(b), F.S., exempts building plans, blueprints, schematic drawings, and diagrams, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency. This information may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is performing work on or related to the building, arena, stadium, water treatment facility, or other structure owned or operated by an agency; or upon a showing of good cause before a court of competent jurisdiction.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law.

The bill does not exempt all audio or video recordings made by law enforcement officers. The bill exempts an audio or video recording by a law enforcement officer, if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where there is a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school or on school property; or
- Shows a child younger than 14 years of age at any location.

The bill authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities and specifies persons who may inspect the recording.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill, in part, exempts from public disclosure an audio or video recording made by a law enforcement officer at a place where a person recorded or depicted in the recording has a *reasonable expectation of privacy*.²⁹

Article I, Section 23 of the Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provide by law."

²⁹ Emphasis provided. The term is undefined in the bill but the term is also undefined in several statutes: s. 90.507, F.S. (waiver of privilege against disclosure of confidential matter or communication); s. 365.16, F.S. (obscene or harassing telephone calls); s. 810.14, F.S. (voyeurism); and s. 877.26, F.S. (direct observation, videotaping, or visual surveillance of customers in merchant's dressing room). As indicated in the analysis, the Florida Supreme Court has articulated how it determines whether an individual has a legitimate expectation of privacy for purposes of determining whether the individual has a right to privacy under Article I, Section 23 of the Florida Constitution.

In *Berkley v. Eisen*,³⁰ the Florida Fourth District Court of Appeal stated that the Florida Supreme Court “expressly recognized that ‘the law in the state of Florida recognizes an individual’s legitimate expectation of privacy in financial institution records.’”³¹ The appellate court noted that “[a]lthough article 1, section 23 states that the right of privacy ‘shall not be construed to limit the public’s right of access to public records,’” there was a public records exemption that covered the financial institutional information that the respondents in that case were seeking to discover. “Thus, the legislature has recognized the confidential nature of the exact type of information at issue here.”³²

The Florida Supreme Court has opined that “[b]efore the right of privacy³³ attaches ‘a reasonable expectation of privacy must exist.’ *Winfield*, 477 So.2d at 547. Determining ‘whether an *individual* has a legitimate expectation of privacy in any give case must be made by considering all the circumstances, especially objective manifestations of that expectation’ *Shaktman v. State*, 533 So.2d 148, 153 (Fla.1989) (Ehrlich, C.J., concurring, emphasis added).”³⁴

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. Statutes Affected:

The bill substantially amends the following sections of the Florida Statutes: 92.56; 119.011; 119.071; 119.0714; 784.046; 794.024; and 794.03.

³⁰ 699 So.2d 789 (Fla. 4th DCA 1997).

³¹ *Id.* at 790, citing and quoting *Winfield v. Division of Pari-Mutuel Wagering, Dep’t of Bus. Regulation*, 477 So.2d 544, 547 (Fla.1985).

³² *Id.* at 791.

³³ The Court is referring to the “right of privacy” under Article I, Section 23 of the Florida Constitution.

³⁴ *Stall v. State*, 570 So.2d 257, 260 (Fla.1990).

IX. Additional Information:

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

PCS (268366) by Criminal Justice:

- Creates a public records exemption for an audio or video recording made by a law enforcement officer in the course of the officer performing his or her official duties or responsibilities, if the recording is taken within certain locations, shows a minor inside a school or on school property, or shows a child younger than 14 years of age at any location.
 - Specifies how the exemption operates in relation to other exemptions that may apply.
 - Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.
 - Authorizes the law enforcement agency with custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities.
 - Specifies persons who may inspect the recording.
 - Provides a statement of public necessity for the exemption.
- B. **Amendments:**
- None.