

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1108

SPONSOR: Senator Sebesta

SUBJECT: Public Records/Criminal Justice

DATE: February 17, 2000

REVISED: 02/22/00 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Bradshaw</u>	<u>EE</u>	<u>Favorable</u>
2.	<u>Gomez</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/3 amendments</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Senate Bill 1108 exempts certain public records relating to criminal investigations from public disclosure pursuant to ch. 119, F.S. Specifically, the bill: clarifies or expands the “confidential informant” exemption in current law to include any public officer or employee who provides information regarding suspected criminal offenses committed by a public servant; exempts any public record that is provided to, or in any way compiled by, a criminal justice agency which constitutes active criminal investigative or intelligence information; and, exempts, for a period of three years after the conclusion of the active criminal investigation, any record compiled or generated by a criminal justice agency in connection with any investigation into crimes committed by a public servant.

This bill substantially amends section 119.07 of the Florida Statutes.

II. Present Situation:

Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.¹

Article I, s. 24, Florida Constitution, provides:

- (a) Every person has 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section

¹Article I, s. 24 of the Florida Constitution.

specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the Florida Constitution, the Public Records Law² specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

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

The Public Records Law states that, unless specifically exempted, all agency³ records are to be 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.⁴

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Exemptions to the Public Records Law are permitted by the Florida Constitution and by statute. Article I, s. 24, Florida Constitution, permits the Legislature to provide by general law 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. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

²Chapter 119, F.S.

³The word "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."

⁴Section 119.011(1), F.S.

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁷Art. I, s. 24(c) of the Florida Constitution.

The Open Government Sunset Review Act of 1995⁸ states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. The three statutory criteria are if the exemption:

- 1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) 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; or
- 3) 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.⁹

Article I, s. 23 of the Florida Constitution, also provides Floridians with a right of privacy. That constitutional right, however, does contain a limitation relating to public records:

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 provided by law.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

⁸Section 119.15, F.S., 1998 Supp.

⁹Section 119.15(4)(b), F.S., 1998 Supp.

Criminal Justice Records

The Public Records Law contains various provisions related to criminal justice records. Critical to these provisions are the following definitions contained in s. 119.011, F.S.:

(3)(a) "*Criminal intelligence information*" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.

(b) "*Criminal investigative information*" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

(c) "*Criminal intelligence information*" and "*criminal investigative information*" shall not include:

1. The time, date, location, and nature of a reported crime.
2. The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.07(3)(f).
3. The time, date, and location of the incident and of the arrest.
4. The crime charged.
5. Documents given or required by law or agency rule to be given to the person arrested, except as provided in s. 119.07(3)(f), and, except that the court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of s. 119.07(1) until released at trial if it is found that the release of such information would:
 - a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and
 - b. Impair the ability of a state attorney to locate or prosecute a codefendant.
6. Informations and indictments except as provided in s. 905.26.

(d) The word "*active*" shall have the following meaning:

1. Criminal intelligence information shall be considered "*active*" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.
2. Criminal investigative information shall be considered "*active*" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

In addition, criminal intelligence and criminal investigative information

shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15 or other statute of limitation.

(4) "*Criminal justice agency*" means any law enforcement agency, court, or prosecutor. The term also includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The term also includes the Department of Corrections.

Section 119.07(3), F.S., contains the following, among a number of criminal justice related exemptions:

- (b) Active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution.
- (c) Any information revealing the identity of a confidential informant or a confidential source is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution.

Public Corruption Study Commission

Senate Bill 1108 incorporates recommendations contained in the Public Corruption Study Commission's *Report to the Governor* (December 15, 1999) [hereinafter, Commission, *Report*]. The Governor established the Commission to "assure that the State's elected and appointed officials and those employed by the state abide by the highest standards of behavior and avoid any type of official misconduct." Executive Order No. 99-237 (September 15, 1999). Other Commission recommendations include: specific revisions to ch. 112, the Code of Ethics for Public Officers and Employees (SB 368); a public records exemption relating to Commission on Ethics' investigations (SB 1110); criminal offenses by public servants (SB 946); enhanced state contract review (SB 1100); and, expansion of the election code violations to include conspiracy to violate (SB 1106).

The Commission found that the federal criminal justice system was Floridians' first choice for reporting public corruption because citizens rightly believe that their identity can best be protected under the federal system. Commission, *Report*, at p. 20-21. Federal criminal justice entities are not required to disclose documents they produce or collect, regardless of whether the criminal investigation is active and regardless of whether criminal charges are ever filed. *Id.*

In Florida, as well as elsewhere, investigations of alleged misconduct by public officers are likely to attract significant press and media coverage. *Id.* Investigations often require the criminal investigative agency to compile documents from other entities and agencies which are public records in the hands of those originating entities or agencies. Frequently, criminal investigative agencies receive requests under the Public Records Law for copies of such records. Also, law enforcement agencies create an investigative file which becomes a public record when the case becomes inactive. Disclosure of both of these types of records reveal confidential aspects of criminal investigations. As a result, the complainant's name is often publicized and he or she can easily become a victim of recrimination from the subject of the complaint. This creates a strong disincentive to report public misconduct. Similarly, the disclosure may hamper investigative efforts by alerting the subject to various aspects of the criminal investigation.

III. Effect of Proposed Changes:

Senate Bill 1108 provides for exemptions to the public records provisions of s. 119.07(1), F.S. and Art. I, s. 24(a), Florida Constitution. The bill attempts to strike a balance between the public's right of access to public information and the need to maintain an appropriate level of confidentiality during and even after investigative efforts have been concluded.

The bill clarifies or expands the "confidential informant" exemption in current law to include any public officer or employee who provides information regarding suspected criminal offenses committed by a public servant. Presently, information revealing the identity of a confidential informant or source is exempt from public records law. s. 119.07(3)(c), F.S. The bill provides specifically that public officers or employees who provide information regarding suspected criminal violations by a public servant are "confidential informants," thereby protecting their identity from disclosure and encouraging such officers and employees to report criminal activity.

Senate Bill 1108 also exempts any public record that is provided to, seized by, transferred to, secured by reason of subpoena or warrant, or otherwise compiled by a criminal justice agency which constitutes active criminal investigative or intelligence information. The records in the possession of the originating agency will remain public records. Commission, *Report*, at p. 20. The Commission believes this will promote more effective investigative efforts by assuring that elements of an active investigation are not made public.

Finally, Senate Bill 1108 exempts, for a period of three years after the conclusion of the active criminal investigation, any record compiled or generated by a criminal justice agency in connection with any investigation into crimes committed by a public servant. This exemption covers both: the public records of other agencies compiled during the investigation (which remain public records in the hands of the originating agency); and, the investigative file produced by the criminal investigative agency. Keeping this information confidential will allow the agency to move forward should subsequent related allegations surface. Committee, *Report*, at p. 21. The Commission believes that this time-limited approach balances the public's right of access to public files with the need to maintain an appropriate level of confidentiality of allegations after investigative efforts have concluded. *Id.*

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

A public records exemption would be created by the bill. The bill relates only to exemptions and it includes a statement of the public necessity that justifies the exemptions. For these reasons, the bill appears to comply with the provisions of Art. I, s. 24(c), Florida Constitution.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

On page 2, line 10: the first word should be an "of", instead of an "or," also there is an unnecessary "by" after the word "warrant."

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:

This is a technical amendment, making grammatical corrections. It changes an "or" to "of," and removes an unnecessary "by."

#2 by Criminal Justice:

This amendment deletes one of the bill's public records exemptions: the provision making exempt for 3 years after the conclusion of the active criminal investigation, any record compiled or generated by a criminal justice agency in connection with any investigation into crimes committed by a public servant. The effect is to restore current law which makes such records public immediately after a case is closed. (WITH TITLE AMENDMENT)

#3 by Criminal Justice:

This amendment is conforming to amendment # 2. It deletes references to the 3 year exemption from section 3 of the bill. Section 3 contains the statement of public necessity required by the state constitution.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
