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DATE: December 12, 2001

**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 285 (PCB SA 02-08)
RELATING TO: Public Records / Victim and Witness Information
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 11 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) provides that an exemption from the requirements of the public records or public meetings laws may be created or *maintained* only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. The Act, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 914.27, F.S., provides a public records exemption for certain information regarding victims and witnesses receiving protective or relocation services. This section was certified by the Division of Statutory Revision for repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

This bill reenacts the public records exemption in s. 914.27, F.S., for information held by any state or local law enforcement agency, state attorney, the statewide prosecutor, the Victim and Witness Protection Review Committee, or the Florida Department of Law Enforcement which discloses the identity or location of a victim or witness who has been identified or certified for protection or relocation by the state attorney or statewide prosecutor. Additionally, the identity or location information of victim or witness family members is confidential and exempt. Relocation sites, techniques, or procedures and permanent relocation information are also confidential and exempt. If sites, techniques, and procedures used were not kept exempt, those seeking to do harm to victims or witnesses could easily sabotage any protections provided. Revealing permanent relocation information regarding a victim, witness, or family member could clearly jeopardize their continued safety. **In addition, this bill removes the language directing the repeal of the exemption.**

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

Every person has the right to inspect or copy any public records 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 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.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or *maintained* only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of 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:

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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or “substantial amendment”¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.²

Section 456.046, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.³ Nonetheless, because the certified exemption as found in the Florida Statutes

¹ 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(3)(b), F.S.

² See s. 119.15(3)(d), F.S.

³ The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.⁴

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. 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 (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁵

Section 914.25, F.S., Protective services for certain victims and witnesses

Section 914.25(2), F.S., authorizes law enforcement agencies to provide protective services and temporary relocation services to a victim or witness at risk of harm.⁶ A victim or witness may be identified as a "victim or witness at risk of harm" by the statewide prosecutor, any state attorney, or any law enforcement officer. Once such identification has been made, the statewide prosecutor, the state attorney, or the law enforcement officer must notify either the statewide prosecutor or the state attorney who has jurisdiction over the criminal investigation.⁷

The statewide prosecutor or the state attorney may determine whether an identified "victim or witness at risk of harm" is critical to a criminal investigation or prosecution. If such victim or witness is deemed critical, the statewide prosecutor or the state attorney may

- Certify that the victim or witness receive protective services; or
- Certify that the victim or witness receive protective services, including temporary relation services.⁸

When such victim or witness is certified by the statewide prosecutor or the state attorney, a law enforcement agency, in "consultation" with the certifying state attorney or the statewide prosecutor, may provide appropriate protective services. The statewide prosecutor or the state attorney must notify the Florida Department of Law Enforcement (FDLE) if such victim or witness needs to be temporarily relocated. FDLE, in "consultation" with the statewide prosecutor or the state attorney, and any other law enforcement agency involved in the criminal investigation or prosecution, must coordinate the temporary relocation of such victim or witness.⁹

Protective services and temporary relocation services may be provided for up to one year, or until the risk giving rise to the certification has diminished, whichever occurs sooner. The statewide prosecutor or the state attorney may recertify such victim or witness for an additional period of up to one year if necessary.¹⁰

⁴ Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

⁵ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

⁶ Section 914.25(1)(a), F.S., defines "victim or witness at risk of harm" as a "victim or witness who, as a result of cooperating in an investigation or prosecution of a serious felony offense, has been subjected to violence or other forms of intimidation, or who is the subject of a substantial threat to commit violence. The term also includes a member of the victim's or witness's immediate family."

⁷ *Id.*

⁸ *See* s. 914.25(b), F.S.

⁹ *See* s. 914.25(4)(a), F.S.

¹⁰ *Id.*

The lead law enforcement agency providing protective services, may seek reimbursement for expenses from the Victim and Witness Protection Review Committee.¹¹ In addition, the statewide prosecutor, any state attorney, or any law enforcement officer acting in good faith in determining eligibility for victim and witness protective and relocation services, or in providing such services, is immune from civil liability.¹²

Section 914.27, F.S., Confidentiality of victim and witness information

Section 914.27, F.S., created pursuant to chapter 97-71, Laws of Florida (L.O.F.), provides a public records exemption for information held by any state or local law enforcement agency, state attorney, the statewide prosecutor, the Victim and Witness Protection Review Committee, or the Florida Department of Law Enforcement which discloses the identity or location of a victim or witness who has been identified or certified for protection or relocation by the state attorney or statewide prosecutor pursuant to s. 914.25, F.S. Additionally, identity or location information of victim or witness family members is confidential and exempt.

If a victim or witness is identified for protective services, but is not certified by the state attorney or statewide to receive such services, the identity and location information becomes public information.

Information regarding a certified victim or witness becomes public information once certification has expired, unless the certifying entity provides a written statement to the Victim and Witness Protection Review Committee stating that disclosure of such information would constitute an unwarranted risk to, or jeopardize the safety of victims, witnesses, or family members of such victims or witnesses. If a written statement is provided, such information remains confidential and exempt until the certifying entity determines that disclosure of such information would not constitute an unwarranted risk to, or jeopardize the safety of any person. A written notification to that effect must be provided to the Victim and Witness Protection Review Committee.

Additionally, s. 914.27, F.S., makes confidential and exempt relocation sites, techniques, or procedures utilized or developed as a result of the victim and witness protection services afforded by s. 914.25, F.S., as well as information regarding the identity or relocation site of any victim, witness, or immediate family member of a victim or witness who has made a relocation of permanent residence by reason of the victim or witness's involvement in the investigation or prosecution giving rise to certification for protection or relocation.

For the purposes of effectively implementing the protective services program, any state or local law enforcement agency, state attorney, or the statewide prosecutor may provide written notification to an agency or to a business entity operating under contract with, licensed by, or having any other business relationship with an agency,¹³ that identity or location information they possess should be held confidential and exempt. The state or local law enforcement agency, state attorney, or the statewide prosecutor providing such written notification must also provide written notification to the agency or business entity informing them of the date in which such confidential and exempt information becomes public information.

Relocation sites, techniques, or procedures and permanent relocation information remains confidential and exempt. If sites, techniques, and procedures used were not kept exempt, those seeking to do harm to victims or witnesses could easily sabotage any protections provided.

¹¹ The Victim and Witness Protection Review Committee was created by s. 943.031(6), F.S.

¹² See 914.25(6), F.S.

¹³ Such business entity might provide, for example, counseling services or relocation services.

Revealing permanent relocation information regarding a victim, witness, or family member would clearly jeopardize their continued safety.

The 1997 Florida Legislature found that the untimely disclosure of identity and location information concerning a victim or witness and their immediate family members would “constitute an unwarranted risk to, and jeopardize the safety of, such victims, witnesses, and family members.”

Open Government Sunset Review Questionnaire

The House of Representatives Committee on State Administration sent out an Open Government Sunset Review Questionnaire in June 2001 to the Office of Statewide Prosecution (OSWP) and the Florida Department of Law Enforcement (FDLE) regarding the public records exemption found in s. 914.27, F.S.

OSWP and FDLE support the reenactment of the exemption. OSWP said that

[m]andatory release of victim / witness relation information could be used by criminal associates of targets to intimidate the relocated victim / witness or to retaliate against him or her for their testimony. This particular exemption to the public records law is actually a matter of life and death.¹⁴

Criminal enterprises, particularly narcotics enterprises, have long collective memories. Certified victims / witnesses whose now-confidential information could become subject to open disclosure under Chapter 119 could very well end up dead or grievously harmed.¹⁵

FDLE responded by saying the “fundamental reason behind the statute is to provide protection for vital victims and witnesses, permitting the sunset of this law would be a disservice to and would likely lead to extreme danger and even could lead to death by murder for the affected victims, witnesses, and their families.”¹⁶

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts the public records exemption found in s. 914.27, F.S. The exemption provides that the following information held by any state or local law enforcement agency, state attorney, the statewide prosecutor, the Victim and Witness Protection Review Committee, or FDLE is confidential and exempt from public disclosure:

- The identity or location of a victim or witness who has been identified or certified for protective or relocation services;
- The identity or location of an immediate family member of a victim or witness who has been identified or certified;

¹⁴ House Committee on State Administration Open Government Sunset Review Questionnaire, James J. Schneider, General Counsel for the Office of Statewide Prosecution, June 27, 2001, #10.

¹⁵ *Id* at #14.

¹⁶ House Committee on State Administration Open Government Sunset Review Questionnaire, James D. Martin, Assistant General Counsel for the Florida Department of Law Enforcement, June 7, 2001, #10.

- Relocation sites, techniques, or procedures utilized or developed as a result of the victim and witness protective services afforded by s. 914.25, F.S.; or
- The identity or relocation site of any victim, witness, or immediate family member of a victim or witness who has made a relocation of permanent residence by reason of the victim's or witness's involvement in the investigation or prosecution giving rise to certification for protective or relocation services.

Law enforcement agencies, state attorneys, and the statewide prosecutor may share such information to facilitate the protective or relocation services and to support prosecution efforts. Such shared information must remain confidential and exempt when provided to any agency or entity.

Exempt identity and location information becomes public information when a victim or witness, who has been identified for protective services, is later denied certification; or, upon certification, when certification expires,¹⁷ unless the state attorney or statewide prosecutor making such certification, provides a written statement to the Victim and Witness Protection Review Committee stating the need to extend certification.¹⁸ Such information will maintain its confidential and exempt status until the certifying state attorney or statewide prosecutor determines that disclosure of such information will not jeopardize the safety of such persons. The certifying state attorney or statewide prosecutor must also provide written notification to the Victim and Witness Protection Review Committee once certification has been discontinued.

Any state or local law enforcement agency, state attorney, or the statewide prosecutor may provide written notification to an agency¹⁹ or to a business entity operating under contract with, licensed by, or having any other business relationship with an agency, or providing services pursuant to s. 914.25, F.S., that such confidential and exempt information held by an agency or business is to be held confidential and exempt. Any state or local law enforcement agency, state attorney, or the statewide prosecutor providing such notification must also provide written notification to the agency or business stating when confidential and exempt identity and location information becomes public information.

In addition, duplicative language is removed, along with the sentence repealing s. 914.27, F.S., as of October 2, 2002.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

¹⁷ Section 914.25(4)(b), F.S., provides that "protective services, including temporary relocation services, may be provided for up to 1 year or until the risk giving rise to the certification has diminished, whichever occurs sooner. If deemed necessary, the statewide prosecutor or the state attorney may recertify a victim or witness at risk of harm for an additional period of up to 1 year."

¹⁸ Since 1997, only one request has been made to extend beyond a year. Email from Joyce Gainous-Harris of FDLE, August 17, 2001.

¹⁹ Section 119.011(2), F.S., defines "agency" as 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."

III. 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.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

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B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

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