

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 126  
 SPONSOR: Criminal Justice Committee and Senators Campbell and Lynn  
 SUBJECT: Victim of Sexual Offense/Public Records Exemption  
 DATE: March 25, 2003      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Committee Substitute for Senate Bill 126 creates a public records exemption that makes confidential and exempt any criminal intelligence information or criminal investigative information which is a photograph, videotape, or image of any part of the body of the victim of a sexual offense prohibited under ch. 794, F.S. (sexual battery), ch. 800, F.S. (lewdness; indecent exposure), and ch. 827, F.S. (abuse of children). This exemption applies to such photographs, videotapes, or images before, on, or after the effective date of the exemption.

The CS also provides that the exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2008, unless reviewed and saved from repeal through reenactment by the Legislature.

The CS also provides a statement of public necessity.

This CS substantially amends s. 119.07, F.S.

**II. Present Situation:**

**A. Constitutional Access to Public Records and Meetings**

Article I, s. 24 of the State Constitution, provides every person with 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well

as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution.

The term “public records” has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption must state with specificity the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose of the law, relate to one subject, and contain only exemptions to public records or meetings requirements. The law enacting an exemption may contain provisions governing enforcement.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida’s citizens to discover the actions of their government. *Christy v. Palm Beach County Sheriff’s Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997). The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute. Attorney General Opinion 85-625. If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985). For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant. *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999). The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records. *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

In *B.B., infra*, at 34, the Court noted with regard to criminal discovery the following:

In the context of a criminal proceeding, the first district has indicated that “the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure,” so that a public records exemption cannot limit a criminal defendant’s access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), “we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure.” Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).

In a footnote, (*B.B., infra*, at 34 n. 4) the Court also noted:

We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is “not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution....”

## **B. The Open Government Sunset Review Act of 1995**

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under

s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which 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; 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. The Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

### C. Current Public Records Exemptions Relating to Victims of Sexual Offenses

Section 119.07(3)(f), F.S., provides that the following information is confidential and exempt from public disclosure: Any criminal intelligence information or criminal investigative information, including the photograph, name, address, or other fact or information which reveals the identity of the victim of the crime of sexual battery, a lewd or lascivious offense committed in the presence of a person less than 16 years of age, or the crime of child abuse.

Section 119.07(3)(s)1., F.S., provides that the following information is confidential and exempt from public disclosure: Any information that reveals the home or employment telephone number, home or employment address, or personal assets of a person who has been the victim of sexual battery.

Section 119.07(3)(s)2., F.S., provides that the following information is confidential and exempt from public disclosure: Any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct, which reveals that minor's identity.

Florida law does not currently provide for a public records exemption for *any* image of a victim of a sexual offense.

In 1997, Dale William Weeks, an inmate in the Florida correctional system, made three public record requests for documents relating to his sexual battery prosecution. *Weeks v. Golden*, 798 So.2d 848 (Fla. 1st DCA 2001) (*Weeks 2*). (The description of the Weeks' cases that follows is from this opinion.) When Weeks' requests went unanswered, he filed a petition for writ of mandamus in the trial court to compel the state attorney of the First Circuit to provide him with the documents requested. The state attorney produced some of the documents but claimed a public records exemption on others. He cited no statutory authority for the exemption. The trial court denied the petition, but the First District Court of Appeal reversed and remanded after finding the petition facially sufficient and the state's response (without citation of statutory authority) to be legally insufficient. *Weeks v. Golden*, 764 So.2d 633 (Fla. 1<sup>st</sup> DCA 2000) (*Weeks 1*).

On remand, the trial court found the state attorney's refusal to provide "sexually explicit assault victim records" to Weeks to be lawful pursuant to s. 119.07(3)(f), F.S., which exempts records that identify the victim of certain sexual offenses. The court also denied Weeks request for three photographs of the victim on the same authority.

Weeks appealed to the First District (*Weeks 2*) the trial court's order denying Week's request for production of the three photographs of the victim. Weeks argued that his request was limited to non-identifying parts of the victim's body. The State did not dispute this, but rather argued there was competent, substantial evidence to support the court's finding. The First District disagreed.

The First District reviewed the photographs, which it indicated were “close-up shots of the victim’s genital area; they depict human anatomy with no personal identifying mark or characteristic.” The court stated that the photographs did not satisfy s. 119.07, F.S., because the photographs Weeks requested of the victim did not identify the victim. The court concluded that “[i]f the legislature had intended to exempt *all* photographs of victims of sexual offenses, it could have easily said so in section 119.07(3)(f).” (The Court made no determination whether the Department of Corrections could restrict Weeks from receiving the photographs as prohibited contraband.)

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

Committee Substitute for Senate Bill 126 creates a public records exemption that makes confidential and exempt any criminal intelligence information or criminal investigative information which is a photograph, videotape, or image of any part of the body of the victim of a sexual offense prohibited under ch. 794, F.S. (sexual battery), ch. 800, F.S. (lewdness; indecent exposure), and ch. 827, F.S. (abuse of children). This exemption applies to such photographs, videotapes, or images before, on, or after the effective date of the exemption.

The impetus for the CS appears to be the Weeks case.

The CS also provides that the exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and stands repealed on October 2, 2008, unless reviewed and saved from repeal through reenactment by the Legislature.

The CS also provides a statement of public necessity. The Legislature finds that it is a public necessity that photographs, videotapes, or images of any part of the body of a victim of a sexual offense prohibited under ch. 794, F.S., ch. 800, F.S., or ch. 827, F.S., be made confidential and exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The Legislature finds these records often depict the victim in a graphic and disturbing fashion and may depict or describe the victim nude, bruised or bloodied. As such, the records are highly sensitive and if viewed, copied, or publicized could result in trauma, sorrow, humiliation, or emotional injury to the victim and the victim’s family. The Legislature further finds that the exemption should be given retroactive effect because it is remedial in nature.

The CS takes effect upon becoming a law.

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

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

None.

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

None.

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:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

---

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

---