

**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: SPB 7018

INTRODUCER: For consideration by the Criminal Justice Committee

SUBJECT: Open Government Sunset Review/Photograph of Sexual Offense Victims

DATE: January 10, 2008

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

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

**I. Summary:**

The public record exemption in s. 119.071(2)(h)2., F.S., is subject to open government sunset review, which means the exemption will be eliminated absent legislative action. This provision makes confidential and exempt any criminal intelligence information or criminal investigative information that is a photograph, videotape, or image of any part of the body of a victim of specified sexual offenses.

The bill reenacts this exemption, a recommendation of a staff interim report, *Open Government Sunset Review of Section 119.071(2)(h)2., F.S., Photographs, Videotapes, or Images of Sexual Offense Victims*, Interim Report 2008-209 (October 2007), Senate Committee on Criminal Justice.

This bill reenacts section 119.071(2)(h), F.S., and repeals section 2, ch. 2003-157, L.O.F.

**II. Present Situation:**

**Section 119.071(2)(h)2., F.S.**

Section 119.071(2)(h)2., F.S., makes confidential and exempt any criminal intelligence information or criminal investigative information that 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., ch. 800, F.S., or ch. 827, F.S. Such records are confidential and exempt regardless of whether they identify the victim or are active criminal intelligence information or active criminal investigative information. This exemption applies to such records before, on, or after the effective date of the exemption.

The public purpose of the exemption is to restrict disclosure of the records covered by the exemption because of the potentially serious impact such disclosure could have on the victim and victim's family. In the enacting legislation, the Legislature found that there was a public necessity in restricting disclosure of these records because they "often depict the victim in a graphic and disturbing fashion, frequently nude, bruised, or bloodied," and because the disclosure of such records "could result in trauma, sorrow, humiliation, or emotional injury to the victim and the victim's family."

The impetus for the creation of the exemption appears to be the decision in *Weeks v. Golden*,<sup>1</sup> an appeal arising from a trial court's denial of a records request by an inmate named Dale William Weeks. The First District Court of Appeals determined that there was no competent substantial evidence supporting the trial court's ruling denying production of the photographs under s. 119.07(3)(f), F.S., "on the ground that they might be used to identify the victim." The court described the records as "close-up shots of the victim's genital area; they depict human anatomy with no personal identifying mark or characteristic." 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)."

### **Findings from Staff's Interim Report**

In the interim report, staff found sufficient support for the reenactment of the exemption in s. 119.071(2)(h)2., F.S. The public purpose of the exemption is to restrict disclosure of the records covered by the exemption because of the potentially serious impact such disclosure would have on the victim and victim's family. In the enacting legislation,<sup>2</sup> the Legislature found that there was a public necessity in restricting disclosure of these records because they "often depict the victim in a graphic and disturbing fashion, frequently nude, bruised, or bloodied," and because such disclosure "could result in trauma, sorrow, humiliation, or emotional injury to the victim and the victim's family."

In addition to the public necessity the Legislature found for creating the exemption, which is consistent with the requirements of Article I, section 24 of the State Constitution, the exemption serves an identifiable public purpose as described in s. 119.15(6)(b)1., F.S., because it facilitates the effective compilation and collection of criminal intelligence information and criminal investigative information. Victims of sexual offenses might be reluctant to report these offenses if they knew that there was unrestricted access to photographs, videotapes, and images of their body parts.

All of the respondents to surveys sent out by Senate and House staff to the Department of Children and Family Services (DCFS), the Florida Department of Law Enforcement (FDLE), the Department of Corrections (DOC), the clerks of the court, the state attorneys, and the public defenders, recommended reenacting the exemption. In its survey responses, the DOC noted that photographs, videotapes, or images of the body parts of sexual offense victims "could be pieced

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<sup>1</sup> 798 So.2d 848 (Fla. 1st DCA 2001) (per curiam). See Staff Analysis of CS/HB 453, Florida House of Representatives (March 23, 2003).

<sup>2</sup> The exemption was created by ch. 2003-157, L.O.F. (H.B. 453, 1st Eng. by Rep. Adams). It originally appeared in s. 119.07(3)(f)2., F.S., but was subsequently transferred to and redesignated as s. 119.07(6)(f)2., F.S., by section 7 of ch. 2004-335, L.O.F. In 2005, the exemption was transferred to and redesignated as s. 119.071(2)(h)2., F.S., by section 15 of ch. 2005-251, L.O.F. The sunset date for the exemption is in ch. 2003-157, L.O.F., rather than in the statutory law.

together with other knowledge to identify the victim.” The DOC further noted that, without the exemption, “victims may be hesitant to report crimes or work with law enforcement and other agencies that offer assistance and services for victims of sex crimes and child abuse.”

The exemption does not appear to be broader than is necessary to meet the public purpose it serves. It is crafted to deal precisely with the situation in the *Weeks* case by restricting disclosure of photographs, videotapes, and images of the body parts of sexual victims, regardless of whether they identify the victim, thereby preventing the compounding of the suffering and trauma already experienced by the victim and the victim’s family as a result of the sexual offense. The exemption does not prevent criminal defendants from defending themselves, because disclosure of the records to defendants is provided for by s. 92.56(1), F.S., and by judicial rule.

The exemption uniquely affects: (1) the victims of certain sexual offenses; (2) the defendants in cases involving the alleged commission of such offenses; (3) criminal justice agencies collecting or compiling the records covered by the exemption; and (4) agencies that retain or share such records for the purpose of possible arrest and prosecution of such offenses or in furtherance of those agencies’ duties.

The records exempted by s. 119.071(2)(h)2., F.S., are compiled or collected by criminal justice agencies (primarily local law enforcement), and are highly sensitive information that is not readily obtainable from alternative sources. It is possible that copies of these records may be available to non-law enforcement agencies, such as the Florida Department of Health (DOH) or the DCFS, in some cases but this is not the norm.

Some, but certainly not all, of the records exempted in s. 119.071(2)(h)2., F.S., are exempted by another exemption. For example, the records exempted in s. 119.071(2)(h)2., F.S., are criminal intelligence information or criminal investigative information. If ‘active,’ they are also exempt pursuant to s. 119.07(2)(c)1., F.S. However, this provision does not make the records confidential, nor does it apply when the criminal intelligence or criminal investigative information is inactive, as is the case with s. 119.071(2)(h)2., F.S.

While there is overlap in which some of the records exempted in s. 119.071(2)(h)2., F.S., are also exempted by another exemption, s. 119.071(2)(h)2., F.S., is neither subsumed within nor duplicated by another exemption. Therefore, it does not appear to be possible to seamlessly merge this exemption with another exemption.

While sufficient support exists for reenacting the exemption in s. 119.071(2)(h)2., F.S., there may be a need to collate, streamline, and clarify the multiple exemptions that affect photographs, videotapes, and images of the body or body parts of sexual offense victims. For example, the wordiness and structure of s. 119.071(2)(h)1., F.S., make it difficult to read, and since subparagraph (2)(h)2. is specified as being in addition to subparagraph (2)(h)1., it should be clear what subparagraph (2)(h)2. adds to subparagraph (2)(h)1. Cross referencing of related statutes and other changes may provide greater clarity and eliminate any confusion about the operation of these statutes.

The FDLE indicated in its survey responses that it “has been advised by trainers that the exemption has limited instructors’ ability to utilize photos in training sexual crime investigators and other criminal investigators.” The agency has suggested the Legislature consider amendments to the exemption to allow for some access to these records for training purposes. It is not known if the exemption has prevented other agencies from using these records for training or other purposes in furtherance of their duties. An exception to the exemption to allow agencies access to these records as is necessary to the furtherance of their duties may be appropriate.

### **Recommendations from Staff’s Interim Report**

In the interim report, staff recommended that the exemption in s. 119.071(2)(h)2., F.S, be reenacted with some modifications or changes to the exemption and related laws, if necessary. The purpose of these changes would be to collate, streamline, and clarify the laws to ensure their optimal and consistent operation, access to records covered by the exemption by agencies as is necessary to the furtherance of their duties, and agreement with legislative intent. Examples of such changes include, but are not limited to, eliminating wordiness and the cross-referencing of statutes.

### **Public Records/Constitutional Requirements**

Article I, section 24 of the State 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 State 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 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. This section also requires the Legislature to enact laws governing enforcement, including the maintenance, control, destruction, disposal, and disposition of records made public by this section.

Exemptions to public records requirements are strictly construed.<sup>3</sup> 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>4</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are made confidential and exempt. If a record is not made confidential but is simply exempted, disclosure of the record is not prohibited in all circumstances. For example, a law enforcement agency may decide to release exempt criminal investigative information to aid in the apprehension of a criminal suspect or to protect public safety. In contrast, if the Legislature makes a record confidential and exempt, this record may only be released to the persons or entities designated in the statute.

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<sup>3</sup> See *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996).

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

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

Section 119.15, F.S., the Open Government Sunset Review Act, as it relates to records, establishes a review and repeal process for exemptions to public records. Under s. 119.15(3), F.S., in the 5th year after enactment of a new records exemption or substantial amendment<sup>5</sup> of an existing records exemption, the exemption shall be repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption. Under s. 119.15(4)(a), F.S., a law that enacts a new records exemption or substantially amends an existing records exemption must state that the record is exempt from Article I, section 24 of the State Constitution and s. 119.07(1), F.S., or s. 286.011, F.S., that the exemption is repealed at the end of 5 years, and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

As part of the sunset review process, s. 119.15(6)(a), F.S., requires the consideration of the following specific questions:

- 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?

Under s. 119.15(6)(b), F.S., an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the exemption 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:

- 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;
- 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
- 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.

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<sup>5</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.

**Relevant Exemptions and Statutes**

Multiple laws, including laws providing for exemptions, are relevant to the sunset review of s. 119.071(2)(h)2., F.S., because some of the laws exempt or make confidential and exempt records similar to those records made confidential and exempt in s. 119.071(2)(h)2., F.S., or punish or provide for damages for release of those records. Review of these laws is necessary because one of the questions to be answered in the sunset review process is whether there are multiple exemptions for the same type of record that it would be appropriate to merge.

Subparagraph (2)(h)1. of s. 119.071, F.S., is linked to subparagraph (2)(h)2. of that section and provides for a public records exemption for 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 as defined in ch. 794, F.S.; the identity of the victim of a lewd or lascivious offense committed upon or in the presence of a person less than 16 years of age, as defined in ch. 800, F.S.; or the identity of the victim of the crime of child abuse as defined by ch. 827, F.S., and any criminal intelligence information or criminal investigative information or other criminal record, including those portions of court records and court proceedings, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in ch. 794, F.S., ch. 800, F.S., or ch. 827, F.S.

Section 39.202(1), F.S., provides that all records held by the DCFS concerning reports of child abuse are confidential and exempt. The exemption applies to information in the possession of entities granted access, such as criminal justice agencies. Further, all records and reports of the DOH child protection team<sup>6</sup> are confidential and exempt pursuant to s. 39.202(6), F.S., and cannot be disclosed, except, upon request, to the state attorney, law enforcement, the DCFS, and necessary professionals, in furtherance of the treatment or additional evaluative needs of the child, by order of the court, or to health plan payors, limited to that information used for insurance reimbursement purposes.

Section 92.56(1), F.S., provides that all court records, including testimony from witnesses, that reveal the photograph, name, or address of the victim of an alleged offense described in ch. 794, F.S., or ch. 800, F.S., or act of child abuse, aggravated child abuse, or sexual performance by a child as described in ch. 827, F.S., are confidential and exempt and may not be made public if, upon a showing to the trial court with jurisdiction over the alleged offense, the state or the victim demonstrates that:

- The identity of the victim is not already known in the community;
- The victim has not voluntarily called public attention to the offense;
- The identity of the victim has not otherwise become a reasonable subject of public concern;
- The disclosure of the victim's identity would be offensive to a reasonable person; and
- The disclosure of the victim's identity would:

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<sup>6</sup> DCFS staff informed legislative staff that some of these records are similar to the records exempted by s. 119.071(2)(h)2., F.S., and that it is typically the DOH records that would be shared with the DCFS, not the criminal intelligence information or criminal investigative information exempted by s. 119.071(2)(h)2., F.S.

- Endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim;
- Endanger the victim because of the likelihood of retaliation, harassment, or intimidation;
- Cause severe emotional or mental harm to the victim;
- Make the victim unwilling to testify as a witness; or
- Be inappropriate for other good cause shown.

If the court, pursuant to subsection (1) of the statute, declares that all court records or other information that reveals the photograph, name, or address of the victim are confidential and exempt, the defendant charged with the crime may apply to the trial court for an order of disclosure of identifying information concerning the victim in order to prepare the defense. The defendant is prohibited from disclosing the victim's identity to any person other than the defendant's attorney or any other person directly involved in the preparation of the defense.<sup>7</sup>

Section 119.071(2)(c)1., F.S., provides that active criminal intelligence information and active criminal investigative information are exempt.

Section 119.0714(1)(h), F.S., provides that nothing in ch. 119, F.S., shall be construed to exempt from s. 119.07(1), F.S., a public record that was made a part of a court file and that is not specifically closed by a court order, except information or records that may reveal the identity of a person who is a victim of a sexual offense as provided in s. 119.071(2)(h), F.S.

Section 406.135(2), F.S., makes confidential and exempt a photograph or video recording of an autopsy held by a medical examiner. The exemption contains an exception for the surviving spouse (and other designated persons if the spouse is deceased) and a local governmental entity, or a state or federal agency, in furtherance of its official duties, without a court order. Additionally, paragraph (4)(a) of the statute provides that the court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.<sup>8</sup>

Section 794.024, F.S., provides that it is a second degree misdemeanor for a public employee or officer to disclosure photographs of certain sexual offense victims. The employee or officer must have access to the records and willfully and knowingly disclose them to a person not specified in the statute as authorized to receive them.

Section 794.026, F.S., provides that an entity or individual who communicates to others, prior to open judicial proceedings, specific identifying information concerning certain sexual offense victims shall be liable to that victim for all damages reasonably necessary to compensate the

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<sup>7</sup> This statute does not prohibit the publication or broadcast of the substance of trial testimony in a prosecution for the offense, but the publication or broadcast may not include an identifying photograph, an identifiable voice, or the name or address of the victim, unless the victim has consented in writing to the publication and filed such consent with the court or unless the court has declared such records not confidential and exempt. s. 92.56(5), F.S.

<sup>8</sup> Subsection (7) of the statute specifies that a criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of ch. 119, F.S., though a court in such proceedings may restrict or control disclosure of the records upon a showing of good cause.

victim for any injuries suffered as a result of such communication, subject to specified requirements.

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

The public record exemption in s. 119.071(2)(h)2., F.S., is subject to open government sunset review, which means the exemption will be eliminated absent legislative action. This provision makes confidential and exempt any criminal intelligence information or criminal investigative information that is a photograph, videotape, or image of any part of the body of a victim of specified sexual offenses.

The bill reenacts this exemption, a recommendation of a staff interim report, *Open Government Sunset Review of Section 119.071(2)(h)2., F.S., Photographs, Videotapes, or Images of Sexual Offense Victims*, Interim Report 2008-209 (October 2007), Senate Committee on Criminal Justice.

In the interim report, staff recommended that the exemption in s. 119.071(2)(h)2., F.S. be reenacted with some modifications or changes to the exemption and related laws, if necessary. The purpose of these changes would be to collate, streamline, and clarify the laws to ensure their optimal and consistent operation, access to records covered by the exemption by agencies as is necessary to the furtherance of their duties, and agreement with legislative intent. The bill, in its current form does not implement this recommendation. At the time this report was completed, Senate and House staff were still determining what, if any, modifications are necessary.

The bill also repeals s. 2, ch. 2003-157, L.O.F., which deletes provisions providing for the repeal of the exemption.

The bill takes effect October 1, 2008.

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

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

None.

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

The bill reenacts the public records exemption in s. 119.071(2)(h)2., F.S. The bill, in its current form, does not expand or modify this 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.