

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 Judiciary Committee

BILL: SB 570

INTRODUCER: Judiciary Committee

SUBJECT: Open Government Sunset Review/Interference with Custody

DATE: February 21, 2011 REVISED: 02/23/11 _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------------------|----------------|-----------|------------------|
| 1. | <u>Daniell/Maclure</u> | <u>Maclure</u> | <u>JU</u> | Favorable |
| 2. | _____ | _____ | <u>GO</u> | _____ |
| 3. | _____ | _____ | <u>RC</u> | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This bill is the result of the Judiciary Committee’s Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Currently, the public-records exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. The bill retains the public-records exemption by deleting language providing for the scheduled repeal of the exemption.

This bill substantially amends section 787.03, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.¹ In 1992, Floridians adopted an amendment to the

¹ Sections 1390, 1391, F.S. (Rev. 1892).

State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁴ records are available for public inspection. Section 119.011(12), F.S., defines the term “public records” very broadly to include “all documents, ... tapes, photographs, films, sounds recordings ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Unless made exempt, all such materials are open for public inspection at the moment they become records.⁵

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁶

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁷ If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.⁸

Open Government Sunset Review Act

The Open Government Sunset Review Act⁹ provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption’s enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services 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. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁰ An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and

² FLA. CONST. art. I, s. 24.

³ Chapter 119, F.S.

⁴ An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.

⁵ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁶ FLA. CONST. art. I, s. 24(c).

⁷ *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

⁸ *Id.* at 54.

⁹ Section 119.15, F.S.

¹⁰ Section 119.15(6)(b), F.S.

cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration 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 combination 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.¹¹

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- 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?
- 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?¹²

Interference with Custody

The Legislature in 1974 created the offense of interference with custody. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.¹³ Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.¹⁴

The statute prescribes three defenses to the offense of interference with custody:

¹¹ *Id.*

¹² Section 119.15(6)(a), F.S.

¹³ Section 787.03(1), F.S.

¹⁴ Section 787.03(2), F.S.

(a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.

(b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, [F.S.,] and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.

(c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.¹⁵

Distinct from the three defenses, the statute further specifies that the statute does not apply:

in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.¹⁶

To avail himself or herself of this exception, a person who takes a minor or incompetent person must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the minor or incompetent person resided. The report must include the name of the person taking the minor or incompetent person, the current address and telephone number of the person and the minor or incompetent person, and the reasons the minor or incompetent person was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act¹⁷ or the Uniform Child Custody Jurisdiction and Enforcement Act.¹⁸
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the minor or incompetent person.¹⁹

¹⁵ Section 787.03(4)(a)-(c), F.S.

¹⁶ Section 787.03(6)(a), F.S.

¹⁷ 28 U.S.C. s. 1738A.

¹⁸ Sections 61.501-61.542, F.S.

¹⁹ Section 787.03(6)(b), F.S.

Public-Records Exemption for Interference with Custody

Under an accompanying public-records exemption, the current address and telephone number of the person taking the minor or incompetent person, as well as the address and telephone number of the minor or incompetent person, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.²⁰ As originally enacted in 2000, this exemption applied to “information provided” to a sheriff or state attorney as part of the report filed within 10 days of taking a “child.” Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.²¹ The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.²²

During the 2005 Regular Session, the Legislature reenacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.²³

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. As a consequence, the 2005 legislation reenacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it was reviewed and saved from repeal through reenactment.²⁴ During the 2006 Regular Session, the Legislature passed House Bill 7113, reenacting and revising the public-records exemption for interference with custody.²⁵ Among other changes, the 2006 legislation included within the scope of the public-records exemption the address and telephone information for an incompetent person who is taken, in addition to the same information for a child.

The public-records exemption for interference with custody is again scheduled for repeal on October 2, 2011, unless saved from repeal through reenactment by the Legislature. In reviewing the public-records exemption under the Open Government Sunset Review Act, Senate professional staff of the Judiciary Committee found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or

²⁰ Section 787.03(6)(c), F.S.

²¹ See s. 787.03(6)(c), F.S. (2000).

²² Comm. on Judiciary, The Florida Senate, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody, s. 787.03, F.S.* (Interim Report 2005-217) (Nov. 2004), available at http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-217ju.pdf (last visited Aug. 31, 2010).

²³ Chapter 2005-89, Laws of Fla.

²⁴ See s. 787.03(7), F.S. (2005); s. 1, ch. 2005-89, L.O.F.

²⁵ Chapter 2006-115, Laws of Fla.

incompetent person. In order to gauge how this exemption functions and its importance, professional staff sent questionnaires to interested parties, including the Florida Prosecuting Attorneys Association, the Florida Sheriffs Association, and the Florida Coalition Against Domestic Violence. Responses from the questionnaire indicated that the exemption is necessary to provide protection to victims of domestic violence, as well as a child or incompetent person who may also be in danger.²⁶ Based on the questionnaire responses, this public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.²⁷

Professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. This public-records exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

This bill retains the public-records exemption related to the interference with custody statute by deleting language providing for the scheduled repeal of the exemption.

This bill provides an effective date of October 1, 2011.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for interference with custody, the exemption will expire on October 2, 2011. Absent the exemption, the address and telephone number of the person fleeing with a child or incompetent person due to domestic violence would be public and accessible by the person who is alleged to have created the safety threat.

²⁶ Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.

²⁷ Section 119.15(6)(b)2., F.S.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

This bill retains the public-records exemption for specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. This bill appears to comply with the requirements of article I, section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

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:

In order to gain the exception provided in statute for a person fleeing domestic violence or seeking to protect a minor or incompetent person from harm, the person must file a report on their whereabouts with the sheriff or state attorney within 10 days after taking the minor or incompetent person. Some survey respondents expressed concern that the 10-day period was too long. One sheriff explained that law enforcement may spend several days investigating the disappearance of the minor or incompetent person without the benefit of knowing that the minor or incompetent person is safe and in the company of a person having legal custody of the minor or incompetent person. However, according to a representative of an organization that advocates on behalf of domestic violence victims, the 10-day period should not be reduced because a

person fleeing domestic violence often needs that amount of time to find a safe place to stay and file the report.²⁸

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁸ E-mail from Nina Zollo, Florida Coalition Against Domestic Violence, to professional staff of the Judiciary Committee (Sept. 7, 2010) (on file with the Senate Committee on Judiciary).