

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 Criminal Justice Committee

BILL: SB 1096

INTRODUCER: Senator Hays

SUBJECT: Public Records/Registration Information/Sexual Predators and Sexual Offenders

DATE: January 21, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Pre-meeting
2.	_____	_____	GO	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates an exemption from the public records requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution for any electronic mail address or physical address information provided to the Florida Department of Law Enforcement (Department) by a person, other than a sexual offender or predator, who requests access to the Department’s automatic notification system. A statement of public necessity is provided and a Sunset Review is required by the bill. Because this bill creates a new public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.¹

This bill substantially amends section 943.44353 of the Florida Statutes.

II. Present Situation:

Sexual Offender and Sexual Predator Registry, Automatic Notification and Access to Information

The Florida Department of Law Enforcement maintains the statewide registry of all sexual predators and sexual offenders. It also maintains a searchable website containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

Section 943.44353, F.S., requires the Department to maintain a system to provide automatic notification of registration information regarding sexual predators and sexual offenders to the public. The system is known as the Offender Alert System (OAS).

¹ Section 24(c), Art. I of the State Constitution.

Schools, public housing agencies, agencies responsible for conducting employment-related background checks, social service entities responsible for protecting minors in the child welfare system, and certain other organizations have access to this system. Additionally, individuals have access to the notification system.

The OAS is an email subscription service which allows citizens to receive an email if a sexual predator/offender moves within a prescribed radius of a selected address. It also allows subscribers to track a predator/offender's movements.

To sign up for the OAS, persons provide their email address. To track registrant activity related to a specific location (i.e., home, school, day care center), they must also provide a physical address(es) so their interests can be tailored accordingly.

Public Records Exemptions

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency³ records are to be available for public inspection.

² Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

³ Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

Section 119.011(12), F.S., defines the term “public record” 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. 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 “intended to perpetuate, communicate, or formalize knowledge.”⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. 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.¹³ 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.¹⁴ An exemption meets the statutory criteria if it:

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁸ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Section 24(c), Art. I of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ *Id.*

- 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 ... would be defamatory ... 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 ... would injure the affected entity in the marketplace.¹⁵

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁶

Exemption Created by Chapter 2011-85, Laws of Florida

During the 2011 Legislative Session, the Legislature enacted s. 119.071(5)(j)1., F.S., effective July 1, 2011, which provides in pertinent part:

“Any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency, including the person’s name, address, telephone number, e-mail address, or other electronic communication address, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption applies to information held by an agency, before, on, or after the effective date of this exemption.”

In setting forth the public necessity for passage of the above exemption, section 2 of Chapter 2011-85, Laws of Florida, provides:

“The Legislature finds that it is a public necessity to exempt from public records requirements any information furnished by a person to an agency for the purpose of being provided with emergency notification by the agency. Through the use of current technology, agencies may contact members of the public by a variety of electronic means, including cellular telephones and electronic mail, to alert them of imminent natural and manmade disasters, medical emergencies, criminal emergencies, and other dangerous conditions. Public safety is significantly enhanced through the use of such emergency notification programs, and expansion of such programs further increases public safety. A public records exemption for information furnished to an agency for this purpose will encourage greater participation in emergency notification programs by alleviating concerns about disclosure of information that could be used for criminal purposes. For these reasons, the public records exemption provided in this act is necessary for

¹⁵ *Id.*

¹⁶ Section 119.15(6)(a), F.S.

the effective implementation of and broad participation in emergency notification programs conducted by agencies.”¹⁷

Opinion of the Attorney General

The Department raised privacy and public safety concerns related to the information provided by subscribers to the OAS in a request for the opinion of the Attorney General on the following question: Are the email addresses and corresponding home, school, and other “watched addresses of concern” with the FDLE Offender Alert System exempt from disclosure under s. 119.071(5)(j), F.S. (Chapter 2011-85)?

General Bondi’s response stated, in part:

The Legislature has characterized the presence of a sexual predator in a community as an extreme threat to public safety requiring notification and the release of information relating to a sexual offender’s presence in the community to be in furtherance of the governmental interests in public safety.¹⁸ Moreover, as clearly reflected in the statement of necessity for section 119.071(5)(j), Florida Statutes, the Legislature was concerned with encouraging public participation in emergency notification programs by ensuring that the information submitted by the public to participate in such programs was protected. ...

The Florida Offender Alert System clearly addresses the Legislature’s concern with the public safety threat posed by the presence of sexual predators and sexual offenders in the community by alerting persons who have requested notification of the immediate danger posed by such individuals moving into their neighborhoods. In the statement of necessity for Chapter 2011-85, Laws of Florida, the Legislature repeatedly expressed its intent that the bill is directed toward public safety and seeks to encourage public participation in such notification alert systems. Thus, the inclusion of the Florida Offender Alert System would appear to be consistent with the expressed legislative intent for the adoption of the exemption.¹⁹

III. Effect of Proposed Changes:

The bill creates an exemption from the public records requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution for any electronic mail address or physical address information provided to the Department by a person, other than a sexual offender or predator, who requests access to the automatic notification system (OAS). The exemption is made retroactive and is subject to an Open Government Sunset Review by October 1, 2017 or it will stand repealed.

A statement of public necessity is provided in Section 2 of the bill. It states:

¹⁷ Chapter 2011-85, Laws of Florida

¹⁸ See s. 775.21(3)(a) and s. 943.0435(12), F.S., respectively.

¹⁹ Op.Att’yGen.Fla. 11-16(2011).

Section 2. The Legislature finds that it is a public necessity to exempt from public records requirements the electronic mail address and physical address information furnished to the Department of Law Enforcement by persons requesting access to the automatic notification system of registration information regarding sexual predators and sexual offenders. A public records exemption for such information furnished to the department will encourage greater access to the notification system by alleviating concerns about disclosure of electronic mail and physical location information that could be used for criminal purposes. Public safety is significantly enhanced through the use of the department's notification system. For these reasons, the public records exemption provided by this act is necessary for effective and broad participation in the notification system by those seeking notification.

The bill takes effect on July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public-records or public-meetings exemption. Because this bill creates a new public-records exemption, it requires a two-thirds vote for passage.

Subject Requirement

Section 24(c), Art. I of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement

Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly-created public-records or public-meetings exemption. Because this bill creates a new public-records exemption, it includes a public necessity statement.

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.