

**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 Governmental Oversight and Accountability Committee

**BILL:** CS/SB 1096

**INTRODUCER:** Criminal Justice Committee and Senator Hays

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

**DATE:** February 17, 2012      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Seay	Roberts	GO	Pre-meeting
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill creates a public records exemption for any electronic mail address or physical address provided to the Florida Department of Law Enforcement (FDLE) by a person who requests access to FDLE’s automatic notification system, unless otherwise required by law. As this bill creates a new public records exemption, it contains a public necessity statement as required by the State Constitution. This bill is subject to future review and repeal pursuant to the Open Government Sunset Review Act.

This bill substantially amends section 943.44353 of the Florida Statutes.

**II. Present Situation:**

**Public Records Law**

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One-hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory

<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24, of the State Constitution, provides that:

(a) Every person has 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, 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

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.<sup>5</sup>

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 used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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<sup>2</sup> FLA. CONST. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word "agency" is defined in s. 119.011(2), F.S., to mean "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." The Florida Constitution also establishes a right of access to 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, except those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>5</sup> Section 119.011(12), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> 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.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

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

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>15</sup> 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. An exemption meets the three statutory criteria if it:

- 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 their safety; 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 that 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.<sup>16</sup>

The Act also requires the Legislature to consider the following:

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<sup>8</sup> Florida Attorney General Opinion 85-62.

<sup>9</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5<sup>th</sup> DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>12</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

- 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

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

The Florida Department of Law Enforcement (FDLE) 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 FDLE 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).

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.

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<sup>17</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

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.

### **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 the effective implementation of and broad participation in emergency notification programs conducted by agencies.”<sup>18</sup>

### **Opinion of the Attorney General**

FDLE 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)?

The Attorney General’s response stated, in part:

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<sup>18</sup> Chapter 2011-85, L.O.F.

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.<sup>19</sup> 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.<sup>20</sup>

### III. Effect of Proposed Changes:

**Section 1** amends 943.44353, F.S., providing that any information regarding an e-mail address or physical address provided to FDLE by a person in order to use or access the automatic Florida Offender Alert notification system is confidential and exempt from public records requirements; providing an exception to the exemption if the protected information is specifically made public or is specifically required to be disclosed by other provisions of law; providing for retroactive application of the public records exemption; providing future review and repeal pursuant to the Open Government Sunset Review Act.

**Section 2** contains a public necessity statement as required by the State Constitution.

**Section 3** provides an effective date of July 1, 2012.

### IV. Constitutional Issues:

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

None.

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

#### **Vote Requirement**

<sup>19</sup> See s. 775.21(3)(a) and s. 943.0435(12), F.S., respectively.

<sup>20</sup> Attorney General Opinion 2011-16.

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 or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

**Public Necessity Statement**

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly created or expanded 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.)

**CS by Criminal Justice on February 16, 2012:**

Provides that other specific provisions of law may override the exemption. This provision in the bill is intended to eliminate unintended impediments to law enforcement investigations.

B. Amendments:

None.

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

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