

**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 Committee on Criminal Justice

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BILL: SB 304

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Certain Personal Identifying Information of Domestic & Sexual Violence Victims

DATE: January 15, 2013      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon		<b>cj SPB 7000 as introduced</b>
2.				
3.				
4.				
5.				
6.				

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**I. Summary:**

SB 304 is the result of an Open Government Sunset Review performed by the Committee on Criminal Justice.

Current law<sup>1</sup> provides that certain personal identifying information contained in records documenting an act of domestic or sexual violence that is submitted to an agency by an agency employee is confidential and exempt. Additionally, a written request for leave submitted by an agency employee for absences related to domestic or sexual violence, including any agency time sheet that reflects such a request, is confidential and exempt from public record requirements until one year after the leave has been taken. This exemption is subject to review under the Open Government Sunset Review Act.<sup>2</sup> It will sunset on October 2, 2013, unless saved from repeal through reenactment by the Legislature.

This bill reenacts the exemption.

This bill does not expand the scope of the public records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends section 741.313(7) of the Florida Statutes.

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<sup>1</sup> Section 741.313(7), F.S.

<sup>2</sup> Section 119.15, F.S.

## II. Present Situation:

### Public Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>3</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>4</sup> Article I, s. 24 of the State Constitution, provides that:

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>5</sup> which pre-dates the public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>6</sup> Section 119.07(1)(a), F.S., states:

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

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>7</sup>

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<sup>3</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>4</sup> Article I, s. 24, Fla. Constitution.

<sup>5</sup> Chapter 119, F.S.

<sup>6</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.

<sup>7</sup> Section 119.011(11), F.S.

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>8</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<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>

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>14</sup> If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.<sup>15</sup>

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

The Open Government Sunset Review Act (Act)<sup>16</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, 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.<sup>17</sup>

The Act states that an exemption may be created 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. 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:

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<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>9</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>10</sup> Article I, s. 24(c), Fla. Constitution.

<sup>11</sup> *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).

<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> Art. I, s. 24(c), Fla. Constitution.

<sup>14</sup> Attorney General Opinion 85-62.

<sup>15</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> Section 119.15(5)(a), F.S.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose 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>18</sup>

The Act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.<sup>19</sup>

### **Current Exemption Under Review**

In 2007, the Legislature created a public record exemption for certain information documenting an act of domestic violence that is submitted to an agency by an agency employee.<sup>20</sup> In 2008, the Legislature extended the same protection to victims of sexual violence.<sup>21</sup> Specifically, s. 741.313(7), F.S., protects from public disclosure personal identifying information contained in records documenting an act of domestic or sexual violence that is submitted to an agency by an agency employee. In addition, a written request for leave submitted by an agency employee for absences related to domestic or sexual violence, including any agency time sheet that reflects such a request, is confidential and exempt from public record requirements until one year after the leave has been taken.<sup>22</sup>

Section 741.313, F.S., applies to public and private employers with 50 or more employees and to employees who have been employed by an employer for at least three months.<sup>23</sup> An employee may take up to three days of leave in any 12 month period if the employee or family member is a victim of domestic or sexual violence. The leave may be with or without pay, at the discretion of the employer.<sup>24</sup> An employee may use the leave from work to do any of the following:

- Seek a protective injunction against domestic, sexual, dating, or repeat violence;

<sup>18</sup> Section 119.15(4)(b), F.S.

<sup>19</sup> Section 119.15(6)(a), F.S. These questions are as follows:

- 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?

<sup>20</sup> Chapter 2007-108, s. 1, Laws of Fla.

<sup>21</sup> Chapter 2008-254, s. 1, Laws of Fla.

<sup>22</sup> *Id.* The public necessity statement in the original legislation creating the exemption states that the leave request is temporary and available one year after the leave has been taken so as to provide continued public oversight of public moneys.

<sup>23</sup> Section 741.313(3), F.S.

<sup>24</sup> Section 741.313(2)(a), F.S.

- Obtain medical care or mental health counseling related to the act of domestic or sexual violence;
- Obtain services from a victim services organization as a result of the act of domestic or sexual violence;
- Seek safe housing; or
- Seek legal assistance in addressing issues relating to the domestic or sexual violence, including attending or preparing for court proceedings.<sup>25</sup>

An employee is required to provide sufficient documentation of the act of domestic or sexual violence as well as advance notice of the leave, except in cases of imminent danger to the employee or the employee's family. Additionally, he or she must use all available annual or vacation leave, personal leave, and sick leave, unless this requirement is waived by the employer.<sup>26</sup>

This public record exemption stands repealed on October 2, 2013, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.<sup>27</sup>

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Criminal Justice Committee recommends that the Legislature retain the public records exemption established in s. 741.313(7), F.S. This recommendation is made in light of information gathered for the Open Government Sunset Review, indicating that there is a public necessity to continue to protect personal identifying information contained in records documenting an act of domestic or sexual violence that is submitted to an agency by an agency employee because disclosure would jeopardize their safety and cause emotional distress.<sup>28</sup>

### III. Effect of Proposed Changes:

This bill removes the repeal date in s. 741.313(7), F.S., thereby reenacting the public records exemption for certain personal identifying information contained in records documenting an act of domestic or sexual violence that is submitted to an agency by an agency employee, including a written request for leave submitted by an agency employee for absences related to domestic or sexual violence, and any agency time sheet that reflects such a request until one year after the leave has been taken.

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<sup>25</sup> Section 741.313(2)(b), F.S.

<sup>26</sup> Section 741.313(4), F.S.

<sup>27</sup> Section 741.313(7)(c), F.S.

<sup>28</sup> According to a majority of survey responses (48 out of 65) from 23 state agencies and 41 city and county governmental entities, and input from the Florida Coalition Against Domestic Violence and the Florida Council Against Sexual Violence, this exemption should be reenacted because it protects information that is personal and highly sensitive, the release of which could subject the employee to embarrassment, emotional distress, escalation of violence, and could deter the employee from seeking assistance from the agency or availing themselves of the benefits of the statute. Twenty-seven respondents recommended reenactment with no other changes. Eight respondents thought law enforcement should have access to the information. Nine respondents suggested reenactment as well as deleting the one-year time limitation. (*But see* note 22 *supra* indicating that the original public necessity statement regarding the time limitation was to provide continued public oversight of public moneys.) Three respondents recommended repealing the exemption, while 14 had no opinion either way. Survey respondents also indicated receiving ten leave requests since January 2008. The First Amendment Foundation stated that it would not oppose reenacting the exemption because the exemption is sufficiently narrow. Survey responses from this Open Government Sunset Review are on file with the Senate Criminal Justice Committee in Tallahassee, Florida.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public records exemption specified in s. 741.313(7), F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

## 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.