

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 Committee on Judiciary

BILL: CS/SB 1216

INTRODUCER: Judiciary Committee and Senator Book

SUBJECT: Public Records/Videotaped Statement of a Minor

DATE: January 10, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---------------|
| 1. | Tulloch | Cibula | JU | Fav/CS |
| 2. | | | GO | |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1216 expands an existing public records exemption that makes information from the videotaped statements of minor children who are alleged to be or are the victims of several specific sexual offenses confidential and exempt from public access requirements under the public records laws. Under the bill, the exemption also applies if the videotaped statements relate to the sexual performance by a child and child pornography as those offenses are redefined in a linked bill SB 1214, which revises laws relating to child exploitation.

The bill requires a two-thirds vote of each chamber because it expands a public records exemption.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution

Under the Florida Constitution, the public is guaranteed the right of access to government records and meetings. The public may 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, unless the record is exempted or specifically made confidential.¹

¹ FLA. CONST., art. I, s. 24(a).

The public is also guaranteed the right to be notified and have access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless an exception is provided for in the Constitution.³

The Florida Statutes

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., contains the main body of public records laws and is known as the Public Records Act.⁴ The Act deals with public records access and guarantees every person's right to inspect and copy any state or local government public record.⁵ Section 286.011, F.S., which is often referred to as the state's sunshine law, requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

Public Records Exemptions

Only the Legislature may create an exemption to public records or open meeting requirements.⁸ An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law. The law must be passed by a two-thirds vote of each house of the Legislature.⁹

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Additional public records laws are found throughout the Florida Statutes.

⁵ Section 119.011(12), F.S., defines "public record" 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." Section 119.011(2), F.S., defines "agency" 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 public records chapter does not apply to legislative records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁶ Section 286.011(1) and (2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁷ Section 119.10, F.S.

⁸ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature designates as both exempt *and* confidential. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991). However, if the Legislature designates a record as confidential, the information is not subject to public inspection and may be released only to the organizations or persons designated in the statute. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

⁹ FLA. CONST., art. I, s. 24(c).

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹⁰ Records designated both as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.¹¹ However, records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹²

Open Government Sunset Review Act

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meeting exemptions.¹³ The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.¹⁴

The Sunset Review Act provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.¹⁵ An exemption serves an identifiable purpose if it (A) meets one of the stated requirements below *and* (B) the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. Under (A), the stated requirements are that the exemption must:

- (1) Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption;¹⁶
- (2) Protect sensitive personal information that would be defamatory or damaging to someone’s reputation or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁷ or
- (3) Protect confidential information of entities including, but not limited to, trade or business secrets.¹⁸

The act also requires specified questions to be considered during the review process.¹⁹ In examining an exemption, the act directs the Legislature to carefully question the purpose and

¹⁰ If the Legislature designates a record as confidential, the record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹¹ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹² *Id.*

¹³ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹⁴ Section 119.15(3), F.S.

¹⁵ Section 119.15(6)(b), F.S. *See also* s. 119.01(1), F.S. “It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.”)

¹⁶ Section 119.15(6)(b)1., F.S.

¹⁷ Section 119.15(6)(b)2., F.S.

¹⁸ Section 119.15(6)(b)3., F.S.

¹⁹ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?

necessity of reenacting the exemption. If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁰ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²¹

Public Records Exemptions for Crime Victims

Under current law, a document identifying the victim of a crime is generally exempt from public access requirements under the public records laws.²² Such documents are exempt when they both:

- (1) Reveal a crime victim's identity or personal identifying information, such as home and employment phone numbers or addresses or the victim's personal assets, *and*
- (2) Specify the person who is the victim of the crime.²³

There are also two categories of "special victims" for which additional public records exemptions have been deemed necessary:

- (1) *Personally targeted abuse victims*—victims of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence may request in writing that any information that is not already confidential and exempt and reveals the victim's *location* also be deemed exempt from inspection.²⁴
- (2) *The videotaped statements of child sex crime victims*—any information in a videotaped statement of a minor who is alleged to be or is a victim of sexual battery,²⁵ lewd and lascivious acts,²⁶ or other sexual misconduct as proscribed under various statutory provisions (generally concerning exhibition or depiction of sexual acts)²⁷ are confidential and exempt

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- 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?

²⁰ FLA. CONST., art. I, s. 24(c).

²¹ Section 119.15(7), F.S.

²² Section 119.071(2)(j)1., F.S.; FLA. CONST., art. I, s. 24(c).

²³ *Id.*

²⁴ *Id.*

²⁵ Section 794.011(1)(h), F.S. ("Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.").

²⁶ Sections 800.01-.09, F.S. (Chapter 800).

²⁷ Section 827.071, F.S. (prohibiting use of a child in a sexual performance and the promotion, possession, or intentionally viewing of a visual depiction of the child's sexual performance (with the exception of law enforcement investigations)); s. 847.012, F.S. (prohibiting intentional selling, renting, or loaning sexually graphic or pornographic materials to minors); s. 847.0125, F.S. (prohibiting retail display of sexually graphic magazine covers which are harmful to minors); s. 847.013, F.S. (prohibiting exposure of minors to sexually graphic or pornographic movies, exhibitions, shows, presentations, or representations); s. 847.0133, F.S. ("A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor" including drawings and written materials); s. 847.0145, F.S. (prohibiting sexual trafficking of minors).

from public access under the Public Records Act if the videotaped statement reveals the minor's identity or other identifying information (the minor's name, face, home, phone number, school, church, etc.) *and* specifies that the minor is the victim of one of the proscribed sexual crimes.²⁸ The child sex crime exemption also criminally penalizes any public employee or official who willfully and knowingly discloses such information from the video.²⁹

III. Effect of Proposed Changes:

Section 1 expands the existing public records exemption concerning information in the videotaped statements of minor children who are the victims of sexual battery,³⁰ lewd and lascivious acts,³¹ or other sexual misconduct as proscribed under various statutory provisions.³² Under the bill, the exemption also applies if the videotaped statements relate to the sexual performance by a child³³ and child pornography³⁴ as those offenses are redefined in a linked bill SB 1214, which revises laws relating to child exploitation. The bill also amends and conforms the same statutory references in the enforcement provision of the exemption, providing criminal penalties for a public employee or officer who willfully and knowingly discloses videotaped information of a child victim of a sex crime.

In accordance with the Open Government Sunset Review Act,³⁵ the bill states that:

- The record is exempt from section 24, Article I, of the State Constitution;
- The record is exempt from section 119.07(1), F.S.; and
- The exemption will be repealed in 5 years, on October 2, 2023, unless reviewed by the Legislature and reenacted.³⁶

Section 2 contains legislative findings that the expansion of the public records exemption is a public necessity. The findings note that many of the videotaped statements by child victims

²⁸ Section 119.071(2)(j)2.a., F.S.

²⁹ Section 119.071(2)(j)2.b., F.S.

³⁰ Section 794.011(1)(h), F.S. (“‘Sexual battery’ means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.”).

³¹ Sections 800.01-.09, F.S. (Chapter 800).

³² Section 827.071, F.S. (prohibiting use of a child in a sexual performance and the promotion, possession, or intentionally viewing of a visual depiction of the child's sexual performance (with the exception of law enforcement investigations)); s. 847.012, F.S. (prohibiting intentional selling, renting, or loaning sexually graphic or pornographic materials to minors); s. 847.0125, F.S. (prohibiting retail display of sexually graphic magazine covers which are harmful to minors); s. 847.013, F.S. (prohibiting exposure of minors to sexually graphic or pornographic movies, exhibitions, shows, presentations, or representations); s. 847.0133, F.S. (“A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor” including drawings and written materials); s. 847.0145, F.S. (prohibiting sexual trafficking of minors).

³³ See SB 1214 at p. 48, proposing creation of 847.003, “Sexual performance by a child; penalties” to replace section 827.071, F.S., also entitled “Sexual performance by a child; penalties,” which SB 1214 proposes to repeal.

³⁴ See SB 1214 at p. 52, proposing substantial revisions to Section 847.0137, F.S., titled “Transmission of pornography by electronic device or equipment prohibited; penalties,” and renaming it “Child pornography; prohibited acts; penalties.”

³⁵ Section 119.15(4)(a), F.S.

³⁶ Section 119.15(4)(a), F.S. (“A law that enacts a new exemption or substantially amends an existing exemption must state that the record or meeting is: 1. Exempt from s. 24, Art. I of the State Constitution; 2. Exempt from s. 119.07(1) or s. 286.011; and 3. Repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.”).

contain highly sensitive information in which the child describes the sexual crime in graphic detail. If such videotaped information were publicized, it could lead to further victimization, humiliation, trauma, sorrow, and emotional injury for both the child and his or her family. To minimize trauma, prevent further victimization and injury, and protect the child's privacy, the findings note that the videotaped statements of child victims of proscribed sexual crimes, including ss. 847.003 and 847.0137, F.S., should also be exempt.

Section 3 provides that the effective date is the same as the effective date of the linked bill, SB 1214, or similar bill. Accordingly, this bill takes effect on October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement: Article I, s. 24(c), of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption.

Public Necessity Statement: Article I, s. 24(c), of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. Here, the bill includes a public necessity statement in Section 2 and, therefore, meets this requirement.

Breadth of Exemption: Article I, s. 24(c), of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.³⁷ Additionally, the Open Government Sunset Review Act (Act) provides that the stated purpose or “identifiable public purpose is served if [(A)] the exemption meets one of the [enumerated] purposes *and* [(B)] 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[.]”³⁸

Here, the bill's exemption serves the second enumerated “identifiable purpose” under the Act: to protect the sensitive personal information of child sex crime victims by limiting access to information in their videotaped statements in order to protect these children and their families from further victimization and trauma. Only personal, identifying information is exempt and confidential under the bill.³⁹

³⁷“The public records act ‘is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.’” *Lighbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (quoting *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994)).

³⁸ Section 119.15(6)(b), F.S. (setting out three enumerated purposes: (1) allow effective and efficient administration of government program, (2) protect individual's identity and sensitive personal information, (3) protect confidential business and trade information).

³⁹ Section 119.15(6)(b)2., F.S. (permitting the exemption of sensitive, personal information pertaining to individuals which could jeopardize the safety of the individual if disclosed, so long as the exemption is limited to identifying information).

Based on the statement of public necessity, the purpose of the exemption is sufficiently compelling to expand the exemption given its aim to protect the identity and reputation of vulnerable child victims. While the bill does not explicitly set out a legislative finding that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption,⁴⁰ the Act itself does not specifically require that the legislative finding be made in writing.⁴¹ Also, that open government policy is outweighed in the context of videotaped statements by child sex crime victims and the need to protect sexually exploited children seems to be an obvious and logical conclusion.

In sum, it appears the bill does not conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish the stated purpose of the law.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. None. Government Sector Impact:

The bill appears unlikely to have a significant fiscal impact on government agencies because videotaped statements of child sex crime victims are already confidential and exempt.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁴⁰ See, e.g., CS/CS/HB 397 (2017 Reg. Session) (“The Legislature finds that the potential harm that may result from the release of such information outweighs any public benefit that may be derived from the disclosure of such information.”). *But see* HB 7093 (2017 Reg. Session) (no written finding that need for exemption outweighs public policy); HB 111 (2017 Reg. Session) (no written finding that need for exemption outweighs public policy).

⁴¹ Rather, the Act requires that the legislature “find” that the purpose is sufficiently compelling to override public policy favoring open government. As a legal term, the word “find” is a verb meaning “[t]o determine a fact in dispute by verdict or decision <find guilty> <found that no duty existed>.”). BLACK’S LAW DICTIONARY (10th ed. 2014).

VIII. Statutes Affected:

This bill substantially amends section 119.071 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary Committee on January 10, 2018:

The CS amends the effective date provision by filling in the “blank” for the linked bill information. The effective date is now pinned to the effective date of SB 1214 or similar legislation.

- B. **Amendments:**

None.