

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 Criminal Justice

BILL: SPB 7002

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Active Criminal Intelligence or Criminal Investigative Information

DATE: November 13, 2017 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Erickson	Jones		CJ Submitted as Comm. Bill/Fav

I. Summary:

SPB 7002 continues an existing public meetings exemption for the portion of a meeting of a duly constituted criminal justice commission at which members of the commission discuss active criminal intelligence information or active criminal investigative information that is currently being considered by, or which may foreseeably come before, the commission. The bill removes the scheduled sunset and repeal of the exemption, thereby reenacting the exemption.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.³ The Public Records Act states that “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.”⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

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,

Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁶

Public Meetings

Article I, s. 24(b), of the Florida Constitution sets forth the state’s public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.⁷

Public policy regarding access to government meetings is further addressed in the Florida Statutes. Section 286.011, F.S., known as the “Government in the Sunshine Law” or “Sunshine Law,” requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken, be open to the public at all times.⁸ A board or commission must provide reasonable notice of all public meetings.⁹ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.¹⁰ Minutes of a public meeting must be promptly recorded and are open to public inspection.¹¹

Public Records and Public Meetings Exemptions

The Legislature may provide by general law for the exemption of records or meetings from the requirements of Art. I, s. 24(a) and (b), of the Florida Constitution.¹² The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its stated purpose.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or public meetings exemptions.¹⁴ The

department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of ch. 119, F.S., 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.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ FLA. CONST., art. I, s. 24(b).

⁸ Section 286.011(1), F.S.

⁹ *Id.*

¹⁰ Section 286.011(6), F.S.

¹¹ Section 286.011(2), F.S.

¹² FLA. CONST., art. I, s. 24(c).

¹³ *Id.*

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. The OGSR does

OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁵

The OGSR provides that a public records or open meetings exemption may be created, revised, or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet the public purpose it serves.¹⁶ An exemption serves an identifiable public purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- 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;¹⁷
- It 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 their good name or reputation or jeopardize their safety;¹⁸ or
- It protects trade or business secrets.¹⁹

As part of the OGSR review process, the Legislature is required to consider the following questions:

- 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?²⁰

If, in reenacting an existing exemption, the exemption is expanded, a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, a public necessity statement and a two-thirds vote for passage are *not* required.

not apply to an exemption required by federal law or applied solely to the Legislature or the State Court System.
Section 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S. However, if this public purpose is cited as the basis of an exemption, only personal identifying information is exempt.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S.

²¹ FLA. CONST. art. I, s. 24(c).

Open Government Sunset Review of the Public Meetings Exemption for a Closed Portion of a Designated Criminal Justice Commission

Active criminal intelligence information²² and active criminal investigative information²³ are exempt from public disclosure.²⁴

In 2013, the Legislature created s. 286.01141, F.S.²⁵ Section 286.01141(2), F.S., closes from the public the portion of a meeting of a duly constituted criminal justice commission²⁶ at which members of the commission discuss active criminal intelligence information or active criminal investigative information that is currently being considered by, or which may foreseeably come before the commission. Section 286.01141(2), F.S., also requires a criminal justice commission to publicly disclose that it discussed such information in the closed portion of a public meeting. This public meetings exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.²⁷

In creating the exemption, the Legislature articulated the following reasons for the exemption:

It is the finding of the Legislature that it is a public necessity that the portion of a meeting of a duly constituted criminal justice commission at which members of the commission discuss active criminal intelligence information or active criminal investigative information currently being considered by, or which may foreseeably come before, the criminal justice commission be made exempt from public meeting requirements.

If the meetings at which exempt information is discussed were open to the public, the purpose of the exemption from public records requirements found in chapter 119, Florida Statutes, would be defeated. The members of a criminal justice commission must be able

²² “Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Section 119.011(3)(a), F.S. Section 119.011(3)(c), F.S., provides that certain information is not criminal intelligence information, such as the time, date, location, and nature of a reported crime. Criminal intelligence information is “active”: (1) as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities; or (2) while such information is directly related to pending prosecutions or appeals. Section 119.011(3)(d), F.S. The word “active” does not apply to information in cases which are barred from prosecution under the applicable statute of limitation. *Id.*

²³ “Criminal investigative information” means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Section 119.011(3)(b), F.S. Section 119.011(3)(c), F.S., provides that certain information is not criminal investigative information, such as the time, date, location and nature of a reported crime. Criminal investigative information is “active”: (1) as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future; or (2) while such information is directly related to pending prosecutions or appeals. Section 119.011(3)(d), F.S. The word “active” does not apply to information in cases which are barred from prosecution under the applicable statute of limitation. *Id.*

²⁴ Section 119.071(2)(c)1., F.S.

²⁵ Chapter 2013-196, L.O.F.

²⁶ “Duly constituted criminal justice commission” means an advisory commission created by municipal or county ordinance whose membership is comprised of individuals from the private sector and the public sector and whose purpose is to examine local criminal justice issues. Section 286.01141(1)(a), F.S.

²⁷ Section 286.01141(3), F.S.

to hear and discuss exempt information freely in order to make sound recommendations regarding strategies and activities that are best suited to protect the welfare of the people of this state. The ability to conduct meetings at which members can freely discuss and fully understand the details of active criminal intelligence information and active criminal investigative information is critical to the ability of a criminal justice commission to operate effectively.²⁸

Open Government Sunset Review Survey

A joint OGSR survey by staffs of the Senate Committee on Criminal Justice and the House Oversight, Transparency and Administration Subcommittee was distributed to counties and municipalities.²⁹ Twenty survey responses were received. Two respondents, Miami-Dade County and Palm Beach County, indicated in their survey responses that they have a “duly constituted criminal justice commission” as defined in s. 286.01141(1)(a), F.S.

The Dade-Miami Criminal Justice Council “was created in 1978 and was codified via ordinance in February 2014.”³⁰ “The general purpose of [the council] is to encourage and facilitate the coordination and cooperation among various agencies and municipalities within Miami-Dade County with crime prevention/intervention strategies, criminal and juvenile justice activities and other activities related to criminal justice.”³¹

The Palm Beach County Criminal Justice Commission was created in 1988 pursuant to an ordinance adopted in 1988.³² The commission

prioritizes its projects at its Annual Planning Meeting in February of each year. The issues discussed at the meetings center around the progress on these priorities which in the past few years have been our reentry program, community engagement, behavioral health issues in the system, body worn camera deployment amongst our local law enforcement agencies, the implementation of a validated risk assessment instrument for pretrial detention decision-making, our jail population and efforts to reduce it, law

²⁸ Section 2, ch. 2013-196, L.O.F.

²⁹ The survey and responses are on file with the Senate Committee on Criminal Justice. Unless otherwise indicated, all information relevant to duly constituted criminal justice commissions is from the survey responses. The Florida Association of Counties and the Florida League of Cities assisted legislative staffs by distributing the surveys. Counties responding to the survey: Brevard; DeSoto; Escambia; Madison; Miami-Dade; Monroe; Okaloosa; Okeechobee; Palm Beach; Pinellas; Seminole; St. Lucie; Sumter; and Walton. Municipalities responding to the survey: Hampton; Inverness; Lake Helen; Long Boat Key; Sanibel; and St. Petersburg. Staff also contacted the Broward County Crime Commission and determined that the commission was not created by ordinance, and therefore not a “duly constituted criminal justice commission” as defined in s. 286.01141(1)(a), F.S. The commission is organized as a Florida 501 C-4, non-profit corporation. See <http://www.browardcrime.org/aboutus.html> (last visited on October 11, 2017).

³⁰ Miami Dade County Ord. No. 14-17, ss. 1-8, adopted February 4, 2014, did not specify provisions intended for use. For purposes of classification, these provisions were included as Miami-Dade County Code of Ordinances, ch. 2, art. CXLIX, ss. 2-2166—2-2173. See https://library.municode.com/fl/miami_-_dade_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH2AD_ARTCXLIXDAAMCRJUCO_S2-2166CRPU (last visited on October 11, 2017).

³¹ Response of Miami-Dade County to the Staff OGSR Survey.

³² Palm Beach County Ord. No. 88-16, adopted Aug. 16, 1988, effective Aug. 29, 1988, amended the Palm Beach County Code of Ordinances by adding provisions designated as Palm Beach Code of Ordinances, ch. 2, art. V, div. 5, ss. 2-216—2-221. See <http://discover.pbcgov.org/criminaljustice/PDF/CJC%20Ordinance.pdf> (last visited on October 11, 2017).

enforcement information sharing systems, and the Batterers' Intervention Program. In addition, other topics include current legislation and countywide crime statistics.³³

The Dade-Miami Criminal Justice Council and the Palm Beach County Criminal Justice Commission have not closed any portion of their meetings to discuss active criminal intelligence information or active criminal investigation information. Because the Dade-Miami Criminal Justice Council has not used the exemption, Miami-Dade County did not render an opinion on whether the exemption should be reenacted. In contrast, Palm Beach County recommended reenactment of the exemption: "While the [Criminal Justice Commission] has never needed to use the exemption, there are always new issues to address. The [Criminal Justice Commission] is committed to data-driven policy-making and may require the exemption for future meetings."³⁴

Reenacting the public meetings exemption would allow for a duly constituted criminal justice commission to discuss active criminal intelligence information or active criminal investigation should the need arise for such discussion; repeal of the exemption would preclude such discussion because the commission would not be able to reveal the contents of such exempt information in a public meeting.

There do not appear to be any alternative means available for members of a duly constituted criminal justice commission to discuss (as a body) active criminal intelligence information or active criminal investigative information. The exempt status of the active criminal intelligence information and active criminal investigation does not imply an exemption from the public meetings requirement of s. 286.011, F.S. An exemption from the public meetings requirement must be expressly provided.³⁵

The open meeting exemption in s. 286.01141, F.S., is not protected by another exemption. Further, there are not multiple exemptions for the same type of meeting that would be appropriate to merge.

III. Effect of Proposed Changes:

The bill continues a public meetings exemption in s. 286.01141, F.S., for the portion of a meeting of a duly constituted criminal justice commission at which members of the commission discuss active criminal intelligence information or active criminal investigative information that is currently being considered by, or which may foreseeably come before, the commission. The bill amends s. 286.01141, F.S., to remove the scheduled sunset and repeal of the exemption, thereby reenacting the exemption.

The bill takes effect October 1, 2018.

³³ Response of Palm Beach County to the Staff OGSR Survey.

³⁴ *Id.* Subsequent to its survey response, the Palm Beach County Criminal Justice Commission confirmed that the commission approved the recommendation to reenact the exemption, which was pending approval by the commission at the time the survey response was received. E-mail from Kristina Henson, Executive Director of the Palm Beach County Criminal Justice Commission (October 2, 2017) (on file with the Senate Committee on Criminal Justice).

³⁵ Florida Attorney General Opinion 93-41 (June 7, 1993).

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

None.

B. Public Records/Open Meetings Issues:

The bill reenacts an existing public records exemption for the portion of a meeting of a duly constituted criminal justice commission at which members of the commission discuss active criminal intelligence information or active criminal investigative information that is currently being considered by, or which may foreseeably come before, the commission. A simple majority vote of the members present in each house of the Legislature is required for passage of the bill.

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. Statutes Affected:

This bill substantially amends section 286.01141 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.)

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.
