

**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 186

INTRODUCER: Senator Lee

SUBJECT: Public Records/Victim of Mass Violence

DATE: February 8, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Favorable</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 186 amends s. 406.136, F.S., and transfers this section to s. 119.071, F.S. The bill expands an existing public records exemption to make confidential and exempt photographs and video and audio recordings that depict or record the killing of a victim of mass violence. Currently, s. 406.136, F.S., only makes confidential and exempt the photographs and video and audio recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties. The current exemption and the exemption created by the bill only apply to such photographs or recordings held by an agency.

The bill defines the term “killing of a victim of mass violence” as “all acts or events that cause or otherwise relate to the death of a person, not including the perpetrator, who is killed in an incident in which three or more people, not including the perpetrator, are killed by an intentional act of violence by another person.”

The bill specifies who may obtain such photographs and recordings, the process of obtaining these materials pursuant to a court order when good cause is shown, and factors a court must consider in determining good cause.

The bill provides that it is a third degree felony for any custodian of such photographs and recordings to willfully and knowingly violate the exemption requirements. The Legislature’s Office of Economic and Demographic Research preliminarily estimates this penalty provision will have a “positive insignificant” prison bed impact (an increase of 10 or fewer prison beds).

The exemption is retroactive and applies to all such photographs or recordings. However, the exemption does not overturn or abrogate or alter any existing orders duly entered into by any court of this state, as of the effective date of the act, which restrict or limit access to any such photographs or recordings.

The bill provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemptions in s. 119.071(4)(d), F.S., are subject to the Open Government Sunset Review Act, and stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill is effective upon becoming a law.

## II. Present Situation:

### Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> 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.<sup>2</sup>

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.<sup>3</sup> The Public Records Act states

[i]t 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.<sup>4</sup>

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.<sup>5</sup> Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> Public records laws are found throughout the Florida Statutes.

<sup>4</sup> Section 119.01(1), F.S.

<sup>5</sup> *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme 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.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

Only the Legislature may create an exemption to public records requirements.<sup>10</sup> An exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>11</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>12</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>13</sup>

When creating or expanding a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>14</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>15</sup>

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,<sup>16</sup> with

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<sup>6</sup> 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” as “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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> *Id.*

<sup>12</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>13</sup> FLA. CONST., art. I, s. 24(c).

<sup>14</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

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

<sup>16</sup> Section 119.15, F.S. An exemption is 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 (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

specified exceptions.<sup>17</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>18</sup> The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.<sup>19</sup>

### **Exemption for Photographs and Recordings Depicting the Killing of a Law Enforcement Officer**

In 2011, the Legislature created s. 406.136, F.S., which provided a public record exemption for photographs and video and audio recordings that depict or record the killing of *a person*.<sup>20</sup> In 2016, the Legislature elected not to reenact the exemption as originally enacted but rather to narrow the exemption so that it applies only to photographs and video and audio recordings that depict the killing of *a law enforcement officer who was acting in accordance with his or her official duties*.<sup>21</sup> These photographs and video and audio recordings are confidential and exempt from public record requirements, except that the exemption permits a surviving spouse to view or copy any such photograph or video recording and listen to or copy any such audio recording.<sup>22</sup> If there is no surviving spouse, the deceased's surviving parents may access the records, and if there are no surviving parents, an adult child of the deceased may access the records.<sup>23</sup> The surviving relative who has the authority to access the records may designate in writing an agent to obtain them.<sup>24</sup>

In addition, a local governmental entity or a state or federal agency, in furtherance of its official duties and pursuant to a written request, may view or copy any such photograph or video recording and listen to or copy any such audio recording. Unless otherwise required in the performance of the entity's or agency's duties, the identity of the deceased must remain confidential and exempt.<sup>25</sup>

Persons other than those covered by these exceptions may only have access to such photographs and recordings if they obtain a court order. Upon a showing of good cause, a court may issue an order authorizing any person to view or copy any such photograph or video recording and listen to or copy any such audio recording. The court may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider:

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<sup>17</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>18</sup> Section 119.15(3), F.S.

<sup>19</sup> Section 119.15(6)(b), F.S.

<sup>20</sup> Chapter 2011-115, L.O.F. (creating s. 406.136, F.S., effective July 1, 2011). "Killing of a person" was defined to mean all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death. Section 406.136(1), F.S. (2015).

<sup>21</sup> Chapter 2016-214, L.O.F. The term "killing of a law enforcement officer who was acting in accordance with his or her official duties" is defined to mean all acts or events that cause or otherwise relate to the death of a law enforcement officer who was acting in accordance with his or her official duties, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death. Section 406.136(1), F.S.

<sup>22</sup> Section 406.136(2), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> Section 406.136(3)(a), F.S.

<sup>25</sup> Section 406.136(3)(b), F.S.

- Whether such disclosure is necessary for the public evaluation of governmental performance;
- The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- The availability of similar information in other public records, regardless of form.<sup>26</sup>

In all cases, the viewing, copying, listening to, or other handling of any such photograph or recording must be under the direct supervision of the custodian of the record or the custodian's designee.<sup>27</sup>

If a petition is filed with the court to view, listen to, or copy such photograph or recording, a surviving spouse must be given reasonable notice that the petition has been filed, a copy of the petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, notice must be given to the parents of the deceased and, if the deceased has no living parent, then to the adult children of the deceased.<sup>28</sup>

It is a third degree felony for any custodian of such photographs or recordings to willfully and knowingly violate these provisions.<sup>29</sup> The same penalty applies to anyone who willfully and knowingly violates a court order issued under these provisions.<sup>30</sup>

The exemption does not apply to photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, nothing prohibits a court in such proceedings, upon good cause shown, from restricting or otherwise controlling the disclosure of a killing, crime scene, or similar photograph or video or audio recording in the same manner as previously described.<sup>31</sup>

The exemption is retroactive and applies to all such photographs or recordings, regardless of whether the killing of the person occurred before, on, or after July 1, 2011. However, the exemption does not overturn or abrogate or alter any existing orders duly entered into by any court of this state, as of the effective date of the act, which restrict or limit access to any such photographs or recordings.<sup>32</sup>

### **Exemptions Which May Apply to Murder Victims**

Several existing public records exemptions may apply to certain records or information relating to murder victims:

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<sup>26</sup> Section 406.136(4), F.S.

<sup>27</sup> Section 406.136(4)(c), F.S.

<sup>28</sup> Section 406.136(5), F.S.

<sup>29</sup> Section 406.136(6)(a), F.S. A third degree felony is punishable by a term of imprisonment up to 5 years, a fine up to \$5,000, or both. Sections 775.082 and 775.083, F.S.

<sup>30</sup> Section 406.136(6)(b), F.S.

<sup>31</sup> Section 406.136(6)(c), F.S.

<sup>32</sup> Section 406.136(7), F.S.

- Active criminal intelligence information<sup>33</sup> and active criminal investigative information<sup>34</sup> are exempt from public disclosure;<sup>35</sup>
- The address of a victim of an incident of mass violence is exempt from public disclosure;<sup>36</sup> and
- A photograph or video or audio recording of an autopsy held by a medical examiner is confidential and exempt from public disclosure.<sup>37</sup>

### III. Effect of Proposed Changes:

The bill amends s. 406.136, F.S., and transfers this section to s. 119.071, F.S.<sup>38</sup> The bill expands an existing public records exemption to make confidential and exempt photographs and video and audio recordings that depict or record *the killing of a victim of mass violence*. Currently, s. 406.136, F.S., makes confidential and exempt the photographs and video and audio recordings that depict or record *the killing of a law enforcement officer who was acting in accordance with his or her official duties*. The current exemption and the exemption created by the bill only apply to such photographs or recordings held by an agency.

The bill defines the term “killing of a victim of mass violence” as “all acts or events that cause or otherwise relate to the death of a person, not including the perpetrator, who is killed in an incident in which three or more people, not including the perpetrator, are killed by an intentional act of violence by another person.”<sup>39</sup>

<sup>33</sup> Section 119.011(3)(a), F.S., defines “criminal intelligence information” as 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. Such information is “active” 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. Section 119.011(3)(d)1., F.S.

<sup>34</sup> Section 119.011(3)(b), F.S., defines “criminal investigative information” as 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. Such information is “active” 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. Section 119.011(3)(d)2., F.S.

<sup>35</sup> Criminal intelligence information and criminal investigative information does not include the name, sex, age, and address of a person arrested or of the victim of a crime. Section 119.011(3)(c) 2., F.S.

<sup>36</sup> Section 119.071(2)(o), F.S. For purposes of this paragraph, the term “incident of mass violence” means an incident in which four or more people, not including the perpetrator, are severely injured or killed by an intentional and indiscriminate act of violence of another. *Id.*

<sup>37</sup> Section 406.135(2), F.S. The exemption contains an exception for the surviving spouse (and other designated persons if the spouse is deceased) and a local governmental entity, or a state or federal agency, in furtherance of its official duties, without a court order. Section 406.135(2) and (3), F.S. The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. Section 406.135(4)(a), F.S. A criminal or administrative proceeding is exempt from s. 406.135, F.S., but unless otherwise exempted, is subject to all other provisions of ch. 119, F.S., provided however that this section does not prohibit a court in such proceedings upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner prescribed in this section. Section 406.135(7), F.S.

<sup>38</sup> Specifically, s. 406.136, F.S., is transferred, renumbered as s. 119.071(2)(p), F.S., and amended.

<sup>39</sup> This definition differs from the definition of “incident of mass violence” in s. 119.071(2)(o), F.S., which exempts from public disclosure the address of a victim of an incident of mass violence. *See* Footnote 36 of this analysis.

The bill also retains provisions relevant to the current exemption and applies them to the new exemption, including:

- Specifying who may obtain such photographs and recordings, the process of obtaining these materials pursuant to a court order when good cause is shown, and factors a court must consider in determining good cause;
- Providing that it is a third degree felony for any custodian of such photographs and recordings to willfully and knowingly violate the exemption requirements;
- Specifying that the exemption is retroactive and applies to all such photographs or recordings; and
- Providing that the exemption does not overturn or abrogate or alter any existing orders duly entered into by any court of this state, as of the effective date of this act, which restrict or limit access to such photographs or recordings.<sup>40</sup>

The bill provides a public necessity statement as required by the State Constitution. The statement includes legislative findings regarding photographs and video and audio recordings that depict or record the killing of a victim of mass violence. These findings indicate:

- Such photographs and recordings render a graphic and often disturbing visual or aural representation of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased and detract from the memory of the deceased;
- Widespread unauthorized dissemination of such photographs and recordings would subject the immediate family of the deceased to continuous injury;
- Dissemination of such photographs and recordings is harmful to the public because terrorists will use them to attract followers, bring attention to their cause, and inspire others to kill, and such dissemination may also educe violent acts by the mentally ill or morally corrupt;
- There continues to be other types of available information, such as crime scene reports, which are available and which are less intrusive and injurious to the immediate family of the deceased and continue to provide for public oversight; and
- The exemption should be given retroactive application because it is remedial in nature.

The bill provides for repeal of the exemption on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill is effective upon becoming a law.<sup>41</sup>

#### **IV. Constitutional Issues:**

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

None.

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<sup>40</sup> See “Present Situation” section of this analysis for a detailed discussion of these provisions.

<sup>41</sup> The bill also directs the Division of Law Revision to replace the phrase “the effective date of this act” wherever it occurs in this act with the date this act becomes a law.

**B. Public Records/Open Meetings Issues:****Voting 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 record exemption. Because the bill expands a public record exemption, it requires a two-thirds vote for final passage.

**Public Necessity Statement**

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemptions.

**Breadth of Exemption**

Article I, s. 24(c), of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law.

There are substantial legislative findings in the statement of public necessity in support of the public records exemption. Further, upon a showing of good cause, a court may issue an order authorizing any person to view or copy any such photograph or video or audio recording (subject to any restrictions or stipulations that the court deems appropriate). For these reasons, the bill appears to be no broader than necessary to accomplish its stated purpose.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.



**C. Government Sector Impact:**

The bill may have an indeterminate fiscal impact on agencies relating to training and redaction of exempt information. However, costs may be minimal if they can be absorbed by the agencies because training and redaction of exempt information are part of the day-to-day responsibilities of agencies.

The bill provides that it is a third degree felony for any custodian of photographs and video and audio recordings that depict or record the killing of a victim of mass violence to willfully and knowingly violate the exemption requirements.

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, of legislation has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research preliminarily estimates this penalty provision will have a "positive insignificant" prison bed impact (an increase of 10 or fewer prison beds).

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 406.136 of the Florida Statutes, and transfers this section to 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.)

None.

**B. Amendments:**

None.