

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 Governmental Oversight and Accountability

BILL: CS/CS/SB 1024

INTRODUCER: Governmental Oversight and Accountability Committee; Criminal Justice Committee and Senator Bean

SUBJECT: Public Records/Postconviction Reinvestigative Information

DATE: February 10, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1024 creates a public records exemption for postconviction reinvestigative information in s. 119.071(2)(q), F.S. Postconviction reinvestigative information is defined in the bill as information compiled by a state attorney or other criminal justice agency at the request of the state attorney for the purpose of making an evidence-based determination as to whether a person is innocent of a crime for which he or she was convicted.

The information is made exempt from public inspection and copying when it is related to an ongoing, good faith investigation of a claim of actual innocence until the claim is no longer capable of further reasonable investigation or the relief sought is granted. This exemption appears to be no more broad than necessary to accomplish the purposes of furthering the pursuit of justice while safeguarding, preserving, and protecting personal information relating to a claim of actual innocence by a convicted person.

The bill provides the public necessity statement for the public records exemption. The bill makes legislative findings in support of the public necessity for the exemption.

The bill requires a two-thirds vote of the members present and voting for final passage. It will stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill's fiscal impact is indeterminate. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2020.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. 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.”

⁶ 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.”

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

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ 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.¹⁹

⁸ Section 119.07(1)(a), F.S.

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

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ 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.

¹⁹ Section 119.15(3), F.S.

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.²⁰ An exemption serves an identifiable 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, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and 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.²⁶

Agency Investigations

Section 119.071(2), F.S., contains general exemptions from the public records law for agency investigations. For purposes of ch. 119, F.S., the term “agency” means:

“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

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?
- 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”²⁷

Conviction Integrity Review Units

Conviction Integrity Review (CIR) units are divisions of prosecutorial offices that work to prevent, identify, and correct false convictions. There were 44 CIR units in the United States in 2018, almost three times the number of just five years earlier. Fifty-eight CIR exonerations took place in 2018.²⁸

Currently, four state attorney’s offices in Florida have established CIR units within their offices. These offices are located in the:

- Fourth Circuit, covering Duval, Clay, and Nassau Counties;
- Ninth Circuit, covering Orange and Osceola Counties;
- Thirteenth Circuit, covering Hillsborough County; and
- Seventeenth Circuit, covering Broward County.²⁹

The first state attorney’s office to establish a CIR unit was the Fourth Circuit in early 2018. All four of the CIR units have essentially the same procedures in place which includes criteria a person must meet to warrant more than an initial screening. For example, the CIR units require that a person present a plausible claim of innocence, and some of the units report they rely upon an independent review panel of legal experts to work with the units to review and evaluate the cases under investigation.³⁰ Prior to 2018, Florida had 64 exonerations, including eight defendants who had been sentenced to death.³¹

The work of the Fourth Circuit’s CIR unit resulted in the 2019 exoneration of two men, Clifford Williams and Nathan Myers, who were sentenced to life in prison for the 1976 Jacksonville murder of Jeanette Williams.³² The CIR unit’s investigation confirmed multiple alibi witnesses for the whereabouts of the two men at the time of the murder, and further confirmed that another man, Nathaniel Lawson, admitted to committing the murder. The CIR unit’s investigation was able to independently confirm Lawson’s presence at the scene at the time of the shooting.³³ Prior

²⁷ Section 119.011(2), F.S.

²⁸ The National Registry of Exonerations, *Exonerations in 2018*, April 9, 2019, p. 2, available at <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> (last visited January 24, 2020).

²⁹ Office of the State Attorney for the Fourth Judicial Circuit, *Conviction Integrity Review*, available at <https://www.sao4th.com/about/programs-and-initiatives/conviction-integrity-review/>; Office of the State Attorney for the Ninth Judicial Circuit, *Conviction Integrity Policy*, available at <https://www.sao9.net/conviction-integrity.html>; Section 119.011 Office of the State Attorney for the Thirteenth Circuit, *Conviction Review Unit*, available at <https://www.sao13th.com/conviction-review-unit-cru/>; Office of the State Attorney for the Seventeenth Circuit, *Conviction Review Unit*, available at <http://www.sao17.state.fl.us/conviction-review.html> (all sites last visited January 24, 2020).

³⁰ *Id.*

³¹ The National Registry of Exonerations, *Exonerations in 2018*, April 9, 2019, p. 13, available at <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> (last visited January 24, 2020).

³² State Attorney’s Office of the Fourth Judicial Circuit of Florida, *Conviction Integrity Investigation, State of Florida v. Hubert Nathan Meyers, State of Florida v. Clifford Williams, Jr.*, March 28, 2019, p. 42, available at https://secureservercdn.net/198.71.233.254/9c2.a8b.myftpupload.com/wp-content/uploads/2019/03/CIR_Investigative_Report_FINAL_3.28.19_R.pdf (last visited January 24, 2020).

³³ *Id.*, at p. 4.

to Mr. Williams' and Mr. Myers' convictions and sentences being vacated by the 4th Circuit Court on March 28, 2019, they had served 42 years and 11 months in prison.³⁴

Currently, the information gathered by CIR units is not considered exempt from the public records law.

III. Effect of Proposed Changes:

The bill creates a public records exemption for postconviction reinvestigative information in s. 119.071(2)(q), F.S.

Postconviction reinvestigative information is defined in the bill as information compiled by a state attorney or other criminal justice agency at the request of the state attorney for the purpose of making an evidence-based determination as to whether a person is innocent of a crime for which he or she was convicted.

The bill makes postconviction reinvestigative information exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution when it is related to an ongoing, good faith investigation of a claim of actual innocence until the claim is no longer capable of further reasonable investigation or the relief sought is granted. This exemption appears to be no more broad than necessary to accomplish the purposes of furthering the pursuit of justice while safeguarding, preserving, and protecting postconviction reinvestigative information.

The bill provides a public necessity statement for the creation of the public records exemption stating:

The Legislature finds that it is a public necessity that postconviction reinvestigative information be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution if it is related to an ongoing, good faith investigation of a claim of actual innocence and remains exempt until the claim is no longer capable of further reasonable investigation or the relief sought is granted. Public release of postconviction reinvestigative information could result in the disclosure of sensitive information, such as the identity or location of an alternate suspect, a witness, or other evidence needed to exonerate a wrongfully convicted person, which could compromise the reinvestigation of a wrongfully convicted person's case. The Legislature further finds that it is necessary to protect this information in order to encourage witnesses, who might otherwise be reluctant to come forward, to be forthcoming with evidence of a crime. It is in the interest of pursuing justice for persons who may have been wrongfully convicted that all postconviction reinvestigative information be protected until investigation of the claim of actual innocence is concluded. The Legislature finds that the harm that may result from the release of such information outweighs any public benefit that may be derived from its disclosure, and it is in the interest of the public to safeguard, preserve, and protect

³⁴ The Florida Senate, *Senate Bill 28 Special Master's Final Report*, January 23, 2020, at p. 1-2, available at <http://www.flsenate.gov/Session/Bill/2020/28/Analyses/2020s00028.sm.PDF> (last visited January 25, 2020).

information relating to a claim of actual innocence by a person who may have been convicted of a crime he or she did not commit.

The bill requires a two-thirds vote of the members present and voting for final passage. It will stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue.

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 bill creating or expanding an exemption to the public records requirements. This bill creates an exemption for postconviction reinvestigative information, as defined in the bill, in s. 119.071(2)(q), F.S., thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding 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 exemption.

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. The purpose of the law is to protect postconviction investigative information relating to a claim of actual innocence by a convicted person which may be developed or gathered during the investigation of the claim. This bill exempts the information for only as long as it is related to an ongoing, good faith investigation of a claim of actual innocence until the claim is no longer capable of further reasonable investigation or the relief sought is granted. The exemption does not appear to be broader than necessary to accomplish the purpose of the exemption.

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 Florida Public Defender Association, Inc., suggests that any workload issues associated with public defenders obtaining documents or information in the postconviction innocence claims addressed by the bill are “indeterminate.”³⁵

The Florida Department of Law Enforcement does not mention any fiscal impact to the agency from this bill.³⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071 of the Florida Statutes.

³⁵ 2020 Bill Analysis, SB 1024, Florida Public Defender Association, Inc. (on file with the Senate Criminal Justice Committee).

³⁶ 2020 Agency Bill Analysis SB 1024, Florida Department of Law Enforcement, December 5, 2019 (on file with the Senate Criminal Justice Committee).

IX. Additional Information:

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

CS/CS by Governmental Oversight and Accountability on February 10, 2020:

The CS revises the bill to make the exemption simply “exempt” rather than “confidential and exempt.” The CS also slightly revises the definition given for postconviction reinvestigative information for clarity, and revises the public necessity statement to meet the constitutional requirement that the Legislature make findings to justify any new public records exemption.

CS by Criminal Justice on January 28, 2020:

The committee substitute:

- Creates a public records exemption for postconviction reinvestigative information in s. 119.071(2)(q), F.S., making postconviction reinvestigative information confidential and exempt from the public records law.
- Defines postconviction reinvestigative information.
- Provides that the information is only confidential and exempt for as long as it is related to an ongoing, good faith investigation of a claim of actual innocence until the claim is no longer capable of further reasonable investigation or the relief sought is granted, which makes the exemption no more broad than necessary to accomplish its purpose.
- Sets forth a public necessity statement for the exemption, that the exemption is in the public interest of safeguarding, preserving, and protecting information relating to a claim of actual innocence by a person who may have been convicted of a crime or crimes that he, she, or they did not commit.
- Provides Legislative findings supporting the public necessity, including that:
 - It is necessary to protect the information in order to encourage witnesses, who might otherwise be reluctant to come forward, to be forthcoming with evidence of a crime or crimes;
 - The information compiled during the reinvestigation could reveal the identity of the person or persons who actually committed the crime or crimes which have been identified as the perpetrator or perpetrators; and
 - It is in the interest of the pursuit of justice that all postconviction reinvestigation information be protected until such investigation is concluded.
- Requires a two-thirds vote of the members present and voting for final passage.
- Stands repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

- B. **Amendments:**

None.