

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: SB 7032

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Body Camera Recordings Obtained by Law Enforcement Officers

DATE: January 24, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Erickson</u>	<u>Jones</u>		CJ Submitted as Committee Bill
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7032 amends s. 119.071(2)(1), F.S., to save from repeal the public records exemption for body camera recordings. A body camera is a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities.

Section 119.071(2)(1), F.S., makes a body camera recording, or a portion thereof, confidential and exempt from public disclosure if the recording is taken:

- Within the interior of a private residence;
- Within the interior of a facility that offers health care, mental health care, or social services;
- At the scene of a medical emergency involving a death or involving an injury that requires transport to a medical facility; or
- In a place that a reasonable person would expect to be private.

The public records exemption also specifies when a law enforcement agency may or must provide disclosure, and also provides for court-ordered disclosure and specifies grounds the court must consider in reaching its decision regarding disclosure.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. The bill removes this repeal language.

Costs incurred by an agency in responding to public records requests for the body camera information should be offset by authorized fees. There are also costs associated with retention of the body camera recordings for the minimum period mandated by the public record exemption. However, Florida law does not mandate that a law enforcement agency acquire and use body cameras. See Section V. Fiscal Impact Statement.

The bill takes effect October 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

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

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).

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

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

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.

²⁰ Section 119.15(6)(b), F.S.

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

Body Cameras

Florida law defines a “body camera” as a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities.²⁷ Although Florida law does not require a law enforcement agency to acquire and use body cameras, it does require a law enforcement agency²⁸ that permits its law enforcement officers²⁹ to wear body cameras to establish policies

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.

²⁷ Section 119.071(2)(1)1.a. and 943.1718(1)(a), F.S.

²⁸ A “law enforcement agency” is defined in s. 943.1718(1)(b), F.S., as an agency that has a primary mission of preventing and detecting crime and enforcing the penal, criminal, traffic, and motor vehicle laws of the state and in furtherance of that primary mission employs law enforcement officers as defined in s. 943.10, F.S.

²⁹ A “law enforcement officer” is defined in s. 943.1718(1)(c), F.S., as any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make

and procedures addressing the proper use, maintenance, and storage of body cameras and the data recorded by body cameras. The policies and procedures must include:

- General guidelines for the proper use, maintenance, and storage of body cameras.
- Any limitations on which law enforcement officers are permitted to wear body cameras.
- Any limitations on law-enforcement-related encounters and activities in which law enforcement officers are permitted to wear body cameras.
- A provision permitting a law enforcement officer using a body camera to review the recorded footage from the body camera, upon his or her own initiative or request, before writing a report or providing a statement regarding any event arising within the scope of his or her official duties. Any such provision may not apply to an officer's inherent duty to immediately disclose information necessary to secure an active crime scene or to identify suspects or witnesses.
- General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.³⁰

Florida law also requires a law enforcement agency that permits its law enforcement officers to wear body cameras to:

- Ensure that all personnel who wear, use, maintain, or store body cameras are trained in the law enforcement agency's policies and procedures concerning them.
- Ensure that all personnel who use, maintain, store, or release audio or video data recorded by body cameras are trained in the law enforcement agency's policies and procedures pertaining to body cameras.
- Retain audio and video data recorded by body cameras in accordance with the requirements of s. 119.021, F.S. (maintenance of public records), except as otherwise provided by law.
- Perform a periodic review of actual agency body camera practices to ensure conformity with the agency's policies and procedures.³¹

According to a 2018 criminal justice agency survey by the Florida Department of Law Enforcement, one state agency, 102 municipal police agencies, 23 sheriffs' offices, one college police department, six university police departments, and one school district reported that they currently use body cameras.³²

Body camera recordings are not subject to ch. 934, F.S. (interception of communications).³³ Therefore, a body camera recording cannot be considered an "intercept" of communications and the general prohibition in ch. 934, F.S., against interception of wire, oral, and electronic communications does not apply to such recordings.

arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.

³⁰ Section 943.1718(2), F.S.

³¹ Section 943.1718(3), F.S.

³² 2018 Criminal Justice Agency Profile Survey Results, Florida Department of Law Enforcement, available at <http://www.fdle.state.fl.us/CJSTC/Publications/CJAP/CJAP> (last visited Dec. 19, 2019). The information, which is only available in Microsoft Excel Spreadsheet format, can be obtained by selecting the relevant law enforcement agency and then selecting "Supplemental Programs."

³³ Section 943.1718(4), F.S.

Generally, information contained in a body camera recording is subject to public disclosure. However, as discussed below, Florida law provides that some information contained in a body camera recording is confidential and exempt from public disclosure.³⁴

Public Records Exemption for Body Camera Recordings

“Although broad disclosure policies can promote police agency transparency and accountability, some videos—especially recordings of victims or from inside people’s homes—will raise privacy concerns if they are released to the public or the news media.” “In most state public disclosure laws, exceptions are outlined that may exempt body-worn camera footage from public release.”³⁵

Like most state public disclosure laws, Florida’s public records law exempts some body camera footage from public release. Section s. 119.071(2)(l), F.S., which was created in 2015,³⁶ provides a public records exemption for a body camera recording made by a law enforcement officer³⁷ in the course of the officer performing his or her official duties and responsibilities.

Section s. 119.071(2)(l), F.S., makes a body camera recording, or a portion thereof, confidential and exempt from public disclosure if the recording is taken:

- Within the interior of a private residence;
- Within the interior of a facility that offers health care, mental health care, or social services;
- At the scene of a medical emergency involving a death or involving an injury that requires transport to a medical facility; or
- In a place that a reasonable person would expect to be private.³⁸

A law enforcement agency may disclose a body camera recording in furtherance of its official duties and responsibilities and may also disclose the recording to another governmental agency in the furtherance of its official duties and responsibilities.³⁹

A law enforcement agency must disclose a body camera recording, or a portion thereof, to:

- A person recorded by a body camera (the person receives those portions of the recording relevant to the person’s presence in the recording);

³⁴ Section 119.071(2)(l), F.S.

³⁵ Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services, available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> (last visited on Dec. 18, 2019). See p. 17 (footnote omitted) of the report.

³⁶ Chapter 2015-41, L.O.F.

³⁷ Section 119.071(2)(l)1.b., F.S., provides that “law enforcement officer” has the same meaning as provided in s. 943.10, F.S. Section 943.10(1), F.S., defines a “law enforcement officer” as any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

³⁸ Section 119.071(2)(l)2.a.-c., F.S.

³⁹ Section 119.071(2)(l)3.a. and b., F.S.

- The personal representative⁴⁰ of a person recorded by a body camera (the person receives those portions of the recording relevant to the recorded person's presence in the recording);⁴¹
- A person not depicted in a body camera recording if the recording depicts a place in which the person lawfully resided, dwelled, or lodged at the time of the recording (the person receives those portions of the recording that record the interior of such a place); and
- Pursuant to a court order.⁴²

In addition to any other grounds the court may consider in determining whether to order that a body camera recording be disclosed, the court must consider:

- Whether disclosure is necessary to advance a compelling interest;
- The recording contains information that is otherwise exempt or confidential and exempt under the law;
- The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party;
- Disclosure would reveal information regarding a person that is of a highly sensitive personal nature;
- Disclosure may cause reputational harm or jeopardize the safety of a person depicted in the recording;
- Confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
- The recording could be redacted to protect privacy interests; and
- There is good cause to disclose all or portions of a recording.⁴³

A law enforcement agency must retain a body camera recording for at least 90 days.⁴⁴ Generally, records retained by law enforcement agencies are governed by statutes and rules promulgated by the Department of State, Division of Library Services.⁴⁵ Currently, public records may be destroyed in accordance with the retention schedules established by the Division of Library Services.⁴⁶ This public records exemption requires law enforcement to retain these recordings for a minimum amount of time but does not otherwise supersede the retention and destruction schedule established by the Division of Library Services.

⁴⁰ Section 119.071(2)(1)1.c., F.S., defines a "personal representative" as a parent of, a court-appointed guardian of, an attorney of, an agent of, or a person holding a power of attorney for a person recorded by a body camera. If a person depicted in the recording is deceased, the term also means the personal representative of the estate of the deceased person; the deceased person's surviving spouse, parent, or adult child; the deceased person's attorney or agent; or the parent or guardian of a surviving minor child of the deceased. An agent must possess written authorization of the recorded person to act on his or her behalf.

⁴¹ This scenario would include a situation in which the person recorded was unable to give consent for some reason or was deceased.

⁴² Section 119.071(2)(1)4.a.-d., F.S.

⁴³ Section 119.071(2)(1)4.d.(I)(A)-(H), F.S. In any proceeding regarding the disclosure of a body camera recording, the law enforcement agency that made the recording must be given reasonable notice of hearings and an opportunity to participate. Section 119.071(2)(1)4.d.(II), F.S.

⁴⁴ Section 119.071(2)(1)5., F.S.

⁴⁵ Section 257.36, F.S. *See State of Florida General Records Schedule GS2 For Law Enforcement, Correctional Facilities, and District Medical Examiners*, effective Aug. 2017, available at <http://dos.myflorida.com/library-archives/records-management/general-records-schedules/> (last visited on Dec. 18, 2019).

⁴⁶ Section 257.36(6), F.S.

The exemption applies retroactively. It does not supersede any other exemption existing prior to or created after the effective date of this exemption. Those portions of a body camera recording that are protected from disclosure by another exemption continue to be exempt or confidential and exempt.⁴⁷ Some of the other public records exemptions that may be relevant to a body camera recording include:

- Active criminal intelligence information and active criminal investigative information (exempt);⁴⁸
- Information revealing surveillance techniques or procedures or personnel (exempt);⁴⁹
- Information revealing the substance of a confession of a person arrested (exempt);⁵⁰
- Information revealing the identity of a confidential informant or a confidential source (exempt);⁵¹
- Criminal intelligence information or criminal investigative information that reveals the identity of the victim of the crime of child abuse or any sexual offense or a videotape or image of any part of the body of the victim of a statutorily-specified sexual offense (confidential and exempt);⁵²
- Any information in a videotaped statement of a minor who is alleged to be or who is a victim of a statutorily-specified sexual offense, which reveals that minor's identity, home, school, etc. (confidential and exempt);⁵³
- A video or audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence (confidential and exempt);⁵⁴ and
- Information revealing undercover personnel of any criminal justice agency (exempt).⁵⁵

The statement of public necessity for creation of the exemption provides the following reasons for creating the exemption:

- It is a public necessity that the following types of body camera recordings are made confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution: recordings taken within the interior of a private residence; recordings taken within the interior of a facility that offers health care, mental health care, or social services; and recordings taken in a place that a reasonable person would expect to be private.
- There is an increased prevalence of body cameras being used by law enforcement officers. Body cameras preserve information that has the potential to assist both law enforcement officers' and the public's ability to review the circumstances surrounding an event in which law enforcement intervention occurs.
- However, in certain instances, audio and video recorded by body cameras is significantly more likely to capture highly sensitive personal information than other types of law enforcement recordings or documents.

⁴⁷ Section 119.071(2)(l)7., F.S.

⁴⁸ Section 119.071(2)(c)1., F.S.

⁴⁹ Section 119.071(2)(d), F.S.

⁵⁰ Section 119.071(2)(e), F.S.

⁵¹ Section 119.071(2)(f), F.S.

⁵² Section 119.071(2)(h), F.S.

⁵³ Section 119.071(2)(j)2.a., F.S.

⁵⁴ Section 119.071(2)(p), F.S.

⁵⁵ Section 119.071(4)(c), F.S.

- Public disclosure of these recordings could have an undesirable chilling effect. People who know they are being recorded by a body camera may be unwilling to cooperate fully with law enforcement officers if they know that a body camera recording can be made publicly available to anyone else. People may also be less likely to call a law enforcement agency for services if their sensitive personal information or the circumstances that necessitate a law enforcement agency's involvement are subject to public dissemination as a body camera recording.
- Body camera recordings could be used for criminal purposes if they were available upon request. This exemption from public records requirements allows law enforcement officers to more effectively and efficiently administer their duties, which would otherwise be significantly impaired.
- These concerns regarding the impact of the public records requirements for body camera recordings not only necessitate the exemption of the recordings from public records requirements, but also outweigh any public benefit that may be derived from their disclosure.⁵⁶

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.⁵⁷

Staff Survey Regarding Exemption Under Review

Staff received responses from seven police departments, one university police department, and seven sheriff offices to a joint survey of the House Oversight, Transparency and Public Management Subcommittee and the Senate Committee on Criminal Justice regarding the public records exemption for body camera recordings. Twelve of the fifteen survey respondents recommended retaining the exemption in its current form. Three survey respondents recommended retaining the exemption with some modifications.⁵⁸

III. Effect of Proposed Changes:

The bill saves from repeal the public records exemption in s. 119.071(2)(1), F.S., for body camera recordings.

⁵⁶ Chapter 2015-41, sec. 2, L.O.F.

⁵⁷ Section 119.071(2)(1)8., F.S.

⁵⁸ The survey responses are on file with the Senate Committee on Criminal Justice. One survey respondent recommended clarifying application of Article I, s. 16, of the State Constitution ("Marsy's Law") to victim information contained in body camera recordings. Marsy's Law appears to impact numerous public records exemptions; therefore, any clarification of application of Marsy's Law would necessarily require addressing its application to multiple public records exemptions, not simply the public exemption regarding body camera recordings. Another survey respondent recommended exempting information in body camera recordings identifying public employees. It is unclear if this recommendation pertains to all public employees but the public records exemption regarding body camera recordings does not supersede any current public records exemption pertinent to a public employee. Section 119.071(2)(1)7., F.S. Another survey respondent recommended clarification regarding whether the public records exemption regarding body camera recordings applies to both video and audio recordings. However, the definition of "body camera" pertinent to this public records exemption states that the device includes audio and video data. Section 119.071(2)(1)1.a., F.S. Further, one of the legislative findings in the public necessity statement in support of this public records exemption is that "in certain instances, *audio and video recorded by body cameras* is significantly more likely to capture highly sensitive personal information than other types of law recordings or documents." Chapter 2015-41, sec. 2, L.O.F. (emphasis provided by staff).

Section 119.071(2)(1), F.S., makes a body camera recording, or a portion thereof, confidential and exempt from public disclosure if the recording is taken:

- Within the interior of a private residence;
- Within the interior of a facility that offers health care, mental health care, or social services;
- At the scene of a medical emergency involving a death or involving an injury that requires transport to a medical facility; or
- In a place that a reasonable person would expect to be private.

The public records exemption also specifies when a law enforcement agency may or must provide disclosure, and also provides for court-ordered disclosure and specifies grounds the court must consider in reaching its decision regarding disclosure.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. The bill removes this repeal language.

The bill takes effect October 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

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. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, a two-thirds vote of the members present and voting for final passage of the bill is not required.

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. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, the bill does not require a public necessity statement.

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 bill exempts body camera recordings in limited circumstances: the interior of a residence; the interior of a health care, mental health care, or social services facility; the scene of a medical emergency involving a death or involving an injury that requires transport to a medical facility; and a place that a reasonable person would expect to be private. Because descriptions of some of these places may require interpretation by agencies having custody of the body camera recordings, specific applications of the exemption could be challenged. However, “exemptions from disclosure are to be narrowly construed,”⁵⁹ and the agency having custody of the records “bears the burden of proving its right to the claimed exemption.”⁶⁰

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Section 119.071(2)(l)2.c., F.S., exempts from public disclosure a body camera recording that is taken in a place that a reasonable person would expect to be private.

Article I, s. 23, of the State Constitution provides:

Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.

The Florida Supreme Court has stated that the right of privacy includes a right to “be free from uninvited observation or of interference in those aspect of [Floridians’] lives that fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest.”⁶¹ Referring to a case which predated Article I, s. 23, of the State Constitution, the Florida Supreme Court opined that the people have a fundamental right to control what they reveal about themselves and to whom they chose to reveal themselves, and noted “this power is exercised in varying degrees by differing individuals, the parameters of an individuals’ privacy can be dictated only by that individual.”⁶²

⁵⁹ *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004) (citations omitted), *rev. den.*, 892 So.2d 1015 (Fla. 2004).

⁶⁰ *Id.* (citation omitted).

⁶¹ *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1998).

⁶² *Id.* at 151.

The Florida Supreme Court found that before the right of privacy attaches “a reasonable expectation of privacy must exist.”⁶³ The test for making that determination is “whether the law recognizes an individual’s legitimate expectation of privacy” in a certain type of record.⁶⁴ The Florida Supreme Court also recognizes the right to be free of observation and interference in aspects of life that fall within a “zone of privacy.”⁶⁵ In determining whether an individual has a legitimate expectation of privacy in a given case, the court must consider all of the circumstances, especially objective manifestations of that expectation.⁶⁶

Courts have used public records exemptions as guideposts of when a privacy interest exists. For example, the Florida Fourth District Court of Appeal relied on the Florida Supreme Court’s finding that financial records were private, but also observed that there was a statutory public records exemption for financial information held by a state agency, and noted that “the legislature has recognized the confidential nature of the exact type of information at issue.”⁶⁷ Likewise, the Second District Court of Appeal of Florida found that people have an expectation of privacy in their social security numbers, and as authority, noted that social security numbers were protected from disclosure by both federal and state law and by various rules of procedure.⁶⁸

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Costs incurred by an agency in responding to public records requests for the body camera information should be offset by authorized fees.⁶⁹ There are also costs associated with retention of the body camera recordings for the minimum period mandated by the public

⁶³ *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

⁶⁴ *Id.*

⁶⁵ *Shaktman*, 553 So.2d at 150.

⁶⁶ *Id.* at 153. In his concurring opinion, Chief Justice Ehrlich opined that “the zone of privacy covered by article I, section 23, can be determined only by reference to the expectations of each individual, and those expectations are protected provided they are not spurious or false. A determination of whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation; for example, in cases where disclosure of purportedly private information is sought, circumstances, such as the kind of information, where it is kept, who has access to it and under what circumstances.” *Id.*

⁶⁷ *Berkley v. Eisen*, 699 So.2d 789, 791 (Fla. 4th DCA 1997).

⁶⁸ *Thomas v. Smith*, 882 So.2d 1037, 1045 (Fla. 2d DCA 2004).

⁶⁹ Section 119.07(2) and (4), F.S.

recording exemption.⁷⁰ However, Florida law does not mandate that a law enforcement agency acquire and use body cameras.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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.)

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.

⁷⁰ Several law enforcement agencies responding to the joint staff survey (see footnote 57) indicated that they retain body camera recordings for a longer period than the minimum retention period (at least 90 days) required by the public records exemption.