

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 872

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

SUBJECT: Public Records/Florida Commission on Offender Review

DATE: February 17, 2020 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cox</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 - Technical Changes

I. Summary:

CS/CS/SB 872 exempts from public inspection and copying certain information held by an agency that could identify or locate current or former commissioners of the Florida Commission on Offender Review (FCOR or commission), certain FCOR personnel, and their spouses and children. The bill applies to FCOR personnel whose duties include making a final decision on, holding a hearing for, or investigating a violation of post-incarceration supervised release.

The information exempted from public records requirements for the above-mentioned entity includes the:

- Home addresses, telephone numbers, dates of birth, and photographs of such personnel;
- Names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and
- Names and locations of schools and day care facilities attended by the children of such personnel.

The bill provides that the exemption created under the bill is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

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

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 does not appear to have a fiscal impact on state or local governments. Costs incurred by an agency in responding to public records requests regarding this exemption should be offset by authorized fees. See Section V. Fiscal Impact Statement.

The bill takes effect upon becoming a law.

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

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.”

“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 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

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

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.

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 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

General Public Records Exemptions for State Agency Personnel

There are three general public records exemptions that apply to all state agency personnel: disclosure of an employee's (1) social security number, (2) medical information, and (3) personal

¹⁹ Section 119.15(3), F.S.

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.

identifying information of dependent children who are insured by an agency group insurance plan.²⁷

(1) Social Security Numbers

Social security numbers of all current and former agency personnel are confidential and exempt when held by the employing agency.²⁸ An employing agency may only release social security numbers for the following reasons:

- It is required by law.
- A receiving government agency needs the social security number to perform its duties.
- The employee consents to disclose his or her social security number.²⁹

In addition, there is a general exemption for social security numbers which applies to the public that makes social security numbers confidential and exempt.³⁰ This exemption applies to any agency that holds anyone's social security number, including those belonging to the personnel of that agency. This exemption, however, permits the agency to disclose social security numbers of agency personnel in order to administer health or retirement benefits.³¹

(2) Medical Information

An agency employee's medical information is also exempt from public disclosure if the medical information could identify the employee. This exemption applies to prospective, current and former employees.³²

(3) Personal Identifying Information

The personal identifying information of a dependent child of an agency employee who is insured by an agency group insurance plan is exempt from public disclosure. This exemption applies to the children of current and former employees and is also retroactively applied.³³

Public Records Exemptions for Specified Agency Personnel and Their Families (s. 119.071(4)(d), F.S.)

Provisions in s. 119.071(4)(d), F.S., exempt from public disclosure certain personal identification and location information of specified agency personnel and their spouses and children. Personnel covered by these exemptions include:

- Active or former sworn or civilian law enforcement personnel, including correctional and correctional probation officers, certain investigative personnel of the Department of Children and Families and Department of Health, and certain personnel of the Department of Revenue and local governments involved in revenue collection and revenue and child support enforcement.³⁴

²⁷ Section 119.071(4)(a) and (b), F.S.

²⁸ Section 119.071(4)(a)1., F.S.

²⁹ Section 119.071(4)(a), F.S.

³⁰ Section 119.071(5)(a)5., F.S.

³¹ Section 119.071(5)(a)5.f. and g., F.S.

³² Section 119.071(4)(b)1., F.S.

³³ Section 119.071(4)(b)2., F.S.

³⁴ Section 119.071(4)(d)2.a., F.S.

- Certain current or former nonsworn investigative personnel of the Department of Financial Services;³⁵
- Certain current or former nonsworn investigative personnel of the Office of Financial Regulation’s Bureau of Financial Investigations;³⁶
- Current or former certified firefighters;³⁷
- Current or former justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges;³⁸
- Current or former state attorneys, assistant state attorneys, statewide prosecutors, and assistant statewide prosecutors;³⁹
- General magistrates, special magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers;⁴⁰
- Certain current or former human resource, labor relations, or employee relations directors, assistant directors, managers, and assistant managers of any local government agency or water management district;⁴¹
- Current or former code enforcement officers;⁴²
- Current or former guardians ad litem;⁴³
- Current or former juvenile probation officers, juvenile probation supervisors, detention superintendents, assistant detention superintendents, juvenile justice detention officers I and II, juvenile justice detention officer supervisors, juvenile justice residential officers, juvenile justice residential officer supervisors I and II, juvenile justice counselors, juvenile justice counselor supervisors, human services counselor administrators, senior human services counselor administrators, rehabilitation therapists, and social services counselors of the Department of Juvenile Justice;⁴⁴
- Current or former public defenders, assistant public defenders, criminal conflict and civil regional counsel, and assistant criminal conflict and civil regional counsel;⁴⁵
- Current or former investigators or inspectors of the Department of Business and Professional Regulation;⁴⁶
- County tax collectors;⁴⁷
- Certain current or former personnel of the Department of Health;⁴⁸
- Certain current or former impaired practitioner consultants who are retained by an agency and certain current or former employees of an impaired practitioner consultant;⁴⁹

³⁵ Section 119.071(4)(d)2.b., F.S.

³⁶ Section 119.071(4)(d)2.c., F.S.

³⁷ Section 119.071(4)(d)2.d., F.S.

³⁸ Section 119.071(4)(d)2.e., F.S.

³⁹ Section 119.071(4)(d)2.f., F.S.

⁴⁰ Section 119.071(4)(d)2.g., F.S.

⁴¹ Section 119.071(4)(d)2.h., F.S.

⁴² Section 119.071(4)(d)2.i., F.S.

⁴³ Section 119.071(4)(d)2.j., F.S.

⁴⁴ Section 119.071(4)(d)2.k., F.S.

⁴⁵ Section 119.071(4)(d)2.l., F.S.

⁴⁶ Section 119.071(4)(d)2.m., F.S.

⁴⁷ Section 119.071(4)(d)2.n., F.S.

⁴⁸ Section 119.071(4)(d)2.o., F.S.

⁴⁹ Section 119.071(4)(d)2.p., F.S.

- Current or former certified emergency medical technicians and paramedics;⁵⁰
- Certain current or former personnel employed in an agency's office of inspector general or internal audit department;⁵¹
- Current or former directors, managers, supervisors, nurses, and clinical employees of an addiction treatment facility;⁵²
- Current or former directors, managers, supervisors, and clinical employees of certain child advocacy centers;⁵³ and
- Active or former civilian personnel employed by a law enforcement agency.⁵⁴

The employing agency as well as the employee may assert the right to the exemption by submitting a written request to each agency which holds the employee's information.⁵⁵ Further, all of these exemptions have retroactive application.⁵⁶

The information exempted by the various provisions of s. 119.071(4)(d)2., F.S., is similar but not identical. All of the provisions in s. 119.071(4)(d)2., F.S., exempt from public disclosure the home addresses,⁵⁷ telephone numbers,⁵⁸ and dates of birth of the specified personnel. However, exemptions are not uniform for names, photographs, and places of employment.

Section 119.071(4)(d)2., F.S., also exempts from public disclosure certain types of information about employees' spouses and children. The exemptions for family members include home addresses, telephone numbers, spouses' places of employment, and names and locations of children's schools and day care facilities. However, exemptions are not uniform for names, dates of birth, and photographs of family members.

In addition, some of the provisions exempt information from ch. 119, F.S., but not from Article I, s. 24(a), of the State Constitution. This means that information would be exempt if held by an executive branch agency, but may not necessarily be exempt if held by the legislative or judicial branches of government.

Finally, certain exemptions have different Open Government Sunset Review sunset dates.

⁵⁰ Section 119.071(4)(d)2.q., F.S.

⁵¹ Section 119.071(4)(d)2.r., F.S.

⁵² Section 119.071(4)(d)2.s., F.S.

⁵³ Section 119.071(4)(d)2.t., F.S.

⁵⁴ Section 119.071(4)(d)2.u., F.S.

⁵⁵ Section 119.071(4)(d)3., F.S.

⁵⁶ Section 119.071(4)(d)4., F.S.

⁵⁷ Section 119.071(4)(d)1.a., F.S., defines "home addresses" to mean "the dwelling location at which an individual resides and includes the physical address, mailing address, street address, parcel identification number, plot identification number, legal property description, neighborhood name and lot number, GPS coordinates, and any other descriptive property information that may reveal the home address."

⁵⁸ Section 119.071(4)(d)1.b., F.S., defines "telephone numbers" to include "home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices."

FCOR Commissioners and Personnel

The FCOR is involved in post-release decisions affecting inmates and ex-offenders. The FCOR functions as a quasi-judicial body that makes a variety of decisions involving parole, conditional release, and conditional medical release.⁵⁹ The FCOR also acts as the investigative arm of the Governor and Cabinet, sitting as the Board of Executive Clemency, in clemency matters.⁶⁰

The commission must consist of six members that reside in Florida.⁶¹ Commissioners are appointed by the Governor and Cabinet and confirmed by the Senate in accordance with s. 947.02, F.S. Commission appointees are appointed for terms of six years, unless otherwise stated, and may not be appointed for more than two consecutive six-year terms.⁶² The FCOR reports that commissioners preside over approximately 36 hearings annually at various locations in Florida.⁶³ These meetings are public proceedings and the commissioners make a variety of determinations regarding parole and other releases.

The commission reviews releasees' supervision status every two years, imposes conditions of conditional release or addiction recovery supervision, and makes final determinations related to revocation of post release supervision that may include recommitment to the Department of Corrections to complete service of the original term of imprisonment.⁶⁴

The FCOR employs investigators who investigate and compile necessary background information to be used in making final decisions related to any of the cases that are before the commission. The FCOR commissioners and certain commission personnel, such as investigators, are routinely involved in decisions which affect the incarceration or supervision status of convicted felons.⁶⁵

As of January 8, 2020, there are 3 commissioners and 43 commission personnel whose duties include making a final decision on, holding a hearing for, or investigating a violation of post-incarceration supervised release.⁶⁶ Current law does not provide a public records exemption for the commissioners or the commission personnel involved in these decisions.

III. Effect of Proposed Changes:

Section 1 amends s. 119.071(4)(d)2., F.S., to exempt certain information pertaining to current or former commissioners of the FCOR or commission personnel whose duties include making certain final decisions on, holding hearings for, or investigating violations of post-incarceration release.

⁵⁹ The FCOR, *Organization Overview*, available at <https://www.fcor.state.fl.us/overview.shtml> (last visited December 21, 2019)(hereinafter cited as "Organization Overview").

⁶⁰ The FCOR, *Agency Analysis for SB 872*, December 3, 2019, p. 2 (on file with the Senate Criminal Justice Committee) (hereinafter cited as the "FCOR Agency Analysis").

⁶¹ Section 947.01, F.S.

⁶² Section 947.03(1), F.S.

⁶³ Organization Overview.

⁶⁴ *Id.*

⁶⁵ The FCOR Agency Analysis, p. 2.

⁶⁶ *Id.*

The bill exempts specific information from public records requirements for the above-mentioned entities including the:

- Home addresses, telephone numbers, dates of birth, and photographs of such personnel;
- Names, home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and
- Names and locations of schools and day care facilities attended by the children of such personnel.

A custodian of a record who is not the employer of the person covered by the exemption must maintain the exempt status of the information if the covered person submits a written request for maintenance of the exemption to the custodial agency.

This exemption applies to information held by an agency before, on, or after the effective date of the exemption.

The bill provides that the exemption created under the bill is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

Section 2 provides a statement of public necessity as required by the State Constitution. Currently, s. 119.071(4)(d), F.S., exempts from public disclosure specified information of certain agency personnel and their families. The public necessity statement notes:

[t]he Legislature finds...efforts of commissioners and commission personnel can have a direct effect on which persons are placed on parole or released on conditional medical release; on the terms and conditions of those persons released on parole, conditional release, conditional medical release, or addiction recovery supervision; and on the determination of whether a releasee has violated the terms of his or her parole. The Legislature finds that the release of such personal identifying information and location information might place these personnel of the Florida Commission on Offender Review and their family members in danger of physical and emotional harm by disgruntled individuals who react contentiously to actions taken by such personnel. The Legislature further finds that the harm that may result from the release of such personal identifying and location information outweighs any public benefit that may be derived from the disclosure of such information.

Section 3 provides that the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to

raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

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 enacts a new exemption for specified identification and location information for current or former commissioners of the FCOR or commission personnel with certain duties, 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 the FCOR commissioners and staff from any harm that could result from decisions that they must make for persons that they interact with as a result of their employment. This bill exempts only the relevant identifying and location information from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

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:

An individual or business that requests location information that is covered by the definition of “home address” in the bill will not be able to readily obtain that information from the records custodian. If the employee or the employee’s agency has taken the initiative and requested that the home address information be exempted from disclosure, the protected person will need to sign a waiver granting permission to the records custodian to release the information to the requestor.

C. Government Sector Impact:

The bill does not appear to have a fiscal impact on state or local governments. Costs incurred by an agency in responding to public records requests regarding these exemptions should be offset by authorized fees.⁶⁷

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.)

CS/CS by Governmental Oversight and Accountability on February 17, 2020:

The CS amends the title to reflect that the public records exemption applies retroactively.

CS by Criminal Justice on January 14, 2020:

The committee substitute limits the public records exemption to current or former commissioners of the Florida Commission on Offender Review or specified commission personnel by removing the provision establishing the exemption for school administrators.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

⁶⁷ Section 119.07(2) and (4), F.S.