

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 893 Pub. Rec./Florida Commission on Offender Review

**SPONSOR(S):** Watson, C.

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 872

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 1 N	Mawn	Hall
2) Oversight, Transparency & Public Management Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

The Florida Commission on Offender Review (“FCOR”) is a quasi-judicial body comprised of three commissioners and other personnel charged by article IV, section 8(c) of the Florida Constitution with making parole and other prison release determinations and setting release conditions. If a commissioner or a duly authorized FCOR representative reasonably believes that an inmate on supervised release (“releasee”) committed a release condition violation, FCOR may cause a warrant to be issued for the releasee’s arrest and conduct a hearing at which a commissioner or authorized FCOR representative makes factual findings regarding the alleged violation. After a hearing, a panel of commissioners enters an order determining whether the factual findings proved the alleged violation and may revoke supervised release, returning a releasee to prison. A public records exemption protects the personal identifying information of judges and others making similar decisions, but no public records exemption protects the information of commissioners and FCOR personnel.

HB 893 exempts from the public record the home addresses, telephone numbers, dates of birth, and photographs of:

- Current and former commissioners;
- FCOR personnel whose duties include investigating, holding hearings on, and making findings regarding conditions of release violations (“FCOR personnel”); and
- Such persons’ spouses and children.

The bill also exempts from the public record the:

- Employment locations of the spouses and children of commissioners and FCOR personnel.
- Daycare and school information of the children of commissioners and FCOR personnel.

Per the Open Government Sunset Review Act, this exemption will be automatically repealed on October 2, 2024 unless reenacted by the Legislature. The bill provides a statement of public necessity as required by the Florida Constitution.

The bill may have a minimal negative fiscal impact on state and local governments as creating a new public records exemption may increase training and compliance costs for agencies dealing with public records.

The bill provides an effective date of July 1, 2020.

**Article I, section 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Public Records

###### *Exemptions*

“Public records” means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material made or received under law or ordinance or in connection with an agency’s official business transactions.<sup>1</sup> Article I, section 24(a) of the Florida Constitution guarantees every person a right to inspect or copy public records of the legislative, executive, and judicial branches. However, Florida recognizes that “not all private facts that come into the public domain via a governmental agency...are necessarily open to inspection by the general public,”<sup>2</sup> and the Legislature may by general law exempt records from the requirements of article I, section 24(a).<sup>3</sup> The general law must state with specificity the public necessity justifying the exemption,<sup>4</sup> must be no broader than necessary to accomplish its purpose,<sup>5</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>6</sup>

Additionally, s. 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal public record. The Open Government Sunset Review Act<sup>7</sup> (“the Act”) provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual’s safety; however, only an individual’s identity may be exempted.
- Protect trade or business secrets.<sup>8</sup>

The Act also provides for the automatic repeal of a newly created or substantially amended exemption on October 2nd of the fifth year after creation or amendment, unless reenacted by the Legislature.<sup>9</sup>

###### *Penalties*

A public officer who unintentionally violates public records law commits a noncriminal infraction, punishable by a fine of up to \$500.<sup>10</sup> Additionally, any person who willfully and knowingly violates such law commits a first degree misdemeanor,<sup>11</sup> unless a higher penalty is specified in statute, and, if such person is a public officer, he or she also faces suspension and removal or impeachment.<sup>12</sup>

##### Florida Commission on Offender Review

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<sup>1</sup> S. 119.011(12), F.S.

<sup>2</sup> *Alice P. v. Miami Daily News, Inc.*, 440 So. 2d 1300, 1303 (Fla. 3d DCA 1983).

<sup>3</sup> Art. I, s. 24(c), Fla. Const.

<sup>4</sup> This portion of a public record exemption is commonly referred to as a “public necessity statement.”

<sup>5</sup> Art. I, s. 24(c), Fla. Const.

<sup>6</sup> *Id.*

<sup>7</sup> S. 119.15, F.S.

<sup>8</sup> S. 119.15(6)(b), F.S.

<sup>9</sup> S. 119.15(3), F.S.

<sup>10</sup> S. 119.10(1)(a), F.S.

<sup>11</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>12</sup> Ss. 119.10 (1)(b), (2)(a) and (b), F.S.

The Florida Commission on Offender Review<sup>13</sup> (“FCOR”) is a quasi-judicial body comprised of three Florida residents appointed by the Governor and Cabinet and confirmed by the Senate (“commissioners”) and other personnel.<sup>14</sup> Article IV, section 8(c) of the Florida Constitution charges FCOR with making parole<sup>15</sup> and other supervised release determinations,<sup>16</sup> including an inmate’s eligibility for:

- Conditional release (“CR”);<sup>17</sup>
- Conditional medical release (“CMR”);<sup>18</sup>
- Control release;<sup>19</sup> and
- Addiction recovery supervision (“ARS”).<sup>20</sup>

FCOR also sets supervised release terms and conditions. If a commissioner or a duly authorized FCOR representative has reasonable grounds to believe that an inmate on supervised release (“releasee”) violated such terms and conditions, FCOR may cause a warrant to be issued for the releasee’s arrest.<sup>21</sup> Within 45 days after FCOR receives notice of a releasee’s arrest for a violation, it must conduct a hearing<sup>22</sup> after notifying the releasee of the allegations against him or her<sup>23</sup> and the releasee’s right to:

- Counsel;<sup>24</sup>
- Be heard in person;<sup>25</sup>
- Secure, present, and compel the attendance of relevant witnesses;<sup>26</sup>
- Produce documents on his or her own behalf;<sup>27</sup>
- Access all evidence and confront and cross-examine witnesses;<sup>28</sup> and
- Waive the hearing.<sup>29</sup>

Within a reasonable time after the hearing, the commissioner or FCOR representative who conducted the hearing must make findings of fact regarding the alleged violation.<sup>30</sup> A panel of at least two commissioners must determine whether the findings of fact proved the alleged violation.<sup>31</sup> The panel may revoke supervised release and return the releasee to prison to serve the remainder of his or her sentence, reinstate the original order granting supervised release, or enter any other order it considers appropriate.<sup>32</sup>

In FY 2018-19, FCOR made 9,128 supervised release eligibility determinations, releasing 6,437 inmates under supervision:<sup>33</sup>

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<sup>13</sup> FCOR was formerly known as the Florida Parole Commission.

<sup>14</sup> Ss. 947.01 and 947.02(1), F.S.

<sup>15</sup> Parole is the release of an inmate, prior to the expiration of the inmate’s court-imposed sentence, with a supervision period to be successfully completed by compliance with the conditions and terms of the release agreement ordered by FCOR. Inmates sentenced for crimes committed prior to Oct. 1, 1983, are eligible for parole. See ch. 947, 948, and 949, F.S.

<sup>16</sup> FCOR, *Organization: Overview*, <https://www.fcor.state.fl.us/overview.shtml> (last visited Jan. 21, 2020); s. 947.13, F.S.

<sup>17</sup> CR is mandatory post-prison supervision for inmates sentenced for certain violent crimes who served a prior felony commitment at a state or federal prison, or who are sentenced as habitual offenders, violent habitual offenders, violent career criminals, or designated sexual predators. Upon release, inmates are supervised for a time period equal to the gain-time they received in prison. S. 947.1405, F.S.; see also FCOR, *Release Types*, <https://www.fcor.state.fl.us/postrelease.shtml> (last visited Jan. 21, 2020).

<sup>18</sup> CMR is the discretionary release of permanently incapacitated or terminally ill inmates who do not pose a danger to others. S. 947.149, F.S.; see also FCOR, *supra* note 17.

<sup>19</sup> Control release is a prison over-crowding program not currently utilized by FCOR, as there are enough prison beds for the current prison population. S. 947.146, F.S.; see also FCOR, *supra* note 17.

<sup>20</sup> ARS is mandatory post-prison supervision for offenders with a substance abuse or addition history and no disqualifying convictions. S. 944.7431, F.S.; see also FCOR, *supra* note 17.

<sup>21</sup> S. 947.141(1), F.S.

<sup>22</sup> S. 947.141(3), F.S.

<sup>23</sup> S. 947.141(3)(a), F.S.

<sup>24</sup> S. 947.141(3)(b), F.S.

<sup>25</sup> S. 947.141(3)(c), F.S.

<sup>26</sup> S. 947.141(3)(d), F.S.

<sup>27</sup> S. 947.141(3)(e), F.S.

<sup>28</sup> S. 947.141(3)(f), F.S.

<sup>29</sup> S. 947.141(3)(g), F.S.

<sup>30</sup> S. 947.141(4), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FCOR, *2019 Annual Report*, <https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202019.pdf> (last visited Jan. 21, 2020).

Release Type	Total Determinations	Persons Released
Parole	1,454 <sup>34</sup>	28
CR	6,430	5,311
CMR	84	38
ARS	1,160	1,060

During the same period, FCOR caused 1,907 arrest warrants to issue for alleged release condition violations and made 1,527 release revocation determinations,<sup>35</sup> returning 1,172 releasees to prison.<sup>36</sup>

Release Type	Total Determinations	Number Revoked	Number Reinstated	Number Dismissed
Parole	19	8	6	5
CR	1,355	1,100	163	92
CMR	0 <sup>37</sup>	0	0	0
ARS	76	64	2	10

Although commissioners and FCOR personnel investigate and make determinations about supervised release eligibility and revocation, no public records exemption protects the personal identifying information of such persons, or of their spouses and children.<sup>38</sup> Judges, state attorneys, public defenders, and others performing similar jobs in the criminal justice system have a public records exemption protecting their personal identifying information. Commissioners and FCOR personnel may be at risk, as their home addresses, telephone numbers, dates of birth, photographs, and information identifying employment locations, schools, and daycares are open to public inspection by anyone, including persons angered by or attempting to unduly influence an FCOR action.

### Effect of Proposed Changes

HB 893 creates a public records exemption protecting the personal identifying information of commissioners, certain FCOR personnel, and their families. Specifically, the bill exempts from the public record the home addresses, telephone numbers, dates of birth, and photographs of:

- Current and former commissioners;
- FCOR personnel whose duties include investigating, holding hearings on, and making findings regarding release condition violations (“FCOR personnel”); and
- Such persons’ spouses and children.

The bill also exempts from the public record the employment locations of the spouses and children of commissioners and FCOR personnel and the daycare and school names and locations of the children of such persons.

Existing criminal penalties for public records law violations apply to the public records exemption created by the bill. Thus, a public officer who unintentionally violates the exemption created by the bill commits a noncriminal infraction, punishable by a fine of up to \$500. Additionally, any person who willfully and knowingly violates such exemption commits a first degree misdemeanor, and if such person is a public officer, he or she also faces suspension and removal or impeachment.

As required by article I, section 24(c) of the Florida Constitution, the bill provides a public necessity statement specifying that the exemption is necessary to protect commissioners, FCOR personnel, and their families from the physical and emotional harm persons angered by an FCOR action may cause or attempt to cause them.

<sup>34</sup> This number reflects the total number of Florida inmates eligible for parole in FY 2018-19. *Id.*

<sup>35</sup> See FCOR, *supra* note 33.

<sup>36</sup> Email from Alec Yarger, Director of Legislative Affairs, Florida Commission on Offender Review, RE: Info Request- FCOR Revocations (Dec. 10, 2019).

<sup>37</sup> There were no release condition violations for inmates on CMR for FY 2018-19. See *Id.*

<sup>38</sup> See s. 119.071, F.S.

Per the Open Government Sunset Review Act, this exemption will be automatically repealed on October 2, 2024 unless reenacted by the Legislature.

The bill provides an effective date of July 1, 2020.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date of July 1, 2020.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The bill may have a minimal impact on state government, as creating a new public records exemption may increase training and compliance costs for state agencies with public records.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

The bill may have a minimal fiscal impact on local governments, as creating a new public records exemption may increase training and compliance costs for agencies dealing with public records. Additionally, the bill may have a positive insignificant impact on jail beds by creating a new exemption, a violation of which is punishable as a first degree misdemeanor.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to effect counties or municipalities.

3. Other:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a new public records exemption; thus, it requires a two-thirds vote for final passage.

#### Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. This bill creates a public records exemption and includes the requisite public necessity statement.

#### Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded public records or public meeting exemption to be no broader than necessary to accomplish the law's stated purpose. The bill creates a new public records exemption for the personal identifying information of current and former commissioners, FCOR personnel, and their spouses and children, which does not appear to be broader than necessary to accomplish its purpose.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Current law provides that the entirety of paragraph (d) of subsection (4) of section 119.071, F.S., is subject to the Act and stands repealed on October 4, 2024, unless reviewed and saved from repeal through reenactment by the Legislature. As such, the public records exemption created by the bill will be reviewed in four years, rather than five years, when the entire paragraph is reviewed pursuant to the Act.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**