

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 Rules

BILL: SB 7032

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Criminal Intelligence Information or Criminal Investigative Information

DATE: February 1, 2022 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Jones</u>	<u>RC</u>	CJ Submitted as Comm. Bill/Fav
	<u>Cellon</u>	<u>Phelps</u>		Pre-meeting

I. Summary:

SB 7032 saves from repeal the public records exemption for the criminal intelligence information or criminal investigative information that reveals the personal identifying information of a witness to a murder, for two years after the date on which the murder is observed by the witness. The exemption makes the records confidential and exempt from public records requirements.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. The exemption contained in s. 119.071(2)(m)1., F.S., is scheduled to repeal on October 2, 2022. This bill removes the scheduled repeal to continue the confidential and exempt status.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2022.

II. Present Situation:

Public Records Law

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 This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

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

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

Section 119.011(12), F.S., defines “public records” to include:

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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

Only the Legislature may create an exemption to public records requirements.⁹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹¹

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32, 34 (Fla. 1992); *see also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act (the Act), prescribe a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption or repeal the sunset date.¹⁸ In practice, many exemptions are continued by repealing the sunset date, rather than reenacting the exemption.

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.¹⁹ 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁰
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²¹ or
- It protects trade or business secrets.²²

¹² FLA. CONST., art. I, s. 24(c).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

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

¹⁶ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.

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

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁴ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁵

Murder

First-degree murder, a capital offense,²⁶ is defined in s. 782.04(1)(a)1. and 2., F.S., as the unlawful killing of a human being:

- When perpetrated from a premeditated design to effect the death of the person killed or any human being;
- When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
 - Drug Trafficking offense prohibited by s. 893.135(1);
 - Arson (s. 806.01, F.S.);
 - Sexual battery (s. 794.011, F.S.);
 - Robbery or home-invasion robbery (s. 812.13 or s. 812.135, F.S.);
 - Burglary (s. 810.02, F.S.);
 - Kidnapping (s. 787.01, F.S.);
 - Escape (s. 944.40, F.S.);
 - Aggravated child abuse (s. 827.03, F.S.);
 - Aggravated abuse of an elderly person or disabled adult (s. 825.1025, F.S.);
 - Aircraft piracy (s. 860.16, F.S.);
 - Unlawful throwing, placing, or discharging of a destructive device or bomb (s. 790.1615, F.S.);
 - Carjacking (s. 812.133, F.S.);
 - Aggravated stalking (s. 784.048, F.S.);
 - Murder of a human being (s. 782.04, F.S.);
 - Resisting an officer with violence (s. 843.01, F.S.);

²³ 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?

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ Section 119.15(7), F.S.

²⁶ A capital felony is punishable by death or life imprisonment. Section 775.082(1)(a), F.S.

- Aggravated fleeing or eluding with serious bodily injury or death (s. 316.1935(4)(b), F.S.);
- A felony act of terrorism;²⁷
- Human trafficking (s. 787.06, F.S.); or
- Which resulted in the unlawful distribution of a specified controlled substance,²⁸ which is the proximate cause of a user's death.²⁹

Murder in the second degree, which is a felony of the first degree punishable by imprisonment for a term of years not exceeding life,³⁰ is the unlawful killing of a human being when:

- Perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, but without any premeditated design to effect the death of any particular individual;³¹ or
- Committed by a person other than the person engaged in the commission of, or attempt to commit, an enumerated felony³² during such felony.³³

Murder in the third degree, which is a second degree felony,³⁴ is the unlawful killing of a human being, without design to effect death, by a person engaged in the commission of, or the attempt to commit, any felony not enumerated by statute.³⁵

Public Records Exemption under Review

In 2017 the Legislature created s. 119.071(2)(m), F.S., which made the criminal intelligence information³⁶ or criminal investigative information³⁷ that reveals the personal identifying

²⁷ Or an act in furtherance of terrorism, including a felony under s. 775.30, F.S., s. 775.32, F.S., s. 775.33, F.S., s. 775.34, F.S., or s. 775.35, F.S.

²⁸ A substance controlled under s. 893.03(1), F.S., includes substances such as cocaine, opium or any synthetic or natural salt, compound, derivative, or preparation of opium; methadone, alfentanil, carfentanil, fentanyl, sufentanil, or specified controlled substance analogs.

²⁹ Section 782.04(1)(a), F.S.

³⁰ A first degree felony is punishable by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment, and a fine of \$10,000. Sections 775.082(3)(b)1. and 775.083, F.S.

³¹ Section 782.04(2), F.S.

³² Enumerated felonies include drug trafficking under s. 893.135(1), F.S.; arson; sexual battery; robbery or home-invasion robbery; burglary; kidnapping; escape; aggravated child abuse or aggravated abuse of an elderly person or disabled adult; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; aggravated stalking; murder of another human being; aggravated fleeing or eluding with serious bodily injury or death; resisting an officer with violence; and a felony act of terrorism or act in furtherance of terrorism. Section 782.04(3), F.S.

³³ Section 782.04(3), F.S.

³⁴ A second degree felony is punishable by a maximum of 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

³⁵ Section 782.04(4), F.S. *See also supra* n. 142.

³⁶ "Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity. Section 119.011(3)(a), F.S.

³⁷ "Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance. Section 119.011(3)(b), F.S.

information of a witness to a murder confidential and exempt, for two years after the date on which the murder is observed.³⁸ A criminal justice agency³⁹ may disclose such information:

- In the furtherance of its official duties and responsibilities;
- To assist in locating or identifying the witness if the witness is believed to be missing or endangered;
- To another governmental agency for use in the performance of its official duties and responsibilities; or
- To the parties in a pending criminal prosecution as required by law.⁴⁰

In creating the exemption, the Legislature provided a public necessity statement articulating the following reasons for the exemption:

- The judicial system cannot function without the participation of witnesses.
- Complete cooperation and truthful testimony of witnesses are essential to the determination of the facts of a case.
- The public disclosure of personal identifying information of a witness to a murder could have a chilling effect on persons stepping forward and providing their accounts of a murder that has been witnessed.
- A witness to a murder may be unwilling to cooperate fully with law enforcement officers if the witness knows his or her personal identifying information can be made publicly available.
- A witness may be less likely to call a law enforcement officer and report a murder if his or her personal identifying information is made available in connection with the murder that is being reported or under investigation.
- A witness could become the subject of intimidation tactics or threats by the perpetrator of the murder if the witness's personal identifying information is publicly available.⁴¹

In order to determine whether and to what degree the public records exemption under review is being utilized by criminal justice agencies, legislative staff surveyed 1,196 agencies and consulted with the Florida Department of Law Enforcement by telephone.⁴² In the fall of 2021, staff sent questionnaires to 1,109 police chiefs, 67 sheriffs, and 20 State Attorneys seeking feedback on the exemption.⁴³ Forty-nine agencies returned answered questionnaires.⁴⁴

Of the 49 responding agencies, 35 indicated they had collected or possessed criminal intelligence information or criminal investigative information relating to 3,240 witnesses of a murder during

³⁸ Chapter 2017-11. L.O.F.

³⁹ "Criminal justice agency" means: any law enforcement agency, court, or prosecutor; any other agency charged by law with criminal law enforcement duties; any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties; or the Department of Corrections.

⁴⁰ Section 119.071(2)(m)1., F.S.

⁴¹ Chapter 2017-11. L.O.F.

⁴² Staff also received a partial questionnaire response from the Florida Department of Law Enforcement focusing on questions and discussion that occurred during the telephonic consultation.

⁴³ Staff had the assistance of the Florida Police Chiefs Association, the Florida Sheriff's Association, and the Florida Prosecuting Attorneys Association in sending the survey questionnaires.

⁴⁴ Open Government Sunset Review Questionnaires, Personal Identifying Information of a Murder Witness, responses are on file with the Senate Criminal Justice Committee.

the approximately 5-year period the exemption has been in effect. There were an approximate total of 1,708 public record requests for the information held by the 35 reporting agencies.⁴⁵

A majority of respondents, 33, recommended that the exemption be reenacted, five of which offered suggestions on expanding the exemption. The suggestions related to the length of time the exemption should be in effect, sharing the witness information more broadly, and to what crimes the exemption should apply.⁴⁶

The exemption stands repealed on October 2, 2022, unless it is reviewed and saved from repeal by the Legislature.⁴⁷

III. Effect of Proposed Changes:

The bill amends s. 119.071(2)(m), F.S., to save from repeal the current exemption for the criminal intelligence information or criminal investigative information that reveals the personal identifying information of a witness to a murder, for two years after the date on which the murder is observed.

The bill deletes the scheduled repeal date of October 2, 2022, thereby maintaining the exemption.

The bill takes effect October 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or 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 continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Section 119.15(3), F.S.

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. This bill continues a current public records exemption without expansion.

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 personal identifying information of a witness to a murder. This bill exempts only the personal identifying information of a witness to a murder 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:

None.

C. Government Sector Impact:

None.

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.
