

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 1327 Pub. Rec./Investigative Genetic Genealogy Information and Materials

**SPONSOR(S):** Criminal Justice Subcommittee, Anderson and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1402

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**FINAL HOUSE FLOOR ACTION:** 112 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 1327 passed the House on April 20, 2023, and subsequently passed the Senate on May 1, 2023.

Section 119.071, F.S., currently exempts active criminal intelligence and investigative information from public record requirements. 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 and is considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

Investigative genetic genealogy (IGG) utilizes single nucleotide polymorphism-based DNA matching combined with family tree research to produce investigative leads in criminal investigations and missing persons cases. IGG information and materials may be exempt as active criminal intelligence or investigative information but become subject to public record requirements when no longer considered active.

The bill amends s. 119.071, F.S., to make confidential and exempt from public record requirements IGG information and materials. "IGG information and materials" means the information, records, and DNA records created or collected by or on behalf of a law enforcement agency conducting IGG research, and includes the names and personal identifying information (PII) of persons identified through the use of genealogy databases, traditional genealogical methods, or other investigative means.

The bill does not protect the name or PII of the donor of a biological sample attributable to a perpetrator or a person identified through IGG who is a witness to or has personal knowledge related to the crime under investigation. The bill provides an exception to the confidential and exempt status of IGG information and materials for law enforcement agencies to: allow an agency to disclose IGG information and materials in furtherance of its official duties and responsibilities or to another governmental agency in furtherance of its official duties and responsibilities; and require an agency to disclose IGG information and materials pursuant to a court order to further a criminal prosecution. The recipient of such a disclosure must maintain the confidential and exempt status of the information and materials, unless further disclosure is court-ordered.

The bill provides for retroactive application of the newly-created public record exemption. The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature.

The bill may have an insignificant negative fiscal impact on local and state governments.

The bill was approved by the Governor on June 14, 2023, ch. 2023-235, L.O.F., and will become effective on July 1, 2023.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Background**

##### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person the right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may provide by general law for exemption from public record requirements provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.<sup>2</sup>

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person the right to inspect and copy any state, county, or municipal record, unless the record is exempt.<sup>3</sup> Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.<sup>5</sup> An identifiable public purpose is served if the exemption meets one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protects trade or business secrets.<sup>6</sup>

Pursuant to the Open Government Sunset Review Act, a new public record exemption or substantial amendment of an existing public record exemption is repealed on October 2nd of the fifth year following enactment, unless the Legislature reenacts the exemption.<sup>7</sup>

##### Active Criminal Intelligence and Investigative Information Exemption

Section 119.071, F.S., currently exempts active criminal intelligence information and active criminal investigative information from public record requirements.<sup>8</sup> Additionally, a law enforcement agency's request to inspect or copy a public record that is in another agency's custody and the custodian's response to the request, and any information that would identify whether a law enforcement agency has requested or received that public record are exempt from public record requirements during the period the information constitutes active criminal intelligence information or active criminal investigative information.<sup>9</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> Art. I, s. 24(c), Fla. Const.

<sup>3</sup> A public record exemption means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the State Constitution. S. 119.011(8), F.S.

<sup>4</sup> S. 119.15, F.S.

<sup>5</sup> S. 119.15(6)(b), F.S.

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

<sup>7</sup> S. 119.15(3), F.S.

<sup>8</sup> S. 119.071(2)(c), F.S.

<sup>9</sup> S. 119.071(2)(c)2.a., F.S.

“Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency<sup>10</sup> in an effort to anticipate, prevent, or monitor possible criminal activity.<sup>11</sup>

“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.<sup>12</sup> Criminal investigative information does not include documents given to the person arrested, except that a court in a criminal case may order that the information given to the person arrested be maintained in a confidential manner and be exempt from public records requirements until released at trial if it is found that the release of such information would be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness.<sup>13</sup>

Criminal intelligence and investigative information is considered “active” as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated crimes; or is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future, respectively.<sup>14</sup>

### FBI's Combined DNA Index System (CODIS)

Deoxyribonucleic acid (DNA) is hereditary material existing in the cells of all living organisms. A DNA profile may be created by testing the DNA in a person's cells. Similar to fingerprints, a person's DNA profile is a unique identifier, except for identical twins, who have the exact same DNA profile. DNA evidence may be collected from any biological material, such as hair, teeth, bones, skin cells, blood, semen, saliva, urine, feces, and other bodily substances.<sup>15</sup> “It is a fundamental principle of genetics that individuals who are closely related will share DNA from their common ancestors; and the more distant the relationship, the less DNA is shared.”<sup>16</sup>

Historically, the most common form of DNA analysis used to match samples and test for identification in forensic laboratories analyzes only certain parts of DNA, known as short tandem repeats (STRs).<sup>17</sup> In the early 1990s, the Federal Bureau of Investigation (FBI) chose 13 STRs as the basis for a DNA identification profile, and the 13 STRs became known as the Combined DNA Index System (CODIS).<sup>18</sup>

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<sup>10</sup> “Criminal justice agency” means: 1) any law enforcement agency, court, or prosecutor; 2) any other agency charged by law with criminal law enforcement duties; 3) any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting 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; and 4) the Department of Corrections. S. 119.011(4), F.S.

<sup>11</sup> S. 119.011(3)(a), F.S.

<sup>12</sup> S. 119.011(3)(b), F.S.

<sup>13</sup> S. 119.011(3)(c)5., F.S.

<sup>14</sup> S. 119.011(3)(d), F.S.

<sup>15</sup> FindLaw, *How DNA Evidence Works*, <https://criminal.findlaw.com/criminal-procedure/how-dna-evidence-works.html> (last visited Apr. 11, 2023).

<sup>16</sup> Daniel Kling, Christopher Phillips, Debbie Kennett, and Andreas Tillmar, *Investigative genetic genealogy: Current methods, knowledge and practice*, Vol. 52, FSI Genetics, p. 1, (May 2021), <https://www.fsigenetics.com/action/showPdf?pii=S1872-4973%2821%2900013-2> (last visited Apr. 11, 2023).

<sup>17</sup> Kelly Lowenberg, *Applying the Fourth Amendment when DNA Collected for One Purpose is Tested for Another*, 79 U. Cin. L. Rev. 1289, 1293 (2011), <https://law.stanford.edu/wp-content/uploads/2011/11/APPLYING-THE-FOURTH-AMENDMENT-WHEN-DNA-COLLECTED-FOR-ONE-PURPOSE.pdf> (last visited Apr. 11, 2023).

<sup>18</sup> *Id.*

CODIS is now the general term used to describe the FBI's program of support for local, state, and national criminal justice DNA databases, as well as the software used to run these databases.<sup>19</sup>

When a suspect's identity is unknown, a participating crime laboratory may upload a forensic profile into CODIS to compare against additional DNA profiles uploaded by other federal, state, or local participating laboratories. If a match is identified, the laboratories involved exchange information to verify the match and establish coordination between the two agencies. This match can provide probable cause for law enforcement to obtain a warrant to collect a biological reference sample from an offender. A laboratory can then perform DNA analysis on the known biological sample and present the analysis as evidence in court.<sup>20</sup>

### Investigative Genetic Genealogy

In contrast to traditional methods of DNA comparison using STR profiles in CODIS, investigative genetic genealogy (IGG), also known as forensic genetic genealogical DNA analysis and searching<sup>21</sup> or forensic genetic genealogy,<sup>22</sup> utilizes single nucleotide polymorphism (SNP)<sup>23</sup>-based DNA matching combined with family tree research to produce investigative leads in criminal investigations and missing persons cases.<sup>24</sup> IGG differs from the traditional STR DNA matching utilized on CODIS in the technology employed, the nature of the databases utilized, the genetic markers involved, and the algorithms run. Information and data derived from IGG is not, and cannot be, uploaded, searched, or retained in any CODIS DNA Index.<sup>25</sup>

IGG examines more than half a million SNP DNA markers which replace the STR DNA markers typically analyzed.<sup>26</sup> Based on the nature of SNP markers scientists are able to identify shared blocks of DNA between a forensic sample and the sample donor's potential relatives.<sup>27</sup> SNP markers have been identified as being more stable than STR markers and allow for increased accuracy in identifying potential familial connections.<sup>28</sup>

The technology used to conduct SNP testing became readily available to the general public in 2007 through direct-to-consumer testing companies (DTCs). Consumers purchase test kits and provide DNA samples to the companies who then generate genetic data using SNP microarrays<sup>29, 30</sup> that produce 600,000 to 700,000 SNP markers. The companies can then analyze the SNP markers for purposes such as:

- Biogeographical ancestry information;
- Identifying potential genetic relatives; and

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<sup>19</sup> FBI, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Apr. 11, 2023).

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Department of Justice, *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, <https://www.justice.gov/olp/page/file/1204386/download> (last visited Apr. 11, 2023).

<sup>22</sup> *Supra* note 16, at 2.

<sup>23</sup> Each SNP represents a variation in a single DNA building block. Medline Plus, National Library of Medicine, *What are single nucleotide polymorphisms (SNPs)?*, <https://medlineplus.gov/genetics/understanding/genomicresearch/snp/> (last visited Apr. 11, 2023).

<sup>24</sup> *Supra* note 16, at 2.

<sup>25</sup> *Supra* note 21, at 3-4.

<sup>26</sup> *Supra* note 21, at 3.

<sup>27</sup> *Supra* note 21, at 3.

<sup>28</sup> Alasdair Macdonald and Graham Holton, *What is STR and SNP DNA?, Who Do You Think You Are?*, <https://www.whodoyouthinkyouaremagazine.com/tutorials/dna/what-is-str-and-snp-dna/> (last visited Apr. 11, 2023).

<sup>29</sup> A microarray tool is used to determine whether DNA from a particular individual contains a mutation in genes. National Human Genome Research Institute, *DNA Microarray Technology Fact Sheet*, <https://www.genome.gov/about-genomics/fact-sheets/DNA-Microarray-Technology> (last visited Apr. 11, 2023).

<sup>30</sup> Whole genome sequencing (WGS) is another way to create SNP datasets that mirrors microarray technology and has been widely adopted to ensure sensitivity to challenging forensic sampling. *Supra* note 16.

- Health, wellness, and trait conditions and predispositions.<sup>31</sup>

When the purpose is to search for potential genetic relatives, the SNP DNA profile is compared against genetic profiles of individuals who have voluntarily submitted their biological samples to such databases. A computer algorithm then evaluates potential familial relationships between the sample donor and service users.<sup>32</sup>

There are four principal DTCs: Ancestry, FamilyTreeDNA (FTDNA), MyHeritage, and 23andMe. As of August 2020, the four principal DTCs have tested over 36 million people. Many DTC genetic testing providers maintain their customers' SNP data in a database. However, the DTCs permit customers to retrieve their data to personally maintain, control, and share their SNP file. Individuals can share their SNP file with researchers and third-party services, such as GEDmatch, that offer to interpret their SNP data.<sup>33</sup>

In addition to the four principal DTCs there are also two frequently-utilized third-party services: GEDmatch and DNASolves. GEDmatch does not provide genetic testing services but instead provides a central location for users to upload and share their SNP file. GEDmatch allows users to search for matches with people who have tested on different platforms at different testing companies and have subsequently shared their SNP file with GEDmatch.<sup>34</sup> GEDmatch is also able to accept raw data from both microarrays and whole genome sequencing (WGS) and can be used for law enforcement matching.<sup>35</sup> Similarly, DNASolves does not provide genetic testing services, but does accept user-uploaded SNP data from the four principal DTCs.<sup>36</sup>

Law enforcement agencies have begun opting to utilize IGG over more traditional searches on CODIS because the profiles uploaded on CODIS use far fewer STR genetic markers than the hundreds of thousands of SNP markers available on genetic genealogy companies' databases.

#### *DOJ Interim Policy on IGG*

In response to the increased utilization of IGG, the U.S. Department of Justice (DOJ) issued an Interim Policy on IGG. The Policy provides that law enforcement agencies may initiate the IGG process when a case involves an unsolved violent crime or unidentified human remains. The Policy provides guidelines for the IGG process including:

- Before the IGG process may be initiated, an agency must have developed a STR DNA profile from a collected crime scene sample and uploaded the sample into CODIS.
- The agency must pursue all reasonable and viable investigative leads, including through a CODIS search.<sup>37</sup>
- If a CODIS search fails to produce a probative and confirmed DNA match, the agency may utilize IGG.
- If the case is properly postured to use IGG, the agency must develop, generally through a third-party vendor, a SNP DNA profile from the collected sample and then upload the DNA profile to DTCs and other third-party genetic genealogy companies (collectively referred to as "GG" companies) to identify potential genetic relatives in the database.

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<sup>31</sup> Scientific Working Group DNA Analysis Methods, *Overview of Investigative Genetic Genealogy*, [https://www.swgdam.org/\\_files/ugd/4344b0\\_6cc9e7c82ccc4fc0b5d10217af64e31b.pdf](https://www.swgdam.org/_files/ugd/4344b0_6cc9e7c82ccc4fc0b5d10217af64e31b.pdf) (last visited Apr. 11, 2023).

<sup>32</sup> *Supra* note 21, at 3.

<sup>33</sup> *Supra* note 31, at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Supra* note 16, at 13.

<sup>36</sup> *Supra* note 16, at 15.

<sup>37</sup> "Reasonable investigative leads" are credible, case-specific facts, information, or circumstances that would lead a reasonably cautious investigator to believe that their pursuit would have a fair probability of identifying a suspect. *Supra* note 21, at 5.

- The agency must identify themselves as law enforcement to GG companies and enter and search SNP DNA profiles only in those GG company databases that provide explicit notice to their service users and the public that law enforcement may use their service sites to investigate crimes or to identify unidentified human remains.
- If the search results in one or more genetic associations, the GG company provides law enforcement with a list of genetically associated<sup>38</sup> service user names along with an estimated relationship.
- The agency may not arrest a suspect based solely on a genetic association generated by a GG company.
- The agency must treat this information as an investigate lead only and must utilize traditional genealogy research and other investigative work to determine the true nature of the genetic association, including creating a STR DNA profile of the new suspect and comparing it to the forensic profile previously uploaded to CODIS.
- If a suspect is arrested and charged with a criminal offense the agency must direct the GG company to remove the SNP DNA profile from its databases and return all associated information to the agency.
- Biological samples and SNP DNA profiles may not be used to determine the donor's genetic predisposition for disease or any other medical condition or psychological trait.<sup>39</sup>

#### *DTCs and Third-Party Companies and Law Enforcement Access*

Of the four principal commercial companies only FTDNA allows law enforcement matching within the opted in section of its database. Law enforcement agencies that want to use the FTDNA database are required to register all forensic samples and genetic files prior to uploading. FTDNA may grant permission to use the database only after the required documentation is submitted, reviewed, and approved. Even if permission is granted, access is limited for the purposes of identifying remains of deceased individuals and identifying perpetrators of homicide, sexual assault, or abduction.<sup>40</sup> FTDNA allows users to opt out of law enforcement searches.<sup>41</sup>

GEDmatch, a citizen science website founded in 2010, proved crucial to the initial development of IGG. GEDmatch allows DNA profiles to be uploaded from a wide variety of sources, including law enforcement agencies. GEDmatch launched a dedicated law enforcement portal in December 2020. GEDmatch allows samples of unidentified human remains to be compared against the entire database, while profiles uploaded to identify the perpetrator of a violent crime<sup>42</sup> may only be matched against the opt in portion of the database. GEDmatch users are automatically opted out of law enforcement searches but may choose to opt in.<sup>43</sup>

DNASolves was setup in December 2019 and is intended to be a dedicated SNP database for law enforcement use. Users on DNASolves contribute data solely to solve crime, there is no public-facing search and users cannot be matched with relatives. Users may voluntarily submit their name, date of birth, and their parents' names to assist investigators.<sup>44</sup>

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<sup>38</sup> A genetic association means that the donor of the sample *maybe* related to the service user. *Supra* note 21, at 4.

<sup>39</sup> *Supra* notes 21 and 31.

<sup>40</sup> *Supra* note 16, at 12.

<sup>41</sup> *Supra* note 31, at 3.

<sup>42</sup> GEDmatch defines "violent crime" as murder, non-negligent manslaughter, aggravated rape, robbery, and aggravated assault. *Supra* note 31, at 3.

<sup>43</sup> *Supra* note 31, at 4.

<sup>44</sup> *Supra* note 16, at 15.

Although, IGG materials and information may be exempt as active criminal intelligence or investigative information, the materials and information become subject to public record requirements when no longer considered active.

## **Effect of the Bill**

The bill amends s. 119.071, F.S., to make confidential and exempt from public record requirements IGG information and materials.

The bill defines “investigative genetic genealogy information and materials” as the information, records, and DNA records created or collected by or on behalf of a law enforcement agency conducting IGG research, and includes the names and personal identifying information of persons identified through the use of genealogy databases, traditional genealogical methods, or other investigative means. The term does not include the name or personal identifying information of:

- The donor of a biological sample attributable to a perpetrator; or
- A person identified through IGG who is a witness to or has personal knowledge related to the crime under investigation.

The bill provides an exception for law enforcement agencies, to:

- Allow an agency to disclose IGG information and materials in furtherance of its official duties and responsibilities or to another governmental agencies in furtherance of its official duties and responsibilities; and
- Require an agency to disclose IGG information and materials pursuant to a court order for the furtherance of a criminal prosecution. The recipient of such a disclosure must maintain the confidential and exempt status of the information and materials and may only publicly disclose them as necessary for the purposes of a criminal prosecution as determined by the court.

The bill provides for retroactive application of the newly-created public record exemption to all IGG information and materials held by an agency before, on, or after July 1, 2023.

The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature.

The bill also provides the constitutionally required public necessity statement.<sup>45</sup> The public necessity statement states, in part, that the Legislature finds that failure to properly protect and limit the disclosure of IGG information and materials will hinder the ability of law enforcement to use IGG to solve violent crimes and provide closure to the family members of victims.

The bill defines additional terms, including:

- “DNA record” which means all information associated with the collection and analysis of a person’s DNA sample, including the distinguishing characteristics collectively referred to as a DNA profile, and includes a single nucleotide polymorphism and a whole genome sequencing DNA profile.
- “Genetic genealogy” which means the use of DNA testing in combination with traditional genealogical methods to infer relationships between persons and determine ancestry.
- “Investigative genetic genealogy” which means the application of genetic genealogy and law enforcement investigative techniques to develop investigative leads in unsolved violent crimes and provide investigative leads as to the identify of unidentified human remains and living unidentified missing persons.

The effective date of this bill is July 1, 2023.

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<sup>45</sup> Art. I, s. 24(c), Fla. Const., requires each public record exemption to “state with specificity the public necessity justifying the exemption.”

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

See Fiscal Comments.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

See Fiscal Comments.

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

None.

### D. FISCAL COMMENTS:

The bill may have an insignificant negative fiscal impact on entities holding IGG information and materials, as staff responsible for complying with public record requests may require training related to the new public record exemption. However, any additional costs will likely be absorbed within existing resources.