

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 Criminal Justice

BILL: SB 310

INTRODUCER: Senator Collins

SUBJECT: Federal Law Enforcement Agency Records

DATE: March 10, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Stokes	CJ	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 310 requires a federal law enforcement agency that is not subject to the federal Freedom of Information Act and that has a physical office located in this state to comply with the public records requirements of this state.

The bill should not have a state fiscal impact. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2023.

II. Present Situation:

Florida Public Records Law

The State 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 who acts on behalf of the government.

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.² 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.³

¹ FLA. CONST., art. I, s. 24(a).

² Public records laws are found throughout the Florida Statutes.

³ Section 119.01(1), F.S. Emphasis provided by staff.

For purposes of ch. 119, F.S., an “agency” is *any state, county, district, authority, or municipal officer, or other separate unit of government created or established by law*, and includes 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.⁴

The Public Records Act contains general exemptions that apply across agencies. Agency or program-specific exemptions often are placed in the substantive statutes that relate 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 connection 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.

Public Records Exemptions in Chapter 119, F.S., Relevant to Federal Law Enforcement Records or Information

Section 943.053(2), F.S., restricts “the dissemination of criminal history information obtained from federal criminal justice information systems and other states by stating that such information shall not be disseminated in a manner inconsistent with the laws, regulations, or rules of the originating agency.”⁸

⁴ Section 119.011(2), 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. A “custodian of public records” means the elected or appointed, state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee. Section 119.011(5), F.S.

⁸ *Public Records, A Guide for Law Enforcement Agencies* (2021 ed.), p. 34 and n. 115, The Office of Attorney General Ashley Moody, available at [http://myfloridalegal.com/webfiles.nsf/WF/MNOS-C79JHP/\\$file/LawEnforcementGuide.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-C79JHP/$file/LawEnforcementGuide.pdf) (last visited on March 8, 2023). At footnote 115, the text notes: “Thus, criminal history record information shared with a public school district by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to public inspection. AGO 99-01.” *Id.*

“Pursuant to s. 119.071(2)(b), F.S., criminal intelligence or investigative information received by a Florida criminal justice agency from a non-Florida criminal justice agency on a confidential or similarly restricted basis is exempt from disclosure.”⁹

Federal Records – Custody and Access

Congress has authorized federal departments to promulgate “regulations for the custody, use, and preservation” of its records.¹⁰ Congress has also authorized federal agencies to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”¹¹

“The [Freedom of Information Act or] FOIA¹² and Privacy Act¹³ are long-established mechanisms for individuals to seek access to [federal] government records.”¹⁴ The acts serve different purposes but are “often read in tandem.”¹⁵ “[T]he FOIA is designed to increase the public’s access to governmental information[.]”¹⁶ “Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of nine exemptions which protect interests such as personal privacy, national security, and law enforcement.”¹⁷

The law enforcement exemption to the FOIA prevents disclosure of:

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential

⁹ *Public Records, A Guide for Law Enforcement Agencies, supra*, at p. 20 and n. 69. At footnote 69, the text notes: “See *State v. Wright*, 803 So. 2d 793 (Fla. 4th DCA 2001) (state not required to disclose criminal histories of civilian witnesses which it obtained from the Federal Bureau of Investigation). The purpose of this statute is to ‘encourage cooperation between non-state and state criminal justice agencies.’ *State v. Buenoano*, 707 So. 2d 714, 717 (Fla. 1998).”

¹⁰ 5 U.S.C. s. 301.

¹¹ 44 U.S.C. s. 3101.

¹² 5 U.S.C. [s.] 552.

¹³ 5 U.S.C. [s.] 552a.

¹⁴ *OIP Guidance: The Interface Between the FOIA and Privacy Act Under the FOIA* (Sept. 30, 2022), U.S. Department of Justice, available at <https://www.justice.gov/oip/oip-guidance-interface-between-foia-and-privacy-act> (last visited on March 8, 2023) (citations omitted).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *What is FOIA?*, U.S. Department of Justice, available at <https://www.foia.gov/about.html> (last visited on March 8, 2023). For a list of the exemptions, see 5 U.S.C. [s.] 552, and *Freedom of Information Act: Frequently Asked Questions (FAQ)*, U.S. Department of Justice, available at <https://www.foia.gov/faq.html> (last visited on March 8, 2023).

source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.¹⁸

“The Privacy Act is designed to foster a relationship of trust between an individual and an agency, by requiring that the agency’s collection, use, and maintenance of records pertaining to individuals must be compatible with the purposes for which the record was collected or created, or otherwise be expressly permitted under the Act.”¹⁹ “The general rule under the Privacy Act is that an agency cannot disclose a record contained in a system of records²⁰ unless the individual to whom the record pertains gives prior written consent to the disclosure. There are twelve exceptions to this general rule.”²¹ None of the exceptions apply to a request for records pursuant to a state public records law.

III. Effect of Proposed Changes:

The bill creates s. 119.03, F.S., which requires a federal law enforcement agency that is not subject to the FOIA and that has a physical office located in this state to comply with the public records requirements of this state. Conforming changes are made to s. 119.01, F.S. (general state policy on public records) and the definitions of “agency” and “custodian of records” in s. 119.011(2) and (5), F.S.

It is unclear which federal records are intended to be covered as federal law enforcement agency records “not subject” to the FOIA. A legitimate question could be raised whether the records include records falling within an FOIA exemption or records that are not subject to disclosure pursuant to the Privacy Act or another federal law.

As previously noted, some federal records information in the custody of a state or local agency is exempt from public disclosure.²² If the bill requires disclosure of this information when it is held by a federal law enforcement agency, there would be an inconsistent application of the Florida Public Records Act.

The bill would expand Florida’s Public Records Act to include records of a federal law enforcement agency that are not subject to FOIA. While this expansion does not appear to violate

¹⁸ 5 U.S.C. s. 552(b)(7)(C). See *DOJ v. Reporters Comm. for Free Press*, 489 U.S. 749 (1989) (disclosure of the contents of an FBI rap-sheet to a third party is prohibited by 5 U.S.C. s. 552(b)(7)(C)).

¹⁹ *OIP Guidance: The Interface Between the FOIA and Privacy Act Under the FOIA*, *supra*.

²⁰ A “system of records” is “a group of agency-controlled records from which information is retrieved by a unique identifier, such as the individual’s name or employee identification number.” *Id.*

²¹ *Overview of the Privacy Act: 2020 Edition*, Office of Privacy and Civil Liberties, U.S. Department of Justice, available at <https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/disclosures-third-parties> (last visited on March 8, 2023). For a list of exemptions, see 5 U.S.C. s. 552 and *Overview of the Privacy Act: 2020 Edition*, *supra*.

²² See s. 943.053(2), F.S. (criminal history information obtained from federal criminal justice information systems) and s. 119.071(2)(b), F.S. (criminal intelligence or investigative information received by a Florida criminal justice agency from a non-Florida criminal justice agency on a confidential or similarly restricted basis).

the right to access public records in the State Constitution,²³ the State Constitution does not provide any support for this expansion.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

The bill does not create a public records exemption or modify an existing public records exemption.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Supremacy Clause

The typical scenario in which state public record law may come into conflict with federal law is when there is a public records request for a federal record or information in the custody of a state custodian of records, such as a state agency. In this scenario, the federal law may preempt the state law.

The general rule is that records which would otherwise be public under state law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records. If a federal statute requires particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Article VI, U.S. Const., the state must keep the records confidential. *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); AGOs 90-102, 85-03, 81-101, 80-31, and 74-372.²⁴

“[E]ven if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. ‘Conflict preemption,’ as it is commonly known, arises in two circumstances: when it is impossible to comply

²³ FLA. CONST., art. I, s. 24(a).

²⁴ Gleason, Patricia. *Overview of the Sunshine and Public Records Laws* (2020), p. 55 available at <https://www-media.floridabar.org/uploads/2022/09/2022-Open-government-overview.doc> (last visited on March 8, 2023).

with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.”²⁵

Staff did not find any case in which a state legislature compelled a federal agency to comply with that state’s public records law requirements. However, courts have held that state court orders were in violation of the Supremacy Clause to the extent those orders compelled production or expunction of federal agency records.²⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The provisions of the bill impact federal agencies so there should not be any state fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.01 and 119.011.

This bill creates the section 119.013 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.

²⁵ *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004) (citations omitted).

²⁶ *See State v. Shirley M.*, 136 Ohio App.3d 753, 737 N.E.2d 1013, 1014 (8th Dist. 2000) (Supremacy Clause was violated insofar as Ohio law gives state court jurisdiction to enter expungement and sealing orders with respect to federal records maintained or in the custody of federal officials); *In re Application of Pacifico for Sealing of Records*, 129 Ohio App. 3d 152, 717 N.E.2d 393 (2d Dist. 1998) (similar holding); and *Schwab v. Gallas*, 742 F.Supp. 509 (N.D. Ohio 1989) (similar holding).

B. Amendments:

None.

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