

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: SB 7012

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Victim of an Incident of Mass Violence

DATE: March 28, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Cellon</u>	<u>Stokes</u>		CJ Submitted as Committee Bill
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7012 saves from repeal the public records exemption for the address of a victim of an incident of mass violence. The exemption makes the records exempt from public records inspection and copying 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)(o), F.S., is scheduled to repeal on October 2, 2023. This bill removes the scheduled repeal to continue the exempt status of the information.

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

The bill takes effect October 1, 2023.

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:

[a] ll 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

Public Records Exemption Under Review

In 2018, the Legislature created s. 119.071(2)(o), F.S., which made the address of a victim of an incident of mass violence exempt from public records laws.²⁶ The exemption in s. 119.071(2)(o), F.S., will stand repealed on October 2, 2023, unless reviewed under the Act²⁷ and saved from repeal through reenactment by the Legislature.

As defined in s. 119.071(2)(o), F.S., the term “incident of mass violence” means an incident in which four or more people, not including the perpetrator, are severely injured or killed by an intentional and indiscriminate act of violence of another. The term “victim” means a person killed or injured during an incident of mass violence, not including the perpetrator.²⁸

In creating the exemption, the Legislature provided a public necessity statement articulating the reasons for the exemption.²⁹ Specifically, the Legislature found:

- After an incident of mass violence has occurred, victims of such an incident are in a vulnerable state as they assist law enforcement with the investigation of the incident and try to recover from the events that occurred.
- In some instances, the victim may have been killed or injured leaving their families to deal with the aftermath of the crime.
- The public availability of such victim’s address may be used to locate the victim or the victim’s family.

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 Section 119.07(1), F.S., and FLA. CONST. art. I, s. 24(a).

²⁷ Section 119.15, F.S.

²⁸ Section 119.071(2)(o), F.S.

²⁹ Chapter 2018-2, L.O.F.

- The availability of such information has allowed people to take advantage of the victims or their families by subjecting the victims or their families to media intrusions at their homes and other unwelcome intrusions into their privacy.
- Therefore, it is necessary that the address of victims of incidents of mass violence be protected to ensure that persons affected by such incidents are not harassed, taken advantage of, or otherwise subjected to additional pain and suffering.³⁰

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 law enforcement agencies. Additionally, Senate and House of Representatives staff participated in a meeting with the Florida Department of Law Enforcement to discuss the exemption. In the fall of 2022, staff sent questionnaires to a total of 666 agencies.³¹ Forty agencies returned answered questionnaires.³²

Of the 40 responding agencies, only one agency reported an incident of mass violence as defined in the public records exemption, in the approximately five years since the exemption became law.³³ The agency reported a drive-by shooting in 2020 in which one person was killed and seven were wounded.³⁴ The agency further reports that it uses Marsy's Law³⁵ to protect victim information and suggests that the exemption could be repealed.^{36, 37}

Although only one responding law enforcement agency has been in a position to utilize the public records exemption in s. 119.071(2)(o), F.S., 37 agencies responded to the survey question about whether the exemption should be reenacted.³⁸ Of those 37 agencies, a majority of 23 agencies said that the public records exemption should be reenacted; five agencies said the

³⁰ *Id.*

³¹ Staff had the assistance of the Florida Police Chiefs Association and the Florida Sheriff's Association in sending out the survey questionnaires.

³² Open Government Sunset Review Questionnaires, Address of a Victim of an Incident of Mass Violence; responses are on file with the Senate Criminal Justice Committee.

³³ *Id.*

³⁴ *Id.*

³⁵ In 2018, Florida voters passed Marsy's Law, an amendment to the Florida Constitution, to expand victim's rights. FLA. CONST. Art. 1, s. 16(b).

³⁶ Other agencies reported that they would use Marsy's Law or would depend upon both the exemption *and* Marsy's Law under appropriate circumstances. Open Government Sunset Review Questionnaires, Address of a Victim of an Incident of Mass Violence; responses are on file with the Senate Criminal Justice Committee.

³⁷ It appears that there is inconsistency in how different law enforcement agencies have interpreted the requirements of Marsy's Law. While some agencies invoke Marsy's Law and automatically redact victim information, others require the victim to request it. *See The Problem with Marsy's Law in Florida*, Tampa Bay Times, June 7, 2022, available at <https://www.tampabay.com/opinion/2022/06/07/the-problem-with-marsys-law-in-florida-editorial/> (last visited February 24, 2023). There is pending litigation on Marsy's Law in the Florida Supreme Court, but it is unclear whether the court will address the automatic applicability of a victim's right to prevent the disclosure of information or records as provided in FLA. CONST. Art 1, s. 16(b). *See, City of Tallahassee v. Florida Police Benevolent Association, Inc.*, 314 So. 3d 796 (Fla. 1st DCA 2021)(Review granted December 21, 2021).

³⁸ Open Government Sunset Review Questionnaires, Address of a Victim of an Incident of Mass Violence; responses are on file with the Senate Criminal Justice Committee.

exemption should be reenacted with changes;³⁹ and nine agencies thought the exemption should be repealed.⁴⁰

The exemption stands repealed on October 2, 2023, unless it is reviewed and saved from repeal by the Legislature.⁴¹

III. Effect of Proposed Changes:

The bill amends s. 119.071(2)(o), F.S., to save from repeal the current exemption for the address of a victim of mass violence.

The bill deletes the scheduled repeal date of October 2, 2023, thereby maintaining the exempt status of the information.

The bill takes effect October 1, 2023.

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.

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.

³⁹ One agency suggests there needs to be more “guidance” in this exemption. Two agencies suggested replacing the term “address” with broader language such as “all information that may be used to identify a victim of mass violence.” An additional agency suggested the exemption is “too narrow” and that it should be changed to “two or more” killed or injured. The fifth agency suggested that the exemption could be merged with language from Marsy’s Law.

⁴⁰ Open Government Sunset Review Questionnaires, Address of a Victim of an Incident of Mass Violence; responses are on file with the Senate Criminal Justice Committee.

⁴¹ Section 119.15(7), F.S.

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 address of a victim of mass violence. This bill exempts only the address of a victim of mass violence 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:

The private sector will continue to be subject to the cost associated with an agency's review and redactions of exempt records in response to a public records request.

C. Government Sector Impact:

The government sector will continue to incur costs related to the review and redaction of exempt records associated with responding to public records requests.

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.
