

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 873 Protected Information of Sexual Offense Victims

SPONSOR(S): Criminal Justice Subcommittee, Bartleman and others

TIED BILLS: IDEN./SIM. BILLS: SB 852

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	17 Y, 0 N, As CS	Leshko	Hall

SUMMARY ANALYSIS

Section 119.071(2)(h)1.b., F.S., makes confidential and exempt from public record requirements criminal intelligence and criminal investigative information including any information that may reveal the identity of a person who is a victim of certain sexual offenses, including a sexual offense described in s. 787.06(3)(b), (d), (f), or (g), F.S., (human trafficking for commercial sexual activity), or chs. 794 (sexual battery), 796 (prostitution), 800 (lewdness and indecent exposure), 827 (child abuse), and 847 (obscenity), F.S.

Section 16(b), art. I, of the State Constitution, commonly known as “Marsy’s Law,” grants victims the right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.

CS/HB 873 creates s. 960.31, F.S., to authorize a sexual offense victim whose protected information is published or otherwise disseminated, or his or her legal representative, to make a request, in writing, for the removal of the protected information to the person or registered agent of the person or entity who published or disseminated the protected information. The bill defines “protected information” as any information made confidential and exempt pursuant to s. 119.071(2)(h)1.b., or otherwise protected pursuant to s. 16(b), art. I, of the State Constitution.

The bill requires the written request for removal to be sent by registered mail and include sufficient proof of identification of the sexual offense victim whose protected information was published or disseminated and specific information identifying the protected information that the written request is seeking to remove. The bill requires the person or entity who published or disseminated the information to remove the information without charge within five calendar days after receipt of the written request and prohibits such person or entity from republishing or otherwise redisseminating the protected information.

The bill authorizes a sexual offense victim, or his or her legal representative, to bring a civil action to enjoin the continued publication or dissemination of the protected information if the protected information is not removed within five calendar days after receipt of the written request or if it is republished or redisseminated after it is required to be removed. The bill authorizes the court to impose civil penalties and award reasonable attorney fees and court costs related to the issuance and enforcement of an injunction. The bill requires any civil penalties recovered to be deposited into the Crimes Compensation Trust Fund.

The bill may have an indeterminate fiscal impact on state government as it may increase deposits into the Crimes Compensation Trust Fund; however, it may increase judicial workload if the creation of the new civil action for an injunction results in additional actions being filed.

The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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.¹ 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.²

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.³ Furthermore, the Open Government Sunset Review Act⁴ 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.⁵ 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.⁶

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.⁷

Furthermore, there is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. However, if the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute.⁸

¹ Art. I, s. 24(a), Fla. Const.

² Art. I, s. 24(c), Fla. Const.

³ 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 Florida Constitution. S. 119.011(8), F.S.

⁴ S. 119.15, F.S.

⁵ S. 119.15(6)(b), F.S.

⁶ *Id.*

⁷ S. 119.15(3), F.S.

⁸ See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991); See Attorney General Opinion 85-62 (August 1, 1985).

Public Record Exemption for Information Relating to Sexual Offense Victims

Section 119.071(2)(h), F.S., makes confidential and exempt criminal intelligence⁹ and criminal investigative information¹⁰ that includes:

- Any information that reveals the identity of a victim of the crime of child abuse or of a person under the age of 18 who is the victim of human trafficking for labor or services;¹¹
- Any information that may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense as described in s. 787.06(3)(b), (d), (f), or (g), F.S., (human trafficking for commercial sexual activity), or chs. 794 (sexual battery), 796 (prostitution), 800 (lewdness and indecent exposure), 827 (child abuse), and 847 (obscenity), F.S.; and
- A photograph, videotape, or image of any part of the body of a victim of a crime of certain sexual offenses or of a victim of human trafficking involving commercial sexual activity.¹²

Exceptions

Under s. 119.071(2)(h)2., F.S., a law enforcement agency may disclose, print, publish, or broadcast such criminal intelligence and criminal investigative information:

- In the furtherance of its official duties and responsibilities.
- When the agency determines that such release would assist in locating or identifying a person that the agency believes to be missing or endangered. Under this exception, the information provided should be limited to that needed to identify or locate the victim and not include the sexual nature of the offense committed against the person.
- To another governmental agency in the furtherance of its official duties and responsibilities.¹³

Additionally, under s. 92.56, F.S., a person may file a petition to access such confidential and exempt records with the trial court having jurisdiction over the alleged offense, however, the court must maintain the confidential and exempt nature of the records if the state or the victim demonstrates that:

- The identity of the victim is not already known in the community;
- The victim has not voluntarily called public attention to the offense;
- The identity of the victim has not otherwise become a reasonable subject of public concern;
- The disclosure of the victim's identity would be offensive to a reasonable person; and
- The disclosure of the victim's identity would:
 - Endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim;
 - Endanger the victim because of the likelihood of retaliation, harassment, or intimidation;
 - Cause severe emotional or mental harm to the victim;
 - Make the victim unwilling to testify as a witness; or
 - Be inappropriate for other good cause shown.¹⁴

These protections may be waived by the victim of the alleged offense in a writing filed with the court, in which the victim consents to the use or release of identifying information during court proceedings and in the records of court proceedings.¹⁵ Additionally, there is no prohibition against the publication or broadcast of the substance of trial testimony in a prosecution for specified human trafficking and sexual offenses,¹⁶ but the publication or broadcast may not include an identifying photograph, an identifiable voice, or the name or address of the victim, unless the victim has declared such records not confidential and exempt.¹⁷

⁹ The term "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. S. 119.011(3)(a), F.S.

¹⁰ The term "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. S. 119.011(3)(b), F.S.

¹¹ See ch. 827, F.S.

¹² See ss. 119.071(2)(h) and 810.145, F.S., and chs. 794, 796, 800, 827, and 847, F.S.

¹³ S. 119.071(2)(h)2., F.S.

¹⁴ S. 92.56(1)(b), F.S.

¹⁵ S. 92.56(4), F.S.

¹⁶ See s. 787.06(3)(a)1., (b), (c)1., (d), (e)1., (f), or (g), and chs. 794, 800, and 827, F.S.

¹⁷ S. 92.56(5), F.S.

Marsy's Law

Section 16(b), art. I, of the State Constitution, commonly known as “Marsy’s Law,” grants victims the right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.¹⁸

Civil Actions Available to Sexual Offense Victims

Civil Right of Action for Communicating the Identity of a Sexual Crime Victim

Section 794.026, F.S., provides that an entity or individual who communicates to others, prior to open judicial proceedings, the name, address, or other specific identifying information concerning the victim of a specified sexual offense proscribed in chs. 794 (sexual battery) and 800 (lewdness and indecent exposure), F.S., is liable to that victim for all damages reasonably necessary to compensate the victim for any injuries suffered as a result of such communication. The victim must show that the communication was intentional and was done with reckless disregard for the highly offensive nature of the publication.¹⁹

Publication or Broadcast of Information Identifying a Sexual Offense Victim

Section 794.03, F.S., prohibits a person from printing, publishing, or broadcasting, or causing or allowing to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual battery offense.²⁰ A violation of this section is a second-degree misdemeanor,²¹ unless the printing, publishing, or broadcasting was in compliance with the law enforcement exceptions provided in s. 119.071(2)(h)2., F.S., or unless the court determines that such information is no longer confidential and exempt.²²

Crimes Compensation Trust Fund

The Department of Legal Affairs administers the Crime Victim Compensation Program, which provides monetary compensation for: economic losses incurred, such as wage loss, disability, or loss of support; treatment costs, such as medical, mental health, or grief counseling; and/or funeral costs.²³ Claims are compensated from moneys in the Crimes Compensation Trust Fund (Fund).²⁴ The Fund consists of moneys appropriated by the Legislature, recovered on behalf of the Department by subrogation or restitution, and received from the federal government, court costs, fines, or any other public or private source.²⁵

Effect of Proposed Changes

CS/HB 873 creates s. 960.31, F.S., to authorize a sexual offense victim whose protected information is published or otherwise disseminated, or his or her legal representative, to make a request, in writing, for the removal of such information to the person or registered agent of the person or entity who published or otherwise disseminated the protected information. The bill defines “sexual offense victim” as any minor or adult who is a victim of a sexual offense prohibited under s. 787.06(3), (b), (d), (f), or (g), chapter 794, chapter 796, chapter 800, chapter 827, or chapter 847. The bill defines “protected information” as any information made confidential and exempt pursuant to s. 119.071(2)(h)1.b., or otherwise protected pursuant to s. 16(b), art. I, of the State Constitution.

¹⁸ Article I, s. 16(b)(5), Fla. Const.

¹⁹ S. 794.026, F.S.

²⁰ See ch. 794, F.S.

²¹ A second-degree misdemeanor is punishable by up to 60 days’ imprisonment and a \$500 fine. Ss. 775.082 and 775.083, F.S.

²² S. 92.56, F.S.

²³ Florida Attorney General, *Victim Compensation Brochure*, [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/\\$file/BVCVictimCompensationBrochure.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/$file/BVCVictimCompensationBrochure.pdf) (last visited Mar. 16, 2023).

²⁴ S. 960.21, F.S.

²⁵ S. 960.21(2), F.S.

The written request for removal of the protected information must be sent by registered mail and include sufficient proof of identification of the sexual offense victim whose protected information was published or otherwise disseminated and specific information identifying the protected information that the written request is seeking to remove. The bill requires the person or entity who published or otherwise disseminated the information to remove the information without charge within five calendar days after receipt of the written request for removal of the protected information and prohibits such person or entity from republishing or otherwise redisseminating the protected information.

The bill authorizes a sexual offense victim whose protected information was published or otherwise disseminated, or his or her legal representative, to bring a civil action to enjoin the continued publication or dissemination of the protected information if the protected information is not removed within five calendar days after receipt of the written request for removal. The bill authorizes the court to impose a civil penalty of \$1,000 per day for noncompliance with an injunction and award reasonable attorney fees and court costs related to the issuance and enforcement of the injunction.

The bill further provides that if a person or an entity was required to remove protected information under this section and later republishes or otherwise redisseminates such information, the sexual offense victim whose protected information is republished or redisseminated, or his or her legal representative, may bring a civil action to enjoin the continued publication or dissemination of the protected information. The bill authorizes the court to impose a civil penalty of \$5,000 per day for noncompliance with an injunction and award reasonable attorney fees and court costs related to the issuance and enforcement of the injunction.

The bill requires any civil penalties recovered to be deposited into the Crimes Compensation Trust Fund.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Creates s. 960.31, F.S., relating to publication or dissemination of protected information relating to a sexual offense victim.

Section 2: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate negative fiscal impact on any person or private entity that published or disseminated a sexual offense victim's protected information due to any costs associated with

removing the protected information and due to any civil penalties imposed for failure to comply with a court-issued injunction to cease publication or dissemination of protected information.

D. FISCAL COMMENTS:

The bill may have an indeterminate positive fiscal impact on state government as any civil penalties imposed on a person or entity for failure to comply with a court-ordered injunction must be deposited into the Crimes Compensation Trust Fund. Additionally, the bill may have an indeterminate negative fiscal impact on state government due to an increase in judicial workload if the creation of the new civil action for an injunction results in additional actions being filed.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The First Amendment of the U.S. Constitution guarantees that “Congress shall make no law ... abridging the freedom of speech, or of the press.”²⁶ The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment.²⁷

CS/HB 873 may implicate the First Amendment as it attempts to censor information that has already been published. A party seeking to uphold censorship “carries a heavy burden of showing an interest sufficient to overcome the First Amendment rights of the press. The party must also demonstrate that there are no alternative measures available to protect the competing interest and that the . . . censorship will be effective to accomplish that purpose.”²⁸ Publication of lawfully obtained, truthful information requires “the most exacting” constitutional scrutiny.²⁹

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 29, 2023, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the original bill as it:

- Authorized a sexual offense victim whose protected information is published or otherwise disseminated, or his or her legal representative, to make a written request, meeting certain requirements, to the person or registered agent of the person or entity who published or disseminated the protected information for the removal of the protected information.
- Required the person or entity who published or disseminated the protected information to remove the protected information within five calendar days after receiving the written request and prohibited such person or entity from republishing or redisseminating the protected information.

²⁶ U.S. Const., amend. I.

²⁷ U.S. Const. amend. XIV. See also Art. I, Fla. Const.

²⁸ *Palm Beach Newspapers, LLC v. State*, 183 So. 3d 480 (Fla. 4th DCA 2016).

²⁹ *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101-102 (1979).

- Authorized a sexual offense victim, or his or her legal representative, to bring a civil action to enjoin continued publication or dissemination of the protected information if the protected information is not removed within five calendar days or if it is republished or redisseminated after it is required to be removed.
- Authorized the court to impose civil penalties and award reasonable attorney fees and court costs related to the issuance and enforcement of an injunction.
- Required any civil penalties recovered to be deposited into the Crimes Compensation Trust Fund.
- Removed definitions for “public proceeding,” “school,” sexual violence or sexual exploitation,” and “victim” and added definitions for “legal representative,” “protected information,” and “sexual offense victim.”
- Removed victim’s control over access to information exempted from public record requirements.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.