



# The Florida Senate

Interim Project Report 2002-212

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Committee on Criminal Justice

Senator Victor D. Crist, Chairman

## OPEN GOVERNMENT SUNSET REVIEW OF S. 943.031(7)(C) AND (D), F.S.

### SUMMARY

Among its statutory responsibilities, the Florida Violent Crime and Drug Control Council is charged with making various funding decisions, some of which relate to funding for the initiation of certain criminal investigations or the support of certain ongoing criminal investigations. In the context of making some of these funding decisions, the Council has considered and discussed, and continues to consider and discuss, relevant, active criminal intelligence information or active criminal investigative information.

In 1997, the Legislature, pursuant to s. 943.031(7)(c), F.S., authorized the Council to close to the public that portion of any meeting of the Council in which active criminal intelligence information or active criminal investigation information is presented and discussed. Additionally, s. 943.031(7)(d), F.S., provides that certain records generated at such closed meetings are exempted from public disclosure. These exemptions are presently subject to review under s. 119.15, F.S., the Open Government Sunset Review Act of 1995, for the purpose of determining whether the exemptions should be reenacted or repealed.

Staff recommends that the exemptions in s. 943.031(7)(c) and (d), F.S., be reenacted because the exemptions meet the criteria in s. 119.15, F.S., for their reenactment.

### BACKGROUND

**Constitutional Access to Public Records and Meetings** -- Section 24(a), Art. I of the State Constitution provides every person with “. . . the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.”

Section 24 specifically includes “. . . the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.” *Id.*

Section 24(b), Art. I of the State Constitution provides, in part, that “[a]ll meetings of any collegial public body of the executive branch of state government . . . at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . , except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.”

Section 24(c), Art. I of the State Constitution authorizes the Legislature to statutorily exempt “. . . records from the requirements of subsection (a) and . . . meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.” A law creating an exemption only exempts requirements relating to public records or public meetings and shall relate to one subject.

**Open Government Sunset Review Act of 1995** -- Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review-and-repeal process for exemptions to requirements relating to public records or public meetings. A new exemption, or substantial amendment of an existing exemption, is repealed on October 2nd of the fifth year after enactment of the exemption, unless the Legislature acts to reenact the exemption. “A law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.” Section 119.15(3)(a), F.S.

“ . . . [A]n exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.” Section 119.15(3)(b), F.S.

By June 1st of the year before repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services is required to “ . . . certify to the President of the Senate and the Speaker of the House of Representatives . . . the language and statutory citation of each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in [s. 119.15, F.S.]” Section 119.15(3)(d), F.S. If the exemption is not identified and certified by the Division, it is not subject to legislative review and repeal. In the event “ . . . the [D]ivision fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year’s certification after that determination.” *Id.*

Section 119.15(2)(a) - (c), F.S., provides that an exemption is to be created or maintained only for the following reasons:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

Section 119.15(4)(a)1. - 4., F.S., requires that the following specific questions be considered as part of the open government sunset review process:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Section 119.15(4)(b), F.S., provides that “[a]n exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves.” (This provision codifies the identical requirements in s. 24(c), Art. I of the State

Constitution.) An identifiable public purpose is served if: 1) the exemption meets one of the purposes described in s. 119.15(4)(b)1. – 3., F.S.; and

2) “. . . 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 . . .” *Id.* The following purposes are described in s. 119.15(4)(b)1. – 3., F.S:

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. (However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted); or
- (3) Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Section 119.15(4)(e), F.S., provides that, “[n]otwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.”

**Duties of the Florida Crime and Drug Control Council** -- Section 943.031, F.S., as recently amended by ch. 2001-127, L.O.F., creates the “Florida Violent Crime and Drug Control Council” (formerly named the “Florida Violent Crime Council”) within the Florida Department of Law Enforcement (FDLE).

Among its statutory responsibilities, the Council is charged with “[e]stablishing a program which provides grants to criminal justice agencies that develop and implement effective violent crime prevention and investigative programs and which provides grants to law enforcement agencies for the purpose of drug control and illicit money laundering investigative

efforts or task force efforts that are determined by the [C]ouncil to significantly contribute to achieving the state's goal of reducing drug-related crime as articulated by the Office of Drug Control, that represent a significant illicit money laundering investigative effort, or that otherwise significantly support statewide strategies developed by the Statewide Drug Policy Advisory Council . . ." The grant program may provide ". . . startup funding for new initiatives by local and state law enforcement agencies to combat violent crime or to implement drug control or illicit money laundering investigative efforts or task force efforts by law enforcement agencies . . ." Section 1, ch. 2001-127, L.O.F. (amending s. 943.031(4)(a), F.S.)

**Exemptions Under s. 943.031(7)(c) and (d), F.S. --** Section 943.031(7)(c)1., F.S., authorizes the Council to ". . . close portions of meetings during which the [C]ouncil will hear or discuss active criminal investigative information or active criminal information . . ." The closed portions of the Council meetings are exempt from the provisions of s. 286.011, F.S. (public meetings and records; public inspection; criminal and civil penalties) and s. 24(b), Art. I of the State Constitution (public meeting requirements), provided certain conditions are met.<sup>1</sup>

<sup>1</sup> The Council chair is required to advise the Council ". . . at a public meeting that, in connection with the performance of a [C]ouncil duty, it is necessary that the [C]ouncil hear or discuss active criminal investigative information or active criminal intelligence information." Section 943.031(7)(c) 1.a., F.S.

The Council chair is further required to make a "declaration of necessity for closure" and provide in writing ". . . specific reasons for such necessity . . . in a document that shall be a public record and shall be filed with the official records of the [C]ouncil." Section 943.031(7)(c)1.b., F.S.

The entire closed session must be recorded. This recording must include ". . . the times of commencement and termination of the closed session, all discussion and proceedings, and the names of all persons present." s. 943.031(7)(c)1.c., F.S. No portion of the session is off the record. The recording must be maintained by the Council. The recording is ". . . exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the criminal investigative information or criminal intelligence information that justifies closure ceases to be active, at which time the portion of the record related to the no longer active information or intelligence shall be open for public inspection and copying." *Id.*

Admission to a closed session of the Council is limited to Council members, FDLE staff supporting the Council's functions, and other persons the chair of the Council has authorized to be present. The Council is required to ". . . assure that any closure of its meetings as authorized by [s. 943.031, F.S.] is limited so that the general policy of this state in favor of public meetings is maintained." Section 943.031(7)(c)2., F.S.

Section 943.031(7)(d), F.S., provides that "[t]hose portions of any public record, such as a tape recording, minutes, and notes, generated during that portion of a . . . Council meeting which is closed to the public pursuant to this section, which contain information relating to active criminal investigations or matters constituting active criminal intelligence are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such criminal investigative information or criminal intelligence information ceases to be active."<sup>2</sup>

Legislative findings in s. 943.031(7)(a)1., F.S., indicate that the Legislature created the exemptions in s. 943.031(7)(c) and (d), F.S., for two reasons:

<sup>2</sup> In addition to the exemptions in s. 943.031(7)(c) and (d), F.S., s. 119.07, F.S., exempts various types of information or records, including, but not limited to: active criminal intelligence information and active criminal investigative information; information revealing undercover personnel of any criminal justice agency; information identifying the victim of a sexual battery or other specified criminal offenses; specified personal information regarding active or former law enforcement personnel; and documents revealing specified information regarding the victim of a crime received by an agency that regularly receives victim information.

Criminal intelligence 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 criminal activities." Section 119.011(3)(d)1., F.S.

Criminal investigative information 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." Section 119.011(3)(d)2., F.S.

"In addition criminal intelligence information and criminal investigative information shall be considered 'active' while such information is directly related to pending prosecutions or appeals." Section 119.011(3)(d), F.S.

1) “. . . presentations and discussions [of active criminal intelligence information and active criminal intelligence information] are necessary for the [C]ouncil to make its funding decisions as required by the Legislature . . .”; and 2) public access to meetings or portions of meetings of the Council in which such information is presented or discussed, or public access to the records or materials containing such information or recording or memorializing the discussion of such records or information “. . . negatively impacts the ability of law enforcement agencies to efficiently continue their investigative or intelligence gathering activities.” See s. 943.031(7)(a)2., F.S. (finding the exemptions to be a “public necessity”).

The Legislature further found that the Council “. . . may, by declaring only those portions of [C]ouncil meetings in which active criminal investigative or active criminal intelligence information is to be presented or discussed closed to the public, assure an appropriate balance between the policy of this state that meetings be public and the policy of this state to facilitate efficient law enforcement efforts.” Section 943.031(7)(a)1., F.S.

To facilitate open government sunset review of the exemptions in s. 943.031(7)(c) and (d), F.S., staff sent a survey questionnaire to FDLE’s General Counsel, who responded to specific questions about the exemptions and the necessity for continuing those exemptions. Staff also reviewed the responses of FDLE’s General Counsel to a survey questionnaire regarding the exemptions that was prepared by the House Committee on State Administration. In response to these two survey questionnaires, FDLE’s General Counsel provided the following information:

1. The specific records that FDLE has determined are confidential and exempt involve “. . . [t]hat portion of records containing active criminal investigative information or active criminal intelligence information.” This information may include, but is not limited to, “. . . details regarding an ongoing homicide investigation, clues found at the homicide scene, possible location of suspects, etc.”<sup>3</sup>
2. The type of Council meetings that FDLE has determined are not open to the public are “. . . [m]eetings during which the . . . Council or its

<sup>3</sup> This response answers the question posed in s. 119.15(4)(a)1., F.S.: “What specific records are affected by the exemption?”

Victim/Witness Protection Subcommittee reviews, hears, or discusses active criminal investigative information, active criminal intelligence information, or information that that could identify a person in the victim/witness protection program.”<sup>4</sup>

3. “Section 914.27, F.S., provides for confidentiality of victim and witness information. Such information is presented to the victim witness committee of the Council when protection or relocation costs are requested.”<sup>5</sup> Additionally, “[i]f a case before the Council involves federal prosecution, or information from another state that has been requested to remain confidential, there may not be disclosure, state law notwithstanding.”<sup>6</sup>
4. The majority of the Council’s meetings are open to the public. FDLE estimates that less than ten percent of the Council’s entire meeting time was closed to the public within the past year.
5. “The Council’s staff works with agencies seeking to make violent crime investigation reimbursement presentations to discourage providing details to the extent that they mandate closed meetings. By law the entire portion of the victim/witness protection subcommittee is closed, but the deliberations of the

<sup>4</sup> This response answers the question posed in s. 119.15(4)(a)1., F.S.: “What specific records are affected by the exemption?”

This response also answers the question posed in s. 119.15(4)(a)2., F.S.: “Whom does the exemption uniquely affect?”

<sup>5</sup> The Council, through the Victim and Witness Protection Committee created within the Council, may reimburse a lead law enforcement agency that provides protective services for expenses incurred in providing such protective services. Section 943.031(6)(c), F.S. See s. 914.25(5), F.S.

<sup>6</sup> Section 119.072, F.S., provides that, “[w]henver criminal intelligence information or criminal investigative information held by a non-Florida criminal justice agency is available to a Florida criminal justice agency based only on a confidential or similarly restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.”

“The provision recognizes the existence of ‘loan agreements’ between a Florida criminal justice agency and non-state agencies . . .” *State v. Buenoano*, 707 So.2d 714, 717 (Fla. 1998).

subcommittee are usually quick, so that only a small portion of the overall Council meeting time is devoted to such issues. In practice, the Council makes every attempt possible to ensure that its meetings are open to the public to the greatest extent possible.”

6. Notes are taken during closed meetings and are not disclosed to the public. “The closed portion of the meeting relating to victim/witness protection is documented by audio tapes that are kept separate from the ‘open’ meeting portions.” Records released to the public pursuant to s. 119.07(1), F.S., do not contain information made confidential and exempt pursuant to s. 943.031, F.S. Redacted records have been provided.
7. FDLE does not separately track release of redacted Council records. The department does “. . . not believe there have been any requests for Council records in the recent past. If records were requested, they would be reviewed to determine whether exempt information is contained in them. If so, exempt information including active criminal investigative information and active criminal intelligence information was redacted.”
8. FDLE’s General Counsel staff is responsible for determining which information is redacted. FDLE’s staff is also the custodian of confidential records or information. Handling, release or non-release, and redaction of exempt records or information are addressed in FDLE Policy and Procedure 2.4, Public Records and Records Management.
9. FDLE’s General Counsel indicates that s. 943.031, F.S., prevents disclosure to the public of certain records and prevents voluntary disclosure to a governmental entity that has requested the exempt information or record. The statute also prevents disclosure of the record or information, even if subpoenaed, but not if subpoenaed followed by a court order supporting the subpoena. The statute does not prevent the record or information from being used in court (no evidentiary privilege is established), nor does it prevent testimony from being given in court regarding a particular matter.
10. FDLE does not believe that confidential and exempt information contained in records that fall under the exemptions in s. 943.031, F.S., can be

readily obtained from another source, such as a public meeting or at the courthouse.<sup>7</sup>

11. “The fundamental reason behind the public records exemption is to protect the compromise of active criminal investigations and protect active criminal intelligence, as well as protecting victims and witnesses who are under ‘witness protection.’” FDLE believes that “[i]nformation relevant to the funding decisions made by the Council would not be made available to the Council without the current exemptions provided for in the law. The Council could not fulfill its statutory mission.”<sup>8</sup>
12. FDLE “strongly supports” the reenactment of the exemptions found in s. 943.013(7)(c) and (d), F.S., and provides the following reasons for reenacting the exemptions:

“The exemption provides a necessary and important means of denying access to specified records. The public release of such records could compromise active criminal investigations and could also be of severe consequences to the affected victims, witnesses, and family members.

“Further, with the new role of the Council in funding proposed drug investigations, it is *essential* that the documents and information received by the Council relating [to] proposals (that if funded will become investigations) remain confidential -- for obvious reasons!”<sup>9</sup> (emphasis provided by FDLE)

## METHODOLOGY

Staff reviewed relevant statutory provisions, surveyed FDLE regarding the exemptions, reviewed FDLE’s responses to this survey and to a survey prepared by the

<sup>7</sup> This response answers the question posed in s. 119.15(4)(a)4., F.S.: “Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?”

<sup>8</sup> This response answers the question posed in s. 119.15(4)(a)2., F.S.: “Whom does the exemption uniquely affect?”

This response also answers the question posed in s. 119.15(4)(a)3., F.S.: “What is the identifiable public purpose or goal of the exemption?”

<sup>9</sup> This response answers the question posed in s. 119.15(4)(a)3., F.S.: “What is the identifiable public purpose or goal of the exemption?”

House Committee on State Administration, and reviewed relevant case law.

## FINDINGS

The exemptions in s. 943.013(7)(c) and (d), F.S., meet the statutory criteria in s. 119.15(2), F.S. (and almost identical criteria in s. 119.15(4), F.S.) for their reenactment.

The exempted information is of a “. . . sensitive, personal nature, concerning individuals.” Section 119.15(2)(a), F.S. *See* 119.15 (4)(b)2., F.S. According to FDLE, the information presented and discussed at closed meetings of the Council only involves active criminal investigative information and active criminal intelligence information. Public disclosure of this information could endanger victims, witnesses (including informants), suspects, and law enforcement undercover personnel. Public disclosure of this information could also impede or compromise criminal intelligence gathering, criminal intelligence operations, and criminal investigations, or allow a suspect to avoid apprehension or escape detection.

The exemptions are also “. . . necessary for the effective and efficient administration of a governmental program . . .” Section 119.15(2)(b) and (4)(b)1., F.S. Without the exemptions, the Council would be unable to consider active criminal investigative information and active criminal intelligence information. Consideration of this information by the Council in closed session appears to be necessary and appropriate to making its various funding decisions. Law enforcement agencies would not proffer this information without guarantees that this information remains exempt from public disclosure.

The exemptions protect information of a “confidential nature.” Section 119.15(2)(c) and (4)(b)3., F.S. Active criminal intelligence information and active criminal investigative information are exempt from public disclosure under s. 119.07, F.S.

Exemptions may be created and maintained only if they serve “. . . an identifiable public purpose and may be no broader than is necessary to meet the public purpose [they] serve.” Section 119.15(4)(b), F.S. There is an “identifiable public purpose” if: 1) the purpose is to allow the effective and efficient administration of a governmental program, protect information of a sensitive personal nature concerning individuals, or protect information of a confidential nature; and 2) “. . . 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.” *See* s. 119.15(4)(b)1. - 3., F.S.

As previously indicated, the exemptions in s. 943.031(7)(c) and (d), F.S., meet all of the criteria under s. 119.15(4)(b)1. - 3., F.S. Further, there are compelling reasons for retaining the exemptions. Retaining the exemptions protects sensitive information regarding victims and others, the disclosure of which could endanger them; ensures that criminal intelligence gathering and criminal investigations will not be impeded or compromised; and allows the Council to perform its statutory duties. The benefits of retaining the exemptions far outweigh any remote benefit that might accrue as a result of their repeal.

The exemptions are no broader than is necessary to meet the public purpose they serve. Meetings or portions of meetings of the Council are closed only when active criminal intelligence or active criminal investigative information is presented or discussed. The discussions of this information are in the context of the Council making a funding decision as part of its statutory duties. Even where the intent of the Council is to close a meeting or a portion of a meeting in order to discuss such information, there are several conditions prescribed in s. 943.031(7)(c)1., F.S., that must be met to provide an exemption. Further, there is no indication that closing a portion of a Council meeting is a frequent or even common occurrence. According to information provided by FDLE, it appears to be exceedingly rare that a portion of a Council meeting is closed to the public.

Similar considerations apply to records or materials recording or memorializing the closed portion of a Council meeting. Section 943.031(7)(d), F.S., only exempts those portions of such records or materials that contain “. . . information relating to active criminal investigations or matters constituting active criminal intelligence . . .” This information only remains exempt until it ceases to be active.

## RECOMMENDATIONS

Staff recommends that the exemptions contained in s. 943.031(7)(c) and (d), F.S., be reenacted, because the exemptions meet the criteria in s. 119.15, F.S., for their reenactment.