

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: CS/CS/248

INTRODUCER: Governmental Oversight and Accountability Committee; Criminal Justice Committee and Senator Smith and others

SUBJECT: Public Records/Recordings by Law Enforcement Officers

DATE: March 18, 2015 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____

Please see Section IX. for Additional Information:
COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/248 creates a public records exemption for body camera recordings made by a law enforcement officer. The portion of a body camera recording is confidential and exempt from public disclosure if the recording is taken:

- within the interior of a private residence;
- on the property of a facility that offers health care, mental health care or social services;
- at the scene of a medical emergency; or
- in a place where a person has a reasonable expectation of privacy.

Law enforcement must release a recording under the following conditions:

- in furtherance of its duties;
- to another governmental agency in the furtherance of its duties;
- pursuant to a court order;
- to the individual recorded; or
- to the personal representative if an individual who is recorded.

Law enforcement is required to maintain a recording for a minimum of 90 days.
This public records exemptions applies retroactively to all body camera recordings.

The bill also provides a statement of public necessity for the exemption, as required by the Florida Constitution.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill creates a new public record exemption; therefore, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

II. Present Situation:

Body-Worn Cameras and Public Records

Body-Worn Cameras (BWCs) or “body cameras” are currently being used or considered for use by many law enforcement agencies. “BWCs are mobile audio and video capture devices that allow officers to record what they see and hear. Devices can be attached to various body areas, including the head, by helmet, glasses or other means, or to the body by pocket, badge, or other means of attachment (such as in-car on the dash). They have the capability to record officer interactions that previously could only be captured by in-car interrogation room camera systems.”¹

The Florida Police Chiefs Association staff is aware of 13 Florida police departments that currently use BWCs² and nine Florida police departments that have implemented pilot programs to test the use of BWCs.³ The media have reported that the Flagler County Sheriff’s Office is using BWC⁴ and the Pasco County Sheriff has indicated an intent to purchase BWCs.⁵ Other Florida sheriffs’ offices may be considering whether to use BWCs.

On December 1, 2014, the White House announced that President Barack Obama was proposing “a three-year \$263 million investment package that will increase use of body-worn cameras, expand training for law enforcement agencies (LEAs), add more resources for police department reform, and multiply the number of cities where DOJ facilitates community and local LEA engagement. As part of this initiative, a new Body Worn Camera Partnership Program would provide a 50 percent match to States/localities who purchase body worn cameras and requisite

¹ Sensor, Surveillance, and Biometric Technologies Center of Excellence. September 2012. *A Primer on Body-Worn Cameras for Law Enforcement*. National Institute of Justice. The quoted text is from page 5 of the report, which is available at <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

² Police departments: Eustis; City of Miami; Cocoa; Daytona Beach; Daytona Beach Shores; Florida State University (motorcycle officers); Gulfport; Palm Bay (SWAT Officers); Pensacola; West Melbourne; Windermere; Miami Beach; and Rockledge.

³ Police departments: Clearwater; Ft. Myers; Marianna; Orlando (University of South Florida study); Plant City; Sarasota; St. Petersburg; Tampa; and West Palm Beach.

⁴ Metz, Claire. “Flagler County deputies fitted with new body cameras. WESH.com (Orlando). August 28, 2014. The news broadcast video is available at <http://www.wesh.com/flagler-county-deputies-fitted-with-new-body-cameras/27779830>.

⁵ Behrman, Elizabeth. “Local law enforcement split on body cameras.” *The Tampa Tribune*. December 14, 2014. The article is available at <http://tbo.com/news/crime/-20141226/>.

storage. Overall, the proposed \$75 million investment over three years could help purchase 50,000 body worn cameras.”⁶

In a recently released report on BWCs it was noted:

State public disclosure laws, often known as freedom of information laws, govern when footage from body-worn cameras is subject to public release. However, most of these laws were written long before law enforcement agencies began deploying body-worn cameras, so the laws do not necessarily account for all of the considerations that must be made when police departments undertake a body-worn camera program.

Although broad disclosure policies can promote police agency transparency and accountability, some videos—especially recordings of victims or from inside people’s homes—will raise privacy concerns if they are released to the public or the news media. When determining how to approach public disclosure issues, law enforcement agencies must balance the legitimate interest of openness with protecting privacy rights.

In most state public disclosure laws, exceptions are outlined that may exempt body-worn camera footage from public release. For example, even the broadest disclosure laws typically contain an exception for video that contains evidence or is part of an ongoing investigation. Some state disclosure laws, such as those in North Carolina, also exempt personnel records from public release. Body-worn camera videos used to monitor officer performance may fall under this type of exception.⁷

Depending upon the content recorded by a BWC, the recording or particular information in the recording may be subject to a public records exemption in current Florida law. If not subject to an exemption, the recording would be a public record. Some of the current public records exemptions that may be relevant to a BWC recording include:

- Active criminal intelligence information and active criminal investigative information (exempt);⁸
- Information revealing surveillance techniques or procedures or personnel (exempt);⁹
- Information revealing the substance of a confession of a person arrested (exempt);¹⁰
- Information revealing the identity of a confidential informant or a confidential source (exempt);¹¹
- Criminal intelligence information or criminal investigative information that reveals the identity of the victim of the crime of child abuse or any sexual offense or a videotape or

⁶ “FACT SHEET: Strengthening Community Policing,” Office of the Press Secretary, The White House. December 1, 2014. The document is available at <http://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

⁷ Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services. The quoted text is from page 17 (footnote omitted) of the report, which is available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

⁸ Section 119.071(2)(c),1., F.S.

⁹ Section 119.071(2)(d), F.S.

¹⁰ Section 119.071(2)(e), F.S.

¹¹ Section 119.071(2)(f), F.S.

image of any part of the body of the victim of a statutorily-specified sexual offense (confidential and exempt);¹²

- Any information in a videotaped statement of a minor who is alleged to be or who is a victim of a statutorily-specified sexual offense, which reveals that minor's identity, home, school, etc. (confidential and exempt);¹³ or
- Information revealing undercover personnel of any criminal justice agency (exempt).¹⁴

Public Records Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹⁵ The records of the legislative, executive, and judicial branches are specifically included.¹⁶

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act¹⁷ guarantees every person's right to inspect and copy any state or local government public record¹⁸ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.¹⁹

Only the Legislature may create an exemption to public records requirements.²⁰ This exemption must be created by general law and must specifically state the public necessity justifying the exemption.²¹ There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature designates confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances.²² 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 the statutory exemption.²³ Further, the

¹² Section 119.071(2)(h), F.S.

¹³ Section 119.071(2)(j)2.a, F.S.

¹⁴ Section 119.071(4)(c), F.S.

¹⁵ FLA. CONST., art. I, s. 24(a).

¹⁶ *Id.*

¹⁷ Chapter 119, F.S.

¹⁸ Section 119.011(12), F.S., defines "public records" to mean "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." Section 119.011(2), F.S., defines "agency" to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, 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." The Public Records Act does not apply to legislative or judicial records *Locke v. Hawkes*, 595 So.2d 32 (Fla.1992).

¹⁹ Section 119.071(1)(a), F.S.

²⁰ FLA. CONST., art. I, s. 24(c).

²¹ FLA. CONST., art. I, s. 24(c).

²² *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (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 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). Attorney General Opinion 85-62, (August 1, 1985).

²³ *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004). *Wait v. Florida Power and Light Co.* 372 So.2d 420 (1979).

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 provisions²⁴ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.²⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²⁶ The OGSR provides that an exemption automatically repeals 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.²⁷

The OGSR 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 necessary.²⁸ An exemption serves an identifiable purpose if it meets one of the following purposes 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;²⁹
- 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;³⁰ or
- It protects trade or business secrets.³¹

In addition, the Legislature must find that the purpose of the exemption overrides the Florida’s public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.³² In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

²⁴ However, the bill may contain multiple exemptions that relate to one subject.

²⁵ FLA. CONST., art. I, s. 24(c).

²⁶ 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 information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

²⁷ Section 119.15(3), F.S.

²⁸ Section 119.15(6)(b), F.S.

²⁹ Section 119.15(6)(b)1., F.S.

³⁰ Section 119.15(6)(b)2., F.S.

³¹ Section 119.15(6)(b)3., F.S.

³² 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?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.³³ If the exemption is reenacted 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 sunset, the previously exempt records will remain exempt unless provided for by law.³⁴

III. Effect of Proposed Changes:

The bill creates s. 119.071(2)(l), to exempt portions of body-worn camera recordings from public records requirements. The bill defines a “body worn camera” as “a portable electronic recording device that is worn on a law enforcement officer's person that records audio and video data of the officer's activities.” The bill also creates a definition of “personal representative” to mean the parent, guardian, or someone who holds a power of attorney of a person recorded by a body camera. If a person is deceased, a “personal representative” also means the personal representative of the estate of the deceased; the deceased’s the widow(er), parent, or adult child; or the parent or guardian of a surviving minor child of the deceased. An attorney who represent any of the aforementioned may also be a personal representative.

The bill provides that a body camera recording is confidential and exempt from public records requirements to the extent the recording is taken:

- within the interior of a private residence;
- on the property of a facility that offers health care, mental health care or social services;
- at the scene of a medical emergency; or
- in a place where a person has a reasonable expectation of privacy.

The bill also provides mandatory exceptions to the exemption. A law enforcement agency must release a recording under the following conditions:

- in furtherance of its duties;
- to another governmental agency in the furtherance of its duties;
- pursuant to a court order;³⁵
- portions of a recording that are related to an individual who is recorded by a body camera may be released to him or her; or
- portions of a recording that are related to an individual who is recorded to the personal representative of an individual who is recorded. This scenario would include a situation in which the person recorded was unable to give consent for some reason or was deceased.

The bill provides that law enforcement agencies must retain a body camera recording for a minimum of 90 days. Generally, records retained by law enforcement agencies are governed by statutes and rules promulgated by the Department of State, Division of Library Services.³⁶ Currently, public records may be destroyed in accordance with the retention schedules

³³ FLA. CONST., art. I, s. 24(c).

³⁴ Section 119.15(7), F.S.

³⁵ This language may be unnecessary because records which are held exempt or confidential and exempt are subject to disclosure by a court order.

³⁶ Section 257.36, F.S. See State of Florida General Records Schedule GS2 For Law Enforcement, Correctional Facilities, and District Medical Examiners, effective February 19, 2015. <http://dos.myflorida.com/library-archives/records-management/general-records-schedules/> (last visited on March 6, 2015).

established by the Division of Library Services.³⁷ This language will require law enforcement to retain these recordings for minimum amount of time, but does not otherwise supersede the retention and destruction schedule established by the Division of Library Services.

This public records exemption has a retroactive clause, which provides that the exemption will apply to all body camera recordings that have already been taken by law enforcement before this bill goes into effect.

The bill also provides a statement of public necessity for the exemption, as required by the Florida Constitution. The public necessity states that the Legislature finds body cameras are more likely to capture sensitive, personal information than other law enforcement recordings or documents. Making body camera recordings publically available may have a chilling effect on the public. People may be unwilling to get call or cooperate with law enforcement if they are aware that they are being recorded and that the body camera recording could be publically disseminated. In addition, body camera recordings could be used for criminal purposes if they were publically available.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption and it includes a public necessity statement.

³⁷ Section 257.36(6), F.S.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts body camera recordings in limited circumstances insofar as it is possible to define what constitutes the interior of a residence; the property of a health care, mental health care, or social services facility; and a medical emergency. The bill may be overly-broad in that it also makes confidential and exempt any place where there is ‘a reasonable expectation of privacy’ because this phrase is not defined.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill, in part, exempts from public disclosure a recording made by a law enforcement officer at a place where a person recorded or depicted in the recording has *a reasonable expectation of privacy*.³⁸

Article I, Section 23 of the Florida Constitution provides:

Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provide by law.

The Florida Supreme Court has stated that the right of privacy includes a right to “be free from uninvited observation or of interference in those aspect of [Floridians’] lives that fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest.”³⁹ Referring to a case which predated Article I, Section 23 of the Florida Constitution, the Florida Supreme Court opined that the people have a fundamental right to control what they reveal about themselves and to whom they chose to reveal themselves, and noted “this power is exercised in varying degrees by differing individuals, the parameters of an individuals’ privacy can be dictated only by that individual.”⁴⁰

The Florida Supreme Court found that before the right of privacy attaches “a reasonable expectation of privacy must exist.”⁴¹ The test for making that determination is “whether the law recognizes an individual’s legitimate expectation of privacy” in a certain type of record.⁴² The Florida Supreme Court also recognizes that the right to be free of observation and interference in aspects of life that fall within a “zone of privacy.”⁴³ In determining whether an individual has a legitimate expectation of privacy in any give

³⁹ *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1998).

³⁹ *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1998).

⁴⁰ *Id* at 151.

⁴¹ *Winfield v. Division of Pari-Mutual Wagering, Department of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

⁴² *Id*. 547.

⁴³ *Shaktman*, 553 So.2d at 150.

case must be made by considering all the circumstances, especially objective manifestations of that expectation.⁴⁴

Courts have used public records exemptions guideposts of when a privacy interest exists. The Florida Fourth District Court of Appeal relied on the Florida Supreme Court's finding that financial records were private, but also observed that there was a statutory public records exemption for financial information held by a state agency, and noted that "the legislature has recognized the confidential nature of the exact type of information at issue."⁴⁵ Likewise, the Second District Court of Appeal of Florida found that people have an expectation of privacy in their social security numbers, and as authority, noted that social security numbers were protected from disclosure by both federal and state law and by various rules of procedure.⁴⁶

The public records exception for recordings taken in a place where a person has a reasonable expectation of privacy may also be impermissibly broad under Article II section 3 of the Florida Constitution, which provides:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Florida Supreme Court found that a public records exemption unconstitutional because the Legislature had delegated too much discretion to the state agency about when records could be released.⁴⁷ The Court stated that:

statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism or exercising unbridled discretion.⁴⁸

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁴⁴ *Shaktman*, 533 So.2d at 153. In his concurring opinion, the Chief Justice Ehrlich opined that "the zone of privacy covered by article I, section 23, can be determined only by reference to the expectations of each individual, and those expectations are protected provided they are not spurious or false. A determination of whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation; for example, in cases where disclosure of purportedly private information is sought, circumstances, such as the kind of information, where it is kept, who has access to it and under what circumstances." *Id.*

⁴⁵ *Berkley v. Eisen* 699 So.2d 789, 791 (Fla. 4th DCA 1997).

⁴⁶ *Thomas v. Smith*, 882 So.2d 1037, 1045 (Fla. 2d DCA 2004),

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The definition of a “personal representative” provides that a parent of a person recorded is permitted to get a copy of a body camera recording. This would permit the parent of an adult with full legal capacity to have his or her parent receive a copy of a body camera recording in contravention of his or her wishes. The phrase “parent of a minor child” may be more appropriate, dependent on the intent of the Legislature.

During the meeting of the Senate Committee on Governmental Oversight and Accountability, a handwritten amendment was adopted by the Committee, but the public necessity statement was not amended to conform to the amended language.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 119.071(2)(l) of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on March 17, 2015:

- Defines body camera and personal representative.
- Makes body camera recordings confidential and exempt if they are taken in certain places.
- Requires law enforcement must release body camera recordings in certain circumstances.
- Provides that a body camera recording must be retained for 90 days.
- Provides for retroactive application to all body camera recordings.
- Makes the public necessity statement more specific.
- Creates a new paragraph to eliminate the need to renumber s. 119.071(2), F.S. and change cross references.

CS by Criminal Justice on February 16, 2015:

- Creates a public records exemption for an audio or video recording made by a law enforcement officer in the course of the officer performing his or her official duties or responsibilities, if the recording is taken within certain locations, shows a minor inside a school or on school property, or shows a child younger than 14 years of age at any location.
- Specifies how the exemption operates in relation to other exemptions that may apply.
- Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act.
- Authorizes the law enforcement agency with custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities.
- Specifies persons who may inspect the recording.
- Requires a law enforcement agency to have a retention policy of not longer than 90 days for the audio or video recordings unless the recording is part of an active criminal investigation or criminal intelligence operation or a court orders its retention for a longer period.
- Requires a law enforcement agency to disclose its records retention policy for recordings under the new exemption.
- Provides a statement of public necessity for the exemption.

B. Amendments:

None.