

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/SB 248

INTRODUCER: Criminal Justice Committee and Senator Smith and others

SUBJECT: Public Records/Recordings by Law Enforcement Officers

DATE: March 16, 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>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____

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

I. Summary:

CS/SB 248 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 and responsibilities, if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where a person recorded or depicted in the recording has a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school or on school property; or
- Shows a child younger than 14 years of age at any location.

If the audio or video recording or a portion of such recording is exempt or confidential and exempt pursuant to another exemption in s. 119.071, F.S., that exemption applies and determines under which circumstances, if any, the recording or a portion of the recording may be disclosed to the public.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.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 also provides a statement of public necessity for the exemption.

The bill authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities and specifies persons who may inspect the recording.

Applicable to the new exemption, a law enforcement agency must 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. A law enforcement agency must disclose its records retention policy for recordings under the new exemption.

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

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/>.

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 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

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)(a), 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.

- 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 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

The bill uses the language “audio or video recording by a law enforcement officer” in the new exemption. This bill analysis focuses on BWCs because it appears that BWCs are the most recent recording devices being used by law enforcement agencies and some of the BWC recordings would be covered by the new exemption. However, an audio or video recording made by another recording device, such as an in-car cameras, hand-held video camera or cellphone, will also be covered by the new exemption.

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

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 119.07(1)(a), F.S.

²⁰ FLA. CONST., art. I, s. 24(c).

²¹ FLA. CONST., art. I, s. 24(c).

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 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.

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).

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.

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.

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 provides that an audio or video recording made by a law enforcement officer in the course of the officer performing his or her official duties and responsibilities is exempt from public records requirements if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where a person recorded or depicted in the recording has a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school, as defined in s. 1003.01, F.S., or on school property, as defined in s. 810.095, F.S.; or
- Shows a child younger than 14 years of age at any location.

As a practical issue, it is not clear how a law enforcement agency's records custodian will be able to make a determination of when some of these exemptions apply. The exemption provided for a recording taken in a place where a person has a "reasonable expectation of privacy" may be an amorphous standard for a records custodian. In addition, it is not clear from the bill how a records custodian will know the ages of the children in a recording, and thus when a recording is exempt from public disclosure.

The bill provides that if an audio or video recording or a portion of such recording is exempt or confidential and exempt pursuant to another exemption in s. 119.071, F.S., then the other exemption applies. The purpose of this provision is to allow another exemption existing in law to take precedence over the one in this bill. This provision is problematic since public records and

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?

³³ FLA. CONST., art. I, s. 24(c).

³⁴ Section 119.15(7), F.S.

open meetings exemptions are codified throughout the Florida Statutes, not just in section 119.071, F.S.³⁵

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 also provides a statement of public necessity for the exemption. The specific findings relevant to the public necessity for the exemption are as follows:

The Legislature finds that information recorded by these devices in these circumstances is significantly more likely to include highly sensitive personal information regarding the persons recorded than in other circumstances. The Legislature finds that public disclosure of these recordings could have an undesirable, chilling effect: persons who know sensitive personal information about them is being or may be recorded may be unwilling to cooperate with law enforcement officers and make calls for the services of law enforcement officers. In the case of minors, information about those minors could jeopardize their safety. The Legislature finds that these interests or concerns not only necessitate the exemption of the recordings but outweigh any public benefit that may be derived from their disclosure.

The bill also authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities.

The bill also specifies that the law enforcement agency may permit the following people to inspect the recording:

- A person recorded or depicted in the recording;
- The agent or attorney of a person recorded or depicted in the recording, if inspection is authorized by that person; and
- A person not recorded or depicted in the recording, if inspection is authorized by all persons recorded or depicted in the recording.³⁶

³⁵ For example, law enforcement officers may be called to investigate a case of abuse, abandonment or neglect of a child which occurs in a public place, such as a parking lot or a public park. The public records exemption for child abuse cases is codified in s. 39.202, F.S., not in s. 119.071, F.S.

³⁶ Other exemptions provide for limited disclosure of exempted information to specific persons. For example, s. 119.071(2)(d), F.S., exempts any comprehensive inventory of state and local law enforcement resources compiled pursuant to part 1, ch. 293, F.S., and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to an emergency. This information is unavailable for inspection except by personnel authorized by the state or local law enforcement agency, the Office of the Governor, the Department of Legal Affairs, the Department of Law Enforcement, or the Division of Emergency Management as having an official need for access to this information. Further, s. 119.071(3)(b), F.S., exempts building plans, blueprints, schematic drawings, and diagrams, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency. This information may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is performing work on or related to the building, arena, stadium, water treatment facility, or other structure owned or operated by an agency; or upon a showing of good cause before a court of competent jurisdiction.

The described inspection of the recording does not apply to information in the recording that is exempt or confidential and exempt pursuant to another provision of s. 119.071, F.S. This provision may not be as broad as intended because some public records exemptions are not codified in s. 119.071, F.S.

Applicable to the new exemption, a law enforcement agency must have a retention policy of not longer than 90 days. A law enforcement agency must disclose its records retention policy for recordings under the new exemption. This provision conflicts with the records retention powers of the Department of State. Records retained by law enforcement agencies are governed by statutes and rules promulgated by the Department of State, Division of Library Services.³⁷ Currently, public records may be destroyed only in accordance with the retention schedules established by the Division of Library Services³⁸ and agencies have a duty to comply with Florida law governing public libraries and state archives.³⁹ It is unclear if the intent of this language is to supersede current law.

The bill allows for a longer retention period longer than 90 for recordings if they are a part of an active criminal investigation or criminal intelligence operation, or a court order provides for a longer retention period. This bill does not save recordings from destruction if for any other purpose, such as civil litigation, or for administrative purposes such as internal affairs investigations or human resources issues. This may be problematic since a litigant may have to wait up to 6 months before filing suit against a governmental entity.⁴⁰

The bill also conforms cross-references in other statutes.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁷ 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).

³⁸ Section 257.36(6), F.S.

³⁹ Section 257.36(5), F.S.

⁴⁰ Section 768.28(6), F.S. It is highly unlikely that once put on notice that litigation is possible that a government entity would engage in the destruction of evidence. However, a litigant might not have filed suit or provided notice before the 90 days had expired and recording is destroyed. In addition, Florida Rule of Civil Procedure 1.380(e), titled "Electronically Stored Information; Sanctions for Failure to Preserve" provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."

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; thus, it includes a public necessity statement.

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 does not exempt all audio or video recordings made by law enforcement officers. The bill exempts an audio or video recording by a law enforcement officer, if the recording:

- Is taken within the interior of a private residence;
- Is taken on the property of a facility that offers health care, mental health care, or social services;
- Is taken at the scene of a medical emergency;
- Is taken at a place where there is a reasonable expectation of privacy;
- Shows a child younger than 18 years of age inside a school or on school property; or
- Shows a child younger than 14 years of age at any location.

The bill authorizes the law enforcement agency having custody over the recording to disclose the recording to another law enforcement agency in furtherance of that agency's official duties and responsibilities and specifies persons who may inspect the recording.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill, in part, exempts from public disclosure an audio or video 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*.⁴¹

⁴¹ Emphasis provided. The term is undefined in the bill but the term is also undefined in several statutes: s. 90.507, F.S. (waiver of privilege against disclosure of confidential matter or communication); s. 365.16, F.S. (obscene or harassing telephone calls); s. 810.14, F.S. (voyeurism); and s. 877.26, F.S. (direct observation, videotaping, or visual surveillance of

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.”⁴² 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.”⁴³

The Florida Supreme Court has opined that before the right of privacy attaches “a reasonable expectation of privacy must exist.”⁴⁴ The test for making that determination is “whether the law recognizes an individual's legitimate expectation of privacy” in a certain type of record.⁴⁵ 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.”⁴⁶ In determining whether an individual has a legitimate expectation of privacy in any give case must be made by considering all the circumstances, especially objective manifestations of that expectation.⁴⁷

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

customers in merchant's dressing room). As indicated in the analysis, the Florida Supreme Court has articulated how it determines whether an individual has a legitimate expectation of privacy for purposes of determining whether the individual has a right to privacy under Article I, Section 23 of the Florida Constitution. The phrase “reasonable expectation of privacy” is usually used in the context of search and seizure cases invoking the Fourth Amendment to the United States Constitution or under Article I Section 12 of the Florida Constitution. It is not clear if the intent of the bill is to allow law enforcement records custodians to use case law based on a reasonable expectation of privacy as has been construed in a search and seizure context in order to decide when to release a record.

⁴² *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1998).

⁴³ *Id.* at 151.

⁴⁴ *Winfield v. Division of Pari-Mutual Wagering, Department of Business Regulation*, 477 So.2d 544, 547 (Fla. 1985).

⁴⁵ *Id.* 547.

⁴⁶ *Shaktman*, 553 So.2d at 150.

⁴⁷ *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.*

“the legislature has recognized the confidential nature of the exact type of information at issue.”⁴⁸ 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.⁴⁹

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.⁵⁰ 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.⁵¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill permits the records custodian to allow an agent or attorney of a person recorded to inspect the audio or video recording, if the depicted person has provided authorization. The intent of the language is unclear as it implies that an agent or attorney would not have the depicted person’s authorization already and specific authorization is required. In addition, the language may be unnecessarily restrictive if it is read narrowly, because in some instances, the

⁴⁸ *Berkley v. Eisen* 699 So.2d 789, 791 (Fla. 4th DCA 1997).

⁴⁹ *Thomas v. Smith*, 882 So.2d 1037, 1045 (Fla. 2d DCA 2004),

⁵⁰ *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976).

⁵¹ *Lewis*, 346 So.2d at 55-56.

person depicted may not have the capacity to give authorization. For example, if the person in the recording is deceased or incompetent he or she may not have the legal capacity to give his or her authorization.

The bill also provides that the records custodian may permit a third party to view the recording if all the people depicted in the recording give their consent. There are some practical problems with this provision because the records custodian may not be able to identify or locate everyone depicted. In addition, if any one person objects, the recording may not necessarily be released. For example, if a person who fears civil liability in an action objects, then he or she may bar a third party from reviewing the video.

These are technical deficiencies because the bill provides that the records are exempt, and not confidential and exempt. Exempt records may be released at the discretion of the records custodian, who is not necessarily required to limit the release of the recordings to the provisions of this bill.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill substantially amends the following sections of the Florida Statutes: 92.56; 119.011; 119.071; 119.0714; 784.046; 794.024; and 794.03.

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 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.

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