

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #: SB 7022

FINAL HOUSE FLOOR ACTION:

SPONSOR(S): Criminal Justice

117 Y's

0 N's

**COMPANION
BILLS:** None.

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

SB 7022 passed the House on March 9, 2016.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides a public record exemption for photographs and video and audio recordings held by an agency that depict or record the killing of a person. These photographs and video and audio recordings are confidential and exempt from public record requirements, except that the exemption permits a surviving spouse to view, listen to, and copy these records. If there is no surviving spouse, the deceased's surviving parents may access the records, and if there are no surviving parents, an adult child of the deceased may access the records. Access to the confidential and exempt records is also permitted for a local governmental entity or a state or federal agency in furtherance of its official duties and to others who obtain a court order granting access.

The bill reenacts the public record exemption, which will repeal on October 2, 2016, if this bill does not become law. However, the bill narrows the exemption so that it only applies to those photographs and recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties.

The bill does not specify that records made before the narrowing of the public record exemption must be made public. Therefore, such records must remain confidential and exempt.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments.

The bill was approved by the Governor on April 8, 2016, ch. 2016-214, L.O.F., and will become effective on October 1, 2016.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Records made before the date of a repeal of a public record or public meeting exemption may not be made public unless otherwise provided by law.⁶ In deciding whether the records will be made public, the Legislature must consider whether the damage or loss to persons or entities uniquely affected by the exemption would occur if the records were made public.⁷

Public Record Exemption under Review

In 2011, the Legislature created a public record exemption for photographs and video and audio recordings held by an agency⁸ that depict or record the killing of a person.⁹ These photographs and video and audio recordings are confidential and exempt¹⁰ from public record requirements, except that

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I of the State Constitution.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 119.15(7), F.S.

⁷ *Id.*

⁸ 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."

⁹ Section 1, ch. 2011-115, L.O.F. "Killing of a person" is defined to mean "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death." Section 406.136(1), F.S.

¹⁰ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain

the exemption permits a surviving spouse to view, listen to, and copy these records.¹¹ If there is no surviving spouse, the deceased's surviving parents may access the confidential and exempt records, and if there are no surviving parents, an adult child of the deceased may access the records.¹² The surviving relative who has the authority to access these records may designate in writing an agent to obtain them.¹³

In addition, a local governmental entity or a state or federal agency, upon written request, may view, listen to, or copy the confidential and exempt photographs and video and audio recordings in furtherance of its official duties. Unless otherwise required in the performance of the entity's or agency's duties, the identity of the deceased must remain confidential and exempt.¹⁴

Persons other than those covered by these exceptions may only have access to the confidential and exempt photographs and recordings if they obtain a court order. Upon a showing of good cause, a court may issue an order authorizing any person to view, listen to, or copy a confidential and exempt photograph or video or audio recording. The court is authorized to prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider:

- Whether such disclosure is necessary for the public evaluation of governmental performance;
- The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- The availability of similar information in other public records, regardless of form.¹⁵

If a petition is filed with the court to view, listen to, or copy the confidential and exempt photographs or recordings, a surviving spouse must be given reasonable notice that the petition has been filed, a copy of the petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter.¹⁶ If there is no surviving spouse, notice must be given to the parents of the deceased and, if the deceased has no living parent, then to the adult children of the deceased. If the court grants access to the confidential and exempt record, the access must be provided under the direct supervision of the custodian of the record or his or her designee.¹⁷

It is a third degree felony for any custodian of a photograph or video or audio recording to willfully and knowingly violate these provisions.¹⁸ The same penalty applies to anyone who willfully and knowingly violates a court order issued under these provisions.¹⁹

The exemption does not apply to photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, nothing prohibits a court in such proceedings from restricting the disclosure of a killing, crime scene, or similar photograph or video or audio recording.²⁰

circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* Attorney General Opinion 85-62 (August 1, 1985).

¹¹ Section 406.136(2), F.S.

¹² *Id.*

¹³ Section 406.136(3)(a), F.S.

¹⁴ Section 406.136(3)(b), F.S.

¹⁵ Section 406.136(4), F.S.

¹⁶ Section 406.136(5), F.S.

¹⁷ Section 406.136(4)(c), F.S.

¹⁸ Section 406.136(6)(a), F.S. A third degree felony is punishable by a term of imprisonment up to 5 years and a fine up to \$5,000. Sections 775.082(3)(d) and 775.083(1)(c), F.S.

¹⁹ Section 406.136(6)(b), F.S.

²⁰ Section 406.136(c), F.S. In *State v. Schenecker*, No. 11-CF-001376A (Fla. 13th Cir.Ct. August 3, 2011), *cert. denied sub nom.*, *Media General Operations v. State*, 71 So. 3d 124 (Fla. 2d DCA 2011), the circuit court applied the exemption to crime scene photographs of homicide victims.

The exemption is retroactive, except that it is not intended to overturn, abrogate, or alter any court order in effect on July 1, 2011, that restricts or limits access to any such photograph or recording.²¹ The 2011 public necessity statement for the public record exemption provided that:

photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased.²²

The public necessity statement further provided that:

the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury.²³

The Legislature further recognized that “there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.”²⁴

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2016, unless reenacted by the Legislature.²⁵

Staff Review of the Exemption

During the 2015 interim, staff of the House and Senate jointly sent a survey regarding interpretation and implementation of the public record exemption to state agencies, state universities and colleges, municipalities, and local law enforcement agencies that receive or maintain the records protected by the exemption. Most of the entities that responded recommended reenacting the exemption.

Effect of the Bill

The bill removes the scheduled repeal of the public record exemption, thereby reenacting the public record exemption for photographs and video and audio recordings held by an agency that depict or record the killing of a person. However, the bill narrows the exemption so that it only applies to those photographs and recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties. These records are confidential and exempt from public record requirements, except that they are accessible to certain family members of the deceased person, governmental entities in furtherance of their official duties, and others who obtain a court order granting access.

²¹ Section 406.136(7), F.S.

²² Section 2, ch. 2011-115, L.O.F.

²³ *Id.*

²⁴ *Id.*

²⁵ Section 406.136(9), F.S.

The bill does not specify that records made before the narrowing of the public record exemption must be made public. Therefore, such records must remain confidential and exempt.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on state agencies and local governments because staff responsible for complying with public record requests may require training related to the narrowing of the public record exemption. However, there may be a positive fiscal impact on these entities because fewer records in their possession will need to be redacted. Any costs would be absorbed by the entities, as they are part of the day-to-day responsibilities of the entities.