

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: SB 7036

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Criminal Intelligence Information/Criminal Investigative Information

DATE: January 24, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Stokes</u>	<u>Jones</u>		CJ Submitted as Committee Bill
1.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	Favorable
2.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

I. Summary:

SB 7036 amends ss. 943.0583 and 119.071, F.S., to save from repeal the current exemptions from public records disclosure for certain criminal intelligence information or criminal investigative information that reveals the identity of victims of human trafficking. This information will continue to be confidential and exempt.

The original public necessity statement for the bill provides that the identity of victims of human trafficking is of a sensitive personal nature. Without this exemption, the release of identifying information may cause further trauma or cause unwarranted damage to the good name or reputation of the victim. Furthermore, victims of human trafficking who have been convicted of crimes committed at the direction of their traffickers are themselves victims of crime. Without the public records exemption these victims face barriers to employment and other life opportunities.

Sections 943.0583 and 119.071(2)(h), F.S., relating to information regarding victims of human trafficking, are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2020, unless reviewed and saved from the repeal through reenactment by the Legislature. This bill removes the scheduled repeal to continue the confidential and exempt status of this information.

This bill does not appear to have a fiscal impact on state or local governments. Costs incurred by an agency in responding to public records requests relating to information regarding victims of human trafficking should be offset by authorized fees. See Section V. Fiscal Impact Statement.

This bill is effective October 1, 2020.

II. Present Situation:

Access to Public Records - Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” as “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.”

⁶ Section 119.011(12), F.S., defines “public record” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

The Act 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 is necessary.²⁰

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and 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.²⁶

Human Trafficking

Human trafficking is a form of modern-day slavery. Victims of human trafficking, ranging from young children to adults, are subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor. There are an estimated 40.3 victims of human trafficking in the world. Of that number, an estimated 25 percent are children. Based on data in 2017, it was estimated that 1 out of 7 endangered runaways reported to the National Center for Missing and Exploited Children were likely child sex trafficking victims.²⁷

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Polaris, *Human Trafficking: The Facts*, available at <https://polarisproject.org/human-trafficking/facts> (last visited December 19, 2019).

“Human trafficking” is defined in s. 787.06(2)(d), F.S., as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploiting that person. “A victim of human trafficking” is a person subjected to coercion,²⁸ for the purpose of being used in human trafficking, a child under 18 years of age subjected to human trafficking, or an individual subjected to human trafficking as defined by federal law.²⁹

Public Records Exemption for Criminal Intelligence Information or Criminal Investigative Information Relating to Human Trafficking

Section 943.0583, F.S., allows a victim of human trafficking to petition the court for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed while the person was a victim of human trafficking, which offense was committed or reported to have been committed as a part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme.³⁰ The standard of proof in a petition for expungement is a preponderance of the evidence. In 2015, the Legislature made any information that reveals, or may reveal, the identity of a victim of human trafficking whose criminal history record has been expunged, confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.³¹

The expunction of a criminal history record is the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order.³² The following criminal intelligence information or criminal investigative information is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- Any information that reveals the identity of a person who is a victim of human trafficking whose criminal history record has been expunged under this section.
- Any information that may reveal the identity of a person who is a victim of human trafficking whose criminal history record has been ordered expunged under this section.

Section 943.0583(11), F.S., 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.

²⁸ Section 787.06(2)(a), F.S., defines “coercion” as using or threatening to use physical force against any person; restraining, isolating, or confining or threatening to restrain, isolate, or confine any person without lawful authority and against her or his will; using lending or other credit methods to establish a debt by any person when labor or services are pledged as a security for the debt, if the value of the labor or services as reasonably assessed is not applied toward the liquidation of the debt, the length and nature of the labor or services are not respectively limited and defined; destroying, concealing, removing, confiscating, withholding, or possessing any actual or purported passport, visa, or other immigration document, or any other actual or purported government identification document, of any person; causing or threatening to cause financial harm to any person; enticing or luring any person by fraud or deceit; or providing a controlled substance as outlined in Schedule I or Schedule II of s. 893.03, F.S., to any person for the purpose of exploitation of that person.

²⁹ Section 943.0583(1)(c), F.S.

³⁰ Section 943.0583(3), F.S., does not allow the following offenses to be expunged: arson, sexual battery, robbery, kidnapping, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, aggravated assault with a deadly weapon, murder, manslaughter, aggravated manslaughter of an elderly person or disabled adult, aggravated manslaughter of a child, unlawful throwing, placing, or discharging of a destructive device or bomb, armed burglary, aggravated battery, and aggravated stalking.

³¹ Section 943.0583(11), F.S.; Chapter 2015-146, L.O.F.

³² Section 943.045(16), F.S.

In creating the exemption, the Legislature articulated the following reasons for the exemption:

[I]t is a public necessity that information in the investigative or intelligence records related to a criminal history record ordered expunged under s. 943.0583, Florida Statutes, which would or could reasonably be expected to reveal the identity of a person who is a victim of human trafficking whose criminal history record has been ordered expunged under s. 943.0583, Florida Statutes, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Persons who are victims of human trafficking and who have been charged with crimes allegedly committed at the behest of their traffickers are themselves victims of crimes. Such victims face barriers to employment and other life opportunities as long as these criminal charges remain on record and accessible to potential employers and others. Therefore, it is necessary that these records be made confidential and exempt in order for human trafficking victims to have the chance to rebuild their lives and reenter society.³³

Staff Surveys Regarding Exemptions Under Review

During the 2019 interim, Senate and House professional staff contacted the Florida Department of Law Enforcement (FDLE), the Department of Juvenile Justice (DJJ), county sheriff's departments, and local police departments. An overwhelming majority of the responding agencies requested to preserve the public records exemption.

Public Records Exemption for Criminal Intelligence Information or Criminal Investigative Information that Reveals the Identity of a Child Abuse Victim or a Minor who is a Victim of Human Trafficking

Section 119.071, F.S., provides general exemptions from inspection or copying of public records. The Legislature has provided that the following information pertaining to agency investigations is exempt from public record:

- Any information that reveals the identity of the victim of the crime of child abuse, or that reveals the identify of a person under the age of 18 who is the victim of the crime of human trafficking; any information that may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense of human trafficking; any photograph, videotape, or image of any part of the body of the victim of a sexual offense, including a sexual offense of human trafficking.³⁴

Section 119.071(2)(h), F.S., relating to information regarding victims of human trafficking, is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from the repeal through reenactment by the Legislature.

³³ Chapter 2015-146, L.O.F.

³⁴ Section 119.071(2)(h), F.S.

In creating the exemption, the Legislature articulated the following reasons for the exemption:

The Legislature finds that it is a public necessity to make confidential and exempt from public records requirements certain criminal intelligence information or criminal investigative information that reveals the identity of a victim of the crime of human trafficking of a minor for labor or any victim of human trafficking for commercial sexual activity. The Legislature finds that it is important to strengthen the protections afforded victims of human trafficking for labor who are minors and victims of human trafficking for commercial sexual activity, regardless of age, in order to ensure their privacy and to prevent their re victimization by making such information confidential and exempt. The identity of these victims is information of a sensitive personal nature. As such, this exemption serves to minimize the trauma to victims because the release of such information would compound the tragedy already visited upon their lives and would be defamatory to or cause unwarranted damage to the good name or reputation of the victims. Protecting the release of identifying information of such victims protects them from further embarrassment, harassment, or injury.³⁵

Staff Survey Regarding Exemptions Under Review

During the 2019 interim, Senate and House professional staff contacted the FDLE, the DJJ, county sheriff's departments and local police departments. An overwhelming majority of the responding agencies requested to preserve the public records exemption.

Twenty-six of the agencies that provided a response to the survey regarding s. 119.071(2)(h), F.S., were in favor of saving the exemption. Only three of those responding agencies suggested changes, and no agencies were in favor of repeal. Twenty-four of the agencies that provided a response to the survey regarding s. 943.0583(11), F.S., were in favor of saving the exemption. Only one of the responding agencies suggested changes, and one agency suggested repeal.

III. Effect of Proposed Changes:

The bill amends ss. 943.0583 and 119.071, F.S., to save from repeal the current exemption from public records disclosure for certain criminal intelligence information or criminal investigative information that reveals the identity of victims of human trafficking.

This bill deletes the scheduled repeal of the current public records exemption for criminal intelligence information or criminal investigative information that reveals the identity of victims of human trafficking. This information will continue to be confidential and exempt from public disclosure after October 1, 2020.

This bill takes effect on October 1, 2020.

³⁵ Chapter 2015-146, L.O.F.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:**Vote Requirement**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. If an 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. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The original public necessity statement for the bill provides that the identity of victims of human trafficking is of a sensitive personal nature. Without this exemption, the release of identifying information may cause further trauma or cause unwarranted damage to the good name or reputation of the victim. Furthermore, victims of human trafficking who have been convicted of crimes committed at the direction of their traffickers are themselves victims of crime. Without the public records exemption these victims face barriers to employment and other life opportunities. The justification upon which the public records exemption is based remains valid. Therefore, for these reasons, the bill reenacts the public records exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect the identity of victims of human trafficking. This bill exempts only certain criminal intelligence information and criminal investigative information that reveals the identity of victims of human trafficking from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Private Sector Impact:

The private sector will continue to be subject to the cost associated with an agency making redactions in response to a public records request.

C. Government Sector Impact:

This bill does not appear to have a fiscal impact on state or local governments. Costs incurred by an agency in responding to public records requests relating to information regarding victims of human trafficking should be offset by authorized fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the sections 119.071 and 943.0583 of the Florida Statutes.

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

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

None.

B. Amendments:

None.

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