

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 22-C

SPONSOR: Criminal Justice Committee and Senators Brown-Waite and Smith

SUBJECT: Public Records Exemption - Law Enforcement Requests

DATE: November 27, 2001      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson/Rhea	Cannon	CJ	Favorable/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This committee substitute creates an exemption for public records requirements for requests for public records by a law enforcement agency for information related to an active investigation, as well as for the transmittal letter from the custodial agency. Notice of when the record becomes public again is required.

This committee substitute amends section 119.07(3), Florida Statutes.

**II. Present Situation:**

Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. The Public Records Law<sup>1</sup> and the Public Meetings Law<sup>2</sup> specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies.

The Public Records Law states that, unless specifically exempted, all agency records are to be available for public inspection.<sup>3</sup> Section 119.011(1), 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.

<sup>1</sup> Chapter 119, F.S.  
<sup>2</sup> Section 286.011, F.S.  
<sup>3</sup> Section 119.07(1), F.S.

An “agency” is defined 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, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”<sup>4</sup>

In November 1992, the public affirmed its approval of Florida’s tradition of “government in the sunshine” by enacting a constitutional amendment to guarantee the practice. The amendment had the effect of including in the State Constitution provisions similar to those of the Public Meetings Law and the Public Records Law and of applying those provisions to all three branches of government.

The constitution authorizes the Legislature to create exemptions from public access requirements by general law. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption and may be no broader than necessary to comport with the public necessity. A law that creates a public records or public meetings exemption is required by the constitution to relate only to exemptions and their enforcement.

Under the Public Records Act, provision is made for an accelerated hearing to enforce public access requirements. Whenever an action is filed to enforce the act, a court is required to set an immediate hearing, giving the case priority over other pending cases.<sup>5</sup> A court may not issue a stay unless it determines that there is a “substantial probability” that opening the records for inspection will result in significant damage.<sup>6</sup>

The Open Government Sunset Review Act of 1995,<sup>7</sup> ss. 119.15 and 286.0111, F.S., provides for the systematic repeal of exemptions to the Public Records Law and Public Meetings Law five years after creation of, or substantial modification to, the exemption. The 1995 law also provides criteria for the Legislature to consider prior to creating or reenacting an exemption. The act authorizes the creation or expansion of an exemption only if<sup>8</sup> the exemption:

- allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of

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<sup>4</sup> Section 119.011(2), F.S.

<sup>5</sup> Section 119.11, F.S.

<sup>6</sup> Section 119.11(3), F.S.

<sup>7</sup> Sections 119.15 and 286.011, F.S.

<sup>8</sup> While s. 119.15, F.S., establishes standards for the creation, expansion or continuation of an exemption, the provision cannot limit the authority of the Legislature to create, expand or continue an exemption because one session of the Legislature may not bind a future session of the Legislature.

information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>9</sup>

Currently, s. 119.07(3)(b), F.S., provides an exemption for criminal intelligence information and criminal investigative information. As such, a request by a law enforcement agency for information related to criminal intelligence or criminal investigative information that is active is exempt. It could be argued that the response or transmittal letter of another agency to a law enforcement agency would fall within the current exemption. The current exemption does not, however, make this explicit.

### **III. Effect of Proposed Changes:**

The committee substitute creates an exemption to public records requirements. Requests of a law enforcement agency to another agency for a public record related to criminal intelligence information and criminal investigative information that is active are made exempt by the committee substitute. Further, the committee substitute makes explicit that the response of another agency to such a request is exempt, as well.

The committee substitute provides that the exemption is remedial in nature and applies to requests made to an agency before, on, or after, the effective date of the committee substitute.

The committee substitute creates a statement of public necessity for the exemption as required by the State Constitution. The statement notes that criminal investigations are jeopardized if law enforcement requests to inspect or copy a public record, the record custodian's response to such a request, or other information that would identify the records requested are available to the public. Such information could make the subjects of investigations aware that an investigation is active and could cause those persons to flee, destroy evidence, evade prosecution, or speed up the timetable for the performance of the illegal act. As such, the information exempted by the committee substitute is made exempt during the time period in which an investigation to which the request is related is active.

The committee substitute also requires law enforcement to notify the custodial agency when such information is no longer part of active criminal intelligence or investigative information.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

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<sup>9</sup> Section 119.15(4)(b), F.S.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Law enforcement will be required to notify an agency when the request is no longer part of active criminal intelligence or investigation information. There may be some minimal costs with establishing a system to provide such notification, though the costs are presently unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.