

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 28-C

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

SUBJECT: Public Records - Delay of Access

DATE: November 27, 2001 REVISED: _____

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

I. Summary:

This committee substitute creates a process by which the Department of Law Enforcement, upon court order, may direct another agency to delay access to a particular public record that is part of an active criminal-intelligence information or active criminal-investigative information for an initial 7-day period under limited circumstances related to an active investigation for terrorism. The period delaying access to a public record may be extended for up to 14 additional days upon court order.

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 Law¹ and the Public Meetings Law² 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.³ 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,

¹ Chapter 119, F.S.
² Section 286.011, F.S.
³ Section 119.07(1), F.S.

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.

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.”⁴

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.⁵ 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.⁶ 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.⁷

The Open Government Sunset Review Act of 1995,⁸ 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 if⁹ 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

⁴ Section 119.011(2), F.S.

⁵ Section 24, Art. I of the State Constitution.

⁶ Section 119.11, F.S.

⁷ Section 119.11(3), F.S.

⁸ Sections 119.15 and 286.011, F.S.

⁹ 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.

- protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of 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.¹⁰

III. Effect of Proposed Changes:

The committee substitute creates a process by which the Florida Department of Law Enforcement, upon court order, may direct another agency to delay access to public records for an initial 7-day period, followed by a 14-day extension upon court order. The process delaying access is limited to a narrowly-defined set of circumstances and does not include arrest records or records of first appearance in court.

Under the committee substitute, the head of the Florida Department of Law Enforcement must certify in writing to the custodial agency specifically enumerated statements. First, the record that is subject to the delay process must be identified. Further, that record must be related to an active investigation into terrorism. The term “terrorism” is not defined in the committee substitute but a reference to a definition which is not yet enacted into law is made. The head of the law enforcement agency must certify in writing that the record, if publicized, could jeopardize the active investigation.

Within 24-hours of submitting the written certification with the custodial agency, the department must file with the circuit court a petition to delay inspection or copying of that record. The court, in an *in camera* hearing, is authorized to approve the 7-day period of delayed access if the department shows by competent, substantial evidence that there is a viable threat of a terrorist act, that the particular record is part of an active investigation into that threatened act, that access to that record could jeopardize the investigation, and that the law enforcement agency has complied with the requirements of the section. Upon making such determination, the court may order the custodial agency to delay inspection or copying of the public records until the expiration of the 7 days or upon the extension of that period.

The 7-day period of delay may be extended by an additional 14-day period if the law enforcement agency applies to the court for an extension prior to the end of the 7-day period. Once again, the court, in an *in camera* hearing, is authorized to extend the period of delayed access for 14 additional days if the law enforcement agency shows by competent, substantial evidence that there is a viable threat of a terrorist act, that the particular record is part of an active investigation into that threatened act, that access to that record could jeopardize the investigation, and that the law enforcement agency has complied with the requirements of the section.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁰ Section 119.15(4)(b), F.S.

B. Public Records/Open Meetings Issues:

Section 24(a), Art. I of the State Constitution provides that every person has the right to inspect or copy any public record unless that record has been made exempt. Section 24(c), Art. I of the State Constitution provides only one method for creating an exemption to public record's requirements. Under that provision, the Legislature may exempt records by general law provided that the law states with specificity the public necessity justifying the exemption and provided that the exemption is no broader than necessary to accomplish that purpose.

The committee substitute creates a process by which access to a public record may be delayed by the Florida Department of Law Enforcement under limited, narrowly-defined circumstances. It could be argued, however, that the committee substitute violates the provisions of s. 24(c), Art. I of the State Constitution.

First, it could be argued that delaying access is a denial of access to a public record and that the denial of access is equivalent to an exemption. By authorizing the executive director of an executive branch agency to temporarily delay the ability of the public to inspect or copy a public record, even upon court order, it could be argued that an invalid delegation of legislative authority has been made to the executive and to the judicial branches. Section 24(c), Art. I of the State Constitution permits only the Legislature to create an exemption to public records. Further, it could be argued that the method authorized by the committee substitute does not comport with the constitutional means for creating an exemption in that the committee substitute does not specify a particular record that is exempt. Further, as no specific record is made exempt by the committee substitute, it could be argued that the committee substitute is broader than permissible under the State Constitution.

On the other hand, it could be argued that the access to public records afforded by the State Constitution is *reasonable* access and that the process provided for in the committee substitute is reasonable. It could be argued that the committee substitute creates only a *process* which temporarily limits access and does not result in the creation of an exemption *per se*. As this process is limited in scope and effect, and ultimately provides that the record remains public, it might be argued that the committee substitute creates a reasonable limitation on access.

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:

There could be additional costs for administrative and court challenges resulting from the provision.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
