

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 652

SPONSOR: Criminal Justice Committee and Senator Fasano

SUBJECT: Public Records/Law Enforcement Officer's Personal Records

DATE: March 3, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates an exemption to the public records law by protecting certain personal records and objects that belong to a law enforcement or correctional officer, under investigation by his or her agency, from public disclosure.

This bill substantially amends section 112.533 of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution provides every person with 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 persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The State Constitution authorizes exemptions to open records and meetings requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Current law provides a public records exemption for the home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement personnel, including correctional officers. The same information, and the place of employment, school, or day care facility is exempt from public disclosure for the officer's spouse and children. s. 119.07(3)(i), F.S.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends a new exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

Identifiable Public Purpose

Under s. 119.15(4)(b), F.S., an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meeting the public purpose it serves. An identifiable public purpose is served if the exemption meets *one* of the following purposes:

1. Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption? or
2. Does the exemption protect information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals? (However, in exemptions under this paragraph, only information that would identify the individuals may be exempted.) or
3. Does the exemption protect information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace?

and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Law Enforcement and Correctional Officers' Bill of Rights

Under the provisions of ss. 112.531 through 112.535, F.S., law enforcement officers and correctional officers are accorded certain rights when they are faced with an investigation by their own agency. This part of Chapter 112, F.S., is commonly referred to as the "Law Enforcement Officers' Bill of Rights."

The complaint and information gathered during the investigation of the complaint are confidential and exempt from the provisions of s. 119.07(1), F.S., until the investigation is concluded. Section 119.07(1), F.S., makes public records accessible to the public upon request.

The confidential nature of the information gathered during the investigation is further protected by the potential for a criminal prosecution of a person who is a participant in the investigation (complainant, officer under investigation or his or her lawyer or other representative, investigator, witness) for willfully disclosing the information. s. 112.533(4), F.S.

The information that has been gathered during the investigation is exempt from disclosure, both from the public and from the officer under investigation, if it is active criminal intelligence or criminal investigative information. s. 119.07(3), F.S.

A careful reading of subsection (2) of s. 112.533, F.S., indicates the following:

- The general rule is that the complaint and *all information* obtained pursuant to the investigation is *confidential and exempt* from public disclosure
 - until the investigation ceases to be active (presumed inactive 45 days after the complaint is filed and no finding is made; presumed active when the investigation is continuing with a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future. s. 112.533(2)(b), F.S.) *or*
 - the officer under investigation is notified that the agency has *concluded its investigation with a finding not to proceed with disciplinary action or to file charges or*
 - the officer is notified that the agency has made a finding to proceed with disciplinary action or to file charges.
- Notwithstanding the *foregoing*, the officer that is the subject of the complaint, and his or her attorney or other representative, may review the complaint and all statements made by the complainant and witnesses immediately prior to the investigative interview. (Note that where a witness is incarcerated and subject to the supervision of the officer under investigation, that witness's statement is not made available to the officer – only the name of the witness. s. 112.533(2)(a)2, F.S.)
- The provisions set forth above do not apply to any public record exempt from disclosure under s. 119.07(3), F.S. - active criminal intelligence information or active criminal investigation.

Palm Beach County PBA v. Neumann, 796 So.2d 1278 (Fla. 4th DCA 2001) involved an officer who was the subject of a disciplinary proceeding *and* who had been indicted by the grand jury for the misdemeanor offense of failure to report child abuse. The grand jury had not indicted on the proposed felony charge. The PBA filed a public records request for copies of the internal investigation file and the Palm Beach County Sheriff's Office refused to produce the records, citing the s. 119.07(3), F.S., *active criminal investigation* exemption. The trial court and the appeal court agreed that the PBA could not have the internal investigation records.

On appeal, the PBA acknowledged the exemption but argued that it requested records that went beyond the misdemeanor charge to the felony charge on which the grand jury did not indict. The court found, however, that all of the charges arose from the same facts, therefore the information was as pertinent to the misdemeanor as the felony and the exemption applied. *Id.* at 1281.

III. Effect of Proposed Changes:

This bill expands the current statutory exemption of certain identifying and personal information pertaining to law enforcement and correctional officers and their families to also include all written documents and other physical items or objects made by or which are the property of the officer and intended for or restricted to his or her personal use, that are produced by the officer at the request of the agency investigating a complaint against him or her pursuant to s. 112.533, F.S. Under the bill, these records are made confidential and exempt from public disclosure.

The bill provides that these records *include, but are not limited to*: personal telephone records, cellular telephone records, beeper and electronic pager records, financial records, credit card and bank records, electronic mail records, and video and audio cassettes.

There is a difference between information and records that the Legislature has made exempt from public disclosure versus those that have been made confidential and exempt. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

The bill would make the documents and objects listed above *confidential and exempt*, which is consistent with the provision in s. 112.533(2)(a), F.S., which makes *all information* obtained pursuant to the investigation confidential and exempt from public disclosure until such time as the investigation is concluded.

It should be noted that the documents and objects that are the subject of the bill could be argued to fall under the umbrella of “all information” which is *currently* confidential and exempt from public disclosure.

This bill provides for future review, and will stand repealed on October 2, 2009, unless it is reenacted by the Legislature.

Section 3 of the bill states the public necessity justifying the exemption as follows:

- it is good public policy to protect the personal and private records of officers under investigation by their agency due to a complaint having been made against them;
- protecting the confidentiality of the records will encourage accused officers to fully cooperate to quickly and effectively resolve the complaint;
- the exemption prevents unnecessary and unwarranted intrusion into the officer’s right of privacy; and
- disclosure of the records may deter the collection of information integral to the investigation.

There is also a finding that any benefit that could occur from public disclosure of the information is outweighed by the unwarranted intrusion into the officer's and his or her family's right to privacy.

Section 4 of the bill provides an effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The State Constitution authorizes exemptions to open records and meetings requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The bill appears to meet requirements of the Constitution if the Legislature finds the stated purpose of the exemption is justified and is no more broad than necessary.

It should be noted that *the existing exemption* in s. 112.533(2), F.S., which is expanded by the provisions of the bill, was enacted in 1990 (L.O.F. 90-360, s. 31), therefore it *is not subject to the requirements of the Constitution of Florida. Article I, Section 24(d), Florida Constitution.*

It could be argued that by expanding the preexisting exemption, as the bill does, the entire exemption must now be subject to periodic review. The current statutory language exempting "all information" gathered during the course of the internal agency investigation may not survive the requirement that the exemption be no broader than necessary to accomplish its purpose.

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:

None.

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.
