

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 Criminal Justice

BILL: CS/SB 550

INTRODUCER: Criminal Justice Committee and Senator Bracy

SUBJECT: Public Records/Murder Witness

DATE: February 22, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	Fav/CS
2.			JU	
3.			GO	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 550 creates a public records exemption by making confidential and exempt criminal intelligence or investigative information that reveals the personal identifying information of a witness to a murder. The exemption applies to each witness for a period of 2 years following the commission of the murder observed by the witness.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity as required by the Florida Constitution.

The Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

The bill becomes effective on July 1, 2017.

II. Present Situation:

Public Records Exemptions for Certain Investigation Information

Currently, s. 119.071(2), F.S., in relevant part, provides public records exemptions for various types of personal information of specified parties involved in the investigation of a crime. Information exempt from public records requirements includes information revealing the identity of a confidential informant or a confidential source,¹ information revealing the identity of a victim of a child abuse offense,² and information revealing the identity of a victim of any sexual offense.³

Witness to a Murder

“A witness’s fear [of retaliation] is perhaps the greatest threat to the criminal justice system’s ability to prosecute cases.”⁴ A witness’s intimidation may cause that person to decide not to come forward and provide crucial evidence to police or to refuse to testify in a case. “[I]nstances of witness intimidation create the perception that the law cannot protect its citizens and thereby undermines public confidence in the police and government. If individuals believe that they cannot be adequately protected, they are less likely to cooperate with the police, which in turn impedes the ability of the police to gather evidence in an attempt to stop criminal behavior.”⁵

News articles have recently reported on several homicides that occurred in 2015 in the Tampa area that remain unsolved.⁶ The victim of one of the unsolved murders was Edward Harris, a 14-year-old boy who was murdered in a park.⁷ A spokeswoman for the Tampa Police Department stated that between October 2014 and April 2015, Mr. Harris was the witness to multiple crimes that resulted in arrests.⁸ Mr. Harris’s family has made statements indicating they believe he was murdered as a result of talking to police.

The “confrontation clause” of the U.S. Constitution⁹ preserves a defendant’s right to confront a witness against him or her and to bring forward information that aids the jury in determining the

¹ Section 119.071(2)(f), F.S.

² Section 119.071(2)(h)1.a., F.S.

³ Section 119.071(2)(h)1.b., F.S.

⁴ Lisa I. Karsai, “You Can’t Give My Name: Rethinking Witness Anonymity In Light of the United States and British Experience” (Fall, 2011), 79 Tenn. L. Rev. 29.

⁵ Judge Joan Comparet-Cassani, “Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine After Alvarado” (Fall, 2002), 39 San Diego L. Rev. 1165. “Even though the United States Department of Justice has conducted surveys about witness intimidation, the results of which indicate that it is increasing and widespread, the Department acknowledged that the exact extent of intimidation is unknown.”

⁶ Dan Sullivan, “Federal officials increase rewards, offer protection, to solve four unsolved Tampa murders” (October 29, 2015), Tampa Bay Times, available at <http://www.tampabay.com/news/publicsafety/crime/federal-officials-increase-rewards-offer-protection-to-solve-four-unsolved/2251784> (last visited on February 10, 2017); Sue Carlton, “Solutions to street violence elusive amid anti-snitching culture” (June 2, 2015), Tampa Bay Times, available at <http://www.tampabay.com/news/publicsafety/crime/carlton-no-snitching-no-answers/2232047> (last visited on February 10, 2017).

⁷ Stephanie Slifer, “Dad believes son was killed in Tampa drive-by shooting for talking to cops” (June 2, 2015), CBS News, available at <http://www.cbsnews.com/news/dad-believes-son-was-killed-in-tampa-drive-by-shooting-for-talking-to-cops/> (last visited on February 10, 2017).

⁸ *Id.*

⁹ Sixth Amendment, U.S. Constitution.

truthfulness and reliability of the witness. For example, the defendant might expose a witness's prejudice, bias, or ulterior motivation to lie; expose lies; test a witness's ability to perceive and remember; or expose weaknesses in the witness's testimony. This right "minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony."¹⁰

Florida Rules of Criminal Procedure require the prosecutor to disclose information about witnesses in discovery.¹¹ However, the rules do allow a court, on its own initiative or upon a motion of counsel, to restrict disclosure if the court finds that "there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party."¹²

Currently, there is no public record exemption for the personal identifying information of a witness to a crime of any sort.

Public Records Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹³ The records of the legislative, executive, and judicial branches are specifically included.¹⁴

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act¹⁵ guarantees every person's right to inspect and copy any state or local government public record¹⁶ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.¹⁷

Only the Legislature may create an exemption to public records requirements.¹⁸ This exemption must be created by general law and must specifically state the public necessity justifying the

¹⁰ Judge Joan Comparet-Cassani, "Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After Alvarado" (Fall, 2002), 39 San Diego L. Rev. 1165.

¹¹ Fla. R. Crim. P. 3.220(b) (Discovery: Prosecutor's Discovery Obligation). Section 119.07(8), F.S., addresses the relationship between discovery obligations and public records.

¹² Fla. R. Crim. P. 3.220(e) (Discovery: Restricting Disclosure).

¹³ FLA. CONST., art. I, s. 24(a).

¹⁴ *Id.*

¹⁵ Chapter 119, F.S.

¹⁶ Section 119.011(12), 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." 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." The Public Records Act does not apply to legislative or judicial records *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

¹⁷ Section 119.07(1)(a), F.S.

¹⁸ FLA. CONST., art. I, s. 24(c).

exemption.¹⁹ A record classified as exempt from public disclosure may be disclosed under certain circumstances.²⁰

If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption.²¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.

A bill enacting an exemption may not contain other substantive provisions²² and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.²³

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created public records exemptions.²⁴ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.²⁵

The OGSR provides that a public records exemption may be created only if it serves an identifiable public purpose and is no broader than necessary.²⁶ An exemption serves an identifiable purpose if it meets one of the following purposes and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption.
- The release of sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt.
- It protects trade or business secrets.²⁷

In addition, the Legislature must find that the purpose of the exemption overrides Florida’s public policy strongly favoring open government.

¹⁹ *Id.*

²⁰ *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48 (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); and *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).

²¹ *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004) and *Wait v. Florida Power and Light Co.*, 372 So.2d 420 (Fla. 1979).

²² However, the bill may contain multiple exemptions that relate to one subject.

²³ FLA. CONST., art. I, s. 24(c).

²⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

²⁵ Section 119.15(3), F.S.

²⁶ Section 119.15(6)(b), F.S.

²⁷ Section 119.15(6)(b)1.-3., F.S.

The OGSR also requires specified questions to be considered during the review process.²⁸ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. These 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?²⁹

To enact an exemption, the Legislature must pass a bill by a two-thirds vote and the bill must include a public necessity statement justifying the exemption.³⁰

III. Effect of Proposed Changes:

The bill creates s. 119.071(2)(m), F.S., (Section 2), to provide that criminal intelligence or investigative information that reveals the personal identifying information of a witness to a murder is confidential and exempt from s. 119.07(1), F.S., and Article I, Section 24(a), of the Florida Constitution. The exemption applies to each witness for a period of 2 years following the commission of the murder observed by the witness.

The bill provides that the information may be disclosed by a criminal justice agency:

- In the furtherance of its official duties and responsibilities;
- To assist in locating or identifying the witness if he or she is believed to be missing or endangered; or
- To another governmental entity for use in the performance of its official duties and responsibilities.

Section 119.011(3)(c)5., F.S., (Section 1), defining what “criminal intelligence information” and “criminal investigative information” do not include, is amended by the bill. The amendment specifically excludes the personal identifying information of a witness to a murder, created in s. 119.071(2)(m), F.S., from the definition of “criminal intelligence information” documents or “criminal investigative information” documents required to be given to the person arrested.

It should be noted that s. 119.011(3)(c)5.a., F.S., provides “except that the court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of s. 119.07(1), F.S.,³¹ until released at trial if it is found that the release of such information would... jeopardize the safety of such victim or witness.”

²⁸ Section 119.15(6)(a), F.S.

²⁹ Section 119.15(6)(a)1.-6., F.S.

³⁰ Section 119.15(7), F.S.

³¹ “Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”

The bill amends s. 119.0714, F.S., (Section 3), to convey the same confidential and exempt status to the witness's personal identifying information should that information become part of a court file.

The exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also provides a statement of public necessity as required by the Florida Constitution.³² This statement includes the following findings:

- The judicial system cannot function without the participation of witnesses.
- Complete cooperation and truthful testimony of witnesses are essential to the determination of the facts of a case.
- The public disclosure of personal identifying information of a witness to a murder could have a chilling effect on persons stepping forward and providing their accounts of a murder that has been witnessed.
- A witness to a murder may be unwilling to cooperate fully with law enforcement officers if the witness knows his or her personal identifying information can be made publicly available.
- A witness may be less likely to call a law enforcement officer and report a murder if his or her personal identifying information is made available in connection with the murder that is being reported or under investigation.
- A witness could become the subject of intimidation tactics or threats by the perpetrator of the murder³³ if the witness's personal identifying information is publicly available.

The bill takes effect on July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

³² FLA. CONST., art. I, s. 24(c).

³³ Murder is defined by reference to s. 782.04, F.S., which is the murder statute.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption and includes a public necessity statement.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, the bill does not appear to be in conflict with this constitutional requirement.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.011, 119.071, and 119.0714.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on February 21, 2017:

The CS:

- Amends s. 119.011(3)(c), F.S., to include a cross reference to the newly created s. 119.071(2)(m), F.S.
- Makes *criminal intelligence information or criminal investigative information that reveals* the personal identifying information of a witness to a murder confidential and exempt for 2 years after the date on which the murder is observed by the witness in s. 119.071(2)(m), F.S.; provides for disclosure of that information under limited circumstances.
- Eliminates the creation of s. 119.0714(1)(k), F.S., and instead amends s. 119.0714(1)(h), F.S., to create a cross reference to s. 119.071(2)(m), F.S.

- B. **Amendments:**

None.