

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 Judiciary

BILL: CS/CS/SB 550

INTRODUCER: Judiciary Committee; Criminal Justice Committee; and Senator Bracy

SUBJECT: Public Records/Murder Witness

DATE: March 9, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Hrdlicka</u>	<u>CJ</u>	Fav/CS
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 550 modifies the authority of a state agency to grant access to or disclose criminal intelligence or investigative information that reveals the personal identifying information of a murder witness. Currently, if this information is held by a state agency, then it is a public record that is accessible by every person. The bill designates this information as confidential and exempt from access or disclosure, thus requiring state entities to deny public records requests for the information. The confidentiality and exemption apply to each witness for a period of 2 years after 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The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

II. Present Situation:

Overview

Florida law expressly requires each branch of this state's government to grant every person access to records held by the government. However, several types of these records are exempt from these access and disclosure requirements. Thus, when a member of the public seeks access to exempt records in a request made pursuant to the public records laws, the government is not required to grant the request.

In addition to being exempt, some records are confidential. Even if a state agency wants to grant access to or produce these records, it may not do so and the records may be disclosed only to the persons or organizations designated in statute. Records that are currently exempt, or confidential and exempt, include several types of criminal intelligence or criminal investigative records, such as the names of confidential informants and victims of certain crimes. However, the personal identifying information of a murder witness is not currently confidential or exempt.

Florida Public Records Law

The Florida Constitution guarantees the right of every person to inspect or copy any public record¹ 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.² The right to access public records specifically includes records of the legislative, executive, and judicial branches.³

The Constitution's guarantee of access to records is implemented by the Public Records Act, set forth at ch. 119, F.S. This act provides that every person has the right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under the supervision of the custodian of the public record.⁴

Only the Legislature may designate a government record as exempt or confidential.⁵ These designations must be made by general law and must specifically state the public necessity justifying the designations.⁶ Furthermore, the exemption or confidentiality must be no broader than necessary to accomplish the stated purpose of the law.

But even confidential and exempt records may be accessed or disclosed under certain circumstances.⁷ If the Legislature designates a record as confidential and exempt, the record may be released to the persons or entities specifically designated in the statutory exemption.⁸

¹ 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).

² FLA. CONST., art. I, s. 24(a).

³ *Id.*

⁴ Section 119.07(1)(a), F.S.

⁵ FLA. CONST., art. I, s. 24(c).

⁶ *Id.*

⁷ *See, 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); *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

⁸ *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004); *Wait v. Florida Power and Light Co.*, 372 So. 2d 420 (Fla. 1979).

Lastly, a bill enacting an exemption may not contain other substantive provisions⁹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁰

Public Records Exemptions for Certain Investigative Information

Currently, s. 119.071(2), F.S., in relevant part, designates several types of personal information related to criminal intelligence or criminal investigations as confidential or exempt. Some types of information that are currently confidential or exempt include information revealing the identity of a confidential informant or a confidential source (exempt),¹¹ information revealing the identity of a victim of a child abuse offense (confidential and exempt),¹² and information revealing the identity of a victim of any sexual offense (confidential and exempt).¹³ The personal identifying information of a witness to a murder is not currently confidential or exempt.¹⁴

Limited Effect of a “Confidential” or “Exempt” Designation

The designation of a record as exempt, or as confidential and exempt, is effective only as to a public records request brought under Florida’s public records laws. Therefore, these exemptions and confidentiality do not block access to government documents if there is an independent basis for that access.¹⁵

One such basis is a discovery request in a criminal case. The Florida Rules of Criminal Procedure require a prosecutor to disclose information about witnesses in discovery.¹⁶ And this requirement, at least in principle if not in a strict legal sense, is rooted in the “confrontation clause” of the United States Constitution.¹⁷ The confrontation clause 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 truthfulness and reliability of the witness.¹⁸ 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 to confront a witness “minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.”¹⁹

⁹ However, the bill may contain multiple exemptions that relate to one subject.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ Section 119.071(2)(f), F.S.

¹² Section 119.071(2)(h)1.a., F.S.

¹³ Section 119.071(2)(h)1.b., F.S.

¹⁴ However, section 119.011(3)(c)5., F.S., states 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) until released at trial if it is found that the release of such information would . . . jeopardize the safety of such victim or witness”

¹⁵ Also, any confidentiality or exemption is eliminated by a record’s entering a court file. However, certain records remain confidential or exempt even if they enter a court file. *See* section 119.0714(1), F.S.

¹⁶ 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. However, the rules 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.” Fla. R. Crim. P. 3.220(e) (Discovery: Restricting Disclosure).

¹⁷ Sixth Amendment, U.S. Constitution.

¹⁸ *Id.*

¹⁹ Judge Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165 (Fall, 2002).

The Problem of Witness Fear, Intimidation, and Murder

According to one law professor, “[a] witness’s fear is perhaps the greatest threat to the criminal justice system’s ability to prosecute cases.”²⁰ Whether or not this fear is indeed the *greatest* threat to the criminal justice system’s ability to prosecute cases, it is common knowledge that it is a very serious problem. A witness’s intimidation may cause him or her to decide not to come forward and provide crucial evidence to police or to refuse to testify in a case. As one judge observed,

[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.²¹

Providing anecdotal evidence of the threat to witnesses, news articles have recently reported on several homicides that occurred in 2015 in the Tampa area that remain unsolved.²² The victim of one of the unsolved murders was Edward Harris, a 14-year-old boy who was murdered in a park.²³ 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.²⁴ Mr. Harris’s family members have indicated that they believe he was murdered as a result of talking to police.²⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created public records exemptions.²⁶ 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.²⁷

²⁰ Lisa I. Karsai, *You Can’t Give My Name: Rethinking Witness Anonymity In Light of the United States and British Experience*, 79 TENN. L. REV. 29 (Fall, 2011).

²¹ Judge Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165 (Fall, 2002) (“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.”).

²² Dan Sullivan, *Federal officials increase rewards, offer protection, to solve four unsolved Tampa murders*, TAMPA BAY TIMES, Oct. 29, 2015, <http://www.tampabay.com/news/publicsafety/crime/federal-officials-increase-rewards-offer-protection-to-solve-four-unsolved/2251784>; Sue Carlton, *Solutions to street violence elusive amid anti-snitching culture*, TAMPA BAY TIMES, Jun. 2, 2015, <http://www.tampabay.com/news/publicsafety/crime/carlton-no-snitching-no-answers/2232047>.

²³ Stephanie Slifer, *Dad believes son was killed in Tampa drive-by shooting for talking to cops*, CBS NEWS, Jun. 2, 2015, <http://www.cbsnews.com/news/dad-believes-son-was-killed-in-tampa-drive-by-shooting-for-talking-to-cops/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 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.

²⁷ Section 119.15(3), F.S.

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.²⁸ An identifiable public purpose is served if the exemption meets one of the following purposes:

- 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 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 subparagraph, only information that would identify the individuals may be exempted; or
- Protects 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.²⁹

In addition, the Legislature must find that the identifiable public purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.³⁰

The OGSR also requires specified questions to be considered during the review process.³¹ 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?³²

To enact an exemption, the Legislature must pass a bill by a two-thirds vote and the bill must explain the public necessity justifying the exemption.³³

III. Effect of Proposed Changes:

Current Florida law expressly requires each branch of this state's government to grant every person access to government records. However, several types of government records are exempt from this requirement. Thus, when a member of the public seeks access to exempt records by submitting a request pursuant to this state's public records laws, the government is not required

²⁸ Section 119.15(6)(b), F.S.

²⁹ Section 119.15(6)(b)1.-3., F.S.

³⁰ Section 119.15(6), F.S.

³¹ Section 119.15(6)(a), F.S.

³² Section 119.15(6)(a)1.-6., F.S.

³³ Section 119.15(7), F.S.

to grant the request. In addition to being exempt, some records are confidential. These confidential records may not be inspected by the public and may only be disclosed to the persons or organizations designated in statute. Records that are currently exempt, or confidential and exempt, include several types of criminal investigative records, such as the names of confidential informants and victims of certain crimes. However, the personal identifying information of a murder witness is not currently confidential or exempt; the bill changes this, as set forth below.

Personal Identifying Information of a Murder Witness is Confidential and Exempt

The bill designates “criminal intelligence or investigative information that reveals the personal identifying information of a witness to a murder” as confidential and exempt from the disclosure requirements under the public records laws. Therefore, if a person submits a public records request for records containing this information to a state agency, the agency may not provide access to or disclose the information. And this confidentiality survives the information entering a court file. The confidential and exempt status of these records applies for a period of 2 years following the commission of the murder observed by the witness.

Exceptions to the Confidentiality and Exemption of Murder Witness Information

As exceptions to the general prohibition on disclosing these murder witness records, a state agency may disclose these records:

- In the furtherance of its official duties and responsibilities;
- To assist in locating or identifying the witness if the witness is believed to be missing or endangered;
- To another governmental agency for use in the performance of its official duties and responsibilities; or
- To the parties in a pending criminal prosecution as required by law.

The Limited Nature of Every Public Records Exemption and Confidentiality Provision

Because a public records exemption generally applies only to public records requests, the bill does not prevent disclosure of information through discovery under the Rules of Criminal Procedure. Accordingly, for example, the defendant in a murder case will be able to access this information through discovery and potentially pass it on to others. With or without the bill, however, if a witness testifies at trial, his or her identity would be revealed to the defendant and anyone else in the courtroom.

Sunset Provision

The confidentiality and exemption created by the bill is subject to the Open Government Sunset Review Act, and therefore stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.³⁴

³⁴ See s. 119.15(3), F.S.

Statement of Public Necessity

The bill also provides a statement of public necessity as required by the Florida Constitution.³⁵ 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 murder³⁶ 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.

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.

³⁵ FLA. CONST., art. I, s. 24(c).

³⁶ Murder is defined by reference to s. 782.04, F.S., which is the murder statute.

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 /CS by Judiciary on March 7, 2017:

The committee substitute expressly allows a criminal justice agency to disclose the personal identifying information of a witness to a murder to the parties in a pending criminal prosecution as required by law.

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.