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 Governmental Oversight and Accountability

BILL:	CS/CS/SB 550
INTRODUCER:	Judiciary Committee; Criminal Justice Committee; and Senators Bracy and Campbell
SUBJECT:	Public Records/Murder Witness
DATE:	March 24, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	**Fav/CS**
2.	Stallard	Cibula	JU	**Fav/CS**
3.	Kim	Ferrin	GO	**Pre-meeting**
4.			RC	

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 two years after the commission of the murder observed by the witness.

Two-thirds of the members of each chamber must vote for this bill in order for it to pass because this bill creates a new public records exemption.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.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 an effective date of July 1, 2017.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.[3] Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.[4] The Public Records Act states that

> it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[5]

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."[7] A violation of the Public Records Act may result in civil or criminal liability.[8]

The Legislature may create an exemption to public records requirements.[9] An exemption must pass by a two-thirds vote of the House and the Senate.[10] In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.[11] A statutory

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.
[4] Public records laws are found throughout the Florida Statutes.
[5] Section 119.01(1), F.S.
[6] Section 119.011(12), F.S., defines "public record" 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 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 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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[8] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[9] FLA. CONST., art. I, s. 24(c).
[10] *Id.*
[11] *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.[12]

When creating a public records exemption, the Legislature may provide that a record is "confidential and exempt" or "exempt."[13] Records designated as "confidential and exempt" may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as "exempt" are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.[14]

Public Records Exemptions for Criminal Investigative and Intelligence Information

Active criminal intelligence information and active criminal investigative information are exempt from s. 119.07(1), F.S., and Article I, s. 24(a), of the Florida Constitution.[15] Section 119.011(3)(a), F.S., defines "criminal intelligence information" as "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." Section 119.011(3)(b), F.S., defines criminal investigative information as,

> information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

The definitions of criminal intelligence and investigative information do not include some specific types of information, which is therefore public. This public information includes the time, date, location and nature of the crime, the charges, and the identities of the arrested person and the victims of the crime.[16] Also excluded from the definition of criminal intelligence and investigative information are documents that must be given to the person who is arrested, because of a law or agency rule.[17] An example of such a rule would be the discovery rules under the Florida Rules of Criminal Procedure.

Criminal intelligence and investigative information becomes public under two circumstances: 1) when information is given to the defendant through a pretrial discovery request; and 2) when the defendant's conviction and sentence are final.

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[12] *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

[13] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[14] *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

[15] Section 119.071(2)(c)1., F.S. The definition of "active" is located at s. 119.011(3)(d), F.S.

[16] Section 119.011(c), F.S.

[17] Section 119.011(c)5., F.S.

After active criminal intelligence investigative information have been provided to a defendant through discovery, that information becomes public under certain circumstances.[18] Those circumstances include considerations about whether making discovery documents public will impede the defendant's right to a fair trial or the right of privacy of third parties.[19] A court may temporary seal pretrial discovery, even if some of the pretrial discovery information is already public.[20] In addition, in criminal cases, discovery may be kept confidential and exempt from public disclosure until trial if the following conditions are met: 1) the information would defamatory or would jeopardize the safety of the witness; and 2) releasing the information would hurt the state attorney's ability to locate or prosecute a codefendant.[21]

Criminal intelligence and investigative information are considered "active" when they are "directly related to pending prosecutions or appeals."[22] Therefore, criminal intelligence investigative information becomes public "when the conviction and sentence becomes final… after direct appeal" (emphasis omitted).[23]

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),[24] information revealing the identity of a victim of a child abuse offense (confidential and exempt),[25] and information revealing the identity of a victim of any sexual offense (confidential and exempt).[26] The personal identifying information of a witness to a murder is not currently confidential or exempt.[27]

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 confidentialities do not block access to government documents if there is an independent basis for that access.[28]

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[18] *Post-Newsweek Stations, Fla, v. Doe*, 612 So. 2d 549, 551 (Fla. 1992). *Florida Freedom Newspapers, Inc., v. McCrary*, 520 So. 2d 32 (Fla. 1988). *Bludworth v. Palm Beach Newspapers, Inc.*, 176 So. 2d 775 (Fla. 5th DCA 1985).
[19] *Post-Newsweek Stations,* 612 So. 2d at 551. *Florida Freedom Newspapers,* 520 So. 2d.
[20] *Florida Freedom Newspapers*, 520 So. 2d at 36.
[21] Section 119.011(c)5.a. and b., F.S.
[22] Section 119.011(3)(d)2., F.S. However, "active" does not apply to information in cases which are barred from prosecution under the provisions of s. 775.15 or other statute of limitation. Section 119.011(3)(d)2., F.S. Section 775.15, F.S., is where the criminal statute of limitations is located.
[23] *Allen v. Butterworth*, 756 So. 2d 52, 66 (FLA 2000).
[24] Section 119.071(2)(f), F.S.
[25] Section 119.071(2)(h)1.a., F.S.
[26] Section 119.071(2)(h)1.b., F.S.
[27] Section 119.011(3)(c)5., F.S., states in pertinent part 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."
[28] Generally, any confidentiality or exemption from public disclosure is eliminated by a record's entering a court file. Certain records remain confidential or exempt, however, even if they enter a court file. *See* s. 119.0714(1), F.S.

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.[29] This requirement, at least in principle if not in a strict legal sense, is rooted in the "confrontation clause" of the United States Constitution.[30] 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.[31] 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."[32]

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."[33] 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.[34]

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.[35] The victim of

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[29] 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).

[30] The Sixth Amendment if the U.S. Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[31] *Id*.

[32] 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).

[33] 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).

[34] 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.").

[35] 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*,

one of the unsolved murders was Edward Harris, a 14-year-old boy who was murdered in a park.[36] 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.[37] Mr. Harris's family members have indicated that they believe he was murdered as a result of talking to police.[38]

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 or substantially amended public records or open meetings exemptions.[39] 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.[40]

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.[41] An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy 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;[42]
- Releasing 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;[43] or
- It protects trade or business secrets.[44]

The OGSR also requires specified questions to be considered during the review process.[45] In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

TAMPA BAY TIMES, Jun. 2, 2015, http://www.tampabay.com/news/publicsafety/crime/carlton-no-snitching-no-answers/2232047.

[36] 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/.

[37] *Id*.

[38] *Id*.

[39] 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 section 119.15(2), F.S.

[40] Section 119.15(3), F.S.

[41] Section 119.15(6)(b), F.S.

[42] Section 119.15(6)(b)1., F.S.

[43] Section 119.15(6)(b)2., F.S.

[44] Section 119.15(6)(b)3., F.S.

[45] Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[46] If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.[47]

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 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. This confidentiality survives the information entering a court file. The confidential and exempt status of these records applies for a period of two years following the commission of the murder observed by the witness. This means that even if the state provided witness' identity to the defendant during discovery, the information would not be public for a two-year window.

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.

5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

[46] FLA. CONST. art. I, s. 24(c).
[47] Section 119.15(7), F.S.

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.

OGSR Provision

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.[48]

Statement of Public Necessity

The bill also provides a statement of public necessity as required by the Florida Constitution.[49] 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 murder[50] 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.

[48] *See* s. 119.15(3), F.S.
[49] FLA. CONST. art. I, s. 24(c).
[50] Murder is defined by reference to s. 782.04, F.S., which is the murder statute.

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. 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:

Lines 66-67 of the bill provide that the murder witness' identification information may be provided to the parties in a pending criminal prosecution. This language appears to be redundant since public records laws do not infringe on the discovery rights of parties.[51]

[51] In, *Ivester v. State*, 398 So. 2d 926, 931 (Fla. 1st DCA 1981), the court stated "[w]hile Section 119.07(3), Florida Statutes, does foreclose certain items from public inspection the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions, of the Florida Rules of Criminal Procedure." Citing *Invester,* the Fifth DCA noted that in the context of a criminal proceeding, "a public records exemption cannot limit a criminal defendant's access to discovery." *B.B. v. Department of Children and Family Services*, 731 So. 2d 30, 34 (Fla. 5th DCA 1999).

The current law provides that discovery may be provided to the defendant because it is "required by law or *agency rule* to be given to the person arrested." Line 67 of the bill provides that criminal intelligence information or criminal investigative information may be provided to the parties pending criminal prosecution "as required by law." It is not clear if, in this case, the Rules of Judicial Administration or the Florida Rules of Criminal Procedure would be inapplicable because they are not considered a "law."[52]

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 two 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.

[52] Article V, section 2(a) of the Florida Constitution, provides that the Supreme Court has the power to adopt the rule of practice, procedure, and administration for all courts. The Supreme Court found that portions of a public records statute fast-tracking production of public records in capital cases were unconstitutional, commenting, "the adoption of time limitations and procedures governing the production of public records in capital cases is within the exclusive province of this Court." *Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000).

B. Amendments:

None.