

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 1216

INTRODUCER: Judiciary Committee and Senator Book

SUBJECT: Public Records/Videotaped Statement of a Minor

DATE: January 22, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 1216 expands an existing public records exemption that makes information from the videotaped statements of minor children who are alleged to be or are the victims of several specific sex offenses confidential and exempt from public records requirements. Under the bill, the exemption also applies to videotaped statements that relate to the sexual performance by a child and child pornography, as these offenses are redefined in linked bill SB 1214.

Current law prohibits and penalizes a public employee or officer with access to videotaped statements of a child victim of a sex offense from willfully and knowingly disclosing videotaped information except in limited circumstances. The bill adds to the list of offenses for which a public employee or officer may not release videotaped statements those of sexual performance by a child, and child pornography.

The public necessity statement of the bill provides as justification for the exemption that videotaped statements by child victims typically contain highly sensitive information, including a description of the sex crime in graphic detail. Release of the information could lead to further victimization, humiliation, trauma, sorrow, and emotional injury for the child and his or her family.

The provisions of this bill are subject to an Open Government Sunset Review and are scheduled for repeal October 2, 2023, unless the Legislature saves the exemption from repeal and reenacts it before that date.

The bill requires a two-thirds vote of each chamber as it expands a public records exemption.

The bill takes effect on the same day as the effective date of linked bill SB 1214, or similar legislation, if adopted in the same legislative session or an extension of the session. The current effective date of SB 1214 is October 1, 2018.

## 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.<sup>1</sup> 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.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> 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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> 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” 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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.<sup>9</sup> The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>10</sup> A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.<sup>11</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>12</sup> 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’ may be released at the discretion of the records custodian under certain circumstances.<sup>13</sup>

### **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.<sup>14</sup> 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.<sup>15</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.<sup>16</sup> 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;<sup>17</sup>

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<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>12</sup> 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).

<sup>13</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>14</sup> 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.

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> Section 119.15(6)(b)1., F.S.

- 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;<sup>18</sup> or
- It protects trade or business secrets.<sup>19</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>20</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</sup> 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.<sup>22</sup>

### Public Records Exemptions for Crime Victims

Under current law, a document identifying the victim of a crime is generally exempt from public access requirements under the public records laws.<sup>23</sup> Such documents are exempt when they both:

- Reveal a crime victim's identity or personal identifying information, such as home and employment phone numbers or addresses or the victim's personal assets, *and*
- Specify the person who is the victim of the crime.<sup>24</sup>

There are also two categories of "special victims" for which additional public records exemptions have been deemed necessary:

- *Personally targeted abuse victims*—victims of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence may request in writing that any information that is not already confidential and exempt and reveals the victim's *location* also be deemed exempt from inspection.<sup>25</sup>

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<sup>18</sup> Section 119.15(6)(b)2., F.S.

<sup>19</sup> Section 119.15(6)(b)3., F.S.

<sup>20</sup> Section 119.15(6)(a), F.S. The 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?

<sup>21</sup> FLA. CONST. art. I, s. 24(c).

<sup>22</sup> Section 119.15(7), F.S.

<sup>23</sup> Section 119.071(2)(j)1., F.S.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

- *The videotaped statements of child sex crime victims*—any information in a videotaped statement of a minor who is alleged to be or is a victim of sexual battery,<sup>26</sup> lewd and lascivious acts,<sup>27</sup> or other sexual misconduct as proscribed under various statutory provisions (generally concerning exhibition or depiction of sexual acts)<sup>28</sup> is confidential and exempt from public access under the Public Records Act if the videotaped statement reveals the minor’s identity or other identifying information (the minor’s name, face, home, phone number, school, church, etc.) and specifies that the minor is the victim of one of the proscribed sexual crimes.<sup>29</sup> The child sex crime exemption also criminally penalizes any public employee or official who willfully and knowingly discloses such information from the video.<sup>30</sup>

### III. Effect of Proposed Changes:

This bill expands the existing public records exemption that currently makes confidential and exempt from disclosure information contained in a videotaped statement of a minor alleged to be or who is a victim of sexual battery,<sup>31</sup> lewd and lascivious acts,<sup>32</sup> or other sexual misconduct as proscribed under various statutory provisions.<sup>33</sup> Under the bill, the exemption also applies if the videotaped statements relate to the sexual performance by a child<sup>34</sup> and child pornography<sup>35</sup> as those offenses are redefined and penalties added in linked bill SB 1214, which revises laws relating to child exploitation.

Current law prohibits and penalizes a public employee or officer with access to videotaped statements of a child victim of a sex offense from willfully and knowingly disclosing videotaped information except in limited circumstances. The bill adds to the list of offenses for which a public employee or officer may not release videotaped statements those of sexual performance by a child, and child pornography.

<sup>26</sup> Section 794.011(1)(h), F.S. (“‘Sexual battery’ means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.”).

<sup>27</sup> Chapter 800, F.S.

<sup>28</sup> Section 827.071, F.S. (prohibiting use of a child in a sexual performance and the promotion, possession, or intentionally viewing of a visual depiction of the child’s sexual performance (with the exception of law enforcement investigations)); s. 847.012, F.S. (prohibiting intentional selling, renting, or loaning sexually graphic or pornographic materials to minors); s. 847.0125, F.S. (prohibiting retail display of a sexually graphic book, magazine, or other printed materials the cover of which are harmful to minors); s. 847.013, F.S. (prohibiting exposure of minors to sexually graphic or pornographic movies, exhibitions, shows, presentations, or representations); s. 847.0133, F.S. (“A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor” including drawings and written materials); s. 847.0145, F.S. (prohibiting sexual trafficking of minors).

<sup>29</sup> Section 119.071(2)(j)2.a., F.S.

<sup>30</sup> Section 119.071(2)(j)2.b., F.S.

<sup>31</sup> Section 794.011(1)(h), F.S., *supra* note 26.

<sup>32</sup> Chapter 800, F.S.

<sup>33</sup> Sections 827.071, F.S.; s. 847.012, F.S.; s. 847.0125, F.S.; s. 847.013, F.S.; s. 847.0133, F.S.; and 847.0145, F.S., *supra* note 28.

<sup>34</sup> See SB 1214, s. 31, proposing creation of 847.003, “Sexual performance by a child; penalties” to replace s. 827.071, F.S., also entitled “Sexual performance by a child; penalties,” which SB 1214 proposes to repeal.

<sup>35</sup> See SB 1214, s. 34, proposing substantial revisions to Section 847.0137, F.S., titled “Transmission of pornography by electronic device or equipment prohibited; penalties,” and renaming it “Child pornography; prohibited acts; penalties.”

The provisions of this bill are subject to an Open Government Sunset Review and are scheduled for repeal October 2, 2023, unless the Legislature saves the exemption from repeal and reenacts it before that date.

In the required statement of public necessity, the bill provides as justification for the exemption that videotaped statements by child victims typically contain highly sensitive information, including a description of the sex crime in graphic detail. Release of the information could lead to further victimization, humiliation, trauma, sorrow, and emotional injury for the child and his or her family.

The bill takes effect on the same day as the effective date of linked bill SB 1214, or similar legislation, if adopted in the same legislative session or an extension of the session. The current effective date of SB 1214 is October 1, 2018.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

*Vote Requirement:* Article I, s. 24(c), of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption.

*Public Necessity Statement:* Article I, s. 24(c), of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. Here, the bill includes a public necessity statement in Section 2 and, therefore, meets this requirement.

*Breadth of Exemption:* Article I, s. 24(c), of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.<sup>36</sup> Additionally, the Open Government Sunset Review Act (Act) provides that the stated purpose or “identifiable public purpose is served if [(A)] the exemption meets one of the [enumerated] purposes *and* [(B)] 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[.]”<sup>37</sup>

Here, the bill’s exemption protects the sensitive personal information of child sex crime victims by limiting access to information in their videotaped statements in order to

<sup>36</sup>“The public records act ‘is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.’” *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007) (quoting *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994)).

<sup>37</sup> Section 119.15(6)(b), F.S. (setting out three enumerated purposes: (1) allow effective and efficient administration of government program, (2) protect individual’s identity and sensitive personal information, (3) protect confidential business and trade information).

protect these children and their families from further victimization and trauma. Only personal, identifying information is confidential and exempt under the bill.<sup>38</sup>

Therefore, it appears that the bill does not conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish the stated purpose of the law.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill appears unlikely to have a fiscal impact on government agencies because videotaped statements of child sex crime victims are already confidential and exempt.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 119.071 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on January 10, 2018:**

The CS amends the effective date provision by filling in the “blank” for the linked bill information. The effective date is now pinned to the effective date of SB 1214 or similar legislation.

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<sup>38</sup> Section 119.15(6)(b)2., F.S. (permitting the exemption of sensitive, personal information pertaining to individuals which could jeopardize the safety of the individual if disclosed, so long as the exemption is limited to identifying information).

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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