

**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 Rules

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BILL: SPB 7024

INTRODUCER: For consideration by the Rules Committee

SUBJECT: Public Records

DATE: February 23, 2018

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

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ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Brown</u>	<u>Phelps</u>	_____	<b>Pre-meeting</b>

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**I. Summary:**

SPB 7024 creates a new public records exemption for the address of a victim or the immediate family member of a victim of a crime of mass violence which has taken place on a public or private K-12 school or postsecondary institution school grounds. Specifically, the bill makes confidential and exempt from public disclosure the address of a victim or an immediate family member of a victim listed in a report of a law enforcement agency.

The bill includes the required statement of public necessity. As justification for the exemption, the bill provides that without the exemption the victim or an immediate family member of a victim could be subject to further emotional trauma and threats to public safety. The statement further provides that without the exemption, a victim or an immediate family member of a victim may be less willing to cooperate with a law enforcement agency in a subsequent investigation.

The bill provides for an Open Government Sunset Review and specifies that the bill stands repealed October 2, 2023, unless the Legislature reviews and saves the exemption from repeal before that time.

A two-thirds vote of each chamber is required for passage of the bill because it creates a new public records exemption.

The bill takes effect upon becoming a law, but applies retroactively to information protected in the bill which is held by an agency before the effective date.

**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

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

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>

The Legislature may create an exemption to public records 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>

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<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.

<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.

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>
- 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.

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<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.

<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:

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.<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 and Police Reports**

General exemptions from public records disclosure are provided in s. 119.071, F.S. Certain information that is received or held by an agency regarding an agency investigation including a criminal investigation is protected from disclosure under public records law. The following are examples of exemptions which apply to information about a victim:

- Any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime and identifies that person as the victim of a crime received by an agency that regularly receives information from or concerning victims of a crime, is exempt from public records requirements<sup>23</sup>;
- Criminal intelligence or criminal investigative information that reveals the identity of a victim of child abuse, human trafficking of a child, or a sexual offense is confidential and exempt from public records requirements<sup>24</sup>; and
- Personal identifying information of an alleged victim in an allegation of sexual harassment is confidential and exempt from public records requirements.<sup>25</sup>

Police reports are generally classified as public records unless a public records exemption applies to information contained in the reports. If an exemption applies, a person who acquires exempt or confidential information contained in a police report is prohibited from either using or sharing the information for the purpose of commercial solicitation of a victim or his or her relative. However, an entity may use information from the report for data collection or analysis, and a news media outlet may publish the information if legally entitled to do so.<sup>26</sup>

Any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of a victim of a crime held by an agency that regularly receives information from or concerning the victim of a crime is exempt from public records disclosure.<sup>27</sup>

Although an exemption may apply to protect from disclosure addresses of victims in certain instances, current law does not specifically make confidential and exempt the address of a victim

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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?

<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> Section 119.071(2)(h)1. a. and b., F.S.

<sup>25</sup> Section 119.071(n), F.S.

<sup>26</sup> Section 119.105, F.S.

<sup>27</sup> Section 119.071(2)(j)1., F.S.

or an immediate family member of a victim listed in a police report for a crime that has taken place at a public or private K-12 or postsecondary institution.

### III. Effect of Proposed Changes:

This bill creates a public records exemption in s. 119.071(2), F.S., relating to agency investigations, for the address of a victim or an immediate family member of a victim of a crime of mass violence which has taken place on a public or private K-12 school or postsecondary institution school grounds. Specifically, the bill makes confidential and exempt from public disclosure the address of a victim or an immediate family member of a victim listed in a report of a law enforcement agency.

In its statement of public necessity, the bill provides as justification that without the exemption the victim or an immediate family member of a victim could be subject to further emotional trauma and threats to public safety. The statement further provides that without the exemption, a victim or an immediate family member of a victim may be less willing to cooperate with a law enforcement agency in a subsequent investigation.

The Legislature finds that the exemption is remedial in nature.

The bill provides for an Open Government Sunset Review and specifies that the bill will stand repealed on October 2, 2023, unless the Legislature reviews the exemption and saves it from repeal before that date.

The bill takes effect upon becoming a law, but applies retroactively<sup>28</sup> to information protected in the bill which is held by an agency before the effective date. The bill directs the Division of Law Revision and Information to replace the phrase “the effective date of this act” with the actual date that the bill becomes law.

### IV. Constitutional Issues:

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

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

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<sup>28</sup> The Supreme Court of Florida has determined that a public record exemption is not to be applied retroactively unless the Legislature clearly expresses intent that the exemption is to be applied retroactively, and that it is constitutionally permissible to do so. Access to public records is a substantive right. Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *Memorial Hospital-West Volusia, Inc. v. New-Journal Corporation*, 784 So. 2d 438, 441 (Fla. 2001).

**B. Public Records/Open Meetings Issues:****Voting Requirement**

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for newly created or expanded public records exemptions to pass. This bill creates a new public records exemption. Therefore, a two-thirds vote is required.

**Public Necessity Statement**

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that this exemption is needed to prevent a victim or an immediate family member of a victim from experiencing further emotional trauma and threats to public safety due to release of his or her address from the police report. The statement further provides that without the exemption, a victim or an immediate family member of a victim may be less willing to cooperate with a law enforcement agency in a subsequent investigation.

**Breadth of Exemption**

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates an exemption for the address of a victim or an immediate family member of a victim of a crime of mass violence that has taken place at a public or private K-12 school or postsecondary institution. The bill appears to be no broader than necessary to accomplish the public necessity for the public records exemption.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

An agency may incur an indeterminate, but de minimus fiscal impact from administering the exemption in this bill.

**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.)

None.

**B. Amendments:**

None.