

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: SPB 7056

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: Public Records/Active Threat Assessment and Management Records

DATE: February 14, 2020

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Hackett</u>	<u>McVaney</u>	_____	Pre-meeting

I. Summary:

SPB 7056 provides that exemptions from public inspection and copying active criminal intelligence information, active criminal investigative information, or other exempt information and records extend to exempt such information when shared with an agency or governmental entity in the furtherance of official duties and responsibilities under a multidisciplinary information-sharing agreement, or when shared with another criminal justice agency in furtherance of its official duties regardless of agreement.

The bill also exempts from public inspection and copying active threat assessment and active threat management records.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2025, unless reviewed and reenacted by the Legislature.

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

Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for final passage.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming a law.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

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.⁵ 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 except as provided in s. 119.071(2)(h) or (o), F.S.⁶ 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.⁷ An example of such a rule would be the discovery rules under the Florida Rules of Criminal Procedure.

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.071(2)(c)1., F.S. The definition of “active” is located in s. 119.011(3)(d), F.S.

⁶ Section 119.011(c), F.S.

⁷ Section 119.011(c)5., F.S.

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.

After active criminal intelligence investigative information have been provided to a defendant through discovery, that information becomes public under certain circumstances.⁸ 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.⁹ A court may temporarily seal pretrial discovery, even if some of the pretrial discovery information is already public.¹⁰ 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.¹¹

Criminal intelligence and investigative information are considered "active" when they are "directly related to pending prosecutions or appeals."¹² Therefore, criminal intelligence investigative information becomes public "when the conviction and sentence becomes final... after direct appeal" (emphasis omitted).¹³

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.¹⁴

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.¹⁵ This requirement, at least in principle if not in a strict legal sense, is rooted in the "confrontation clause" of the United States Constitution.¹⁶ The confrontation clause preserves a defendant's

⁸ *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).

⁹ *Post-Newsweek Stations*, 612 So. 2d at 551. *Florida Freedom Newspapers*, 520 So. 2d.

¹⁰ *Florida Freedom Newspapers*, 520 So. 2d at 36.

¹¹ Section 119.011(c)5.a. and b., F.S.

¹² 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.

¹³ *Allen v. Butterworth*, 756 So. 2d 52, 66 (FLA 2000).

¹⁴ 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.

¹⁵ 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).

¹⁶ The Sixth Amendment of 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

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.¹⁷ 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."¹⁸

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.¹⁹

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.²⁰ The Florida Supreme Court has interpreted the statutory definition of "public record" to include "material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."²¹

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.²² A violation of the Public Records Act may result in civil or criminal liability.²³

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.²⁴ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.²⁵

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.

¹⁷ *Id.*

¹⁸ 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).

¹⁹ Section 119.01(1), F.S. 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."

²⁰ 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."

²¹ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

²² Section 119.07(1)(a), F.S.

²³ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.²⁶ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.²⁷

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.²⁸ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.²⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act³⁰ (the Act) prescribes a legislative review process for newly created or substantially amended³¹ public records or open meetings exemptions, with specified exceptions.³² It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.³³

The Act 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.³⁴ 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;³⁵
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;³⁶ or

(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

²⁶ See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

²⁷ See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

²⁸ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

²⁹ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

³⁰ Section 119.15, F.S.

³¹ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

³² Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

³³ Section 119.15(3), F.S.

³⁴ Section 119.15(6)(b), F.S.

³⁵ Section 119.15(6)(b)1., F.S.

³⁶ Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.³⁷

The Act also requires specified questions to be considered during the review process.³⁸ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.³⁹ If the exemption is continued without substantive changes or if the exemption is continued and 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.⁴⁰

Criminal Intelligence and Investigative Information

Active criminal intelligence information and active criminal investigative information are exempt from public inspection and copying requirements, s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.⁴¹ Exempt active criminal investigative information may be shared with another criminal justice agency and retain its protected status.⁴²

“Criminal intelligence information” means information concerning “an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.”⁴³ Criminal intelligence information is considered “active” as long “as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities” or “is directly related to pending prosecutions or appeals.”⁴⁴

“Criminal investigative information” is defined as information relating to “an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal

³⁷ Section 119.15(6)(b)3., F.S.

³⁸ 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?

³⁹ See generally s. 119.15, F.S.

⁴⁰ Section 119.15(7), F.S.

⁴¹ Section 119.071(2)(c)1., F.S.

⁴² *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995). The City of Riviera Beach court held that exempt records of the West Palm Beach police department’s active criminal investigation concerning a shooting incident involving a police officer from Riviera Beach could be furnished to the Riviera Beach police department for use in a simultaneous administrative internal affairs investigation of the officer without losing their exempt status. *Accord Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998) (applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record).

⁴³ Section 119.011(3)(a), F.S.

⁴⁴ Section 119.011(3)(d), F.S.

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.”⁴⁵ Such information is considered “active” as long “as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future” or “is directly related to pending prosecutions or appeals.”⁴⁶

“Criminal justice agency” is defined to mean any law enforcement agency, court, prosecutor or any other agency charged by law with criminal law enforcement duties or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The term also includes the Department of Corrections.⁴⁷

III. Effect of Proposed Changes:

Section 1 amends s. 119.071(c)(2), F.S., to provide that exemptions from public inspection and copying for active criminal intelligence information, active criminal investigative information, or other exempt information and records extend to exempt such information when shared with an agency or governmental entity in the furtherance of official duties and responsibilities under a multidisciplinary information-sharing agreement, or when shared with another criminal justice agency in furtherance of its official duties regardless of agreement.

The bill further exempts from public inspection and copying active threat assessment and active threat management records. The threat assessment and threat management records shall be considered “active” as long as they relate to an ongoing good faith belief by the FDLE that a threat assessment or a threat management plan will lead to detection, reasonable anticipation, prevention, or monitoring of possible targeted violence when the assessment or records are in the possession of a criminal justice agency or its employees, a governmental agency, whether state or federal, or any other governmental entity pursuant to a multidisciplinary information-sharing agreement for a public safety purpose, including, but not limited to, a targeted violence threat assessment and management plan.

The bill defines the following terms:

- “Lead law enforcement agency” to mean the law enforcement agency designated as the lead agency in a multidisciplinary information-sharing agreement;
- “Multidisciplinary information-sharing agreement” to mean an agreement entered into between a law enforcement agency and another law enforcement agency, a criminal justice agency, or any other entity to share active criminal intelligence or active criminal investigative information for the purposes of furthering information sharing for law

⁴⁵ Section 119.011(3)(b), F.S. *See Rose v. D’Alessandro*, 380 So. 2d 419 (Fla. 1980) (complaints and affidavits received by a state attorney in the discharge of his investigatory duties constitute criminal intelligence or criminal investigative information).

⁴⁶ Section 119.011(3)(d), F.S.

⁴⁷ Section 119.011(4), F.S.

enforcement criminal intelligence purposes, criminal investigative purposes, threat assessments, or threat management plans;

- “Targeted violence” to mean a situation involving an identifiable person or group of persons who actively pursue physical injury or harm toward an identifiable target or prospective victim, including, but not limited to, a specific person, a group of persons, an entity, or a location;
- “Threat assessment” to mean the process of collecting and sharing active criminal intelligence information or active criminal investigative information in a multidisciplinary effort to contextualize and understand a targeted violence threat; and
- “Threat management” to mean the process of developing, implementing, and monitoring an individualized plan in a multidisciplinary effort to intervene, mitigate, or prevent a targeted violence threat.

The public records exemptions in the bill are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a statement of public necessity, which states:

The Legislature finds that it is a public necessity that records related to active threat assessments and active threat management plans be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The Legislature finds that it is a public necessity for law enforcement agencies and criminal justice agencies to be able to share active threat assessment and threat management records securely with vital multidisciplinary partners who have important roles in threat assessments and threat management plans and that the information retain its exempt status. The Legislature finds that the release of these records could hinder active criminal investigations and could cause harm to the person under the threat assessment and threat management plan and could potentially cause certain individuals to proceed with their intentions to cause targeted violence. The Legislature finds that the release of these records and the potential impact that the release may have on an individual under an active threat assessment or active threat management plan could cause harm to the residents in this state if such information were made public. The Legislature is gravely concerned and saddened by the horrific mass shootings perpetrated in this state. The Legislature is concerned about the increase in these targeted violence incidents and finds that it is important for law enforcement agencies, criminal justice agencies, and their multidisciplinary partners to use the valuable tool of threat assessments and threat management plans to proactively mitigate and prevent these threats and protect the people of this state.

Section 3 provides that the bill takes effect upon becoming a law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for active threat assessment and active threat management records, thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect active criminal intelligence information, active criminal investigative information, and other exempt information and records shared with an agency or governmental entity in the furtherance of official duties and responsibilities under a multidisciplinary information-sharing agreement, as well as active threat assessment records, and active threat management records. This bill exempts only active criminal intelligence information, active criminal investigative information, and other exempt information and records shared with an agency or governmental entity in the furtherance of official duties and responsibilities under a multidisciplinary information-sharing agreement from the public records requirements, as well as active threat assessment records and active threat management records. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill does not appear to have a fiscal impact on state or local governments. Costs incurred by an agency in responding to public records requests regarding these exemptions should be offset by authorized fees.⁴⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends the following section of the Florida Statutes: 119.071.

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.

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

⁴⁸ Section 119.07(2) and (4), F.S.