

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill decreases access to public records.

Maintain public security – The bill creates an additional protection from exploitation for victims of sex crimes.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.² If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,³ then a public necessity statement and a two-thirds vote for passage are not required.

Public Record Exemption under Review

Current law provides a public record exemption for any criminal intelligence information⁴ or criminal investigative information⁵ that is a photograph, videotape, or image of any part of the body of the victim of certain sexual offenses,⁶ regardless of whether it identifies the victim.⁷ Prior to this act, the law

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

⁴ Section 119.011(3)(a), F.S., defines "criminal intelligence information" to mean "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."

⁵ Section 119.011(3)(b), F. S., defines "criminal investigative information" to mean "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."

⁶ The exemption specifies sexual offenses prohibited under chapter 794, chapter 800, or chapter 827, F.S.

⁷ Section 119.071(2)(h)2., F.S.

provided a public record exemption for information revealing the identity of a victim of sexual battery, a lewd or lascivious offense, or child abuse.⁸ Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2008, unless reenacted by the Legislature.⁹

The possible catalyst for the Legislature's decision to expand the existing protection to such victims was the case of *Weeks v. Golden*.¹⁰ In 1997, James Weeks, an inmate in the Florida correctional system, made three public records requests for documents relating to his sexual battery prosecution. When his requests went unanswered, he filed a petition to compel the state attorney to provide him with the documents requested, which included "close-up shots of the victim's genital area." The First District Court of Appeal eventually determined that because these photographs did not identify the victim, the public was entitled to access these photos, stating "[i]f the legislature had intended to exempt all photographs of victims of sexual offenses, it could have easily said so" in statute.¹¹

Other Relevant Public Record Exemptions

Current law provides other public record exemptions that are relevant to the exemption under review.

All court records, including witness testimonies, revealing the photograph, name, or address of the victim of an alleged offense described in chapter 794 or chapter 800, F.S., or act of child abuse, aggravated child abuse, or sexual performance by a child as described in chapter 827, F.S., are confidential and exempt if the state or the victim demonstrates a need for confidentiality.¹² If the court declares that all court records or other information that reveal the identity of the victim are confidential and exempt, the defendant charged may apply for an order of disclosure for preparing a defense. The defendant, however, is prohibited from disclosing the victim's identity to anyone other than his or her defense team.¹³

In addition, information or records that have been made part of a court file and that may reveal the identity of a person who is a victim of a sexual offense is exempt from public record requirements as provided in s. 119.071(2)(h), F.S.¹⁴

2007 Interim Study

In 2007, the Division of Statutory Revision of the Office of Legislative Services certified for repeal the public record exemption for photographs, videotapes, or images of victims of certain sexual offenses. As such, Committee staff reviewed the exemption during the interim and it was determined that the exemption protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety.¹⁵

EFFECT OF BILL

The bill reenacts and expands the public record exemption to include a photograph, videotape, or

⁸ Section 119.071(2)(h)1., F.S.

⁹ Section 2., chapter 2003-157, L.O.F.

¹⁰ See Staff Analysis of CS/HB 453, Florida House of Representatives (March 27, 2003).

¹¹ *Weeks v. Golden*, 798 So.2d 848 (Fla. 1st DCA 2001).

¹² The state or victim must demonstrate to the court that the: identity of the victim is not already known in the community; victim has not voluntarily called public attention to the offense; identity of the victim has not otherwise become a reasonable subject of public concern; disclosure of the victim's identity would be offensive to a reasonable person; and disclosure of the victim's identity would: endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim; endanger the victim because of the likelihood of retaliation, harassment, or intimidation; cause severe emotional or mental harm to the victim; make the victim unwilling to testify as a witness; or be inappropriate for other good cause shown. Section 92.56(1), F.S.

¹³ Section 92.56(2), F.S.

¹⁴ Section 119.0714(1)(h), F.S.

¹⁵ See the Committee on State Affairs interim project report entitled "Open Government Sunset Reviews," January 2008, at pages 7 – 10 (on file with the Committee on State Affairs).

image of any part of the body of the victim of a sexual offense under chapter 796, F.S., such as sex trafficking, or the victim of a sexual offense under chapter 847, F.S., such as child pornography. As such, the repeal date is extended to October 2, 2013, and a public necessity statement is included.

The bill also authorizes release of the confidential and exempt criminal investigative information and criminal intelligence information by a law enforcement agency:

- In the furtherance of its duties and responsibilities.
- For print, publication, or broadcast if the law enforcement agency determines that release would assist in locating or identifying a person that the agency believes to be missing or endangered. The information provided should be limited to information needed to identify or locate the victim. It should not include the nature of the sexual offense committed against the missing or endangered person.

The bill amends s. 92.56, F.S., relating to court records, to provide that the confidential and exempt status of the criminal investigative information and the criminal intelligence information must be maintained in court records and in court proceedings. If a petition for access to such confidential and exempt information is filed with the trial court having jurisdiction over the alleged offense, the confidential and exempt status must be maintained by the court if the state or the victim demonstrates that the criteria currently provided in s. 92.56, F.S.,¹⁶ are met.

Further, the bill amends s. 92.56, F.S., to provide that a defendant charged with child abuse or any specified sexual offenses under that statute may apply to the trial court for an order of disclosure of information in court records held confidential and exempt pursuant to s. 119.0714(1)(h), F.S., or maintained as confidential and exempt pursuant to court order under that statute. Such identifying information concerning the victim may be released to the defendant or the defendant's attorney in order to prepare the defense. The confidential and exempt status of such information may not be construed to prevent the disclosure of the victim's identity to the defendant.

The bill also amends s. 794.03, F.S., which provides a criminal penalty for publishing or broadcasting information identifying the victim of a sexual battery. It creates an exception to the statute for confidential and exempt information disclosed as provided in s. 119.071(2)(h), F.S., or when the court determines that such information is no longer confidential and exempt pursuant to s. 92.56, F.S.

Finally, the bill reorganizes the exemption and makes conforming changes.

C. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to expand the public record exemption for photographs of victims of sex crimes.

Section 2 provides a public necessity statement.

Section 3 repeals s. 2 of chapter 2003-157, L.O.F., which provides for repeal of the exemption.

Section 4 amends s. 92.56, F.S., to make conforming changes.

¹⁶ The state or the victim must demonstrate that:

- The identity of the victim is not already known in the community;
- The victim has not voluntarily called public attention to the offense;
- The identity of the victim has not otherwise become a reasonable subject of public concern;
- The disclosure of the victim's identity would be offensive to a reasonable person; and
- The disclosure of the victim's identity would:
 - Endanger the victim because the assailant has not been apprehended and is not otherwise known to the victim;
 - Endanger the victim because of the likelihood of retaliation, harassment, or intimidation;
 - Cause severe emotional or mental harm to the victim;
 - Make the victim unwilling to testify as a witness; or
 - Be inappropriate for other good cause shown.

Section 5 amends s. 119.0714, F.S., to make conforming changes.

Section 6 amends s. 794.03, F.S., to make conforming changes.

Section 7 provides an effective date of October 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "FISCAL COMMENTS."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See "FISCAL COMMENTS."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on law enforcement agencies, because staff responsible for complying with public records requests could require training related to the expansion of the current public record exemption. In addition, law enforcement agencies could incur costs associated with redacting the confidential and exempt criminal investigative information and criminal intelligence information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the law enforcement agency.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a statement of public necessity (public necessity statement) for a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Not applicable.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.