

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 1021 Pub. Rec./Human Trafficking Victims

**SPONSOR(S):** Criminal Justice Subcommittee

**TIED BILLS:** HB 1017 **IDEN./SIM. BILLS:** SB 1426

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Thomas	Cunningham

### SUMMARY ANALYSIS

During the current 2014 Legislative Session, PCS/HB 1017, in part, proposes to expand the provisions relating to the expunction of certain criminal records for victims of human trafficking to include the expunction of any criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed:

- As a part of the human trafficking scheme of which he or she was a victim; or
- At the direction of an operator of a human trafficking scheme.

This bill, which is linked to the passage of HB 1017, amends s. 119.071(2)(h), F.S., to expand the types of criminal intelligence and criminal investigative information that are confidential and exempt from public records requirements to include identifying information of child victims of human trafficking for labor or services, as well as, all victims of human trafficking for commercial sexual purposes.

The bill also amends s. 943.0583, F.S., to make confidential and exempt any criminal intelligence and criminal investigative information related to victims of human trafficking resulting from the arrest or filing of charges for an offense committed or reported to have been committed by the victim as a part of the human trafficking scheme of which he or she was a victim, or at the direction of an operator of the scheme, whose criminal history record has been expunged.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

**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 record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Public Records Laws**

##### Florida Constitution

Article I, Section 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may exempt records from the requirements of Article I, Section 24 of the Florida Constitution, provided the exemption is passed by two-thirds vote of each chamber and:

- States with specificity the public necessity justifying the exemption (public necessity statement); and
- Is no broader than necessary to meet that public purpose.<sup>2</sup>

##### Florida Statutes

Florida Statutes also address the public policy regarding access to government records through a variety of statutes in ch. 119, F.S. Currently, s. 119.07, F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act<sup>3</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose *and* the "[l]egislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>4</sup> However, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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
- Protects trade or business secrets.<sup>5</sup>

The Open Government Sunset Review Act requires the automatic repeal of a public record exemption on October 2<sup>nd</sup> of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup> The Act also requires specified questions to be considered during the review process.<sup>7</sup>

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<sup>1</sup> Article I, Sec. 24(a), FLA. CONST.

<sup>2</sup> Article I, Sec. 24(c), FLA. CONST.

<sup>3</sup> Section 119.15, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> Section 119.15(6)(a), F.S., states that 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 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?

## Public Record Exemption for Expunged Criminal History Records

Any criminal history record of a minor or an adult that is ordered expunged must be physically destroyed or obliterated by any criminal justice agency having custody of such record, except that the Florida Department of Law Enforcement (FDLE) must retain criminal history records in all cases.

Current law provides that an expunged criminal history record that is retained by FDLE is confidential and exempt<sup>8</sup> from s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution, and is not available to any person or entity except upon order of the court with jurisdiction.<sup>9</sup> In addition, information relating to the existence of an expunged criminal history record is confidential and exempt from public record requirements, except that FDLE must disclose the existence of such record to certain entities as provided for in current law.<sup>10</sup>

## Public Record Exemption for Certain Agency Investigation Information

Currently, s. 119.071(2)(h), F.S., provides specified criminal intelligence information<sup>11</sup> or criminal investigative information<sup>12,13</sup> is confidential and exempt from public records requirements, including:

- Any information, including the photograph, name, address, or other fact, which reveals the identity of the victim of the crime of child abuse as defined by ch. 827, F.S. (child abuse); and
- Any information, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in ch. 794, F.S. (sexual battery), ch. 796, F.S. (prostitution); ch. 800, F.S. (lewdness and indecent exposure); ch. 827, F.S. (abuse of children), or ch. 847, F.S. (obscenity); and
- A photograph, videotape, or image of any part of the body of the victim of a sexual offense prohibited under ch. 794, F.S. (sexual battery), ch. 796, F.S. (prostitution), ch. 800, F.S. (lewdness and indecent exposure), s. 810.145, F.S. (video voyeurism), ch. 827, F.S. (abuse of children), or ch. 847, F.S. (obscenity), regardless of whether the photograph, videotape, or image identifies the victim.<sup>14</sup>

Such confidential and exempt criminal investigative and criminal intelligence information may be disclosed by a law enforcement agency in specified instances, including:

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<sup>8</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>9</sup> Section 943.0585(4), F.S.

<sup>10</sup> Section 943.0585(4)(c), F.S.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> Section 119.011(3)(c), F.S., provides “criminal intelligence information” and “criminal investigative information” shall not include:

- The time, date, location, and nature of a reported crime.
- The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.071(2)(h), F.S.
- The time, date, and location of the incident and of the arrest.
- The crime charged.
- Documents given or required by law or agency rule to be given to the person arrested, except as provided in s. 119.071(2)(h), F.S., and, except 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. 119.071(1), F.S., until released at trial if it is found that the release of such information would:
  - Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and
  - Impair the ability of a state attorney to locate or prosecute a codefendant.
- Informations and indictments except as provided in s. 905.26, F.S.

<sup>14</sup> Section 119.071(2)(h)3., F.S., requires the exemption to apply to confidential and exempt criminal intelligence and criminal investigative information held by a law enforcement agency before, on, or after the effective date of the exemption.

- In the furtherance of its official duties and responsibilities;
- For print, publication, or broadcast if the law enforcement agency determines that such release would assist in locating or identifying a person that such agency believes to be missing or endangered;<sup>15</sup> or
- To another governmental agency in the furtherance of its official duties and responsibilities.

This public records exemption is scheduled to repeal on October 2, 2016.

### Human Trafficking Victim Expunction

During the 2013 Legislative Session, CS/CS/HB 1325 and CS/HB 1327 passed, which in part, authorized a victim of human trafficking<sup>16</sup> to petition the court<sup>17</sup> for the expunction of any conviction for an offense, except an offense listed in s. 775.084(1)(b)1., F.S.,<sup>18</sup> committed while he or she was a victim of human trafficking. The only offenses that may be expunged are the convictions for offenses committed as a part of the human trafficking scheme of which he or she was a victim, or at the direction of an operator of the scheme.

A petition for expunction must include:

- A sworn statement<sup>19</sup> attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation<sup>20</sup> of the victim's status as a victim of human trafficking, if any exists.<sup>21</sup>

The completed petition must be served on the appropriate state attorney or statewide prosecutor and the arresting agency, who can each respond to the court regarding the petition.<sup>22</sup> The court's determination of the petition must be by a preponderance of the evidence.<sup>23</sup> A determination made without official documentation must be made by a showing of clear and convincing evidence.<sup>24</sup> If a court grants an expunction, s. 943.0583, F.S., requires:

- The clerk of the court to certify copies of the order to the appropriate state attorney or the statewide prosecutor, the arresting agency, and to any other agency that the records of the court reflect has received the criminal history record from the court;<sup>25</sup>
- The arresting agency to forward the order to any other agency listed in the court order to which the arresting agency disseminated the criminal history record information to which the order pertains;<sup>26</sup>
- FDLE to forward the order to expunge to the Federal Bureau of Investigation;<sup>27</sup> and

<sup>15</sup> Section 119.071(2)(h)2.c., F.S., provides the information disclosed should be limited to that needed to identify or locate the victim and not include the sexual nature of the offense committed against the person.

<sup>16</sup> Section 943.0583(1)(c), F.S., defines "victim of human trafficking" to mean a person subjected to coercion, as defined in s. 787.06, F.S., for the purpose of being used in human trafficking, a child under 18 years of age subjected to human trafficking, or an individual subjected to human trafficking as defined by federal law.

<sup>17</sup> Section 943.0583(4), F.S., requires a petition under this section to be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking, subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition or for other reasons consistent with the purpose of s. 943.0583, F.S.

<sup>18</sup> Arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault with a deadly weapon; murder; manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking. Section 775.084(1)(b)1., F.S.

<sup>19</sup> Providing false information on the sworn statement is punishable as a third degree felony.

<sup>20</sup> Section 943.0583(1)(b), F.S., defines "official documentation" to mean any documentation issued by a federal, state, or local agency tending to show a person's status as a victim of human trafficking.

<sup>21</sup> Section 943.0583(6), F.S.

<sup>22</sup> Section 943.0583(7), F.S. In judicial proceedings on the petition, the petitioner and their attorney may appear telephonically, via video conference, or other electronic means.

<sup>23</sup> Section 943.0583(3), F.S.

<sup>24</sup> Section 943.0583(5), F.S.

<sup>25</sup> Section 943.0583(7)(c), F.S.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

- Criminal justice agencies with custody of the expunged record, except FDLE, to physically destroy the record.<sup>28</sup>

Persons who have had their human trafficking criminal history records expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record and not face perjury charges or otherwise be liable for giving a false statement for failing to acknowledge an expunged criminal record unless they are a candidate for employment with a criminal justice agency or is a defendant in a criminal prosecution.<sup>29</sup> However, persons are required to acknowledge such arrests when applying for future sealing or expunctions under ss. 943.059, 943.0585, or 943.0583, F.S.<sup>30</sup> Expunged convictions are deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.<sup>31</sup>

Additionally, the 2013 legislation created a public records exemption for a criminal history record of a victim of human trafficking that is ordered expunged. Specifically, such record retained by FDLE is confidential and exempt from public record requirements and shall only be made available to criminal justice agencies for their respective criminal justice purposes. A criminal justice agency may retain a notation indicating compliance with an order to expunge. The exemption repeals on October 2, 2018, unless reviewed and saved from repeal by the Legislature.

### **Proposed Committee Substitute for House Bill 1017**

During the current 2014 Legislative Session, PCS/HB 1017, in part, proposes to expand the provisions relating to the expunction of certain criminal records for victims of human trafficking to include the expunction of any criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed as a part of the human trafficking scheme of which he or she was a victim, or at the direction of an operator of the scheme.

### **Effect of the Bill**

The bill, which is linked to the passage of House Bill 1017 or similar legislation, amends s. 119.071(2)(h), F.S., to expand the types of criminal intelligence and criminal investigative information that are confidential and exempt from public records requirements to include:

- Any information which reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services proscribed in s. 787.06(3)(a), F.S.;
- Any information which may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), (g), or (h), F.S.; and
- A photograph, videotape, or image of any part of the body of a victim of a crime of human trafficking involving commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), (g), or (h), F.S.

The bill also amends s. 943.0583, F.S., providing that the above-described criminal intelligence and criminal investigative information related to victims of human trafficking that is made confidential and exempt from public records requirements in s. 119.071(2)(h), F.S., is also made confidential and exempt from public records requirements under the section providing expunction for human trafficking victims.

The bill provides for repeal of the exemptions on October 2, 2019, unless both exemptions are reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.<sup>32</sup>

## **B. SECTION DIRECTORY:**

Section 1. Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

<sup>28</sup> Section 943.0583(8), F.S.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Section 943.0583(3), F.S.

<sup>32</sup> Article 1, Sec. 24(c), FLA. CONST.

Section 2. Amends s. 943.0583, F.S., relating to human trafficking victim expunction.

Section 3. Provides a public necessity statement.

Section 4. Provides an effective date to be the same as that of HB 1017 or similar legislation, if such legislation is passed during the same session and becomes law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state government expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 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 final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

##### 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. The bill creates a public record exemption; thus, it includes a public necessity statement.

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. The bill creates a public record exemption limited to expunged criminal records of victims of human trafficking. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**