

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB EEG 23-08 OGSR/Address of a Victim of an Incident of Mass Violence

**SPONSOR(S):** Ethics, Elections & Open Government Subcommittee

**TIED BILLS:**           **IDEN./SIM. BILLS:** SB 7012

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Ethics, Elections & Open Government Subcommittee	18 Y, 0 N	Skinner	Toliver

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2<sup>nd</sup> of the fifth year after enactment.

Current law provides public record exemptions for active criminal intelligence information and active criminal investigative information. Criminal intelligence information is 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 criminal activity. Additionally, information identifying certain victims is confidential and exempt when the victim is a victim of a human trafficking or child abuse offense under the age of 18 or when an individual is a victim of a sexual offense.

In 2018, the Legislature created a public record exemption for the address of a victim of an incident of mass violence, providing that a "victim" is a person killed or injured during an incident of mass violence, not including the perpetrator, and that a "incident of mass violence" occurs when four or more people, not including the perpetrator, are severely injured or killed by an intentional and indiscriminate act of violence of another.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2023, if the bill does not become law.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR Act)<sup>1</sup> 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 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

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

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> 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, then a public necessity statement and a two-thirds vote for passage are not required.

##### Public Record Exemptions for Victim Information

Current law provides public record exemptions for active<sup>5</sup> criminal intelligence information and active<sup>6</sup> criminal investigative information. Criminal intelligence information is information with respect to an identifiable person or group of persons that is collected by a criminal justice agency<sup>7</sup> in an effort to anticipate, prevent, or monitor criminal activity.<sup>8</sup> Criminal investigative information is 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

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Article I, s. 24(c), FLA. CONST.

<sup>5</sup> 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. *See* s. 119.011(3)(d), F.S.

<sup>6</sup> Criminal investigative 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. *See* s. 119.011(3)(d), F.S.

<sup>7</sup> "Criminal Justice Agency" means any law enforcement agency, court, or prosecutor; any other agency charged by law with criminal law enforcement duties; 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; or the Department of Corrections. Section 119.011(4), F.S.

<sup>8</sup> Section 119.011(3)(a), F.S.

surveillance.<sup>9</sup> The terms criminal intelligence information and criminal investigative information do not include the name, sex, age, and address of the victim of a crime, except in certain instances.<sup>10</sup>

Additionally, certain information contained in criminal intelligence information or criminal investigative information that identifies a victim is confidential and exempt from public record requirements.<sup>11</sup> Those instances when such victim identifying information are protected include:

- A victim under the age of 18 of a human trafficking or child abuse offense.
- A victim of a sexual offense.<sup>12</sup>

Such victim information may only be disclosed by a law enforcement agency (LEA):

- In the furtherance of its official duties and responsibilities.
- For print, publication, or broadcast if the LEA determines that release would assist in locating or identifying a person the LEA believes to be missing or endangered. The information provided must be limited to that needed to identify or locate the victim.
- To another governmental agency in the furtherance of its official duties and responsibilities.<sup>13</sup>

Current law also provides that documents received by any agency that regularly receives information from or concerning the victims of crime that reveal 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 a victim of a crime are exempt from public record requirements.<sup>14</sup> Any information that is not otherwise confidential or exempt from public record requirements that reveals certain information about victims of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence is exempt from public record requirements, but only upon written request<sup>15</sup> by the victim.<sup>16</sup>

### Marsy's Law

Marsy's Law is a constitutional amendment<sup>17</sup> approved by voters in 2018.<sup>18</sup> The provision, in part, grants victims the right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family.<sup>19</sup> There is a difference in application among law enforcement agencies<sup>20</sup> as to whether the exemption from disclosure applies automatically, or whether victims must affirmatively invoke the exemption.

### Public Record Exemption under Review

In 2018, the Legislature created a public record exemption for the address of a victim of an incident of mass violence, providing that a "victim" is a person killed or injured during an incident of mass violence, not including the perpetrator, and that an "incident of mass violence" occurs when four or more people, not including the perpetrator, are severely injured or killed by an intentional and indiscriminate act of

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<sup>9</sup> Section 119.011(3)(b), F.S.

<sup>10</sup> Section 119.011(3)(c)2., F.S. The address of a victim of an incident of mass violence is included under these terms by cross - reference to s. 119.071(2)(o), F.S.

<sup>11</sup> Section 119.071(2)(h)1., F.S.

<sup>12</sup> Sections 119.071(2)(h)1.a. and 119.071(2)(h)1.b., F.S.

<sup>13</sup> Section 119.071(2)(h)2., F.S.

<sup>14</sup> Section 119.071(2)(j)1., F.S.

<sup>15</sup> Such information is no longer exempt 5 years after the receipt of the written request. *See* s.119.071(2)(j)1., F.S.

<sup>16</sup> Section 119.071(2)(j)1., F.S.

<sup>17</sup> Article I, s. 16(b) – (e), FLA. CONST.

<sup>18</sup> 2018 General Election Official Results Constitutional Amendment, Florida Department of State Division of Elections, available at <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=> (last visited February 24, 2023).

<sup>19</sup> Article I, s. 16(b)(5), FLA. CONST.

<sup>20</sup> Open Government Sunset Review Questionnaire, Address of a Victim of an Incident of Mass Violence, responses on file with the Ethics, Elections & Open Government Subcommittee.

violence of another.<sup>21</sup> Such information is exempt<sup>22</sup> from public record requirements.<sup>23</sup> The 2018 legislation also amended the definition of “criminal intelligence information” and “criminal investigative information” to include the address of a victim of an incident of mass violence.<sup>24</sup>

The 2018 public necessity statement<sup>25</sup> for the exemption provides that:

After an incident of mass violence has occurred, victims of such an incident are in a vulnerable state as they assist law enforcement with the investigation of the incident and try to recover from the events that occurred. In some instances, the victim may have been killed or injured leaving their families to deal with the aftermath of the crime. The public availability of such victim’s address may be used to locate the victim or the victim’s family. The availability of such information has allowed people to take advantage of the victims or their families by subjecting the victims or their families to media intrusions at their homes and other unwelcome intrusions into their privacy. Therefore, it is necessary that the address of victims of incidents of mass violence be protected to ensure that persons affected by such incidents are not harassed, taken advantage of, or otherwise subjected to additional pain and suffering.<sup>26</sup>

Pursuant to the OGSR Act, the exemption will repeal on October 2, 2023, unless reenacted by the Legislature.<sup>27</sup>

During the 2022 interim, House and Senate staff sent questionnaires<sup>28</sup> to police departments and sheriffs’ offices throughout the state as part of its review under the OGSR Act. The majority of responses recommended the exemption be reenacted as it. No responses indicated being aware of any litigation concerning the exemption. The responses also highlighted a difference in how Marsy’s law is applied throughout Florida. While some agencies apply Marsy’s law automatically to victims, other agencies require the victim to affirmatively invoke it. House and Senate staff also met with staff from the Florida Department of Law Enforcement (FDLE). FDLE recommended that the exemption be reenacted as is.

### **Effect of the Bill**

The bill removes the scheduled repeal of the exemption, thereby maintaining the public record exemption for these records held by an agency.

### **B. SECTION DIRECTORY:**

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

Section 2 provides an effective date of October 1, 2023.

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<sup>21</sup> Chapter 2018-2, L.O.F., codified as s. 119.071(2)(o), F.S.

<sup>22</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 statute. *See* Attorney General Opinion 85-62 (August 1, 1985).

<sup>23</sup> *Id.*

<sup>24</sup> Chapter 2018-2, L.O.F., codified as s. 119.011(3)(c), F.S.

<sup>25</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption to “state with specificity the public necessity justifying the exemption.”

<sup>26</sup> Chapter 2018-2, s. 3, L.O.F.

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

<sup>28</sup> Open Government Sunset Review Questionnaire, Address of a Victim of an Incident of Mass Violence, responses on file with the Ethics, Elections & Open Government Subcommittee.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

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

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

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

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties and municipalities.

#### 2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The bill does not require rulemaking nor confer or alter an agency's rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.