

# SENATE STAFF ANALYSIS AND ECONOMIC 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: Judiciary Committee

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BILL: SB 726

SPONSOR: Judiciary Committee

SUBJECT: Open Government Sunset Review/Interference With Custody

DATE: February 8, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Maclure</u>	<u>JU</u>	<b>Favorable</b>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill narrows a public-records exemption for certain information submitted to a sheriff or state attorney by someone who takes a child and seeks to avoid prosecution for the offense of interference with custody. This bill also saves the public-records exemption from repeal under the Open Government Sunset Review Act.

This bill substantially amends section 787.03, Florida Statutes.

## II. Present Situation:

### Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a) of the State Constitution provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and

districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law<sup>1</sup> also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term “public records” to include:

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.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”<sup>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

Under Article I, s. 24(c) of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public-records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>4</sup>

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

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<sup>1</sup> Chapter 119, F.S.

<sup>2</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>3</sup> *See Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

<sup>4</sup> s. 119.15(3)(b), F.S.

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

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?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”<sup>5</sup>

### **Interference with Custody**

The Legislature passed a law in 1974 which provided for a third-degree felony for the offense of “interference with custody” as follows:

- (1) Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under or any incompetent person from the custody of the child or incompetent person’s parent, his or her guardian, a public agency having the lawful charge of the child or incompetent person, or any other lawful custodian commits the offense of interference with custody and commits a felony of the third degree....

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<sup>5</sup> s. 119.15(4)(b), F.S.

(2) In the absence of a court order determining rights to custody or visitation with any child 17 years of age or under or with any incompetent person, any parent of the child or incompetent person, whether natural or adoptive, stepparent, legal guardian, or relative of such child or incompetent person who has custody thereof and who takes, detains, conceals, or entices away that child or incompetent person within or without the state, with malicious intent to deprive another person of his or her right to custody of the child or incompetent person, commits a felony of the third degree....<sup>6</sup>

Defenses apply in the following situations:

- The defendant reasonably believes his or her action was necessary to protect the child or the incompetent person from danger to his or her welfare;
- The defendant was the victim of domestic violence or had reasonable cause to believe that acting was necessary to protect himself or herself from domestic violence; or
- The child or incompetent person was taken at his or her own instigation without enticement and without purpose to commit a crime with or against the child or incompetent person.<sup>7</sup>

The statute provides:

This section does not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence...or believes that his or her action was necessary to preserve the child or the incompetent person from danger to his or her welfare seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger.<sup>8</sup>

To avoid prosecution, the spouse who takes a child must file a report with the sheriff's office or the state attorney's office of the county where the child resided at the time the child was taken. The report must be filed within 10 days of taking the child and is required to contain the following:

- The name of the person taking the child;
- The current address and telephone number of the person and child; and
- The reasons the child was taken.<sup>9</sup>

The report filing requirement and the information contained in it was added by the Legislature in 2000.<sup>10</sup> During the 2000 session, the Legislature also enacted a public records exemption for the

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<sup>6</sup> s. 787.03, F.S.

<sup>7</sup> s. 787.03(4), F.S.

<sup>8</sup> s. 787.03(6)(a), F.S.

<sup>9</sup> s. 787.03(6)(b), F.S.

<sup>10</sup> Chapter 2000-231, L.O.F.

information provided to a sheriff or state attorney.<sup>11</sup> In its statement of public necessity for the public records exemption, the Legislature found that:

Exempting information provided to sheriffs and state attorneys under section 787.03(6)(b), Florida Statutes, by persons fleeing from domestic violence or the threat of it is a public necessity. The information is of a sensitive, personal nature and concerns individuals who are under threat of physical and psychological harm if their whereabouts is revealed.<sup>12</sup>

This public records exemption is subject to the Open Government Sunset Review Act of 1995, and is repealed on October 2, 2005, unless reviewed and reenacted by the Legislature before that date.<sup>13</sup> The Senate Committee on Judiciary in November 2004 released a report that evaluated this public records exemption for identification, contact, and justification information provided to sheriffs and state attorneys by a person taking a child or incompetent person in specific situations.<sup>14</sup> The report found that:

The public records exemption currently protects identifying and contact information and the underlying reasons for committing the act of interference with custody. It appears that these types of information are generally appropriate subjects for exemption, in that they are of a sensitive, personal nature concerning individuals.<sup>15</sup> Representative parties and organizations agree that the exemption is necessary to protect safety and prevent retaliation, and that this is an identifiable public purpose. However, it is uncertain that providing an exemption for underlying reasons accomplishes this objective. The statement of public necessity accompanying the public records exemption only references public harm by citing disclosure of the person who interfered with custody and their whereabouts. The underlying reasons for committing an interference with custody are not addressed in the statement of public necessity. Our broad public records law in Florida requires that an exemption be no broader than necessary. Therefore, it is recommended that the public records exemption be retained, but that language relating to underlying reasons be considered for removal from the public records exemption, in keeping with this requirement.

### III. Effect of Proposed Changes:

This bill revises the public-records exemption for certain information required to be provided to a sheriff or state attorney to avoid prosecution for the crime of interference with custody. The bill limits information included in the exemption to that of the name of the person taking the child and the current address and telephone number of the person and the child. The underlying

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<sup>11</sup> Chapter 2000-357, L.O.F.

<sup>12</sup> *Id.*

<sup>13</sup> s. 787.03(6)(c), F.S.

<sup>14</sup> The Florida Senate, Committee on Judiciary, Interim Project Report 2005-217, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody*, s. 787.03, F.S. (2004).

<sup>15</sup> See s. 119.15(2)(a), F.S.

reasons for taking the child are deleted from the public-records exemption under this proposed committee bill. This bill also saves the public-records exemption from repeal under the Open Government Sunset Review Act by deleting language that provides for the repeal of the public-records exemption on October 2, 2005.

#### **IV. Constitutional Issues:**

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

None.

##### **B. Public Records/Open Meetings Issues:**

Information consisting of the underlying reasons for taking the child, required to be contained in a report filed with the sheriff or state attorney in order to avoid prosecution for interference with custody, will now be subject to disclosure under the public records law.

Under Article I, s. 24(c) of the State Constitution, records may be exempted from open government requirements only where the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions for the public records and meetings requirements and provisions governing enforcement and must relate to one subject. This bill appears to relate to one subject and revising the exemption is consistent with this constitutional provision.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

Removing from the public records exemption information relating to justification for interfering with custody may aid police in investigations as the information will be publicly available, which may enhance the discovery of additional information.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

There are inconsistencies in the language used in the underlying interference with custody statute. The Legislature may wish to consider revising the language to make it consistent throughout.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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