

# 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: Governmental Operations Committee

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BILL: PCS/SB 816

INTRODUCER: Criminal Justice Committee

SUBJECT: Open Government Sunset Review/Criminal Intelligence

DATE: March 13, 2007

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

Section 119.071(2)(c)2., F.S., provides that a request of a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian's response to the request, and any information that would identify the public record that was requested by the law enforcement agency or provided by the custodian are exempt from public records requirements during the period in which the information constitutes active criminal intelligence or investigative information. The proposed committee substitute makes some organizational changes for clarity, including transferring existing retroactive language to a new sub-subparagraph; clarifies that any information that would identify whether a law enforcement agency has requested or received that public record is protected; and deletes the repeal of the exemption.

This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill amends section 119.071(2)(c), Florida Statutes.

## II. Present Situation:

The Open Government Sunset Review Act<sup>1</sup> provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President

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

of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption:

- (a) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (b) 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; or
- (c) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>2</sup>

The act also requires consideration of the following:

- (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?

In addition to these considerations, pursuant to amendments to the section made by ch. 2005-251, L.O.F., that became effective October 1, 2005, consideration must also be given to the following:

- (1) Is the record or meeting protected by another exemption?
- (2) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

**Pertinent Terms Defined** - There are certain terms, defined within s. 119.011, F.S., that appear in the exemption under review. An understanding of these definitions is helpful for purposes of determining whether the exemption meets the statutory criteria for retention.

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<sup>2</sup> Section 119.15(4)(b), F.S.

“Criminal intelligence information” means 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>3</sup>

“Criminal investigative information” means 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>4</sup>

Criminal intelligence information shall be 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.

Criminal investigative information shall be 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.

In addition, criminal intelligence and criminal investigative information shall be considered “active” while such information is directly related to pending prosecutions or appeals. The word “active” shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15, F.S., or other statute of limitation.<sup>5</sup>

A “law enforcement agency” falls under the general category of “criminal justice agency” in s. 119.011(4), F.S. Other criminal justice agencies include the court, prosecutor, and any other agency charged by law with criminal law enforcement duties.

The broader category of “criminal justice agency” also includes any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting 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 Department of Corrections is also listed as a “criminal justice agency.”<sup>6</sup>

**Exemption Under Review** - Section 119.071(2)(c)2., F.S.,<sup>7</sup> provides that:

[a] request of a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian’s response to the request, and any information that would identify the public record that was requested by the law enforcement agency or provided by the custodian are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, during the period in which the information constitutes criminal intelligence information or criminal investigative information that is active. This exemption is remedial in

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

<sup>4</sup> Section 119.011(3)(b), F.S.

<sup>5</sup> Section 119.011(3)(d), F.S.

<sup>6</sup> Section 119.011(4), F.S.

<sup>7</sup> Chapter 2001-364, Laws of Florida.

nature, and it is the intent of the Legislature that the exemption be applied to requests for information received before, on, or after the effective date of this subparagraph. The law enforcement agency shall give notice to the custodial agency when the criminal intelligence information or criminal investigative information is no longer active, so that the custodian's response to the request and information that would identify the public record requested are available to the public. This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

The public necessity statement declares that:

...criminal investigations are jeopardized if law enforcement requests to inspect or copy a public record, the record custodian's response to such a request, or other information that would identify the records requested are available to the public.<sup>8</sup>

The public necessity for the exemption is further explained as follows:

Persons who obtain such information may inadvertently or purposefully make the subjects of such investigations aware that an investigation is active. If it is discovered that criminal activity is being investigated, perpetrators of that activity may flee, destroy evidence, evade prosecution, or speed up the timetable for the performance of that illegal activity.<sup>9</sup>

*Co-existing Exemption* – Section 119.071(2)(c)1., F.S. provides that:

[a]ctive criminal intelligence information and active criminal investigative information are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Briefly restated, “active criminal intelligence information” must meet the following criteria:

- information gathered by a criminal justice agency
- related to an identifiable person or group
- in an effort to detect, prevent or monitor on-going or reasonably anticipated criminal activity.<sup>10</sup>

“Active criminal investigative information” consists of:

- information gathered by a criminal justice agency
- related to an identifiable person or group
- so long as the investigation is on-going with a reasonable expectation of securing an arrest or prosecution in the foreseeable future.<sup>11</sup>

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<sup>8</sup> Chapter 2001-364, Laws of Florida.

<sup>9</sup> Chapter 2001-364, Section 2, Laws of Florida.

<sup>10</sup> Sections 119.011(3)(a), 119.011(3)(d)1., F.S.

<sup>11</sup> Sections 119.011(3)(a), 119.011(3)(d)2., F.S.

It is clear that this active criminal intelligence and investigative information, when shared between criminal justice agencies, maintains the exemption from public disclosure via a request made under the Public Records Act.<sup>12</sup> But, what about situations where an agency that does *not* fall under the definition of a “criminal justice agency” shares *information requested from that agency by a criminal justice agency* for intelligence gathering or investigative purposes?

The exemption created in Chapter 2001-364, Laws of Florida, addressed that concern. The exemption protects *requests by law enforcement agencies* to non-criminal justice agencies, the non-criminal justice agency’s *response to the request*, and any *information that would identify what records were requested or provided*.<sup>13</sup>

Section 119.071(2)(c)2., F.S., satisfies the criteria for retention set forth in the Open Government Sunset Review Act.

As previously noted, the exemption protects *requests by law enforcement agencies* to non-criminal justice agencies, the non-criminal justice agency’s *response to the request*, and any *information that would identify what records were requested or provided*.<sup>14</sup>

The exemption serves an identifiable public purpose. Enhancing public safety, through criminal justice agencies’ detection and investigation of criminal activity, and making arrests where warranted, is the overall public purpose. How the exemption accomplishes the overall public purpose is expanded upon, in detail, in Section 2 of Chapter 2001-364, Laws of Florida, which states:

...criminal investigations are jeopardized if law enforcement requests to inspect or copy a public record, the record custodian’s response to such a request, or other information that would identify the records requested are available to the public. Persons who obtain such information may inadvertently or purposefully make the subjects of such investigations aware that an investigation is active. If it is discovered that criminal activity is being investigated, perpetrators of that activity may flee, destroy evidence, evade prosecution, or speed up the timetable for the performance of that illegal activity.<sup>15</sup>

Further, the exemption is no more broad than necessary. It is as narrowly drawn as possible without *compromising* its purpose, and it applies only so long as the exempt information constitutes *active* criminal-intelligence information or *active* criminal –investigative information.<sup>16</sup> In addition, the exemption requires the law enforcement agency seeking the agency records to *notify the agency records custodian* when the information is no longer considered to be *active*.<sup>17</sup> This notification facilitates the records custodian’s ability to respond appropriately to the citizen who may be seeking the public record. Unless the public record is

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<sup>12</sup> see *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla. 4th DCA 1994), wherein the court “conclude[d] that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status.”

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

<sup>14</sup> *id.*

<sup>15</sup> Section 2, Ch. 2001-364, L.O.F.

<sup>16</sup> Section 1, Ch. 2001-364, L.O.F.

<sup>17</sup> Section 1, Ch. 2001-364, L.O.F.

exempt from disclosure under some other exemption, the citizen may access it upon the termination of the information's "active" status.

Although there are general exemptions for *other types* of active criminal investigative and active criminal investigative information – the *specific information itself* -- the *law enforcement requests, agency responses, and identifying information* -- made exempt from disclosure under this particular statute, is not exempt under any other provision of law, therefore there is no potential for a merger of exemptions.

The exemption under review "*allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.*"<sup>18</sup> The exemption was created, and should be retained, because the efficient and uncompromised exchange of intelligence and information between criminal justice agencies and non-criminal justice agencies is critical to the successful detection, investigation, and prosecution of criminal activity. Without the exemption it is possible for the information or intelligence to be obtained prematurely, potentially thwarting investigations. Although the information itself would be exempt from disclosure when in the hands of a law enforcement agency, an "end-around" request for disclosure, made to the non-law enforcement agency, for "the request from the law enforcement agency and copies of the documents provided" could compromise public safety.

### III. Effect of Proposed Changes:

The proposed committee substitute amends the exemption in s. 119.071(2)(c)2., F.S., by making some organizational changes for clarity, including transferring existing retroactive language to a new sub-subparagraph; by clarifying that any information that would identify whether a law enforcement agency has requested or received a public record is protected; and by deleting the repeal of the exemption. The proposed committee substitute protects a request made by a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian's response to the request, and any information that would identify whether a law enforcement agency has requested or received that public record during the period in which the information constitutes active criminal intelligence information or active criminal investigative information.

### IV. Constitutional Issues:

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

None.

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

This bill has undergone the required Open Government Sunset Review pursuant to s. 119.15, F.S., a report of which was published by the Florida Senate in November 2006. *See, Open Government Sunset Review of Criminal Intelligence and Criminal*

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<sup>18</sup> Section 119.15(6)(b)2., F.S.

*Investigative Information, Section 119.071(2)(c)2., Report No. 2007-207, by the Committee on Criminal Justice.*

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:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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

None.

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