

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL 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: The Professional Staff of the Committee on Fiscal Policy

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**BILL:** CS/CS/HB 1491

**INTRODUCER:** Regulatory Reform & Economic Development Subcommittee; State Affairs Committee; Representatives Tramont and Overdorf

**SUBJECT:** Public Records/Investigations by the Department of Legal Affairs

**DATE:** February 13, 2024      **REVISED:** \_\_\_\_\_

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Yeatman</u>	<u>FP</u>	<u><b>Pre-meeting</b></u>
2.	_____	_____	_____	_____

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**I. Summary:**

CS/CS/HB 1491 exempts from public records copying and inspection requirements certain information received by the Department of Legal Affairs in connection with its enforcement obligations under HB 3<sup>1</sup> or similar legislation during the 2024 Regular Session.

Specifically, the bill exempts, from the public records requirements in s. 119.07(1), F.S. and Art. I, s. 24(a) of the State Constitution, all information held by the department, either pursuant to a notification of violation of the new statute created by HB 3,<sup>2</sup> or an investigation of a violation of the new statute, until such time as the investigation is completed or ceases to be active.

The bill provides that during an active investigation, certain information made confidential and exempt by the bill may be disclosed by the department. It also provides that upon completion of an investigation, or once an investigation ceases to be active, certain information received by the department must remain confidential and exempt from the public disclosure requirements, including the “proprietary information” of commercial entities as defined in the bill.

The bill provides a statement of public necessity as required by the State Constitution. Because the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill takes effect on the same date that HB 3 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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<sup>1</sup> The purpose of HB 3 is to prevent persons younger than 18 from accessing material harmful to minors on websites or applications.

<sup>2</sup> Section 501.1737, F.S.

## II. Present Situation:

### Access to Public Records – Generally

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>3</sup> The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>4</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.<sup>5</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>6</sup> Lastly, ch. 119, F.S., known as the Public Records Act, provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

The Public Records Act provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>7</sup>

Section 119.011(12), F.S., defines “public records” to include:

[a]ll 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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”<sup>8</sup>

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<sup>3</sup> FLA. CONST. art. I, s. 24(a).

<sup>4</sup> *Id.* See also, *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 48 So. 3d 755, 762-763 (Fla. 2010).

<sup>5</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2022-2024) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2022-2024).

<sup>6</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>7</sup> Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>9</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>10</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>11</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>12</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>13</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>14</sup>

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.<sup>15</sup> Records designated as "confidential and exempt" are not subject to inspection by the public and may only be released under the circumstances defined by statute.<sup>16</sup> Records designated as "exempt" may be released at the discretion of the records custodian under certain circumstances.<sup>17</sup>

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

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act<sup>18</sup> (the Act), prescribe a legislative review process for newly created or substantially amended<sup>19</sup> public records or open meetings exemptions, with specified exceptions.<sup>20</sup> The Act requires the repeal of

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<sup>9</sup> Section 119.07(1)(a), F.S.

<sup>10</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>11</sup> FLA. CONST. art. I, s. 24(c).

<sup>12</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1<sup>st</sup> DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>13</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>14</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>15</sup> *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5<sup>th</sup> DCA 2004).

<sup>16</sup> *Id.*

<sup>17</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5<sup>th</sup> DCA 1991).

<sup>18</sup> Section 119.15, F.S.

<sup>19</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>20</sup> Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

such exemption on October 2 of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>21</sup>

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>22</sup> An exemption serves an identifiable purpose if the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption and it meets one of the following purposes:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>23</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>24</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>25</sup>

The Act also requires specified questions to be considered during the review process.<sup>26</sup> In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are again required.<sup>27</sup> If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.<sup>28</sup>

### **Public Records Exemptions for Active Criminal Intelligence Information and Criminal Investigative Information**

Provisions in s. 119.071(2)(c), F.S., exempt from public disclosure active criminal intelligence information and criminal investigative information.

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<sup>21</sup> Section 119.15(3), F.S.

<sup>22</sup> Section 119.15(6)(b), F.S.

<sup>23</sup> Section 119.15(6)(b)1., F.S.

<sup>24</sup> Section 119.15(6)(b)2., F.S.

<sup>25</sup> Section 119.15(6)(b)3., F.S.

<sup>26</sup> Section 119.15(6)(a), F.S. 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 the 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?

<sup>27</sup> See generally s. 119.15, F.S.

<sup>28</sup> Section 119.15(7), 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>29</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.<sup>30</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>31</sup> Criminal intelligence 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.<sup>32</sup>

Additionally, criminal intelligence and criminal investigative information are considered “active” while such information is directly related to pending prosecutions or appeals,<sup>33</sup> but not if relating to cases which are barred from prosecution under an applicable statute of limitation.<sup>34</sup>

Six categories of criminal intelligence and criminal investigative information are expressly excluded from the exemption.<sup>35</sup> These categories are:<sup>36</sup>

- 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 otherwise provided.
- 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, 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 enumerated provision<sup>37</sup> 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<sup>38</sup> as provided.

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<sup>29</sup> Section 119.011(3)(a), F.S.

<sup>30</sup> Section 119.011(3)(d)1., F.S.

<sup>31</sup> Section 119.011(3)(b), F.S.

<sup>32</sup> Section 119.011(3)(d)2., F.S.

<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g., s. 775.15, F.S.*

<sup>35</sup> *City of Miami v. Metropolitan Dade County*, 745 F. Supp. 683, 686 (S.D. Fla. 1990).

<sup>36</sup> Section 119.011(3)(c), F.S.

<sup>37</sup> Section 119.07(1), F.S.

<sup>38</sup> Section 905.26, F.S.

Under the Public Records Act, public records of a governmental entity do not transform into protected criminal investigative information merely because they have been transferred to a law enforcement agency.<sup>39</sup>

### III. Effect of Proposed Changes:

**Section 1** of the bill amends s. 501.1737, F.S., as created by HB 3 to include a new subsection (8) exempting all information held by the Department of Legal Affairs pursuant to a notification of violation of s. 501.1737, F.S., or an investigation of a violation of s. 501.1737, F.S., from the public disclosure requirements<sup>40</sup> until such time as the investigation is completed or ceases to be active. This exemption must be construed in conformity with s. 119.071(2)(c), F.S.

The bill provides that during an active investigation, information made confidential and exempt pursuant to the bill may be disclosed by the department:

- In the furtherance of its official duties and responsibilities.
- For print, publication, or broadcast, if the department determines that such release would assist in notifying the public or locating or identifying a person that the department believes to be a victim of an improper use or disposal of customer records, except that information made confidential and exempt by the following paragraph may not be released pursuant to this paragraph.
- To another governmental entity in the furtherance of its official duties and responsibilities.

The bill also provides that upon completion of an investigation, or once an investigation ceases to be active, the following information held by the department must remain confidential and exempt from the public disclosure requirements:

- Information that is otherwise confidential or exempt from s. 119.07(1) or s. 24(a), Art. I of the State Constitution.
- Personal identifying information.
- A computer forensic report.
- Information that would otherwise reveal weaknesses in the data security of the commercial entity.
- Information that would disclose the proprietary information of the commercial entity.

For purposes of s. 501.1737(8), F.S., the term “proprietary information” means information that:

- Is owned or controlled by the commercial entity.
- Is intended to be private and is treated by the commercial entity as private because disclosure would harm the commercial entity or its business operations.
- Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public.
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department.
- Reveals competitive interests, the disclosure of which would impair the competitive advantage of the commercial entity who is the subject of the information.

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<sup>39</sup> *State Attorney's Office of Seventeenth Judicial Circuit v. Cable News Network, Inc.*, 251 So. 3d 205, 212 (Fla. 4<sup>th</sup> DCA 2018).

<sup>40</sup> See s. 119.07(1), F.S.; FLA. CONST. art I, s. 24(a).

The bill provides that s. 501.1737(8), F.S., is subject to the Open Government Sunset Review Act<sup>41</sup> and will stand repealed on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** of the bill provides the public necessity statement, as required by the State Constitution.

The statement provides that it is a public necessity that all information held by the department pursuant to a notification of a violation of s. 501.1737, F.S., or an investigation of a violation of that section, be made confidential and exempt from the public disclosure requirements for the following reasons:

- A notification of a violation of s. 501.1737, F.S., may result in an investigation of such violation. The premature release of such information could frustrate or thwart the investigation and impair the ability of the department to effectively and efficiently administer the statute. In addition, release of such information before completion of an active investigation could jeopardize the ongoing investigation.
- Release of information that is otherwise confidential or exempt from public records requirements once an investigation is completed or ceases to be active would undo the specific statutory exemption protecting that information; thus, clarifying that any protections currently afforded to that information are not removed.
- An investigation of a violation of s. 501.1737, F.S., is likely to result in the gathering of sensitive personal identifying information, which could include identification numbers, unique identifiers, professional or employment-related information, and personal financial information. Such information could be used for the purpose of identity theft. The release of such information could subject individuals to possible privacy violations, as it would reveal information of a sensitive personal nature.
- Notices received by the department and information generated during an investigation of a violation of s. 501.1737, F.S., are likely to contain proprietary information. Such information derives independent, economic value, actual or potential, from being generally unknown to, and not readily ascertainable by, other persons who might obtain economic value from its disclosure or use. Allowing public access to proprietary information through a public records request could destroy the value of the proprietary information and cause a financial loss to the commercial entity. Release of such information could give business competitors an unfair advantage.
- Information held by the department may contain a computer forensic report or information that could reveal weaknesses in the data security of a commercial entity. The release of this information could result in the identification of vulnerabilities in the cybersecurity system of the commercial entity and be used to harm the commercial entity and clients.
- The harm that may result from the release of information held by the department pursuant to a notification or investigation by the department of a violation of s. 501.1737, F.S., could impair the effective and efficient administration of the investigation and thus, outweighs the public benefit that may be derived from the disclosure of the information.

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<sup>41</sup> See s. 119.15, F.S.

**Section 3** of the bill provides that it takes effect on the same date that HB 3 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law. HB 3 takes effect July 1, 2024.

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

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

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

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

###### **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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for all information held by the Department of Legal Affairs pursuant to a notification of violation of the new law, s. 501.1737, F.S., or an investigation by the department of a violation of the new law, until such time as the investigation is completed or ceases to be active; thus, the bill requires a two-thirds vote to be enacted.

###### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

###### **Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the new law is to prevent persons younger than 18 from accessing material harmful to minors on websites or applications. This bill exempts only information held by the Department of Legal Affairs pursuant to a notification of violation of the new law, s. 501.1737, F.S., or an investigation by the department of a violation of the new law, until such time as related investigations are completed or cease to be active, from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

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

None.



**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

This bill may have a minimal negative fiscal impact on the Department of Legal Affairs personnel, because staff responsible for complying with public record requests may require training related to the new public record exemption. However, the costs should be absorbed as part of the day-to-day responsibilities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 501.1737 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.