

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1327 Pub. Rec./Investigative Genetic Genealogy Information and Materials

SPONSOR(S): Anderson

TIED BILLS: **IDEN./SIM. BILLS:** SB 1402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Leshko	Hall
2) Ethics, Elections & Open Government Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 119.071, F.S., currently exempts active criminal intelligence and investigative information from public records requirements. 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 and 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.

Investigative genetic genealogy (IGG) utilizes single nucleotide polymorphism (SNP)-based DNA matching combined with family tree research to produce investigative leads in criminal investigations and missing persons cases. IGG materials and information may be exempt as active criminal intelligence or investigative information but would become subject to public records requirements when no longer considered active.

HB 1327 amends s. 119.071, F.S., to make confidential and exempt from public records requirements IGG materials and information, including SNP and whole genome sequencing (WGS) DNA profiles. However, the bill does not provide protections for: the identity or personal identifying information of the donor of a biological sample attributable to a perpetrator, with the exception of the SNP or WGS DNA profile developed from the crime scene evidence; or a person identified through IGG who is a witness to or has personal knowledge related to the crime under investigation, with the exception of the person's SNP or WGS DNA profile.

Additionally, the bill provides an exception for law enforcement agencies to:

- Allow an agency to disclose IGG materials and information in furtherance of its official duties and responsibilities or to another government agency in furtherance of its official duties and responsibilities; and
- Require an agency to disclose IGG materials and information pursuant to a court order for furtherance of a criminal prosecution. If the materials and information are disclosed pursuant to a court order the recipient must maintain the confidentiality of the materials and information and may only publicly disclose them as necessary for the purposes of a criminal prosecution as determined by the court.

The bill provides for retroactive application of the newly-created public record exemption. The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature. The bill may have an insignificant negative fiscal impact on local and state governments.

The bill provides an effective date of July 1, 2023.

Article I, section 24(c) of the Florida 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:

Background

Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person the right to inspect or copy any public record of the legislative, executive, and judicial branches of government.¹ The Legislature, however, may provide by general law for exemption from public record requirements provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.²

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person the right to inspect and copy any state, county, or municipal record, unless the record is exempt.³ Furthermore, the Open Government Sunset Review Act⁴ provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and 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.⁵ An identifiable public purpose is served if the exemption meets 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.⁶

Pursuant to the Open Government Sunset Review Act, a new public record exemption or substantial amendment of an existing public record exemption is repealed on October 2nd of the fifth year following enactment, unless the Legislature reenacts the exemption.⁷

Active Criminal Intelligence and Investigative Information Exemption

Section 119.071, F.S., currently exempts active criminal intelligence information and active criminal investigative information from public records requirements.⁸ Additionally, a law enforcement agency's request to inspect or copy a public record that is in another agency's custody and 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 are exempt from public records requirements during the period the information constitutes active criminal intelligence information or active criminal investigative information.⁹

¹ Art. I, s. 24(a), Fla. Const.

² Art. I, s. 24(c), Fla. Const.

³ A public record exemption means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the State Constitution. S. 119.011(8), F.S.

⁴ S. 119.15, F.S.

⁵ S. 119.15(6)(b), F.S.

⁶ *Id.*

⁷ S. 119.15(3), F.S.

⁸ S. 119.071(2)(c), F.S.

⁹ S. 119.071(2)(c)2.a., F.S.

“Criminal intelligence information” means information with respect to an identifiable person or group of persons collected by a criminal justice agency¹⁰ in an effort to anticipate, prevent, or monitor possible criminal activity.¹¹

“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.¹² Criminal investigative information does not include documents given to the person arrested, except that a court in a criminal case may order that the information given to the person arrested be maintained in a confidential manner and be exempt from public records requirements 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.¹³

Criminal intelligence and investigative 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 crimes; or 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, respectively.¹⁴

FBI’s Combined DNA Index System (CODIS)

Deoxyribonucleic acid (DNA) is hereditary material existing in the cells of all living organisms. A DNA profile may be created by testing the DNA in a person’s cells. Similar to fingerprints, a person’s DNA profile is a unique identifier, except for identical twins, who have the exact same DNA profile. DNA evidence may be collected from any biological material, such as hair, teeth, bones, skin cells, blood, semen, saliva, urine, feces, and other bodily substances.¹⁵ “It is a fundamental principle of genetics that individuals who are closely related will share DNA from their common ancestors; and the more distant the relationship, the less DNA is shared.”¹⁶

Historically, the most common form of DNA analysis used to match samples and test for identification in forensic laboratories analyzes only certain parts of DNA, known as short tandem repeats (STRs).¹⁷ In the early 1990s, the Federal Bureau of Investigation (FBI) chose 13 STRs as the basis for a DNA identification profile, and the 13 STRs became known as the Combined DNA Index System (CODIS).¹⁸ CODIS is now the general term used to describe the FBI’s program of support for local, state, and national criminal justice DNA databases as well as the software used to run these databases.¹⁹

¹⁰ “Criminal justice agency” means: 1) any law enforcement agency, court, or prosecutor; 2) any other agency charged by law with criminal law enforcement duties; 3) 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; and 4) the Department of Corrections. S. 119.011(4), F.S.

¹¹ S. 119.011(3)(a), F.S.

¹² S. 119.011(3)(b), F.S.

¹³ S. 119.011(3)(c)5., F.S.

¹⁴ S. 119.011(3)(d), F.S.

¹⁵ FindLaw, *How DNA Evidence Works*, <https://criminal.findlaw.com/criminal-procedure/how-dna-evidence-works.html> (last visited Mar. 17, 2023).

¹⁶ Daniel Kling, Christopher Phillips, Debbie Kennett, and Andreas Tillmar, *Investigative genetic genealogy: Current methods, knowledge and practice*, Vol. 52, FSI Genetics, p. 1, (May 2021), <https://www.fsigenetics.com/action/showPdf?pii=S1872-4973%2821%2900013-2> (last visited Mar. 17, 2023).

¹⁷ Kelly Lowenberg, *Applying the Fourth Amendment when DNA Collected for One Purpose is Tested for Another*, 79 U. Cin. L. Rev. 1289, 1293 (2011), <https://law.stanford.edu/wp-content/uploads/2011/11/APPLYING-THE-FOURTH-AMENDMENT-WHEN-DNA-COLLECTED-FOR-ONE-PURPOSE.pdf> (last visited Mar. 17, 2023).

¹⁸ *Id.*

¹⁹ FBI, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Mar. 17, 2023).

When a suspect's identity is unknown, a participating crime laboratory may upload a forensic profile into CODIS to compare against additional DNA profiles uploaded by other federal, state, or local participating laboratories. If a match is identified, the laboratories involved exchange information to verify the match and establish coordination between the two agencies. This match can provide probable cause for law enforcement to obtain a warrant to collect a biological reference sample from an offender. A laboratory can then perform DNA analysis on the known biological sample and present the analysis as evidence in court.²⁰

Investigative Genetic Genealogy (IGG)

In contrast to traditional methods of DNA comparison using STR profiles in CODIS, investigative genetic genealogy (IGG), also known as forensic genetic genealogical DNA analysis and searching²¹ or forensic genetic genealogy,²² utilizes single nucleotide polymorphism (SNP)²³-based DNA matching combined with family tree research to produce investigative leads in criminal investigations and missing persons cases.²⁴ IGG differs from the traditional STR DNA matching utilized on CODIS in the technology employed, the nature of the databases utilized, the genetic markers involved, and the algorithms run. Information and data derived from IGG is not, and cannot be, uploaded, searched, or retained in any CODIS DNA Index.²⁵

IGG examines more than half a million SNP DNA markers which replace the STR DNA markers typically analyzed.²⁶ Based on the nature of SNP markers scientists are able to identify shared blocks of DNA between a forensic sample and the sample donor's potential relatives.²⁷ SNP markers have been identified as being more stable than STR markers and allow for increased accuracy in identifying potential familial connections.²⁸

The technology to conduct SNP testing became readily available to the general public in 2007 through direct-to-consumer testing companies (DTCs). Consumers purchase test kits and provide DNA samples to the companies who then generate genetic data using SNP microarrays^{29, 30} that produce 600,000 to 700,000 SNP markers. The companies can then analyze the SNP markers for purposes such as:

- Biogeographical ancestry information;
- Identifying potential genetic relatives; and
- Health, wellness, and trait conditions and predispositions.³¹

When the purpose is to search for potential genetic relatives, the SNP DNA profile is compared against genetic profiles of individuals who have voluntarily submitted their biological samples to these databases. A computer algorithm then evaluates potential familial relationships between the sample donor and service users.³²

²⁰ *Id.*

²¹ U.S. Department of Justice, *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, <https://www.justice.gov/olp/page/file/1204386/download> (last visited Mar. 17, 2023).

²² *Supra* note 16, at 2.

²³ Each SNP represents a variation in a single DNA building block. Medline Plus, National Library of Medicine, *What are single nucleotide polymorphisms (SNPs)?*, <https://medlineplus.gov/genetics/understanding/genomicresearch/snp/> (last visited Mar. 17, 2023).

²⁴ *Supra* note 16, at 2.

²⁵ *Supra* note 21, at 3-4.

²⁶ *Supra* note 21, at 3.

²⁷ *Supra* note 21, at 3.

²⁸ Alasdair Macdonald and Graham Holton, *What is STR and SNP DNA?, Who Do You Think You Are?*, <https://www.whodoyouthinkyouaremagazine.com/tutorials/dna/what-is-str-and-snp-dna/> (last visited Mar. 17, 2023).

²⁹ A microarray tool is used to determine whether DNA from a particular individual contains a mutation in genes. National Human Genome Research Institute, *DNA Microarray Technology Fact Sheet*, <https://www.genome.gov/about-genomics/fact-sheets/DNA-Microarray-Technology> (last visited Mar. 17, 2023).

³⁰ Whole genome sequencing (WGS) is another way to create SNP datasets that mirrors microarray technology and has been widely adopted to ensure sensitivity to challenging forensic sampling. *Supra* note 16.

³¹ Scientific Working Group DNA Analysis Methods, *Overview of Investigative Genetic Genealogy*, https://www.swgdam.org/files/ugd/4344b0_6cc9e7c82ccc4fc0b5d10217af64e31b.pdf (last visited Mar. 17, 2023).

³² *Supra* note 21, at 3.

There are four principal DTCs: Ancestry, FamilyTreeDNA (FTDNA), MyHeritage, and 23andMe. As of August 2020, the four principal DTCs have tested over 36 million people. Many DTC genetic testing providers maintain their customers' SNP data in a database. However, the DTCs permit customers to retrieve their data to personally maintain, control, and share their SNP file. Individuals can share their SNP file with researchers and third-party services, such as GEDmatch, that offer to interpret their SNP data.³³

In addition to the four principal DTCs there are also two frequently-utilized third-party services: GEDmatch and DNASolves. GEDmatch does not provide genetic testing services but instead provides a central location for users to upload and share their SNP file. GEDmatch allows users to search for matches with people who have tested on different platforms at different testing companies and have subsequently shared their SNP file with GEDmatch.³⁴ GEDmatch is also able to accept raw data from both microarrays and WGS and can be used for law enforcement matching.³⁵ Similarly, DNASolves does not provide genetic testing services, but does accept user-uploaded SNP data from the four principal DTCs.³⁶

Law enforcement agencies have begun opting to utilize IGG over more traditional searches on CODIS because the profiles uploaded on CODIS use far fewer STR genetic markers than the hundreds of thousands of SNP markers available on genetic genealogy companies' databases.

In response to the increase in the utilization of IGG, the U.S. Department of Justice (DOJ) issued an Interim Policy on IGG. The Policy provides that law enforcement agencies may initiate the IGG process when a case involves an unsolved violent crime or unidentified human remains. The Policy provides guidelines for the IGG process including:

- Before the IGG process may be initiated an agency must have developed a STR DNA profile from a collected crime scene sample and uploaded the sample into CODIS.
- The agency must pursue all reasonable and viable investigative leads, including through a CODIS search.³⁷
- If a CODIS search fails to produce a probative and confirmed DNA match, the agency may utilize IGG.
- If the case is properly postured to use IGG, the agency must develop, generally through a third-party vendor, a SNP DNA profile from the collected sample and then upload the DNA profile to DTCs and other third-party genetic genealogy companies (collectively referred to as "GG" companies) to identify potential genetic relatives in the database.
- The agency must identify themselves as law enforcement to GG companies and enter and search SNP DNA profiles only in those GG company databases that provide explicit notice to their service users and the public that law enforcement may use their service sites to investigate crimes or to identify unidentified human remains.
- If the search results in one or more genetic associations, the GG company provides law enforcement with a list of genetically associated³⁸ service user names along with an estimated relationship.
- The agency may not arrest a suspect based solely on a genetic association generated by a GG company.
- The agency must treat this information as an investigate lead only and must utilize traditional genealogy research and other investigative work to determine the true nature of the genetic

³³ *Supra* note 31, at 2.

³⁴ *Id.*

³⁵ *Supra* note 16, at 13.

³⁶ *Supra* note 16, at 15.

³⁷ "Reasonable investigative leads" are credible, case-specific facts, information, or circumstances that would lead a reasonably cautious investigator to believe that their pursuit would have a fair probability of identifying a suspect. *Supra* note 21, at 5.

³⁸ A genetic association means that the donor of the sample *may* be related to the service user. *Supra* note 21, at 4.

association, including creating a STR DNA profile of the new suspect and comparing it to the forensic profile previously uploaded to CODIS.

- If a suspect is arrested and charged with a criminal offense the agency must direct the GG company to remove from its databases and return the SNP DNA profile and all associated information to the agency.
- Biological samples and SNP DNA profiles may not be used to determine the donor's genetic predisposition for disease or any other medical condition or psychological trait.³⁹

DTCs and Third-Party Companies and Law Enforcement Access

Of the four principal commercial companies only FTDNA allows law enforcement matching within the opted in section of its database. Law enforcement agencies that want to use the FTDNA database are required to register all forensic samples and genetic files prior to uploading. FTDNA may grant permission to use the database only after the required documentation is submitted, reviewed, and approved. Even if permission is granted, access is limited for the purposes of identifying remains of deceased individuals and identifying perpetrators of homicide, sexual assault, or abduction.⁴⁰ FTDNA allows users to opt out of law enforcement searches.⁴¹

GEDmatch, a citizen science website founded in 2010, proved crucial to the initial development of IGG. GEDmatch allows DNA profiles to be uploaded from a wide variety of sources, including law enforcement agencies. GEDmatch launched a dedicated law enforcement portal in December 2020. GEDmatch allows samples of unidentified human remains to be compared against the entire database, while profiles uploaded to identify the perpetrator of a violent crime⁴² may only be matched against the opt in portion of the database. GEDmatch users are automatically opted out of law enforcement searches but may choose to opt in.⁴³

DNASolves was setup in December 2019 and is intended to be a dedicated SNP database for law enforcement use. Users on DNASolves contribute data solely to solve crime, there is no public-facing search and users cannot be matched with relatives. Users may voluntarily submit their name, date of birth, and their parents' names to assist investigators.⁴⁴

Although, IGG materials and information may be exempt as active criminal intelligence or investigative information, the materials and information would become subject to public records requirements when no longer considered active.

Effect of Proposed Changes

HB 1327 amends s. 119.071, F.S., to make confidential and exempt from public records requirements investigative genetic genealogy materials and information, including SNP and WGS profiles.

The bill defines "investigative genetic genealogy materials" as the information, records, and genetic profiles created or collected by or on behalf of a law enforcement agency conducting investigative genetic genealogy research, and includes names and personal identifying information or identifiers of persons determined through the use of genealogy databases, traditional genealogy methods, or other investigative means. The term does not include:

- The identity or personal identifying information of the donor of a biological sample attributable to a perpetrator, with the exception of the SNP or WGS DNA profile developed from the crime scene evidence; or

³⁹ *Supra* notes 21 and 31.

⁴⁰ *Supra* note 16, at 12.

⁴¹ *Supra* note 31, at 3.

⁴² GEDmatch defines "violent crime" as murder, non-negligent manslaughter, aggravated rape, robbery, and aggravated assault. *Supra* note 31, at 3.

⁴³ *Supra* note 31, at 4.

⁴⁴ *Supra* note 16, at 15.

- A person identified through IGG who is a witness to or has personal knowledge related to the crime under investigation, with the exception of the person's SNP or WGS DNA profile.

The bill provides an exception for law enforcement agencies, to:

- Allow an agency to disclose materials and information in furtherance of its official duties and responsibilities or to another governmental agencies in furtherance of its official duties and responsibilities; and
- Require an agency to disclose materials and information pursuant to a court order for furtherance of a criminal prosecution. If the materials and information are disclosed pursuant to a court order the recipient must maintain the confidentiality of the materials and information and may only publicly disclose them as necessary for the purposes of a criminal prosecution as determined by the court.

The bill provides for retroactive application of the newly-created public record exemption to all investigative genetic genealogy materials and information, including SNP and WGS profiles, held by an agency before, on, or after July 1, 2023.

The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature.

The bill also provides the constitutionally required public necessity statement.⁴⁵

The bill defines additional terms, including:

- "Genetic genealogy" which means the use of DNA testing in combination with traditional genealogical methods to infer relationships between person and determine ancestry.
- "Investigative genetic genealogy" which means the application of genetic genealogy and law enforcement investigative techniques to develop investigative leads in unsolved violent crimes and provide investigative leads as to the identify of unidentified human remains and living unidentified missing persons. An SNP or WGS DNA profile is developed from an unknown DNA profile from a crime scene or unidentified human remains and then uploaded into a web-based genealogy database, which is used to detect possible genetic relationships with distant relatives.

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 a statement of public necessity.

Section 3: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

⁴⁵ Art. I, s. 24(c), Fla. Const., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have an insignificant negative fiscal impact on entities holding IGG materials and information, as staff responsible for complying with public record requests may require training related to the new public record exemption. However, any additional costs will likely be absorbed within existing resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Vote Requirement

Article I, section 24(c) of the Florida 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, section 24(c) of the Florida 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. The public necessity statement states that the Legislature finds, in part, that failure to properly protect and limit the disclosure of IGG materials and information will hinder the ability of law enforcement to use IGG to solve violent crimes and provide closure to the family members of victims.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded 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 for IGG materials and information, which does not appear to be broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES