

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 109 Pub. Rec./Participants in Treatment-Based Drug Court Programs

SPONSOR(S): Judiciary; Government Operations Subcommittee; Gibbons

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	Cox	Cunningham
2) Government Operations Subcommittee	10 Y, 0 N, As CS	Williamson	Williamson
3) Judiciary Committee	15 Y, 0 N, As CS	Cox	Havlicak

SUMMARY ANALYSIS

Rule 2.420 of the Florida Rules of Judicial Administration states the public must have access to records of the judicial branch. However, Rule 2.420 establishes 20 categories of court record information which the clerk of the court must automatically designate and maintain as confidential (Type I information) that the public may not access. Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing. Drug court records contained in court files are not currently listed as Type I information. In order to make these records confidential, a motion must be filed and the trial court must hold a hearing.

In 2011, it was suggested that Rule 2.420 be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports (which would include drug court records) as Type I information. However, the Florida Supreme Court held that "the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list."

The bill creates a public record exemption for information relating to a participant or a person considered for participation in a treatment-based drug court program. The exemption applies to such information contained in the following records:

- Records created or compiled during screenings for participation in a treatment-based drug court program;
- Records created or compiled during substance abuse screenings;
- Behavioral health evaluations; and
- Subsequent treatment status reports.

The bill authorizes release of the confidential and exempt information in certain instances. It also provides that the disclosure provisions do not apply to records of a service provider when such records pertain to the identity, diagnosis, and prognosis of or provision of service to an individual.

The bill provides for retroactive application of the public record exemption. The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill eliminates the need to file motions and conduct hearings to make drug court records confidential. The Office of the State Courts Administrator reports that the bill will result in a reduction in judicial and court system workload, but that the precise impact cannot be accurately determined.

Article I, Section 24(c) of the State 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, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act² 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:

- 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.
- Protects trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

Public Access to Judicial Records

Rule 2.420 of the Florida Rules of Judicial Administration (Rule) states the public must have access to records of the judicial branch.^{3,4} However, the Rule currently identifies 20 categories of court record information which the clerk of the court must automatically designate and maintain as confidential (Type I information).⁵ Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing.⁶

In 2011, it was suggested that the Rule be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports (which would include drug court records) as Type I information.

¹ Section 24(c), Art. I of the State Constitution.

² See s. 119.15, F.S.

³ Fla. R. Jud. Admin. 2.420(b)(1) defines "records of the judicial branch" as all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

- "Court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and
- "Administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

⁴ Fla. R. Jud. Admin 2.420(b)(2) defines "judicial branch" as the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all entities established by or operating under the authority of the supreme court or the chief justice.

⁵ *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011); Fla. R. Jud Admin 2.420(d)(3).

⁶ *Id.*

However, the Florida Supreme Court held that because such information was not expressly exempt from public access by the laws in effect on July 1, 1993, or court rules in effect on September 1992, such information was not appropriate for inclusion as Type I information.⁷ The opinion further stated “the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list.”⁸

Records from Treatment-Based Drug Courts

Section 397.334, F.S., establishes pretrial and postadjudicatory treatment-based drug court programs. These programs are designed to divert drug addicted offenders from the criminal justice system and provide supervised community treatment services in lieu of incarceration.⁹ Participants in drug court programs receive substance abuse treatment, screenings, and continual monitoring and evaluations.¹⁰ Records of the screenings and evaluations can be reviewed by court officials as part of the process of determining whether the individual is complying with the drug court program.¹¹

Since drug court records contained in court files are not currently listed as Type I information, a motion must be filed and the trial court must hold a hearing in order to make these records confidential.¹²

Effect of the Bill

The bill amends s. 397.334, F.S., to make information relating to a participant or a person considered for participation in a treatment-based drug court program confidential and exempt¹³ from public records requirements. The exemption applies to such information contained in the following records:

- Records created or compiled during screenings for participation in a treatment-based drug court program;
- Records created or compiled during substance abuse screenings;
- Behavioral health evaluations; and
- Subsequent treatment status reports.

The bill provides that the confidential and exempt information may be disclosed:

- Pursuant to the written request of the participant or the person considered for participation, or his or her legal representative.
- To another governmental entity in the furtherance of its responsibilities associated with the screening of a person considered for participation in a treatment-based drug court program or the provision of treatment to a person in a treatment-based drug court program.

Disclosure provisions do not apply to records of a service provider that pertain to the identity, diagnosis, and prognosis of or provision of service to an individual. Release of those records is governed by s. 397.501(7), F.S.¹⁴

⁷ *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

⁸ *Id.*

⁹ Section 397.305, F.S.

¹⁰ Section 397.334(4), F.S.

¹¹ Section 397.334(5), F.S.

¹² Office of the State Courts Administrator, Analysis of HB 109 (on file with the Criminal Justice Subcommittee). *See* Fla. R. Jud. Admin. 2.420.

¹³ 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 the statutory exemption. *See* 85-62 Fla. Op. Att’y Gen. (1985).

¹⁴ Section 397.501(7), F.S., provides that records of service providers that pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential in accordance with chapter 397, F.S., and with applicable federal confidentiality regulations, and are exempt from public record requirements. Such records may not be disclosed without the written consent of the individual to whom they pertain except in certain instances as provided in the subsection.

The bill provides for retroactive application¹⁵ of the public record exemption. It also provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. The bill provides a statement of public necessity as required by the Florida Constitution.

B. SECTION DIRECTORY:

Section 1. Amends s. 397.334, F.S., relating to treatment-based drug court programs.

Section 2. Provides a public necessity statement.

Section 3. The bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill eliminates the need to file motions and conduct hearings to make drug court records confidential. The Office of the State Courts Administrator (OSCA) determined the bill will result in a reduction in judicial and court system workload.¹⁶ However, the precise impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the reduction in workload.¹⁷

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

¹⁵ The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).

¹⁶ Office of the State Courts Administrator, Analysis of HB 109 (2014) (on file with the Criminal Justice Subcommittee).

¹⁷ *Id.*

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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 newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created 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 information identifying a participant or a person considered for participation in a treatment-based drug court program contained in certain records. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

OSCA reports that this bill will result in the need for changes to Rule 2.420(d)(1)(B), of the Florida Rules of Judicial Administration to add drug court records contained in court files as automatic Type I information.¹⁸

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 25, 2014, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with committee substitute. The amendment clarified the public record exemption, authorized release of the confidential and exempt information in certain instances, provided that the disclosure requirements do not apply to records of a service provider, and provided for retroactive application of the public record exemption.

On April 4, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified when the confidential information may be released to another governmental entity.

This analysis is drafted to the committee substitute as approved by the Judiciary Committee.

¹⁸ *Id.*