

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.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 1278

INTRODUCER: Judiciary Committee and Senator Ring

SUBJECT: Public Records/Petitions to Determine Incapacity

DATE: January 29, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1278 creates new exemptions from the public records inspection and access requirements of Art. 1, s. 24(a) of the State Constitution and s. 119.07(1), F.S. This bill makes confidential and exempt certain petitions, orders, and personal identifying information generated during Baker Act proceedings. The information may be disclosed upon request to certain enumerated persons involved in the proceedings or when directed by the court.

The exemptions will be repealed on October 2, 2021, unless reviewed and reenacted by the Legislature before that date. The bill also provides a statement of public necessity as required by the State Constitution.

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

II. Present Situation:

Public Records Law

The Florida Constitution

Under the State Constitution, the public is guaranteed the right of access to government records and meetings. The public may 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, unless the record is exempted or specifically made confidential.¹ This right of access to records and meetings specifically includes the legislative, executive, and judicial branches of government, their agencies and departments, local governmental entities, and any person acting on behalf of the government.²

The Florida Statutes

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., which is known as the Public Records Act, provides that the public may access legislative and executive branch records.³ According to the Public Records Act, a public record includes most any document, recording, or other material, regardless of its physical form or characteristics or how it is transmitted.⁴ Anyone who violates the Public Records Act may be punished by civil or criminal penalties or suspension and removal or impeachment from office.⁵

The Legislature may create an exemption to public records or open meetings requirements.⁶ An exemption must specifically state the public necessity justifying the exemption and must be tailored narrowly to accomplish the stated purpose of the law.⁷ Additionally, the exemption must pass by two-thirds vote of the House and Senate.⁸ An exemption that does not meet these criteria may be held unconstitutional.⁹

When the Legislature creates a public records exemption, it may classify the record as “confidential and exempt” or “exempt.” When designated as “confidential and exempt,” the record may be released by the records custodian only under the limited circumstances defined by the Legislature. When a record is designated as “exempt,” it may be released at the discretion of the records custodian.

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature’s records are public pursuant to s. 11.0431, F.S.

⁴ Section 119.011(12), F.S., defines “public record” to mean “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.” Section 119.011(2), F.S., defines “agency” to mean “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.”

⁵ Section 119.10, F.S.

⁶ FLA. CONST., art. I, s. 24(c).

⁷ *Id.*

⁸ *Id.*

⁹ *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (1999). In this case the Florida Supreme Court determined that a public meeting exemption was unconstitutional because the statement of public necessity did not define essential terms and the exemption was written too broadly. The Court also decided that it could not move into the legislature’s realm to narrow the exemption to save the statute.

Open Government Sunset Review Act

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.¹¹

The Sunset Review Act provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.¹² An exemption serves an identifiable purpose if it meets one of the stated requirements below *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. The exemption must:

- Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption;¹³
- Protect sensitive personal information that would be defamatory or damaging to someone's reputation or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁴ or
- Protect confidential information of entities including trade or business secrets.¹⁵

The act also requires specified questions to be considered during the review process.¹⁶ In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁷ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.¹⁸

¹⁰ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

¹³ Section 119.15(6)(b)1., F.S.

¹⁴ Section 119.15(6)(b)2., F.S.

¹⁵ Section 119.15(6)(b)3., F.S.

¹⁶ 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?

¹⁷ FLA. CONST., art. I, s. 24(c).

¹⁸ Section 119.15(7), F.S.

The Florida Mental Health Act, also known as The Baker Act

The Legislature adopted the Florida Mental Health Act, also known as The Baker Act, in 1971.¹⁹ It is designed to help people receive treatment who are suffering with mental, emotional, and behavioral disorders. Baker Act proceedings provide people with emergency services, sometimes through temporary detention, to obtain a mental health evaluation and treatment. The treatment may be voluntary or involuntary. The Baker Act requires that programs offer comprehensive services to people who need intensive short-term treatment and continued treatment to aid in their recovery. The Baker Act also provides protections and rights for people examined or treated for mental illness. Legal procedures are established for mental health examination and treatment, including voluntary admission, involuntary admission, involuntary inpatient treatment, and involuntary outpatient treatment.

Confidentiality of Records under the Baker Act

The concern has been expressed that while “clinical records”²⁰ under the Baker Act are designated and maintained as confidential by the clerk of the court, it is not clear whether other Baker Act records are open to the public for review.²¹ There appears to be a difference of opinion among various clerks of court as to what is and what is not exempt from disclosure. If the petitions, orders, and identifying information in this bill were all classified as confidential and exempt, then there would be uniformity among the clerks of the court in administering these provisions statewide.

III. Effect of Proposed Changes:

Newly Created Public Records Exemptions in the Baker Act

CS/SB 1278 provides public records exemptions in four specific sections of the Baker Act to shield the sensitive information from public view.

Section 1 – Involuntary Examination and Ex Parte Order

In s. 394.463(2), F.S., a petition for an involuntary examination and the court’s ex parte order stating that the person appears to meet the criteria for involuntary examination are made confidential and exempt under s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. A petition that is made confidential and exempt under this provision must be disclosed, upon request, by the clerk of the court to a judge in the circuit, a respondent, a guardian, health care surrogate or proxy, an attorney for the respondent, and to any other person as directed by an order of the court. The bill does not provide that the order may be released to any party or agency. This is problematic because the statute currently contemplates the order being provided

¹⁹ Chapter 71-131, s. 1, Laws of Fla. The Baker Act is contained in Part I of chapter 394, Florida Statutes.

²⁰ Section 394.4615, F.S., states that “[a] clinical record is confidential and exempt from the provisions of s. 119.07(1).” The Judicial Administration Rules also provide for the confidentiality of clinical records under the Baker Act. Fla. R. Jud. Admin. 2.420(d)(1)(B)(viii).

²¹ Section 394.455(3), F.S. Clinical records are defined as being all parts of the record required to be maintained, including medical records, progress notes, charts, admission and discharge data, and other information recorded by the facility that pertains to the patient’s hospitalization or treatment. In lay terms, this is often characterized as records requiring a medical signature.

to the receiving facility and Agency for Health Care Administration (lines 30-33, 57-59, and 74-77).

Section 2 –Petition for Involuntary Outpatient Placement

In s. 394.4655(3)(d), F.S., a petition and order entered by the court for involuntary outpatient placement are made confidential and exempt from the public records provisions in the statutes and the State Constitution. A petition that is made confidential and exempt shall be disclosed by the clerk of the court, upon request, to a judge in the circuit, the respondent, a guardian, health care surrogate or proxy, an attorney for the respondent, and to any other person as directed in a court order. Additionally, the clerk is prohibited from posting any personal identifying information on the court docket or in publicly accessible files. The bill does not provide that court orders may be released to any party.

Section 3 –Petition for Involuntary Inpatient Placement

Section 394.467(3), F.S., is amended to provide that a petition and any order entered by the court for involuntary inpatient placement is confidential and exempt under the statutes and State Constitution. As in the above sections, the clerk must, upon request, disclose the petition to a judge in the circuit, the respondent, a guardian, a health care surrogate or proxy, an attorney for the respondent, and any other person as directed by the court. In addition, the clerk may not post any personal identifying information from the petition on the court docket or in publicly accessible files. The bill does not provide that court orders may be released to any party.

Section 4 – Clinical Records

The bill amends s. 394.4615, F.S., to provide that all *personal identifying information* about an individual for whom a petition is filed or an order entered and filed with the clerk of court under the Baker Act is confidential and exempt from the statutory and constitutional public records provisions.

Consistent with the above sections, the clerk must, upon request, disclose the *petition or order* to a judge in the circuit, the respondent, a guardian, a health care surrogate or proxy, an attorney for the respondent, and any other person as directed by the court. The clerk is also prohibited from posting any personal identifying information on the court docket or in publicly accessible files.

These provisions appear to contradict each other because the exemption applies to *personal identifying information*, but the bill provides that *petitions and orders* may be released.

Open Government Sunset Review Provisions

Each of the four sections is subject to the Open Government Sunset Review Act as explained above in the Present Situation. Accordingly, each of these four public record exemptions will be repealed on October 2, 2021, unless each provision is reviewed and saved from repeal through reenacting legislation before that date.

Section 5 – Statement of Public Necessity

Section 5 provides a statement of public necessity explaining why these public records exemptions are needed. The statement states that personal identifying information contained in petitions, orders and dockets filed pursuant to ch. 394, F.S. should be confidential and exempt. The exemption will preserve the privacy of information that would otherwise be made available to the public, and the disclosure of the information would produce undue harm to the person alleged to have a mental illness.

Effective Date

This bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The county/municipality mandates provision of Art. VII, section 18, of the State Constitution may apply because county tax collectors and county property appraisers may incur additional costs relating to redacting information made confidential and exempt under this bill. However, an exemption may apply based on the limited fiscal impact that is anticipated to be incurred.

B. Public Records/Open Meetings Issues:

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

The State Constitution requires the exemption to be no broader than necessary to accomplish the stated purpose of the law. In this instance, the public purpose is defined by the public necessity statement to relate to the protection of personal identifying information of persons for whom petition is filed or an order is issued under the Baker Act. The exemptions provided in the bill appear much broader in that the exemptions make the entire petition and order confidential and exempt.

Sections 1-3 prohibit the clerk from posting personal identifying information on dockets or publically accessible files. However, the bill does not specifically state that personal identifying information is confidential and exempt.

This exemption is broader than the public necessity statement and therefore does not appear to meet constitutional requirements.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate. Clerks of court may be requested to perform more redactions and remove petitions and court orders from publically accessible files.

VI. Technical Deficiencies:

The bill does not protect all pleadings, such as a response to a petition, from public disclosure.

The bill makes court orders confidential and exempt, but does not permit the clerk of court to provide copies of the orders to parties or agency.

VII. Related Issues:

The bill specifically provides that a clerk of court may not make personal identifying information available on a docket or public file, however, if a clerk of court narrowly construes this statement, he or she could also publish the information on a public website because there is no prohibition on internet publication.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 394.463, 394.4655, 394.467, and 394.4615.

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

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

CS by Judiciary on January 20, 2016:

The committee substitute makes technical changes to ss. 394.4655(3)(d) and 394.467(3)(b), F.S. by adding the phrase “under this section.” The court has not been mentioned at this time in the chronology of the sections, so for clarity, the sentence is rephrased to state that “The petition and any order entered by the court *under this section* are confidential and exempt . . .”

Also, the singular verb “is” is replaced with the plural verb “are” for correct subject-verb agreement in the first sentence of s. 394.467(3)(b), F.S.

B. Amendments:

None.

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