HOUSE OF REPRESENTATIVES STAFF ANALYSIS
FINAL BILL ANALYSIS

BILL #: CS/HB 363 Pub. Rec./Admission to Mental Health Facilities
SPONSOR(S): Health & Human Services Committee, Silvers and others
TIED BILLS: CS/CS/HB 361 **IDEN./SIM. BILLS:** CS/CS/SB 838

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	15 Y, 0 N	Gilani	Brazzell
2) Oversight, Transparency & Public Management Subcommittee	13 Y, 0 N	Moehrle	Harrington
3) Health & Human Services Committee	18 Y, 0 N, As CS	Gilani	Calamas

FINAL HOUSE FLOOR ACTION: **GOVERNOR'S ACTION:** Approved
112 **Y's** 0 **N's**

SUMMARY ANALYSIS

CS/HB 363 passed the House on May 1, 2019, as CS/CS/SB 838.

The Florida Mental Health Act, otherwise known as the Baker Act, provides legal procedures for voluntary and involuntary mental health examination and treatment. Involuntary examination, involuntary outpatient services, and involuntary inpatient placement are court-involved procedures under the Baker Act which provide for treating an individual alleged to have a mental illness who has refused to voluntarily undergo necessary treatment.

Current law governing involuntary mental health treatment makes a patient's clinical records confidential and exempt from public records law. Since the law does not provide an exemption for petitions for involuntary examination or involuntary treatment or orders for involuntary inpatient placement, the portions of those documents that do not contain clinical records, including the allegations and facts in pleadings supporting the petitioner's belief that the individual suffers from mental illness, are open for public inspection.

The bill makes petitions for voluntary and involuntary examination for mental health treatment, court orders, and related records filed with a court pursuant to the Baker Act confidential and exempt from public record requirements. These documents may only be released to specified individuals. The bill prohibits the clerk of the court from posting any personal identifying information on the court docket or in publicly accessible files. The bill also requires that anyone who receives clinical or court records under this section must keep them confidential.

The bill provides for retroactive application of the public record exemption and includes a statement of public necessity as required by the Florida Constitution, finding that the mental health of a person is a medical condition that deserves protection from public dissemination and that public stigma associated with a mental health condition could lead to treatment avoidance and unwarranted damage to the reputation of an individual or his or her family. The bill also requires repeal of the exemption on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill has an indeterminate, but likely insignificant, negative fiscal impact on the state courts system.

The bill was approved by the Governor on May 24, 2019, chapter 2019-51, the bill will become effective on July 1, 2019.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access 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 of persons acting on their behalf.[1] The public also has a right to notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.[2] The Legislature's meetings must also be open and noticed to the public, unless there is an exception.[3]

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act[4] guarantees every person's right to inspect and copy any state or local government public record.[5] The Sunshine Law[6] requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.[7]

The Legislature may create an exemption to public records or open meetings requirements.[8] An exemption must specifically state the public necessity justifying the exemption[9] and must be tailored to accomplish the stated purpose of the law.[10] 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 confidential and exempt from the Public Records Act.[11]

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[1] FLA. CONST., art. I, s. 24(a).
[2] FLA. CONST., art. I, s. 24(b).
[3] FLA. CONST., art. I, s. 24(b).
[4] Ch. 119, F.S.
[5] "Public record" means "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." S. 119.011(12), F.S. "Agency" means "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." S. 119.011(2), F.S. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to section 11.0431, F.S.
[6] S. 286.011, F.S.
[7] S. 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.
[8] FLA. CONST., art. I, s. 24(c).
[9] FLA. CONST., art. I, s. 24(c).
[10] FLA. CONST., art. I, s. 24(c).
[11] 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 statute. *See* Attorney General Opinion 85-62 (August 1, 1985).

Exempt Records

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.[12]

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.[13] The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.[14]

The OGSR 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.[15] In addition, it may be no more broad than necessary to meet one of the following purposes:[16]

- Allow the state or its political subdivision to effectively and efficiently administer a government program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.[17]

Florida Mental Health Act

The Florida Mental Health Act, otherwise known as the Baker Act, was enacted in 1971 to revise the state's mental health commitment laws. [18] The Act provides legal procedures for mental health examination and treatment, including voluntary and involuntary examinations. It additionally protects the rights of all individuals examined or treated for mental illness in Florida.[19]

Involuntary Examination

Individuals in acute mental or behavioral health crisis may require emergency treatment to stabilize their condition. Emergency mental health examination and stabilization services may be provided on a

[12] *See Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S, [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." Id. at 686.
[13] S. 119.15, F.S. S. 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it 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.
[14] S. 119.15(3), F.S.
[15] S. 119.15(6)(b), F.S.
[16] Id.
[17] Id.
[18] Ss. 394.451-394.47891, F.S.
[19] S. 394.459, F.S.

voluntary or involuntary basis.[20] An involuntary examination is required if there is reason to believe that the person has a mental illness and because of his or her mental illness: [21]

- The person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination or is unable to determine for himself or herself whether examination is necessary; **and**
- Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; **or**
- There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.

The involuntary examination may be initiated in one of three ways: [22]

- A court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination, based on sworn testimony. The order of the court shall be made a part of the patient's clinical record.
- A law enforcement officer must take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to an appropriate, or the nearest, receiving facility for examination. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record.
- A physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker may execute a certificate stating that he or she has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination and stating the observations upon which that conclusion is based. The report and certificate shall be made a part of the patient's clinical record.

Involuntary patients must be taken to either a public or private facility which has been designated by the Department of Children and Families (DCF) as a Baker Act receiving facility. The purpose of receiving facilities is to receive and hold, or refer, as appropriate, involuntary patients under emergency conditions for psychiatric evaluation and to provide short-term treatment or transportation to the appropriate service provider.[23] The patient must be examined by the receiving facility within 72 hours of the initiation of the involuntary examination.[24]

In Fiscal Year 2016-2017, there were 199,944 involuntary examinations initiated under the Baker Act.[25] The number of involuntary examinations initiated under the Baker Act has increased 111.42 percent from Fiscal Year 2001-02 to Fiscal Year 2016-17. The increase in the number of involuntary examinations initiated is much greater than the increase in Florida's population during this same time.[26]

[20] Ss. 394.4625 and 394.463, F.S.
[21] S. 394.463(1), F.S.
[22] S. 394.463(2)(a), F.S.
[23] S. 394.455(39), F.S.
[24] S. 394.463(2)(g), F.S.
[25] The Baker Act/The Florida Mental Health Act--Fiscal Year 2016/2017 Annual Report, prepared for the Florida Department of Children and Families by the Baker Act Reporting Center, Louis de la Parte Florida Mental Health Institute, Department of Mental Health Law & Policy, University of South Florida, available at http://www.dcf.state.fl.us/programs/samh/publications/The%20Baker%20Act%20-%20FL%20MH%20Act%20-%20FY%2016-17%20Annual%20Report%20-%20Released%20June%202018.pdf (last visited Mar. 18, 2019).
[26] Id.

Involuntary Outpatient Placement

A person may be ordered to involuntary outpatient services upon a finding of the court that by clear and convincing evidence:[27]

- The person is 18 years of age or older;
- The person has a mental illness;
- The person is unlikely to survive safely in the community without supervision, based on a clinical determination;
- The person has a history of lack of compliance with treatment for mental illness;
- The person has:
    - At least twice within the immediately preceding 36 months been involuntarily admitted to a receiving or treatment facility, or has received mental health services in a forensic or correctional facility; or
    - Engaged in one or more acts of serious violent behavior toward self or others, or attempts at serious bodily harm to himself or herself or others, within the preceding 36 months;
- The person is, as a result of his or her mental illness, unlikely to voluntarily participate in the recommended treatment plan and either he or she has refused voluntary placement for treatment or he or she is unable to determine for himself or herself whether placement is necessary;
- In view of the person's treatment history and current behavior, the person is in need of involuntary outpatient services in order to prevent a relapse or deterioration that would be likely to result in serious bodily harm to himself or herself or others, or a substantial harm to his or her well-being;
- It is likely that the person will benefit from involuntary outpatient placement; and
- All available, less restrictive alternatives that would offer an opportunity for improvement of his or her condition have been judged to be inappropriate or unavailable.

A petition for involuntary outpatient placement may be filed by the administrator of either a receiving facility or a treatment facility. [28] The petition must allege and sustain each of the criterion for involuntary outpatient placement and be accompanied by a certificate recommending involuntary outpatient placement by a qualified professional and a proposed treatment plan.[29]

The petition for involuntary outpatient placement must be filed in the county where the patient is located, unless the patient is being placed from a state treatment facility, in which case the petition must be filed in the county where the patient will reside.[30] When the petition has been filed, the clerk of the court shall provide copies of the petition and the proposed treatment plan to DCF, the managing entity, the patient, the patient's guardian or representative, the state attorney, and the public defender or the patient's private counsel.[31]

Once a petition for involuntary outpatient placement has been filed with the court, the court must hold a hearing within five working days, unless a continuance is granted.[32] The state attorney for the circuit in which the patient is located shall represent the state, rather than the petitioner, as the real party in interest in the proceeding.[33] The court must, within one court working day of the filing of the petition

[27] S. 394.4655(2), F.S.
[28] S. 394.4655(4)(a), F.S.
[29] S. 394.4655(4)(b), F.S.
[30] S. 394.4655(4)(c), F.S.
[31] Id.
[32] S. 394.4655(7)(a)1., F.S.
[33] Id.

appoint the public defender to represent the person who is the subject of the petition, unless that person is otherwise represented by counsel.[34]

At the hearing on involuntary outpatient placement, the court shall consider testimony and evidence regarding the patient's competence to consent to treatment; if the court finds that the patient is incompetent to consent to treatment, it shall appoint a guardian advocate.[35] If the court concludes that the patient meets the criteria for involuntary outpatient placement, it must issue an order for involuntary outpatient services.[36] The order must specify the duration of involuntary outpatient services, up to 90 days, and the nature and extent of the patient's mental illness.[37] The order of the court and the treatment plan shall be made part of the patient's clinical record.[38]

If, at any time before the conclusion of the initial hearing on involuntary outpatient placement, it appears to the court that the person does not meet the criteria for involuntary outpatient services but, instead, meets the criteria for involuntary inpatient placement, the court may order the person admitted for involuntary inpatient examination.[39]

Involuntary Inpatient Placement

A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:

- He or she is mentally ill and because of his or her mental illness:
    - He or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or is unable to determine for himself or herself whether placement is necessary; **and**
    - He or she is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; **or**
    - There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
- All available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.[40]

The administrator of the receiving or treatment facility that is retaining a patient for involuntary inpatient treatment must file a petition for involuntary inpatient placement in the court in the county where the patient is located.[41] Upon filing, the clerk of the court must provide copies to DCF, the patient, the patient's guardian or representative, and the state attorney and public defender of the judicial circuit in which the patient is located.[42]

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[34] S. 394.4655(5), F.S.
[35] S. 394.4655(7)(d), F.S.
[36] S. 394.4655(7)(b)1., F.S.
[37] Id.
[38] Id.
[39] S. 394.4655(7)(c), F.S. Additionally, if the person instead meets the criteria for involuntary assessment, protective custody, or involuntary admission pursuant to the Marchman Act, the court may order the person to be admitted for involuntary assessment pursuant to the statutory requirements of the Marchman Act.
[40] S. 394.467(1), F.S.
[41] S. 394.467(2)-(3), F.S.
[42] S. 394.467(3), F.S.

The court proceedings for involuntary inpatient placement closely mirror those for involuntary outpatient services.[43] However, unlike an order for involuntary outpatient services, which statute makes part of the patient's clinical record, nothing in the laws governing involuntary inpatient placement makes the court's order part of the patient's clinical record.

Confidentiality of Involuntary Hospitalization Proceedings

Confidentiality of Clinical Records in Baker Act Proceedings in Florida

The general rule in Florida is that civil court records are open for public inspection unless a law or a court order specifies otherwise. Because the Baker Act is a civil proceeding, the information that is not exempted from public record requirements contained in the court file is available to the public for inspection.

According to Florida law, only the clinical records of a patient being treated for mental illness under the Baker Act are confidential and exempt.[44] Clinical records are all parts of the patient's record required to be maintained and includes all medical records, progress notes, charts, and admission and discharge data, and all other information recorded by a facility which pertains to the patient's hospitalization or treatment.[45] Additionally, under the Baker Act, court orders for involuntary examination[46] and for involuntary outpatient placement[47] must both be made part of the patient's clinical record.

All court records under the Baker Act, except clinical records, are open for public inspection. Therefore, all petitions filed under the Baker Act and orders for involuntary inpatient placement are open for public inspection unless a court orders otherwise.

Some Florida Judicial Circuits have taken action to make all documents, and the images of all documents, filed in Baker Act and Marchman Act[48] commitment or treatment cases confidential. Circuits have taken this action, in some cases, because the clinical records and other protected information in these cases are so interwoven and an integral part of the court file that it is administratively impractical to maintain only portions of the file as confidential.[49]

In the Eighth Judicial Circuit,[50] the parties' names and the court dockets are not confidential and are still accessible to the public, but the viewing of the documents within the court file is limited to:[51]

- The parties to the case;
- The parties' attorneys;
- Any governmental agency or its representative authorized by law to view the clinical records;
- Any other person or entity authorized by law; and
- A person or entity authorized to view a record by written court order.

[43] *See* s. 394.467(6)-(7), F.S.
[44] S. 394.4615, F.S.
[45] S. 394.455(6), F.S.
[46] S. 394.463(2)(a)1., F.S.
[47] S. 394.4655(7), F.S.
[48] The Marchman Act provides for voluntary and involuntary admission and treatment for substance abuse. *See* ch. 397, F.S.
[49] J. David Walsh, Chief Judge, Seventh Judicial Circuit, *Re: Confidentiality of Court Records REF: W-2011-104*, Jun. 6, 2011, available at https://www.clerk.org/pdf/Rule_2.420.pdf (last visited March 18, 2019).
[50] Robert E. Roundtree, Chief Judge, Eighth Judicial Circuit, *Administrative Order No. 7.12: Confidentiality of Certain Baker Act and Marchman Act Files*, Oct. 5, 2012, available at https://circuit8.org/web/ao/7.12-v1.pdf (last visited March 18, 2019).
[51] *Id.*

Confidentiality of Involuntary Hospitalizations in Other States

Some states make information relating to an involuntary hospitalization for substance abuse or mental health and the related court documents confidential and exempt from disclosure. Some states make court records that relate only to involuntary mental health treatment confidential,[52] while other states also protect court records relating to substance abuse treatment as confidential.[53]

Effect of the Bill

The bill makes all petitions for voluntary and involuntary admission for mental health treatment, court orders, and related records that are filed with or by a court pursuant to the Baker Act confidential and exempt from public record requirements. The information contained in these court files will not be open for public inspection. The documents may only be released to:

- The petitioner;
- The petitioner's attorney;
- The respondent;
- The respondent's attorney;
- The respondent's guardian or guardian advocate, if applicable;
- In the case of a minor respondent: the respondent's parent, guardian, legal custodian, or guardian advocate;
- The respondent's treating health care practitioner;
- The respondent's health care surrogate or proxy;
- DCF, without charge;
- The Department of Corrections, without charge, if the respondent is committed or is to be returned to the custody of the Department of Corrections from DCF; and
- A person or entity authorized to view records upon a court order for good cause. In determining if there is good cause for the disclosure of records, the court must weigh the person or entity's need for the information against potential harm to the respondent from the disclosure.

The bill also prohibits the clerk of the court from posting any personal identifying information on the court docket or in publicly accessible files. Additionally, the bill requires that anyone who receives these records must keep them confidential.

The bill allows the clerk of the court to submit the information required by s. 790.065, F.S., relating to the sale and delivery of firearms, to the Department of Law Enforcement.

The bill provides for retroactive application of the public records exemption. As such, the public records exemption applies to all protected records filed with a court before, on, or after July 1, 2019.

The bill provides a statement of public necessity as required by the Florida Constitution, which provides the following legislative findings:

[52] For example, Iowa provides all that papers and records pertaining to any involuntary hospitalization or application for involuntary hospitalization of any person hospitalized with mental illness are confidential. Iowa Code s. 229.24(1). Similarly, Ohio provides that all records, and reports, other than court journal entries or court docket entries, identifying a person and pertaining to the person's mental health condition, assessment, provision of care or treatment, or payment for assessment, care or treatment must be kept confidential and cannot be disclosed. Ohio Rev. Code. s. 5119.28(A).

[53] For example, South Carolina provides that certificates, applications, records, and reports made for specified purposes, and directly or indirectly identifying a mentally ill or alcohol and drug abuse patient or former patient or individual whose commitment has been sought, must be kept confidential, and must not be disclosed. S.C. Code s. 44-22-100.(A). Additionally, in Michigan courts cannot acknowledge the existence of records pertaining to drug and alcohol screening and assessment, additional counseling, and treatment for substance abuse. Mich. Comp. Laws. s. 330.1261; 330.1285.

- The mental health of a person is a medical condition that deserves protection from public dissemination.
- The public stigma associated with a mental health condition could lead individuals to avoid seeking needed treatment, leading to a worsening of that person's condition, harm to self or others, and the person becoming a burden to the state.
- There is a public necessity to exempt personal identifying information in order to protect information of a sensitive personal nature, the release of which could cause unwarranted damage to the reputation of an individual and his or her family.
- The knowledge that sensitive personal information is subject to disclosure could have a chilling effect on the willingness of individuals to seek mental health treatment.

The bill makes the public records exemptions subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

A. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

There could be an indeterminate negative impact on circuit courts. Currently, circuit courts are tasked with maintaining the confidentiality of clinical records within Baker Act cases; under the bill, petitions for involuntary examination, involuntary outpatient placement, and involuntary inpatient placement, and orders for involuntary inpatient placement will also be confidential and the docket cannot contain any identifying information of the patient. Circuit courts may see an indeterminate insignificant increase in costs to keep additional records confidential and insure that identifying information is removed from their dockets.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

C. FISCAL COMMENTS:

None.