Tab 1	**SB 58** by **Book**; Legislature

122310	D	S	RCS	JU, Book	Delete everything after	01/23 10:29 AM
534952	AA	S	RCS	JU, Gibson	Delete L.34 - 35:	01/23 10:29 AM

Tab 2	**SJR 74** by **Bradley (CO-INTRODUCERS) Simpson, Book, Rouson, Rodriguez, Mayfield, Baxley, Hooper**; (Similar to H 00053) Single-subject Limitation for Constitution Revision Commission Proposals

Tab 3	**SJR 86** by **Rodriguez**; (Similar to H 00053) Single-subject Limitation for Constitution Revision Commission Proposals

Tab 4	**SPB 7006** by **JU**; Uniform Interstate Depositions and Discovery Act

880802	A	S	RS	JU, Rodriguez	Delete L.86:	01/23 10:28 AM
746004	SA	S	FAV	JU, Rodriguez	Delete L.86:	01/23 10:28 AM

Tab 5	**SPB 7008** by **JU**; OGSR/Security Breach Information/Department of Legal Affairs

Tab 6	**SPB 7010** by **JU**; OGSR/Treatment-based Drug Court Programs

The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Simmons, Chair
Senator Rodriguez, Vice Chair

MEETING DATE: Tuesday, January 22, 2019
TIME: 12:30—2:00 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Building

MEMBERS: Senator Simmons, Chair; Senator Rodriguez, Vice Chair; Senators Baxley, Gibson, Hutson, and Stargel

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 58** Book	Legislature; Citing this act as the "Truth in Government Act"; deleting provisions regarding the administration of oaths and affirmations to witnesses appearing before legislative committees, and associated penalties, to conform to changes made by the act; requiring that persons addressing a legislative committee take an oath or affirmation of truthfulness; providing criminal penalties for certain false statements before a legislative committee, etc. JU 01/07/2019 JU 01/22/2019 Fav/CS CJ RC	Fav/CS Yeas 6 Nays 0
2	**SJR 74** Bradley (Similar HJR 53, SJR 86)	Single-subject Limitation for Constitution Revision Commission Proposals; Proposing and amendment to the State Constitution to require that any proposals to revise the State Constitution, or any part thereof, filed by the Constitution Revision Commission be limited to a single subject, etc. JU 01/07/2019 JU 01/22/2019 Favorable EE RC	Favorable Yeas 6 Nays 0
3	**SJR 86** Rodriguez (Similar HJR 53, SJR 74)	Single-subject Limitation for Constitution Revision Commission Proposals; Proposing an amendment to the State Constitution to require that any proposals to revise the State Constitution, or any part thereof, filed by the Constitution Revision Commission be limited to a single subject, etc. JU 01/07/2019 JU 01/22/2019 Not Considered EE RC	Not Considered

Consideration of proposed bill:

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SPB 7006**	Uniform Interstate Depositions and Discovery Act; Designating the "Uniform Interstate Depositions and Discovery Act"; requiring a party to submit a foreign subpoena to a clerk of court in this state for the issuance of a subpoena in this state; requiring the clerk of court to promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed; requiring that the service of the subpoena be served in compliance with the laws of this state and the Florida Rules of Civil Procedure, etc.	Submitted and Reported Favorably as Committee Bill Yeas 6 Nays 0
	Consideration of proposed bill:		
5	**SPB 7008**	OGSR/Security Breach Information/Department of Legal Affairs; Amending provisions which provides a public records exemption for information received by the Department of Legal Affairs pursuant to a notification of a security breach or during the course of an investigation of such breach; removing the scheduled repeal of the exemption, etc.	Submitted and Reported Favorably as Committee Bill Yeas 6 Nays 0
	Consideration of proposed bill:		
6	**SPB 7010**	OGSR/Treatment-based Drug Court Programs; Amending provisions relating to an exemption from public records requirements for certain information relating to screenings for participation in treatment-based drug court programs and subsequent treatment status reports; removing the scheduled repeal of the exemption, etc.	Submitted and Reported Favorably as Committee Bill Yeas 6 Nays 0
	Other Related Meeting Documents		

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 Judiciary

BILL:	CS/SB 58
INTRODUCER:	Judiciary Committee and Senator Book
SUBJECT:	Contempt and Disorderly Conduct Before a Legislative Committee
DATE:	January 24, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Fav/CS**
2.			CJ	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

The bill creates an enforcement mechanism to punish legislators or non-legislators who engage in contemptuous or disorderly conduct before a legislative committee. The bill further provides that contemptuous conduct includes knowingly making a materially false statement before a legislative committee, regardless of whether the speaker is under oath. The enforcement mechanism, in effect, implements related provisions of the State Constitution.

The enforcement mechanism begins when a committee member files a complaint with the appropriate rules chair alleging that misconduct occurred in a committee meeting. The complaint can then be heard by a special master or other committee to determine probable cause. If probable cause is found, the appropriate house may punish the person who engaged in misconduct. The punishment may include a fine of up to $1,000 or a term of imprisonment of up to 90 days in the county jail, or both.

The provisions of the bill will apply in the absence of legislative rules establishing a procedure to address misconduct occurring before legislative committees.

II. Present Situation:

Punishing the Misconduct of Legislators and Non-Legislators in a Legislative Setting

The Florida Constitution

Article III of the Florida Constitution, which pertains to the Legislature, authorizes the Legislature to punish legislators and non-members in two separate sections. These provisions, however, do not define what constitutes the misconduct or provide a procedure for resolving allegations of misconduct.

Members

The Constitution authorizes each house of the Legislature to punish a member for contempt or disorderly conduct. The Constitution also authorizes each house to expel a member when two-thirds of the membership votes for expulsion.[1]

Non-Members

When the Legislature is in session, each house may compel witnesses to attend and produce documents and other forms of evidence regarding a matter under investigation before the Legislature or a legislative committee. A person who is not a member of the Legislature may be punished while the Legislature is in session by a fine that does not exceed $1,000 or imprisonment that does not exceed 90 days, or both, who is found guilty of:

- Disorderly or contemptuous conduct before the Legislature or one of its committees;
- Refusal to obey a lawful summons; or
- Refusal to answer lawful questions.[2]

The punishment for contempt occurring before an interim legislative committee must be by judicial proceedings as established by law.[3]

The Florida Statutes

The statutes authorize legislative committees to invite public and private individuals to appear before them and submit information relevant to the committee's jurisdiction. To carry out its duties, committees may issue subpoenas and other process necessary to compel the attendance of witnesses before the committee and issue subpoenas duces tecum to compel the production of documentary evidence.[4] The chair or any other member of the committee may administer oaths and affirmations as prescribed by law to witnesses who appear before the committee for the purpose of testifying in any matter for which the committee desires evidence.[5]

While in session, either house of the Legislature is authorized to punish a person, who is not a member, who is found guilty of disorderly or contemptuous conduct in its presence or who refuses to obey a lawful summons. The imprisonment, however, must not extend beyond the

[1] FLA. CONST. art. III, s. 4(d).
[2] FLA. CONST. art. III, s. 5.
[3] *Id*.
[4] Section 11.143(3)(a), F.S.
[5] *Id*.

final adjournment of the legislative session.[6] When the Legislature is not in session and a witness does not respond to a lawful subpoena or fails to answer lawful inquiries or turn over subpoenaed evidence, the procedure is different. The committee may file a complaint in circuit court, and the court will take jurisdiction of the witness and direct the witness to respond to lawful inquiries. A failure to comply with the court order is treated as a direct and criminal contempt of court which the court will punish.

Two distinct statutes provide criminal penalties for giving false testimony to a legislative committee: false swearing and perjury.
The false swearing provision is contained in s. 11.143(4)(a), F.S. and states that whoever willfully affirms or swears falsely regarding a material matter or thing before a legislative committee commits a second degree felony.[7] The statute addressing perjury in official proceedings is found in s. 837.02, F.S. In pertinent part, the statute provides that "whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree."[8] An "official proceeding" is defined to include a proceeding before a legislative body, which would include a legislative committee.[9] A "material matter" is any subject which could affect the course or outcome of the proceeding.[10] A statement that is alleged to be perjury must be a statement of fact, not a statement of opinion or belief. For a statement to be material, it must be germane to the inquiry and have a bearing on a determination in the underlying case.[11]

III. Effect of Proposed Changes:

The bill removes the current provision that authorizes either house, during session, to punish a non-legislative member for "disorderly or contemptuous conduct in its presence." It transfers that brief provision to a newly created and expanded section of law.

Legislative Members Are Included

The newly created section expands the prohibition against disorderly or contemptuous conduct before legislative committees to include members of the legislature as well as non-members.

"Contemptuous Conduct"

"Contemptuous conduct" is not defined but the bill expressly provides that contemptuous conduct includes the act of knowingly making a materially false statement before a legislative committee, regardless of whether the speaker is under oath or affirmation. This change is consistent with the *Mason's Manual of Legislative Procedure,* which states:

[6] Section 11.143(1) and (3), F.S.
[7] A second degree felony is punishable by a maximum of 15 years imprisonment and a $10,000 fine. Sections 775.082 and 775.083, F.S.
[8] A third degree felony is punishable by a maximum of 5 years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.
[9] Section 837.011(1), F.S.
[10] Section 837.011(3), F.S.
[11] *Vargas v. State,* 705 So. 2d 270 (Fla. 3d DCA 2001).

> Witnesses before a legislative body or its committee need not be sworn, unless there is some rule or provision of law or of the constitution requiring it, but give their testimony under the penalty of being adjudged guilty of contempt if they testify falsely.[12]

Punishment

During Session

Whoever engages in disorderly or contemptuous conduct while the Legislature is in session may be punished by the appropriate house by a fine that does not exceed $1,000 and imprisonment in the county jail for up to 90 days, or both, when the presiding officer of the appropriate house orders the punishment. This mirrors the constitutional language contained in section 5, Article III.

During Interim Committee Meetings

Whoever engages in disorderly or contemptuous conduct during an interim legislative committee meeting commits a misdemeanor of the second degree which is punishable by a maximum of 60 days imprisonment and a fine not to exceed $500.[13]

Procedure to be Used in the Absence of Legislative Rules

The bill establishes a legislative procedure for either house to follow when addressing allegations of disorderly and contemptuous misconduct. However, if the Senate or House of Representatives establishes legislative rules governing the procedure for addressing misconduct allegations, those rules take precedence and this bill does not apply.

Complaint

When a committee member believes that disorderly or contemptuous conduct has occurred in the committee, he or she may file a complaint with the rules chair of the appropriate house. The complaint must identify the alleged disorderly or contemptuous conduct, state the facts demonstrating that the conduct was a violation of the statute, and supply the relevant documentation or evidence.

Referral to a Special Master or Committee

If the rules chair does not find that disorderly or contemptuous conduct occurred, he or she must dismiss the complaint. If the chair determines that the facts, if found to be true, would amount to a violation of the statute, he or she must refer the complaint to either a special master or a standing or select committee for an expeditious determination of probable cause.

The special master or committee must then:

- Give reasonable notice to the person named in the complaint;
- Conduct an investigation;

[12] National Conference of State Legislatures, *Mason's Manual of Legislative Procedure*, s. 800, para. 4. (2010).
[13] Sections 775.082 and 775.083, F.S.

- Give the accused an opportunity to be heard; and
- Prepare a report and recommendation regarding the violation.

Probable Cause Finding

If the report and recommendation do not support a finding of probable cause, the rules chair must dismiss the complaint. If probable cause is found, however, the report and recommendation must be taken up and acted upon by the appropriate house.

Duties of the Presiding Officer

If the appropriate house determines that the accused did engage in disorderly or contemptuous conduct and determines a punishment, the presiding officer must issue an order imposing the punishment. If imprisonment is ordered, the order must direct the Leon County Sheriff or the sheriff where the person resides to take the person into custody for confinement in the county jail for the time specified in the order. If any fines are levied they must be deposited into the Lobbyist Registration Trust Fund.

Effective Date

This bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

County jails would bear the cost of housing a person who is punished under this section by imprisonment of up to 90 days.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 11.143, Florida Statutes, and creates section 11.1435, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on January 22, 2019:
This committee substitute substantially amends the underlying bill. The substance of the underlying bill required persons to first take an oral or written oath or affirmation and declare to speak truthfully before testifying before a legislative committee. It exempted legislators, legislative staff, and children in certain circumstances. The committee substitute does not address oaths or affirmations but prohibits disorderly or contemptuous conduct before a legislative committee. The committee substitute clarifies that contempt includes knowingly making a false statement about a material matter when testifying before a committee and establishes a process for addressing disorderly and contemptuous conduct.

B. Amendments:

None.

122310

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/23/2019	.	
	.	
	.	
	.	

The Committee on Judiciary (Book) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 11.143, Florida Statutes, is amended to read:

11.143 Standing or select committees; powers.—

(1) Each standing or select committee, or subcommittee thereof, is authorized to invite public officials and employees and private individuals to appear before the committee for the purpose of submitting information to it. Each such committee is

122310

authorized to maintain a continuous review of the work of the state agencies concerned with its subject area and the performance of the functions of government within each such subject area and for this purpose to request reports from time to time, in such form as the committee designates, concerning the operation of any state agency and presenting any proposal or recommendation such agency may have with regard to existing laws or proposed legislation in its subject area.

(2) In order to carry out its duties, each such committee is empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in this state, including any confidential information.

(3)(a) In order to carry out its duties, each such committee, whenever required, may issue subpoena and other necessary process to compel the attendance of witnesses before such committee, and the chair thereof shall issue the process on behalf of the committee, in accordance with the rules of the respective house. The chair or any other member of such committee may administer all oaths and affirmations in the manner prescribed by law to witnesses who appear before the committee for the purpose of testifying in any matter concerning which the committee desires evidence. Upon motion of any member of the committee, a witness shall be placed under oath.

(b) Each such committee, whenever required, may also compel by subpoena duces tecum the production of any books, letters, or other documentary evidence, including any confidential information, it desires to examine in reference to any matter before it.

(c) Either house during the session may punish by fine or imprisonment any person not a member who has been guilty of ~~disorderly or contemptuous conduct in its presence or of~~ a refusal to obey its lawful summons, but such imprisonment must not extend beyond the final adjournment of the session.

(d) The sheriffs in the several counties or a duly constituted agent of a Florida legislative committee 18 years of age or older shall make such service and execute all process or orders when required by such committees. Sheriffs shall be paid as provided for in s. 30.231.

(4)(a) Whoever willfully affirms or swears falsely in regard to any material matter or thing before any such committee is guilty of false swearing, which constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If a witness fails to respond to the lawful subpoena of any such committee at a time when the Legislature is not in session or, having responded, fails to answer all lawful inquiries or to turn over evidence that has been subpoenaed, such committee may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of the complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the possession of the witness which is lawfully demanded. The failure of a witness to comply with such order of the court constitutes a direct and criminal contempt of court, and the court shall punish the witness accordingly.

122310

(5) All witnesses summoned before any such committee shall receive reimbursement for travel expenses and per diem at the rates provided in s. 112.061. However, the fact that such reimbursement is not tendered at the time the subpoena is served does not excuse the witness from appearing as directed therein.

Section 2. Section 11.1435, Florida Statutes, is created to read:

11.1435 Contempt and disorderly conduct before legislative committees.—

(1) A person, including a member of the Legislature, may not engage in disorderly or contemptuous conduct before a standing committee or select committee or subcommittee of the Legislature. Contemptuous conduct includes knowingly making a materially false statement, whether or not under oath or affirmation, before a legislative committee.

(a) A person, including a member of the Legislature, who engages in disorderly or contemptuous conduct while the Legislature is in session may be punished by the house in which the misconduct occurred. The punishment may not exceed a fine of $1,000 or imprisonment in the county jail for up to 90 days, or by both, upon the order of the presiding officer of the house in which the misconduct occurred.

(b) A person, including a member of the Legislature, who engages in disorderly or contemptuous conduct during an interim meeting of a legislative committee commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(2) If a violation of this section occurs while the Legislature is in session, a member of the committee before

122310

which a violation occurs may file a complaint with the rules chair of the appropriate house of the Legislature. The complaint must identify the disorderly or contemptuous conduct, state the facts showing that the conduct was made in violation of this section, and include relevant supporting documentation or evidence.

(3) If the rules chair determines that the complaint fails to support a finding of a violation of this section, the complaint must be dismissed. If the rules chair determines that the complaint states facts that, if true, would be a violation of this section, the complaint must be referred to a special master or a standing or select committee to expeditiously determine whether probable cause of a violation exists.

(4) The special master or a standing or select committee shall give reasonable notice to the person who is alleged to have engaged in disorderly or contemptuous conduct, shall conduct an investigation, and shall give the person an opportunity to be heard. Following such actions, the special master or standing or select committee shall prepare a report and recommendation regarding the alleged violation.

(5) If the report and recommendation of the special master or standing or select committee conclude that the facts do not support a finding of probable cause, the rules chair must dismiss the complaint. If the report and recommendation find probable cause that the person violated this section, the report and recommendation must be taken up and acted upon by the appropriate house where the disorderly or contemptuous conduct occurred.

(6) If the appropriate house determines that a person

122310

engaged in disorderly or contemptuous conduct and determines a punishment for the conduct, the presiding officer must issue an order imposing the punishment. An order imposing imprisonment must direct the Leon County Sheriff or the sheriff of the person's county of residence to take the person into custody for confinement in the county jail for the time period specified in the order. Any fines must be deposited into the Lobbyist Registration Trust Fund.

(7) This section applies in the absence of legislative rules establishing a procedure to address the misconduct prohibited by this section.

Section 3. This act shall take effect July 1, 2019.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to contempt and disorderly conduct before a legislative committee; amending s. 11.143, F.S.; requiring a witness to be placed under oath upon motion of any committee member; conforming a provision to changes made by the act; creating s. 11.1435, F.S.; prohibiting a person, including a member of the Legislature, from engaging in disorderly or contemptuous conduct; specifying applicable penalties, including fines and imprisonment; providing a procedure for investigating and punishing disorderly or contemptuous conduct while the Legislature is in

122310

session; providing that the procedures apply in the absence of certain legislative rules; providing an effective date.

534952

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/23/2019	.	
	.	
	.	
	.	

The Committee on Judiciary (Gibson) recommended the following:

Senate Amendment to Amendment (122310) (with title amendment)

Delete lines 34 - 35
and insert:
which the committee desires evidence.

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete lines 148 - 149
and insert:

534952

F.S.; conforming a provision

By Senator Book

32-00011-19 201958__

A bill to be entitled

An act relating to the Legislature; providing a short title; amending s. 11.143, F.S.; deleting provisions regarding the administration of oaths and affirmations to witnesses appearing before legislative committees, and associated penalties, to conform to changes made by the act; creating s. 11.1435, F.S.; requiring that persons addressing a legislative committee take an oath or affirmation of truthfulness; providing exceptions; requiring that a member of the legislative committee administer the oath or affirmation; providing criminal penalties for certain false statements before a legislative committee; authorizing the use of a signed appearance form in lieu of an oral oath or affirmation; prescribing conditions related to the use of such form; providing penalties for making a false statement after signing such form; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Truth in Government Act."

Section 2. Section 11.143, Florida Statutes, is amended to read:

11.143 Standing or select committees; powers.—

(1) Each standing or select committee, or a subcommittee thereof, may:

(a) ~~is authorized to~~ Invite public officials and employees

32-00011-19 201958__

and private individuals to appear before the committee for the purpose of submitting information to it.

(b) ~~Each such committee is authorized to~~ Maintain a continuous review of the work of the state agencies concerned with its subject area and the performance of the functions of government within each such subject area and for this purpose to request reports from time to time, in such form as the committee designates, concerning the operation of any state agency and presenting any proposal or recommendation such agency may have with regard to existing laws or proposed legislation in its subject area.

(2) In order to carry out its duties, each such committee has ~~is empowered with~~ the right and authority to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in this state, including any confidential information.

(3)(a) In order to carry out its duties, each such committee, whenever required, may issue subpoena and other necessary process to compel the attendance of witnesses before such committee, and the chair thereof shall issue the process on behalf of the committee, in accordance with the rules of the respective house. ~~The chair or any other member of such committee may administer all oaths and affirmations in the manner prescribed by law to witnesses who appear before the committee for the purpose of testifying in any matter concerning which the committee desires evidence.~~

(b) Each such committee, whenever required, may also compel by subpoena duces tecum the production of any books, letters, or other documentary evidence, including any confidential

information, it desires to examine in reference to any matter before it.

(c) Either house during the session may punish by fine or imprisonment any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or of a refusal to obey its lawful summons, but such imprisonment must not extend beyond the final adjournment of the session.

(d) The sheriffs in the several counties or a duly constituted agent of a Florida legislative committee 18 years of age or older shall make such service and execute all process or orders when required by such committees. Sheriffs shall be paid as provided for in s. 30.231.

(4) ~~(a) Whoever willfully affirms or swears falsely in regard to any material matter or thing before any such committee is guilty of false swearing, which constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.~~

~~(b)~~ If a witness fails to respond to the lawful subpoena of any such committee at a time when the Legislature is not in session or, having responded, fails to answer all lawful inquiries or to turn over evidence that has been subpoenaed, such committee may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of the complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the possession of the witness which is lawfully demanded. The failure of a witness to comply with such order of the court constitutes a direct and

criminal contempt of court, and the court shall punish the witness accordingly.

(5) All witnesses summoned before any such committee shall receive reimbursement for travel expenses and per diem at the rates provided in s. 112.061. However, the fact that such reimbursement is not tendered at the time the subpoena is served does not excuse the witness from appearing as directed therein.

Section 3. Section 11.1435, Florida Statutes, is created to read:

11.1435 Oath or affirmation; penalty.—

(1)(a) Any person who addresses a standing or select committee, or a subcommittee thereof, shall first declare that he or she will speak truthfully by taking an oath or affirmation in substantially the following form: "Do you swear or affirm that the information you are about to share will be the truth, the whole truth, and nothing but the truth?" The person's answer must be noted in the record.

(b) Paragraph (a) does not apply to:

1. A member of the Legislature in his or her official capacity or an employee of the Legislature in his or her capacity as an employee; however, the member or employee is subject to discipline by the presiding officer of the applicable house of the Legislature for making a false statement that he or she does not believe to be true.

2. A child, if the chair of the committee determines the child understands the duty to tell the truth or the duty not to lie.

Notwithstanding the exceptions prescribed in this paragraph, a

standing or select committee, or any subcommittee thereof, may, if deemed necessary, require any person who addresses the committee to take an oath or affirmation of truthfulness as provided in this section, subject to the penalties provided in subsection (2).

(c) The chair or any other member of the committee shall administer the oath or affirmation required under this section.

(2)(a) Except as provided in paragraph (b), whoever makes a false statement that he or she does not believe to be true, under the oath or affirmation required by this section in regard to any material matter, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Whoever is compelled by subpoena as a witness before a committee under s. 11.143(3) and who makes a false statement that he or she does not believe to be true, under the oath or affirmation required by this section in regard to any material matter, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) In lieu of the oral oath or affirmation required by this section, the Senate or the House of Representatives may by the rules of each respective house require any person, as prescribed in subsection (1), who addresses a committee to complete and sign an appearance form. The form must be signed before the person addresses the committee. Signing the form constitutes a written affirmation to speak the truth, the whole truth, and nothing but the truth, and subjects the person to the penalties as provided in this section. The form must include a statement notifying the person that signing the form constitutes an affirmation and notifying the person of the penalty

provisions.

Section 4. This act shall take effect July 1, 2019.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Children, Families, and Elder Affairs, *Chair*
Appropriations
Appropriations Subcommittee on Education
Appropriations Subcommittee on Health and Human Services
Health Policy
Rules

JOINT COMMITTEE:
Joint Legislative Budget Commission

SENATOR LAUREN BOOK
32nd District

December 17, 2018

Chair David Simmons
Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Chair Simmons:

I respectfully request that **SB 58—Legislature**, also known as the "Truth in Government Act," be placed on the agenda for the next Committee on Judiciary meeting.

Should you have any questions or concerns, please feel free to contact my office or me. Thank you in advance for your consideration.

Thank you,

Lauren Book

Senator Lauren Book
Senate District 32

Cc: Tom Cibula, Staff Director
Joyce Butler, Administrative Assistant

REPLY TO:
☐ 967 Nob Hill Road, Plantation, Florida 33324 (954) 424-6674
☐ 202 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5032

Senate's Website: *www.flsenate.gov*

BILL GALVANO
President of the Senate

DAVID SIMMONS
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/22/19
Meeting Date

58
Bill Number (if applicable)

Topic Legislature

Amendment Barcode (if applicable)

Name Rich Templin

Job Title

Address 135 S. Monroe
Street

Phone 850-224-6926

Tallahassee FL 32301
City *State* *Zip*

Email

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Florida AFL-CIO

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Judiciary

BILL:	SJR 74
INTRODUCER:	Senator Bradley and others
SUBJECT:	Single-subject Limitation for Constitution Revision Commission Proposals
DATE:	January 18, 2019 REVISED: 1/23/19

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Favorable**
2.			EE	
3.			RC	

I. Summary:

SJR 74 limits any amendment to the Constitution proposed by the Constitution Revision Commission to "one subject and matter connected therewith." Under current law, each proposal of the Commission may embrace multiple subjects, and the Commission may even propose a singular, comprehensive revision of the Constitution.

As a joint resolution, this legislation must be agreed to by three-fifths of the membership of each house of the Legislature. Then, the constitutional amendment proposed in the resolution will be placed on the 2020 General Election ballot, and will take effect if approved by at least 60 percent of the votes cast on the measure. The next Constitution Revision Commission convenes in 2037, and thus it would be the first Commission to be governed by the amendment.

II. Present Situation:

Overview

The Florida Constitution requires that a Constitution Revision Commission be established every 20 years and that it have the authority to propose a revision of all or any part of the Florida Constitution. Accordingly, a Constitution Revision Commission may propose single-subject amendments, multi-subject amendments, or a revision of the entire Constitution.

Context – Proposed Amendments that Appeared on the 2018 General Election Ballot

Seven of the amendments on the 2018 General Election ballot were proposed by the Commission. And at least two of the Commission-proposed amendments were regarded by many as including two or more changes that were substantially unrelated; in other words, each of these

amendments were considered by many to involve the "bundling" of multiple subjects.[1] Accordingly, voters who wanted to vote for only one of the changes set forth in a given multi-subject amendment may have been frustrated by having to choose between voting for a change they did not desire (because it was paired with one they wanted) or having to vote against a change they desired (because it was paired with a change they did *not* like).[2]

Examples of Commission-proposed amendments that many regarded as multi-subject were amendment 9 and amendment 6. Amendment 9 combined a ban on oil-drilling in state seawaters with a ban on "vaping" in indoor workplaces. Amendment 6 combined what many regarded as three different subjects: a crime-victim-rights proposal, a prohibition on judges deferring to agencies' interpretation of statutes or rules, and a 5-year increase in the mandatory retirement age for judges.

Constitution Revision Commission

Origin

The Florida Constitution was revised extensively in 1968 by way of three joint resolutions that were proposed during a Special Session of the Legislature. One of the resolutions included a provision requiring a Constitution Revision Commission to convene once every 20 years, beginning in 1977. Accordingly, three Commissions have convened: in 1977-1978, 1997-1998, and most recently in 2017-2018.[3]

Members

The Constitution requires that the Commission be comprised of 37 members, and it provides guidelines for the selection of these members. The Attorney General must serve on the Commission, and the rest of the members must be chosen by the Governor (15), Speaker of the House (9), President of the Senate (9), and the Chief Justice of the Florida Supreme Court (3). The Governor must appoint a chair from among the 37 members.[4]

Task, Procedures, and Authority

The Commission's task is to examine the Constitution and decide which, if any, amendments to submit for voter approval. The amendments must be submitted to the Secretary of State at least 180 days before the next general election.[5] In turn, the amendments must be submitted to the

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[1] *See, e.g.*, The News Service of Florida, *Constitutional Amendments? One subject only, please*, THE GAINESVILLE SUN (Nov. 23, 2018), https://www.gainesville.com/news/20181123/constitutional-amendments-one-subject-only-please.

[2] *See* Brendan Rivers and News Service of Florida Staff, *Bill Filed to Ban Bundled Amendments from Constitution Revision Commission*, WJCT FIRST COAST CONNECT (Nov. 26, 2018), http://news.wjct.org/post/bill-filed-ban-bundled-amendments-constitution-revision-commission; *see generally*, Editorial Board, *Florida's constitutional amendments: Vote 'yes' on 4 and 11, 'no' on rest*, TALLAHASSEE DEMOCRAT (Oct. 7, 2018), https://www.tallahassee.com/story/opinion/editorials/2018/10/07/floridas-amendments-yes-4-and-11-no-rest-our-opinion/1494375002/ (arguing that amendment 6 and amendment 9 each included a proposal worthy of approval, but should be voted against on account of at least one unworthy proposal in each); Kelley H. Armitage, *Constitution Revision Commissions Avoid Logrolling, Don't They?*, 72 FLA. B.J. 62 (Nov. 1998) (arguing that the Constitution Revision Commission does not have sufficient safeguards against logrolling).

[3] Constitution Revision Commission, *History*, http://flcrc.gov/about/history.html (last visited Dec. 31, 2018).

[4] FLA. CONST. art. XI, s. 2.

[5] FLA. CONST. art. XI, s. 2.

voters at the next general election held more than 90 days after submission to the Secretary of State. To become effective, an amendment must be approved by at least 60 percent of the votes cast on the measure.[6]

The constitutional provision giving rise to the Commission does little to prescribe how a Commission must go about its task. Indeed, it says only that the Commission must convene at the call of its chair, adopt rules of procedure, and "hold [an unspecified number of] public hearings."[7]

The Single-Subject Requirement

Amendments that are Limited to One Subject

The Constitution authorizes five sources from which an amendment may originate: the Legislature, the Constitution Revision Commission, a citizen initiative, a constitutional convention, or the Taxation and Budget Reform Commission. Only amendments that originate by way of citizen initiative are limited to one subject. Accordingly, as the Florida Supreme Court stated in a case challenging a 2018 Commission-proposed amendment, the Constitution Revision Commission need not limit its proposals to one subject:

> Unlike proposed amendments that originate through initiative petitions, amendments proposed by the CRC are not bound by the single-subject rule limiting amendments to one subject. . . . Moreover, the Florida Constitution expressly authorizes bundling, as it gives the CRC authority to revise the entire constitution or any part of it. The power to amend the whole constitution in one proposal necessarily includes the lesser power to amend parts of the constitution in one proposal.[8]

Policy Reasons for the Single-Subject Limitation on Amendments Originating as Initiatives

The Florida Supreme Court has repeatedly explained the purposes for the single-subject requirement, at least with regard to citizen-initiative amendments. In its decision in *Fine v. Firestone*, the Court stated that the single-subject limitation allows

> the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support.[9]

[6] FLA. CONST. art. XI, s. 5.
[7] FLA. CONST. art. XI, s. 2.
[8] *Detzner v. Anstead*, 256 So. 3d 820, 823-24 (Fla. 2018) (citation omitted); *see also, County of Volusia v. Detzner*, 253 So. 3d 507, 512 (Fla. 2018) ("Appellants have conceded, however, that CRC proposals are not bound by the single subject requirement . . . ."); *Charter Review Commission of Orange Cty. v. Scott*, 647 So. 2d 835, 837 (Fla. 1994) ("Only proposals originating through a petition initiative are subject to the single-subject rule.").
[9] *Fine v. Firestone*, 448 So. 2d 984, 994 (Fla. 1984).

Moreover, the Court stated, the single-subject limitation protects the Constitution "against precipitous and spasmodic changes in the organic law."[10] Making a similar point in a later case, the Florida Supreme Court stated that the

> single-subject requirement in article XI, section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution.[11]

As to why this reasoning should not apply to prohibit multi-subject amendments that originate from other than a citizen initiative, such as the Constitution Revision Commission, the Court noted that the other methods of propounding a constitutional amendment "all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal."[12] This is not true, the Court noted, of citizen initiatives.[13]

What "One Subject" Means

Over the years, the Florida Supreme Court has issued several opinions in which it explained what it means for an amendment to be limited to one subject.

In these opinions, the Court has stated, the single-subject limitation is "functional and not locational."[14] In other words, the question is primarily one of what the amendment does, rather than a question of what part(s) of the Constitution it alters. As such, the single-subject limitation requires of each amendment a "natural and logical oneness of purpose."[15] Moreover, the single-subject limitation prohibits an amendment from

> (1) engaging in "logrolling" or (2) "substantially altering or performing the functions of multiple aspects of government." The term logrolling refers to a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.[16]

And although "no single proposal can substantially *alter* or *perform* the functions of multiple branches," the single-subject limitation does not prohibit a proposal that would "*affect* several branches of government."[17] However, "how an initiative proposal *affects* other articles or sections of the constitution *is an appropriate factor* to be considered in determining whether there is more than one subject included in an initiative proposal."[18]

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[10] *Id.* at 832 (quoting *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (Thornal, J., concurring)).
[11] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (quoting *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984)).
[12] *Id*. at 1339.
[13] *Id*.
[14] *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).
[15] *Advisory Op. to Att'y Gen. re Rights of Electricity Consumers regarding Solar Energy Choice (FIS)*, 188 So. 3d 822, 828 (Fla. 2016).
[16] *Id.* at 827-28 (internal citations omitted).
[17] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (emphasis in the original).
[18] *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (emphasis added).

A brief look at three Supreme Court opinions will help illuminate the Court's understanding of these legal principles, and therefore of what "one subject" really means.

In a recent advisory opinion, the Court analyzed an amendment that would have guaranteed a

> right for electricity consumers "to own or lease solar equipment installed on their property to generate electricity for their own use" while simultaneously ensuring that "State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do."[19]

In the Court's analysis of the amendment, it identified two basic "components"—the establishment of a right and a guarantee of the government's authority to regulate that right. And the Court rejected the argument that these components embraced different subjects as a matter of law, stating instead that the components were "two sides of the same coin," and were therefore "component parts or aspects of a single dominant plan or scheme," and accordingly were, "naturally related and connected to the amendment's oneness of purpose."[20] The Court also noted that the amendment did not engage in impermissible logrolling, as it did not combine a popular measure with an unpopular measure in hopes of compelling sufficient support for the unpopular measure.[21]

In another advisory opinion, the Court examined an amendment proposed by citizen initiative that would have created a "trust to restore the Everglades funded by a fee on raw sugar."[22] The Court held that the amendment violated the single-subject rule because it "perform[ed] the functions of multiple branches of government."[23] The amendment performed the legislative functions of imposing a levy, establishing a trust, and granting the trustees with power to set and redefine the boundaries of the "Everglades Ecosystem." Additionally, the amendment "contemplate[d] the exercise of vast executive powers" by the trustees, including the "management, construction, and operation of water storage and sewer systems."[24] Finally, the Court stated that the amendment would have performed a judicial function by essentially adjudicating that the sugar cane industry had polluted the Everglades and by imposing a judgment-like fee on that industry to cover cleanup costs.[25]

In yet another opinion, issued in *Fine v. Firestone*, the Court disapproved of a proposed amendment that contained three subjects.[26] But the Court did so without specifying that the

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[19] *Advisory Op. to Att'y Gen. re Rights of Electricity Consumers regarding Solar Energy Choice (FIS)*, 188 So. 3d 822, 828 (Fla. 2016) (quoting the language of the proposed amendment at issue, titled, "Rights of Electricity Consumers Regarding Solar Energy Choice").
[20] *Id*. at 828.
[21] *Id*.
[22] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1337 (Fla. 1994).
[23] *Id.* at 1340.
[24] *Id*.
[25] *Id*.
[26] *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

subjects were related to the functions of various branches of government or that the amendment was an attempt at logrolling. Instead, the Court stated that the amendment

> limits the way in which governmental entities can tax; it limits what government can provide in services which are paid for by the users of such services; and it changes how governments can finance the construction of capital improvements with revenue bonds that are paid for from revenue generated by the improvements.[27]

Joint Resolution

A joint resolution by the Legislature is one of the ways in which an amendment to the Florida Constitution may originate.[28] Like a bill, it may begin in either house of the Legislature.

To pass out of the Legislature and be submitted to the voters, a joint resolution must be agreed to by three-fifths of the membership of each house of the Legislature.[29] Unless expedited by the Legislature, the joint resolution is then submitted to the voters at the next general election. If the amendment proposed in the resolution is approved by at least 60 percent of the people voting on the measure, it becomes effective in the January following the election unless otherwise specified in the amendment or in the Constitution.[30]

III. Effect of Proposed Changes:

The constitutional amendment proposed in the joint resolution, if approved by the voters at the general election in 2020, requires that any amendment proposed by a future Constitution Revision Commission be limited to "one subject and matter directly connected therewith." Under current law, each proposal of the Commission may embrace multiple subjects, and the Commission may even propose a singular, comprehensive revision of the Constitution.

Because the wording of the single subject requirement for Commission proposals is identical to that used in the Constitution for citizen initiatives, the Supreme Court will likely presume that the single-subject requirements are the same.[31]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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[27] *Id.* at 992 (Fla. 1984).
[28] FLA. CONST. art. XI. An amendment or revision may originate as a proposal by the Legislature, the Constitution Revision Commission, a Constitutional Convention, the Taxation and Budget Reform Commission, or the people directly, by way of an initiative.
[29] FLA. CONST. art. XI, s. 1.
[30] FLA. CONST. art XI, s. 5.
[31] *See e.g., State v. Hackley*, 95 So. 3d 92, 95 (Fla. 2012); *State v. Hearns*, 961 So. 2d 211, 217 (Fla. 2007) ("We have held that where the Legislature uses the exact same words or phrases in two different statutes, we may assume it intended the same meaning to apply.").

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State, Division of Elections, provided the following information regarding the cost of advertising the proposed amendment contained in the resolution:

> The Division of Elections is required to advertise the full text of proposed constitutional amendments in English and Spanish[ ] twice in a newspaper of general circulation in each county before the election in which the amendment shall be submitted to the electors. The Division is also required to provide each Supervisor of Elections with English and Spanish booklets or posters displaying the full text of proposed amendments, for each polling room or early voting area in each county. The Division is also responsible for translating the amendments into Spanish. The statewide average cost to advertise constitutional amendments, in English and Spanish, in newspapers for the 2018 election cycle was $92.93 per English word of the originating document.
>
> Using 2018 election cycle rates, the cost to advertise this amendment in newspapers and produce booklets for the 2020 general election could be $29,737.60, at a minimum. Accurate cost estimates cannot be determined until the total number of amendments to be advertised is known. At this time, no amendments have achieved ballot position for the 2020 election

by either joint resolution of the Florida Legislature or by the initiative petition process.[32]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may wish to consider whether to limit the proposals of the Taxation and Budget Reform Commission consistently with the way it proposes to limit amendments proposed by the Constitution Revision Commission. The TBRC, created by Article VI, s. 6 of the Florida Constitution, is substantially similar to the Constitution Revision Commission. Like the Constitution Revision Commission, the TBRC is comprised of appointees who have the power to propose constitutional amendments directly to the electors. These amendments may include a "revision of this constitution or any part of it dealing with taxation or the state budgetary process."[33] The narrower focus of the TBRC, however, does not preclude it from proposing multi-subject amendments.

VIII. Statutes Affected:

This resolution amends Article XI, section 2 of the Florida Constitution.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[32] Email from Brittany Dover, Director of Legislative Affairs, Florida Department of State (Jan. 10, 2019) (on file with the Senate Committee on Judiciary).
[33] FLA. CONST. art. XI, s. 6(e).

By Senator Bradley

5-00368-19 201974__

Senate Joint Resolution

A joint resolution proposing an amendment to Section 2 of Article XI of the State Constitution to require that any proposals to revise the State Constitution, or any part thereof, filed by the Constitution Revision Commission be limited to a single subject.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 2 of Article XI of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE XI

AMENDMENTS

SECTION 2. Revision commission.—

(a) Within thirty days before the convening of the 2037 ~~2017~~ regular session of the legislature, and each twentieth year thereafter, there shall be established a constitution revision commission composed of the following thirty-seven members:

(1) the attorney general of the state;

(2) fifteen members selected by the governor;

(3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and

(4) three members selected by the chief justice of the supreme court of Florida with the advice of the justices.

(b) The governor shall designate one member of the

5-00368-19 201974__

commission as its chair. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) Each constitution revision commission shall convene at the call of its chair, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part thereof ~~of it~~.

(d) Any proposal of a revision of this constitution, or any part thereof, filed by the constitution revision commission with the custodian of state records must embrace but one subject and matter directly connected therewith.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE XI, SECTION 2

ESTABLISHING SINGLE-SUBJECT LIMITATION FOR CONSTITUTION REVISION COMMISSION PROPOSALS.—Proposing an amendment to the State Constitution to require that any proposal of a revision to the State Constitution, or any part thereof, filed by the Constitution Revision Commission with the custodian of state records for placement on the ballot be limited to a single subject and matter directly connected to such subject.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations, *Chair*
Finance and Tax
Innovation, Industry and Technology
Rules

JOINT COMMITTEE:
Joint Legislative Budget Commission, *Alternating Chair*

SENATOR ROB BRADLEY
5th District

December 13, 2018

Senator David Simmons, Chairman
Committee on Judiciary
515 Knott Building
404 South Monroe Street
Tallahassee, Florida 32399-1100

Dear Mr. Chairman:

I respectfully request that SJR 74, which places a single-subject limitation for Constitutional Revision Commission proposals, be placed on the committee's agenda at your earliest convenience.

Thank you for your consideration and please reach out to my staff or me if you have any questions or concerns about the joint resolution.

Sincerely,

Rob Bradley

cc: Mr. Tom Cibula

REPLY TO:
☐ 1279 Kingsley Avenue, Suite 107, Orange Park, Florida 32073 (904) 278-2085
☐ 414 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5005

Senate's Website: *www.flsenate.gov*

BILL GALVANO
President of the Senate

DAVID SIMMONS
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/22/2019
Meeting Date

SB 74
Bill Number (if applicable)

Topic Single-subject Limitation

Amendment Barcode (if applicable)

Name Trish Neely

Job Title Consultant

Address 2024 Shangri La Lane
Street

Phone 850 3223317

Tallahassee FL 32313
City *State* *Zip*

Email luvadvocacy@gmail.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against
(The Chair will read this information into the record.)

Representing League of Women Voters

Appearing at request of Chair: ☒ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/22/15
Meeting Date

SB 74
Bill Number (if applicable)

Topic Single Subject

Amendment Barcode (if applicable)

Name Rich Templin

Job Title

Address 135 S. Monroe
Street

Phone 850-224-6926

Tallahassee FL 32301
City *State* *Zip*

Email

Speaking: [X] For [ ] Against [ ] Information

Waive Speaking: [ ] In Support [ ] Against
(The Chair will read this information into the record.)

Representing Florida AFL-CIO

Appearing at request of Chair: [ ] Yes [X] No

Lobbyist registered with Legislature: [X] Yes [ ] No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/22/2019 (Meeting Date)

SJR 74 (Bill Number (if applicable))

Topic Single Subject Limitation for CRC Proposals (Amendment Barcode (if applicable))

Name Edward B. Labrador

Job Title Legislative Counsel

Address 100 S. Andrews Ave, Main Library 8th Floor (Street)

Phone 954-826-1155

Fort Lauderdale (City) FL (State) 33301 (Zip)

Email elabrador@broward.org

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Broward County

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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S-001 (10/14/14)

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 Judiciary

BILL:	SJR 86
INTRODUCER:	Senator Rodriguez
SUBJECT:	Single-subject Limitation for Constitution Revision Commission Proposals
DATE:	January 18, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			EE	
3.			RC	

I. Summary:

SJR 86 limits any amendment to the Constitution proposed by the Constitution Revision Commission to "one subject and matter connected therewith." Under current law, each proposal of the Commission may embrace multiple subjects, and the Commission may even propose a singular, comprehensive revision of the Constitution.

As a joint resolution, this legislation must be agreed to by three-fifths of the membership of each house of the Legislature. Then, the constitutional amendment proposed in the resolution will be placed on the 2020 General Election ballot, and will take effect if approved by at least 60 percent of the votes cast on the measure. The next Constitution Revision Commission convenes in 2037, and thus it would be the first Commission to be governed by the amendment.

II. Present Situation:

Overview

The Florida Constitution requires that a Constitution Revision Commission be established every 20 years and that it have the authority to propose a revision of all or any part of the Florida Constitution. Accordingly, a Constitution Revision Commission may propose single-subject amendments, multi-subject amendments, or a revision of the entire Constitution.

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Seven of the amendments on the 2018 General Election ballot were proposed by the Commission. And at least two of the Commission-proposed amendments were regarded by many as including two or more changes that were substantially unrelated; in other words, each of these

amendments were considered by many to involve the "bundling" of multiple subjects.[1] Accordingly, voters who wanted to vote for only one of the changes set forth in a given multi-subject amendment may have been frustrated by having to choose between voting for a change they did not desire (because it was paired with one they wanted) or having to vote against a change they desired (because it was paired with a change they did *not* like).[2]

Examples of Commission-proposed amendments that many regarded as multi-subject were amendment 9 and amendment 6. Amendment 9 combined a ban on oil-drilling in state seawaters with a ban on "vaping" in indoor workplaces. Amendment 6 combined what many regarded as three different subjects: a crime-victim-rights proposal, a prohibition on judges deferring to agencies' interpretation of statutes or rules, and a 5-year increase in the mandatory retirement age for judges.

Constitution Revision Commission

Origin

The Florida Constitution was revised extensively in 1968 by way of three joint resolutions that were proposed during a Special Session of the Legislature. One of the resolutions included a provision requiring a Constitution Revision Commission to convene once every 20 years, beginning in 1977. Accordingly, three Commissions have convened: in 1977-1978, 1997-1998, and most recently in 2017-2018.[3]

Members

The Constitution requires that the Commission be comprised of 37 members, and it provides guidelines for the selection of these members. The Attorney General must serve on the Commission, and the rest of the members must be chosen by the Governor (15), Speaker of the House (9), President of the Senate (9), and the Chief Justice of the Florida Supreme Court (3). The Governor must appoint a chair from among the 37 members.[4]

Task, Procedures, and Authority

The Commission's task is to examine the Constitution and decide which, if any, amendments to submit for voter approval. The amendments must be submitted to the Secretary of State at least 180 days before the next general election.[5] In turn, the amendments must be submitted to the

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[1] *See, e.g.*, The News Service of Florida, *Constitutional Amendments? One subject only, please*, THE GAINESVILLE SUN (Nov. 23, 2018), https://www.gainesville.com/news/20181123/constitutional-amendments-one-subject-only-please.

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[3] Constitution Revision Commission, *History*, http://flcrc.gov/about/history.html (last visited Dec. 31, 2018).

[4] FLA. CONST. art. XI, s. 2.

[5] FLA. CONST. art. XI, s. 2.

voters at the next general election held more than 90 days after submission to the Secretary of State. To become effective, an amendment must be approved by at least 60 percent of the votes cast on the measure.[6]

The constitutional provision giving rise to the Commission does little to prescribe how a Commission must go about its task. Indeed, it says only that the Commission must convene at the call of its chair, adopt rules of procedure, and "hold [an unspecified number of] public hearings."[7]

The Single-Subject Requirement

Amendments that are Limited to One Subject

The Constitution authorizes five sources from which an amendment may originate: the Legislature, the Constitution Revision Commission, a citizen initiative, a constitutional convention, or the Taxation and Budget Reform Commission. Only amendments that originate by way of citizen initiative are limited to one subject. Accordingly, as the Florida Supreme Court stated in a case challenging a 2018 Commission-proposed amendment, the Constitution Revision Commission need not limit its proposals to one subject:

> Unlike proposed amendments that originate through initiative petitions, amendments proposed by the CRC are not bound by the single-subject rule limiting amendments to one subject. . . . Moreover, the Florida Constitution expressly authorizes bundling, as it gives the CRC authority to revise the entire constitution or any part of it. The power to amend the whole constitution in one proposal necessarily includes the lesser power to amend parts of the constitution in one proposal.[8]

Policy Reasons for the Single-Subject Limitation on Amendments Originating as Initiatives

The Florida Supreme Court has repeatedly explained the purposes for the single-subject requirement, at least with regard to citizen-initiative amendments. In its decision in *Fine v. Firestone*, the Court stated that the single-subject limitation allows

> the citizens to vote on singular changes in our government that are identified in the proposal and to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support.[9]

[6] FLA. CONST. art. XI, s. 5.
[7] FLA. CONST. art. XI, s. 2.
[8] *Detzner v. Anstead*, 256 So. 3d 820, 823-24 (Fla. 2018) (citation omitted); *see also, County of Volusia v. Detzner*, 253 So. 3d 507, 512 (Fla. 2018) ("Appellants have conceded, however, that CRC proposals are not bound by the single subject requirement . . . ."); *Charter Review Commission of Orange Cty. v. Scott*, 647 So. 2d 835, 837 (Fla. 1994) ("Only proposals originating through a petition initiative are subject to the single-subject rule.").
[9] *Fine v. Firestone*, 448 So. 2d 984, 994 (Fla. 1984).

Moreover, the Court stated, the single-subject limitation protects the Constitution "against precipitous and spasmodic changes in the organic law."[10] Making a similar point in a later case, the Florida Supreme Court stated that the

> single-subject requirement in article XI, section 3, mandates that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution.[11]

As to why this reasoning should not apply to prohibit multi-subject amendments that originate from other than a citizen initiative, such as the Constitution Revision Commission, the Court noted that the other methods of propounding a constitutional amendment "all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal."[12] This is not true, the Court noted, of citizen initiatives.[13]

What "One Subject" Means

Over the years, the Florida Supreme Court has issued several opinions in which it explained what it means for an amendment to be limited to one subject.

In these opinions, the Court has stated, the single-subject limitation is "functional and not locational."[14] In other words, the question is primarily one of what the amendment does, rather than a question of what part(s) of the Constitution it alters. As such, the single-subject limitation requires of each amendment a "natural and logical oneness of purpose."[15] Moreover, the single-subject limitation prohibits an amendment from

> (1) engaging in "logrolling" or (2) "substantially altering or performing the functions of multiple aspects of government." The term logrolling refers to a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed.[16]

And although "no single proposal can substantially *alter* or *perform* the functions of multiple branches," the single-subject limitation does not prohibit a proposal that would "*affect* several branches of government."[17] However, "how an initiative proposal *affects* other articles or sections of the constitution *is an appropriate factor* to be considered in determining whether there is more than one subject included in an initiative proposal."[18]

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[10] *Id.* at 832 (quoting *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (Thornal, J., concurring)).
[11] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (quoting *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984)).
[12] *Id*. at 1339.
[13] *Id*.
[14] *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984).
[15] *Advisory Op. to Att'y Gen. re Rights of Electricity Consumers regarding Solar Energy Choice (FIS)*, 188 So. 3d 822, 828 (Fla. 2016).
[16] *Id.* at 827-28 (internal citations omitted).
[17] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (emphasis in the original).
[18] *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (emphasis added).

A brief look at three cases will help illuminate the Supreme Court's understanding of these legal principles, and therefore of what "one subject" really means.

One case was advisory opinion for a citizen initiative relating to solar energy. The amendment under review would have guaranteed a

> right for electricity consumers "to own or lease solar equipment installed on their property to generate electricity for their own use" while simultaneously ensuring that "State and local governments shall retain their abilities to protect consumer rights and public health, safety and welfare, and to ensure that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do."[19]

These guarantees, according to the Court fell into two components—the establishment of a right and a guarantee of the government's authority to regulate that right. And the Court rejected the argument that these were different subjects as a matter of law, stating instead that the components were "two sides of the same coin," and were therefore "component parts or aspects of a single dominant plan or scheme," and accordingly were, "naturally related and connected to the amendment's oneness of purpose."[20] The Court also noted that the amendment did not engage in impermissible logrolling, as it did not combine a popular measure with an unpopular measure in hopes of compelling sufficient support for the unpopular measure.[21]

In another advisory opinion, the Court examined an amendment proposed by citizen initiative that would have created a "trust to restore the Everglades funded by a fee on raw sugar."[22] The Court held that the amendment violated the single-subject rule because it "perform[ed] the functions of multiple branches of government."[23] The amendment performed the legislative functions of imposing a levy, establishing a trust, and creating a granting the trustees with power to set and redefine the boundaries of the "Everglades Ecosystem." Additionally, the amendment "contemplate[d] the exercise of vast executive powers" by the trustees, including the "management, construction, and operation of water storage and sewer systems."[24] Finally, the Court stated that the amendment would have performed a judicial function by essentially adjudicating that the sugar cane industry had polluted the Everglades and by imposing a judgment-like fee on that industry to cover cleanup costs.[25]

In yet another case, *Fine v. Firestone*, the Court disapproved of a proposed amendment that contained three subjects.[26] But the Court did so without specifying that the subjects

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[19] *Advisory Op. to Att'y Gen. re Rights of Electricity Consumers regarding Solar Energy Choice (FIS)*, 188 So. 3d 822, 828 (Fla. 2016) (quoting the language of the proposed amendment at issue, titled, "Rights of Electricity Consumers Regarding Solar Energy Choice").
[20] *Id*. at 828.
[21] *Id*.
[22] *In re Advisory Op. to the Att'y Gen.—Save Our Everglades*, 636 So. 2d 1336, 1337 (Fla. 1994).
[23] *Id.* at 1340.
[24] *Id*.
[25] *Id*.
[26] *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

impermissibly were related to the functions of various branches of government or that the amendment was an attempt at logrolling. Particularly, the Court stated that the amendment

> limits the way in which governmental entities can tax; it limits what government can provide in services which are paid for by the users of such services; and it changes how governments can finance the construction of capital improvements with revenue bonds that are paid for from revenue generated by the improvements.[27]

Joint Resolution

A joint resolution by the Legislature is one of the ways in which an amendment to the Florida Constitution may originate.[28] Like a bill, it may begin in either house of the Legislature.

To pass out of the Legislature and be submitted to the voters, a joint resolution must be agreed to by three-fifths of the membership of each house of the Legislature.[29] Unless expedited by the Legislature, the joint resolution is then submitted to the voters at the next general election. If the amendment proposed in the resolution is approved by at least 60 percent of the people voting on the measure, it becomes effective in the January following the election unless otherwise specified in the amendment or in the Constitution.[30]

III. Effect of Proposed Changes:

The constitutional amendment proposed in the joint resolution, if approved by the voters at the general election in 2020, requires that any amendment proposed by a future Constitution Revision Commission be limited to "one subject and matter directly connected therewith." Under current law, each proposal of the Commission may embrace multiple subjects, and the Commission may even propose a singular, comprehensive revision of the Constitution.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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[27] *Id. at* 992 (Fla. 1984).
[28] FLA. CONST. art. XI. An amendment or revision may originate as a proposal by the Legislature, the Constitution Revision Commission, a Constitutional Convention, the Taxation and Budget Reform Commission, or the people directly, by way of an initiative.
[29] FLA. CONST. art. XI, s. 1.
[30] FLA. CONST. art XI, s. 5.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of State, Division of Elections, provided the following information regarding the cost of advertising the proposed amendment contained in the resolution:

> The Division of Elections is required to advertise the full text of proposed constitutional amendments in English and Spanish[ ] twice in a newspaper of general circulation in each county before the election in which the amendment shall be submitted to the electors. The Division is also required to provide each Supervisor of Elections with English and Spanish booklets or posters displaying the full text of proposed amendments, for each polling room or early voting area in each county. The Division is also responsible for translating the amendments into Spanish. The statewide average cost to advertise constitutional amendments, in English and Spanish, in newspapers for the 2018 election cycle was $92.93 per English word of the originating document.
>
> Using 2018 election cycle rates, the cost to advertise this amendment in newspapers and produce booklets for the 2020 general election could be $29,737.60, at a minimum. Accurate cost estimates cannot be determined until the total number of amendments to be advertised is known. At this time, no amendments have achieved ballot position for the 2020 election by either joint resolution of the Florida Legislature or by the initiative petition process.[31]

[31] Email from Brittany Dover, Director of Legislative Affairs, Florida Department of State (Jan. 10, 2019) (on file with the Senate Committee on Judiciary).

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may wish to consider whether to limit the proposals of the Taxation and Budget Reform Commission consistently with the way it proposes to limit amendments proposed by the Constitution Revision Commission. The TBRC, created by Article VI, s. 6 of the Florida Constitution, is substantially similar to the Constitution Revision Commission. Like the Constitution Revision Commission, the TBRC is comprised of appointees who have the power to propose constitutional amendments directly to the electors. These amendments may include a "revision of this constitution or any part of it dealing with taxation or the state budgetary process."[32] The narrower focus of the TBRC, however, does not preclude it from proposing multi-subject amendments.

VIII. Statutes Affected:

This resolution amends Article XI, section 2 of the Florida Constitution.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[32] FLA. CONST. art. XI, s. 6(e).

By Senator Rodriguez

37-00333A-19 201986__

Senate Joint Resolution

A joint resolution proposing an amendment to Section 2 of Article XI of the State Constitution to require that any proposals to revise the State Constitution, or any part thereof, filed by the Constitution Revision Commission be limited to a single subject.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 2 of Article XI of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE XI

AMENDMENTS

SECTION 2. Revision commission.—

(a) Within thirty days before the convening of the 2037 ~~2017~~ regular session of the legislature, and each twentieth year thereafter, there shall be established a constitution revision commission composed of the following thirty-seven members:

(1) the attorney general of the state;

(2) fifteen members selected by the governor;

(3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and

(4) three members selected by the chief justice of the supreme court of Florida with the advice of the justices.

(b) The governor shall designate one member of the

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

37-00333A-19 201986__

commission as its chair. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) Each constitution revision commission shall convene at the call of its chair, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part thereof ~~of it~~.

(d) Any proposal of a revision of this constitution, or any part thereof, filed by the constitution revision commission with the custodian of state records must embrace but one subject and matter directly connected therewith. This subsection shall be construed in a manner consistent with the single-subject limitation applicable to initiatives, as provided in section 3 of this article.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE XI, SECTION 2

ESTABLISHING SINGLE-SUBJECT LIMITATION FOR CONSTITUTION REVISION COMMISSION PROPOSALS.—Proposing an amendment to the State Constitution to require that any proposal of a revision to the State Constitution, or any part thereof, filed by the Constitution Revision Commission with the custodian of state records for placement on the ballot be limited to a single subject and matter directly connected to such subject.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Judiciary, *Vice Chair*
Appropriations Subcommittee on Agriculture, Environment and General Government
Ethics and Elections
Rules

SENATOR JOSE JAVIER RODRIGUEZ
37th District

December 18, 2018

Chairman David Simmons
Committee on Judiciary
404 S. Monroe Street
Tallahassee, FL 32399-1100
Sent via email to simmons.david@flsenate.gov

Chair Simmons,

I respectfully request that you place SJR 86 Single-subject Limitation for Constitution Revision Commission on the agenda of the Committee on Judiciary at your earliest convenience.

Should you have any questions or concerns, please feel free to contact me or my office. Thank you in advance for your consideration.

Thank you,

Senator José Javier Rodríguez
District 37

CC:
Tom Cibula, Staff Director
Joyce Butler, Administrative Assistant
Valerie Clarke, Legislative Assistant to Senator Simmons
Carolyn Grzan, Legislative Assistant to Senator Simmons
Diane Suddes, Legislative Assistant to Senator Simmons

REPLY TO:
☐ 2100 Coral Way, Suite 505, Miami, Florida 33145 (305) 854-0365
☐ 220 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5037

Senate's Website: *www.flsenate.gov*

BILL GALVANO
President of the Senate

DAVID SIMMONS
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

W/D

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/22/2019
Meeting Date

SR 86
Bill Number (if applicable)

Topic Single Subject limitation for CRC Proposals

Amendment Barcode (if applicable)

Name Edward G. Labrador

Job Title Legislative Counsel

Address 100 S. Andrews Ave., Main Library 8th Floor Phone 954-826-1115
Street

Fort Lauderdale FL 33301 Email elabrador@broward.org
City *State* *Zip*

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☑ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Broward County

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Judiciary

BILL:	SPB 7006
INTRODUCER:	Judiciary Committee
SUBJECT:	Uniform Interstate Depositions and Discovery Act
DATE:	January 23, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula		**JU Submitted as Comm. Bill/Fav**

I. Summary:

SPB 7006 amends the Uniform Foreign Depositions Law and enacts the Uniform Interstate Depositions and Discovery Act (UIDDA). The UIDDA will replace and supersede the Uniform Foreign Depositions Law in Florida.

Essentially, the UIDDA provides a streamlined, administrative process among the United States and U.S. territories by which a clerk of court can "domesticate" a "foreign subpoena" issued by another state court. Rather than requiring the appointment of a commissioner in Florida or obtaining Florida counsel to issue a subpoena, the UIDDA permits an out-of-state attorney or party to file a foreign subpoena with the clerk of court in the county where discovery is sought. Upon filing the foreign subpoena, the clerk of court must promptly issue a Florida subpoena as a ministerial act. The out-of-state attorney or party is not subject to the jurisdiction of the Florida courts based on the issuance of the domesticated subpoena. However, if the subpoena is challenged or is in need of either modification or enforcement, a Florida court proceeding must be opened and Florida law will apply.

II. Present Situation:

Discovery Generally

Generally, discovery is a toolbox used by the parties in a lawsuit to "discover" the other side's evidence, whether the evidence is a witness's testimony or a physical object, like documents or photos.[1] For example, in a case involving an auto collision, a party will likely want to "discover"

[1] Henry P. Trawick, Jr., Trawick's Fla. Prac. & Proc. § 16:2 (2018-2019 ed.) ("Discovery may be obtained by depositions on oral examination or by written questions, interrogatories to a party, production and inspection of documents, tangible things and entry on land, and mental and physical examination of persons. This is a comprehensive set of tools with which to discover matters needed in litigation."); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining discovery, "2. Compulsory disclosure, at a party's request, of information that relates to the litigation <the plaintiff filed a motion to compel discovery>. *See* Fed. R. Civ. P. 26–37; Fed. R. Crim. P. 16. • The primary discovery devices are interrogatories, depositions, requests for admissions, and requests for production. Although discovery typically comes from parties, courts also allow

the testimony of the drivers, the testimony of any by-standers, copies of insurance policies, photos of damages to the vehicles or the ability to inspect the damaged vehicles, copies of quotes or receipts for repairs, and so forth.

In a civil lawsuit, discovering the evidence of the other party is useful in determining the scope of a trial or whether a trial is even necessary. If one or both of the parties determine through discovery that there are no material facts in dispute, one or both of the parties may move for summary judgment, negating the need for an expensive trial. Additionally, the discovery process often aids the parties in reaching a settlement, thereby alleviating the need for a costly trial.[2]

One tool in the discovery toolbox, and perhaps the most widely used discovery tool in the United States, is the deposition.[3] Depositions are used to "discover" what a witness knows by taking the testimony of that witness (also known as "deposing" a witness).[4]

A subpoena is a method for carrying out discovery. It is essentially a summons to a party or other witnesses requiring that certain evidence (documents, things, testimony, places to be inspected) be made available to the party conducting discovery. [5] Generally, there are two types of subpoenas: (1) *subpoena ad testificandum* which directs a witness to appear and give testimony; and (2) *subpoena duces tecum* which directs a witness to appear and bring or produce "specified documents, records, or things."[6]

limited discovery from nonparties. . . . 4. The pretrial phase of a lawsuit during which depositions, interrogatories, and other forms of discovery are conducted.").

[2] *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 893 (Fla. 4th DCA 2006) ("Revelation through discovery procedures of the strength and weakness of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.") (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970).

[3] Mullin, Timothy L. Jr. (1981) "Interstate Deposition Statutes: Survey and Analysis," University of Baltimore Law Review: Vol. 11: Iss. 1, Article 2, p. 3. Available at: http://scholarworks.law.ubalt.edu/ublr/vol11/iss1/2 ("The most widely employed discovery method is the deposition.").

[4] *See* n. 1, *supra.*

[5] BLACK'S LAW DICTIONARY (10th ed. 2014) (defining subpoena).

[6] *Id.*

Florida Law on Depositions and Discovery

In Florida, discovery in civil cases is primarily governed by the Florida Rules of Civil Procedure,[7] which are largely patterned after the Federal Rules of Civil Procedure.[8] In particular, Florida Rule of Civil Procedure 1.280 provides for the methods (or tools) and scope of conducting discovery. In pertinent part, the methods[9] include depositions[10] and the production of documents or things or permission to enter land or property for inspection.[11] As to scope, Rule 1.280 "broadly allow[s] parties to obtain discovery of 'any matter, not privileged, that is relevant to the subject matter of the pending action,' whether the discovery would be admissible at trial, or is merely 'reasonably calculated to lead to the discovery of admissible evidence.'"[12]

Florida Rule of Civil Procedure 1.410 also governs the use of subpoenas in conducting discovery. In pertinent part, Rule 1.410 provides as follows:

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[7] *See* Fla. R. Civ. P. 1.280. Initially, however, in 1947, "the Legislature adopted the discovery rules used by federal district courts" and codified those rules under Chapter 91, entitled "Depositions." Henry P. Trawick, Trawick's Fla. Prac. & Proc. § 16:1 (2018-2019 ed.) (citing "former s. 91.30, F.S., repealed 1955"). In 1955, however, the Legislature repealed Chapter 91, deeming it to have been superseded by the Florida Rules of Civil Procedure promulgated by the Florida Supreme Court. *See* Laws 1955, c. 29737, s. 1, ("AN ACT relating to the revision of the Florida Statutes to conform with the Florida rules of civil procedure by repealing . . . Chapter 91 . . .WHEREAS, the Supreme Court of Florida adopted on March 1, 1954, and promulgated the Florida Rules of Civil Procedure to govern litigants in suites of a civil nature and all special statutory proceedings in the courts therein named, to supercede [sic.] existing statutes in conflict therewith, and WHEREAS, the adoption of the Florida Rules of Civil Procedure necessitates the integration of many existing Florida Statutes with these rules, and WHEREAS, the Committee of Civil Procedure for the Florida Bar and the Statutory Revision Department of the Attorney General's office have diligently and constructively utilized all efforts to accomplish such integration to aid dispatch in litigation, simplify procedure and aid in the dispensation of justice, and WHEREAS, a comprehensive report for such integration has been prepared to accomplish these ends, and is recommended by the Board of Governors of the Florida Bar, to repeal sections completely superseded or obsolete, to amend sections requiring change in language or content, which report has been widely published in the Florida Bar Journal, and circulated to the practicing attorneys, the members of the courts, and to the public at large, without a single objection or voice of dissent, NOW THEREFORE, Be It Enacted by the Legislature of the State of Florida: Section 1. The following sections of the Florida Statutes, relating to civil procedure, as superseded by the Florida rules of civil procedure; are repealed: . . . chapter 91. . ."), available at http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1955/LOF1955V1Pt1Ch29615-29833.pdf, p. 262.

[8] *See Miami Transit Co. v. Ford*, 155 So. 2d 360, 362 (Fla. 1963) ("In substantial measure the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure. Admittedly, there are some differences occasioned primarily by our continued recognition of certain procedural distinctions between law and equity. However, the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules to the extent possible."). *See, e.g., Savage v. Rowell Distrib. Corp.*, 95 So. 2d 415, 417 (Fla. 1957))"Our Rule 1.17(b) is almost identical with Rule 17(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. and was patterned thereafter, so the decisions of the federal courts construing their rule are pertinent here."); *Delta Rent-A-Car, Inc. v. Rihl*, 218 So. 2d 467, 468 (Fla. 4th DCA 1969)("However, federal rule 30(g)(1) is identical [to Florida Rule 1.310(g)(1)] and any federal cases under such rule would be pertinent and highly persuasive.") In 1973, the Florida Rules of Civil Procedure were renumbered to the rule numbers currently used, and amended to substantially follow "the 1970 changes in the equivalent federal rules." *See* n. 6, *supra*. *See also* Fla. R. Civ. P. 1.280, COMMITTEE NOTES ("1972 Amendment. The rule is derived from Federal Rule of Civil Procedure 26 as amended in 1970. Subdivisions (a), (b)(2), and (b)(3) are new. Subdivision (c) contains material from former rule 1.310(b). Subdivisions (d) and (e) are new, but the latter is similar to former rule 1. 340(d). Significant changes are made in discovery from experts. The general rearrangement of the discovery rule is more logical and is the result of 35 years of experience under the federal rules.").

[9] Fla. R. Civ. P. 1.280(a).

[10] Fla. R. Civ. P. 1.310.

[11] Fla. R. Civ. P. 1.350 ("Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes"). *But see* Fla. R. Civ. P. 1.351 ("Production of Documents and Things Without Deposition," providing that procedure set out is the exclusive procedure for obtaining documents or things by subpoena from non-parties).

[12] *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (quoting Fla. R. Civ. P. 1.280(b)(1)).

(a) Subpoena Generally. Subpoenas for testimony before the court, subpoenas for production of tangible evidence, and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action.
. . . .

(d) Service. A subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena on a person named within must be made as provided by law. Proof of such service must be made by affidavit of the person making service except as applicable under rule 1.351(c) for the production of documents and things by a nonparty without deposition, if not served by an officer authorized by law to do so.

(e) Subpoena for Taking Depositions.
(1) Filing a notice to take a deposition as provided in rule 1.310(b) or 1.320(a) with a certificate of service on it showing service on all parties to the action constitutes an authorization for the issuance of subpoenas for the persons named or described in the notice by the clerk of the court in which the action is pending or by an attorney of record in the action. The subpoena must state the method for recording the testimony. The subpoena may command the person to whom it is directed to produce designated books, documents, or tangible things that constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 1.280(b), but in that event the subpoena will be subject to the provisions of rule 1.280(c) and subdivision (c) of this rule. Within 10 days after its service, or on or before the time specified in the subpoena for compliance if the time is less than 10 days after service, the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. If objection has been made, the party serving the subpoena may move for an order at any time before or during the taking of the deposition on notice to the deponent.
(2) A person may be required to attend an examination only in the county wherein the person resides or is employed or transacts business in person or at such other convenient place as may be fixed by an order of court.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued.

(g) Depositions before Commissioners Appointed in this State by Courts of Other States; Subpoena Powers; etc. When any person authorized by the laws of Florida to administer oaths is appointed by a court of record of any other state, jurisdiction, or government as commissioner to take the testimony of any named witness within this state, that witness may be compelled to attend and testify before that commissioner by witness subpoena issued by the clerk of any

> circuit court at the instance of that commissioner or by other process or proceedings in the same manner as if that commissioner had been appointed by a court of this state; provided that no document shall be compulsorily annexed as an exhibit to such deposition or otherwise permanently removed from the possession of the witness producing it, but in lieu thereof a photostatic copy may be annexed to and transmitted with such executed commission to the court of issuance.

Additionally, there are costs associated with the discovery process which are authorized by statute. Section 92.142, F.S. provides that witnesses who are summoned to give testimony must be paid for their time. Section 28.24 sets out the service charges a clerk of court is permitted to charge for writing, preparing, signing, and sealing a subpoena ($7) or signing and sealing a subpoena only ($2).[13]

Out-of-State Discovery

Each state in the United States has its own laws and rules governing discovery. When out-of-state discovery becomes necessary to a lawsuit, navigating the various state laws can be tricky. As one Louisiana Bar Article explained,[14]

> Litigants often seek discovery across state lines. In federal court, Federal Rule of Civil Procedure 45 authorizes an attorney to simply sign a subpoena to be served in the district where the witness or evidence is located. In state court, however, each state has a particular procedure for issuing and enforcing subpoenas directed to a nonparty, out-of-state witness. The trial and error associated with navigating these state court procedures are often vexing and, in some cases, prohibitively expensive.[15]

A Massachusetts Bar Article similarly praised the federal discovery rule while lamenting the lack of uniformity among states:

> In federal court, attorneys have essentially nationwide subpoena power pursuant to Federal Rule of Civil Procedure 45, under which a subpoena may be issued from U.S. District Court in the foreign jurisdiction where discovery is sought.
>
> Conversely, in state court, attorneys needing to obtain discovery in a foreign state must navigate the specific procedures and requirements for issuing and enforcing a subpoena in the foreign state. This cumbersome process, which

[13] Section 28.24(18), F.S.
[14] Christopher D. Cazenave and Graham H. Ryan, *Interstate Discovery Simplified: Louisiana Passes the Uniform Interstate Depositions and Discovery Act*, Louisiana Bar Journal Vol. 62, No. 6, pp. 427, http://files.lsba.org/documents/publications/BarJournal/Journal-Feature1-Cazenave-AprilMay-2015.pdf.
[15] *Id.* at 427.

> often requires obtaining two court orders and hiring local counsel, is inefficient, costly and wasteful of judicial resources (sometimes in multiple jurisdictions).[16]

Uniform Foreign Depositions Act

In an attempt to implement a uniform rule across state jurisdictions that provides a streamlined discovery process similar to the federal rules, the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)[17] drafted the Uniform Foreign Depositions Act (UFDA) in 1920. UFDA was enacted in Florida in 1959 as the Uniform Foreign Depositions Law, and Florida became one of only 14 states to enact the law.[18] The Uniform Foreign Depositions Law provides, in pertinent part, as follows:

> Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.[19]

Florida's Uniform Foreign Depositions Law is limited to the taking of depositions and testimony of persons residing in Florida. It does not include the production of documents or things. If "the deposition is arranged between the parties and the witness" and testimony is taken voluntarily, then Florida court proceedings are not necessary.[20] However, when a "witness is reluctant or the party taking the deposition needs subpoenas for any other reason, the clerk can issue subpoenas for the deposition in the same manner as though the deposition were being taken in a Florida action" under the Uniform Foreign Depositions Law.[21] And the "process and proceeding" for taking testimony will be governed by the Florida Rules of Civil Procedure discussed above. However, the clerk can only issue a subpoena "when an authenticated copy of the order appointing a commissioner or of the notice of taking the deposition or of other authority to take the deposition is exhibited to the clerk."[22]

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[16] Nathaniel W. Rice, *The UIDDA streamlines the process of obtaining out-of-state discovery*, Massachusetts Academy of Trial Attorneys Journal, Vol. 6, No. 3, Feb. 2016, pp. 1, 10, https://masslawyersweekly.com/files/2013/11/MATA_020816.pdf.

[17] The Uniform Law Commission is a non-profit organization comprised of state commissions on uniform laws from each state and certain U.S. territories. The purpose of the Uniform Law Commission is to "study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable." Uniform Law Comm'n, Nat'l Conference of Comm'rs on Uniform State Laws, *Organization*, https://www.uniformlaws.org/aboutulc/overview (last visited Jan. 15, 2019).

[18] Section 90.25, F.S. (1959); renumbered as s. 92.251, F.S. by Ch. 76-237, s. 3, Laws of Fla. (1976). *See also* Mullin, Timothy L. Jr. (1981) "Interstate Deposition Statutes: Survey and Analysis," University of Baltimore Law Review: Vol. 11: Iss. 1, Article 2, p. 4, n. 15 (available at: http://scholarworks.law.ubalt.edu/ublr/vol11/iss1/2.).

[19] Section 92.251(2), F.S.

[20] Henry P. Trawick, Trawick's Fla. Prac. & Proc. § 16:16 (2018-2019 ed.).

[21] *Id.*

[22] *Id. See also* Fla. R. Civ. P. 1.140(g)("Depositions before Commissioners Appointed in this State by Courts of Other States; Subpoena Powers; etc."), *supra*. *See also* Extraterritorial Depositions: Foreign States—By Formal Process, 4 Fla. Prac., Civil Procedure § 1.300:10 ("The formal process for securing out-of-state depositions requires two steps: first, the issuance of a commission in the Florida court, authorizing an officer in the jurisdiction where the deposition is to be taken; and second, the

Unless enforcement of the subpoena becomes necessary, a Florida court proceeding does not need to be opened. However, "[i]f enforcement becomes necessary, "an action to enforce the subpoena must be filed. It is begun by a complaint and proceeds in the same manner as other civil actions."[23] It should also be noted that when "a Florida attorney is taking the deposition in Florida for a foreign proceeding, he [or she] can issue the subpoena."[24]

Uniform Interstate Depositions and Discovery Act

Given some of the limits of UFDA and its lackluster reception by the states, the Uniform Law Commissioners made two more attempts to promulgate a uniform discovery law, the most recent of which is the Uniform Interstate Depositions and Discovery Act (UIDDA). The UIDDA is modeled after the simpler, streamlined procedure set forth in Federal Rule of Civil Procedure 45 and has been described as follows:

> The UIDDA allows a party seeking discovery to present the clerk of court in the jurisdiction where the discovery is sought with a subpoena issued under the authority of the trial court, and then the clerk is to issue a subpoena under the authority of the discovery court for service on the witness. There is no need to file a motion with the court or to open a miscellaneous proceeding, and requesting a subpoena in this manner is not considered an entrance of appearance in the courts of the discovery state, which eliminates the need to obtain local counsel simply in order to obtain a subpoena. The only local judicial involvement contemplated by the UIDDA occurs if there is a dispute over enforcement, in which case any application for a protective order or to enforce the subpoena must be made to the local court.[25]

The prefatory comments to the UIDDA describe the clerk of court's role as ministerial and the process as administrative.[26] To date, 41 states and U.S. territories have adopted the UIDDA as either a statute or court rule.[27] Some states, may have a reciprocity requirement, meaning the UIDDA procedure is only available to states that have also enacted the UIDDA.[28]

III. Effect of Proposed Changes:

SPB 7006 replaces the 1920 Uniform Foreign Depositions Law in s. 92.251, F.S., with the 2007 Uniform Interstate Depositions and Discovery Act (UIDDA), recommended by the Uniform Law

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issuance of a subpoena (or subpoena duces tecum) by the appropriate court in the other state to require that the deponent appear and testify.").

[23] Henry P. Trawick, Trawick's Fla. Prac. & Proc. § 16:16 (2018-2019 ed.).

[24] *Id.*

[25] Brenda M. Johnson, *An Introduction to Obtaining Out-of-State Discovery in State and Federal Court Litigation*, CATA News, Spring 2014, p. 27, https://www.nphm.com/wp-content/uploads/2014/10/Out-of-state-depo-article.pdf.

[26] *See* Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Interstate Deposition and Discovery Act*, 4 (2007) available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f67a712b-0585-c0be-3e71-0523c8de4089&forceDialog=0.

[27] *See* Uniform Law Commission, *Uniform Interstate Deposition and Discover Act*, *Enactment Map*, https://www.uniformlaws.org/committees/community-home?communitykey=181202a2-172d-46a1-8dcc-cdb495621d35&tab=groupdetails (last visited Jan. 17, 2019).

[28] *See* n. 25, *supra* (cautioning that, as of 2014, Georgia, Alabama, and Utah had reciprocity requirements).

Commission. If adopted, Florida will join the other 41 states or U.S. territories that have enacted the UIDDA.

The UIDDA is "patterned" after (but not identical to) Federal Rule of Civil Procedure 45, a rule which, according to the prefatory note, "appears to be universally admired by civil litigators for its simplicity and efficiency."[29] Essentially, the UIDDA provides a streamlined, administrative process among the United States and U.S. territories by which a clerk of court can "domesticate" a "subpoena" issued by a "foreign jurisdiction."

Definitions: The UIDDA does not use the term "domesticate," which is often used to describe how a subpoena from one state becomes enforceable in another. However, the UIDDA addresses the concept of domestication by defining and using the terms "foreign jurisdiction" and "state." (s. 92.251(2), F.S.). A foreign jurisdiction is a "state" outside this state, and a "state" is any state of the United States and certain other U.S. territories. As a result, the UIDDA does not apply to subpoenas from other countries.

Additionally, the term "subpoena" is defined broadly in the UIDDA as a document issued under the authority of a court to require that a "person," which is also defined as including legal entities, give deposition testimony, produce documents or other items for inspection, or permit inspection of a place. A "foreign subpoena" is defined as one issued by a court in another state or territory of the United States.

Issuance of Subpoenas: The streamlined administrative procedures of the UIDDA require that a clerk of court in this state "promptly issue" a subpoena when an out-of-state party files a "foreign subpoena" issued by the court of another state. The UIDDA specifically provides that, by filing a foreign subpoena with the clerk of court, the out-of-state party is *not* submitting to the jurisdiction of the Florida courts. Rather, the clerk of court is performing a ministerial, administrative function, meaning the out-of-state party does not have to hire Florida counsel or make a motion to appear in Florida. Likewise, a judge will not have to be involved in the issuance of the subpoena.

The UIDDA requires that the out-of-state party file the foreign subpoena with the clerk of court in the *county* where discovery is sought. This means the foreign subpoena must be filed where the person to be deposed is living, where the records sought are kept, or where the place to be inspected is located.

If the foreign subpoena is valid (issued by a foreign court) and properly filed (in the correct county), the clerk of court is required to issue a Florida subpoena. The Florida subpoena must, however, incorporate the terms of the foreign subpoena and contain the contact information for the counsel of record or for non-represented parties.

Service of Subpoena: Once the Florida subpoena is issued, it will be served on the party from whom discovery is sought in the same manner as any other Florida subpoena, in accordance with the Florida law and Florida Rules of Civil Procedure.

[29] *See* note 26, *supra*.

Deposition, Production, and Inspection: Once the Florida subpoena is issued, Florida law applies to all parties, including the out-of-state party, in conducting discovery (deposing a witness, producing documents or things, inspecting property).

Application to Court: Similarly, the subpoena recipient who wishes to challenge the subpoena or the out-of-state party who wishes to modify or enforce the subpoena must submit an application to the court in the county where discovery is sought. The application must comply with Florida rules and statutes. This means that the out-of-state party must then submit to the jurisdiction of Florida courts. Thus, at this point, an out-of-state party may have to retain Florida counsel, or an out-of-state attorney may associate with Florida counsel and file a "Verified Motion for Admission to Appear Pro Hac Vice Pursuant to Florida Rule of Judicial Administration 2.510."[30]

Uniformity of Application and Construction: The primary goal of the UIDDA is to promote uniform procedures among the states in essentially domesticating foreign subpoenas, and the courts are encouraged to consider this aim when applying or construing the UIDDA. Additionally, although reciprocity language is not included in the model act, the bill requires that only out-of-state parties from jurisdictions that have enacted the UIDDA (or substantially similar) procedures may utilize Florida's streamlined UIDDA process.

Inapplicability to Criminal Proceedings: Although the model UIDDA does not exclude criminal proceedings, the proposed bill contains this exclusion. In criminal proceedings in Florida, limited discovery is permitted by the Florida Rules of Criminal Procedure, but only *if* the defendant elects to participate. There is no reciprocal right to discovery because of the presumption of innocence and the constitutional right against self-incrimination; that is, a criminal defendant cannot be compelled by the state to participate in discovery. Because of these constitutional concerns and need for additional safeguards, the Florida statutes and Florida Rules of Criminal Procedure set forth a distinct process for discovery in criminal cases, including extradition of necessary witnesses from other states.[31]

Effective Date and Application: The bill takes effect on July 1, 2019, and specifically applies to cases pending on that date.[32]

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[30] FL ST J ADMIN Rule 2.510(a) ("Upon filing a verified motion with the court, an attorney who is an active member in good standing of the bar of another state and currently eligible to practice law in a state other than Florida may be permitted to appear in particular cases in a Florida court upon such conditions as the court may deem appropriate, provided that a member of The Florida Bar in good standing is associated as an attorney of record.").

[31] *See* Fla. R. Crim. P. 3.220; Ch. 942, F.S.

[32] In Florida, newly enacted statutes that impose a new obligation or duty that interferes with vested rights will not be applied retroactively to pending cases. On the other hand, statutes that relate to procedure only or are remedial in nature are generally applied retroactively to pending cases. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985). *See also City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986)); *Palm Beach County Sheriff's Office v. Sun-Sentinel Co., LLC*, 226 So. 3d 969, 975–76 (Fla. 4th DCA 2017) (following *City of Orlando v. Desjardins* in holding that newly enacted public records exemption was remedial and applied retroactively). While the UIDDA imposes new duties and obligations upon the clerks of court to domesticate and issue subpoenas for production or inspection, the UIDDA is largely procedural and does not appear to interfere with any vested rights.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Court rule-making: Article V, section 2(a), of the Florida Constitution provides, in relevant part:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Article II, section 3 of the Florida Constitution, reads:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

These provisions have been interpreted to give the Florida Supreme Court exclusive jurisdiction over procedural matters while the Legislature has exclusive jurisdiction over substantive law.

One concern raised by the bill is whether the Legislature has the constitutional power to adopt a procedural act concerning discovery when discovery procedures fall within the purview of the Florida Rules of Civil Procedure. On the other hand, the bill at issue is amending the current Uniform Foreign Depositions Act, which has been in place since 1955. If the UIDDA is deemed more substantive and viewed as a policy choice determining how Florida treats foreign subpoenas, then the Legislature may pass the UIDDA as a general law. However, if the UIDDA is deemed purely procedural, then the

Florida Supreme Court has exclusive jurisdiction to determine how the clerks of court will domesticate and issue foreign subpoenas. Notably, some of the jurisdictions that have passed the UIDDA have done so through court rule.

If the bill is passed and the resulting statute were to be challenged, the court would have a number of options. The court could recognize that the "legislative action" here is "a statement of the public desire."[33] For instance, in *Timmons v. Coombs*,[34] the court found that s. 768.79, F.S., contained procedural portions and adopted those as rules of court without explaining which portions of the law were procedural and which portions were substantive. On the other hand, if the court were to find the UIDDA is procedural, it could strike down the statute and either adopt the UIDDA as a court rule or require the parties to follow the Florida Rules of Civil Procedure.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For private legal practitioners, the more streamlined process may translate into saving time and money for their clients. On the other hand, more Florida residents may be subject to domesticated foreign subpoenas given the simplified procedures.

The simplicity of the UIDDA procedures also gives rise to the potential for abuse of Florida residents by out-of-state parties. However, given that subpoenas issued under the UIDDA are challengeable in Florida and the out-of-state party will be required then to obtain and pay Florida counsel to address any such challenge, abusive discovery practices may be cost prohibitive.

C. Government Sector Impact:

The Florida Association of Court Clerks and Comptrollers (FACC) have commented that the primary distinction between the current Uniform Foreign Depositions Act and the UIDDA is the UIDDA expands discovery beyond depositions to production of documents and things and to inspection of places. The FACC believes the procedures currently used and filing fees charged by the clerks of court under the Uniform Foreign Depositions Act will remain the same but predict that the clerks of court will receive

[33] *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992) (rejecting district court's conclusion that s. 45.061, F.S., is unconstitutional merely because it contains procedural aspects).

[34] 608 So. 2d 1 (1992). *See* n. 56, *supra* ("We have consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. . . . This is particularly so in areas of the judicial process that necessarily involve both procedural and substantive provisions to accomplish a proposal's objective. To strictly apply the nonseverance principle . . . would make it increasingly difficult to adopt new judicial process proposals that have both substantive and procedural aspects. The judiciary and the legislature must work to solve these types of separation-of-powers problems without encroaching upon each other's functions and recognizing each other's constitutional functions and duties. One example is The Florida Evidence Code[.]").

more filings given the expansion to subpoenas for production and inspection. While this will result in additional workload to the clerks' offices, it should also result in additional revenue. Whether these revenues sufficiently reflect the potential increased workload is not known at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 92.251, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

880802

LEGISLATIVE ACTION

Senate	.	House
Comm: RS	.	
01/23/2019	.	
	.	
	.	
	.	

The Committee on Judiciary (Rodriguez) recommended the following:

Senate Amendment (with title amendment)

Delete line 86
and insert:
subject matter among states that enact it. Subpoenas may only be issued pursuant to this section if the foreign jurisdiction that issued the foreign subpoena has adopted the Uniform Interstate Depositions and Discovery Act or a substantially similar measure.

880802

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete line 19
and insert:
construction and application of the act; specifying that a subpoena may only be issued pursuant to this act if the foreign jurisdiction that issued the foreign subpoena has adopted the Uniform Interstate Depositions and Discovery Act or a substantially similar measure; specifying

746004

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
01/23/2019	.	
	.	
	.	
	.	

The Committee on Judiciary (Rodriguez) recommended the following:

Senate Substitute for Amendment (880802) (with title amendment)

Delete line 86
and insert:
subject matter among states that enact it. Subpoenas may only be issued pursuant to this section if the foreign jurisdiction that issued the foreign subpoena has adopted the Uniform Interstate Depositions and Discovery Act or a substantially similar measure that applies to civil proceedings.

746004

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 19

and insert:

construction and application of the act; specifying that a subpoena may only be issued pursuant to this act if the foreign jurisdiction that issued the foreign subpoena has adopted the Uniform Interstate Depositions and Discovery Act or a substantially similar measure; specifying

FOR CONSIDERATION By the Committee on Judiciary

590-00935A-19 20197006pb

A bill to be entitled

An act relating to the Uniform Interstate Depositions and Discovery Act; amending s. 92.251, F.S.; revising a short title; defining terms; requiring a party to submit a foreign subpoena to a clerk of court in this state for the issuance of a subpoena in this state; requiring the clerk of court to promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed; providing requirements for the subpoena; requiring that the service of the subpoena be served in compliance with the laws of this state and the Florida Rules of Civil Procedure; specifying that laws and rules governing compliance with subpoenas apply to subpoenas issued pursuant to the act; requiring that applications challenging a subpoena issued pursuant to the act comply with the statutes and rules of this state and be submitted to a specified court; providing for the uniform construction and application of the act; specifying that the act does not apply to criminal proceedings; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 92.251, Florida Statutes, is amended to read:

92.251 Uniform Foreign Depositions Law.—

(1) SHORT TITLE.—This section may be cited as the "Uniform Interstate ~~Foreign~~ Depositions and Discovery Act ~~Law~~."

590-00935A-19 20197006pb

(2) DEFINITIONS.—As used in this section, the term:

(a) "Foreign jurisdiction" means a state other than this state.

(b) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(c) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(d) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(e) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

1. Attend and give testimony at a deposition;

2. Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

3. Permit inspection of premises under the control of the person.

(3) ISSUANCE OF SUBPOENA.—

(a) To request issuance of a subpoena under this section, a party from a foreign jurisdiction must submit a foreign subpoena to a clerk of court in the county in this state in which

discovery is sought. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena pursuant to paragraph (b) shall:

1. Incorporate the terms used in the foreign subpoena; and

2. Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(4) SERVICE OF SUBPOENA.—A subpoena issued by a clerk of court under subsection (3) must be served in compliance with the laws of this state and the Florida Rules of Civil Procedure.

(5) DEPOSITION, PRODUCTION, AND INSPECTION.—The laws and rules of this state govern and apply to all subpoenas issued under subsection (3).

(6) APPLICATION TO COURT.—An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under subsection (3) must comply with the statutes and rules of this state and be submitted to the court in the county in which discovery is to be conducted.

(7) UNIFORMITY OF APPLICATION AND CONSTRUCTION.—In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

(8) INAPPLICABILITY TO CRIMINAL PROCEEDINGS.—This act does

not apply to criminal proceedings.

~~(2) Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state.~~

~~(3) This section shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.~~

Section 2. This act applies to requests for discovery in all proceedings pending or commenced on or after July 1, 2019.

Section 3. This act shall take effect July 1, 2019.

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-22-19
Meeting Date

SB 7006
Bill Number (if applicable)

Topic UIDPA

Amendment Barcode (if applicable)

Name Bob Harris

Job Title

Address 2618 Centennial Place
Street

Phone 222-0720

Tallahassee FL 32308
City *State* *Zip*

Email bharris@lawfla.com

Speaking: ☑ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Trial Lawyers Section, The Florida Bar

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1-22-19
Meeting Date

SB 7006
Bill Number (if applicable)

880802
Amendment Barcode (if applicable)

Topic UIDDA

Name Bob Harris

Job Title

Address 2618 Centennial Place
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This form is part of the public record for this meeting.

S-001 (10/14/14)

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 Judiciary

BILL:	SPB 7008
INTRODUCER:	Judiciary Committee
SUBJECT:	OGSR/Security Breach Information/Department of Legal Affairs
DATE:	January 18, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**JU Submitted as Comm. Bill/Fav**
2.			CJ	
3.			RC	

I. Summary:

SPB 7008 is based on an Open Government Sunset Review of a public records exemption for information received by the Department of Legal Affairs following a data-security breach of a covered entity. The exemption is scheduled for repeal on October 2, 2019.

The exemption was enacted as a companion bill to the Florida Information Protection Act of 2014, which requires covered entities to take reasonable steps to protect and secure personal information held in electronic form, such as social security numbers, driver license numbers, and medical information. However, if unauthorized access to the information of at least 500 people nonetheless occurs, the Act requires the covered entity involved to notify the Department.

The exemption serves to protect sensitive personal, corporate, and governmental information, as well as to ensure the integrity of an investigation of a security breach. Accordingly, allowing the exemption to sunset could cause the:

- Premature release of confidential information that would jeopardize a related investigation;
- Publication of sensitive personal information, in turn causing identity theft or financial harm; or
- Disclosure of a computer forensic report that reveals vulnerabilities in a covered entity's data security, thus making the entity vulnerable to future data breaches.

For these reasons, the bill repeals the scheduled repeal of the public records exemption.

The bill takes effect October 1, 2019.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.[3] The Public Records Act states that

> [i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[4]

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.[5] Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[7]

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] Public records laws are found throughout the Florida Statutes.
[4] Section 119.01(1), F.S.
[5] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).
[6] 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" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).

under supervision by the custodian of the public record.[8] A violation of the Public Records Act may result in civil or criminal liability.[9]

Only the Legislature may create an exemption to public records requirements.[10] An exemption must be created by general law and must specifically state the public necessity justifying the exemption.[11] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions[12] and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.[13]

When creating or expanding a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'[14] Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.[15]

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,[16] with specified exceptions.[17] It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[18] The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.[19]

The Florida Information Protection Act of 2014 and the Related Exemption

In 2014, the Legislature enacted the Florida Information Protection Act, which expressly requires private and governmental "covered entities"[20] to take reasonable steps to secure electronically

[8] Section 119.07(1)(a), F.S.
[9] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[10] FLA. CONST., art. I, s. 24(c).
[11] *Id.*
[12] The bill may, however, contain multiple exemptions that relate to one subject.
[13] FLA. CONST., art. I, s. 24(c)
[14] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).
[15] *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).
[16] Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).
[17] Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.
[18] Section 119.15(3), F.S.
[19] Section 119.15(6)(b), F.S.
[20] "Covered entity" means "a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information." For purposes of the notice requirements set forth in the Act, the term includes governmental entities.

held personal information and to report larger security breaches that compromise this information. One aspect of the reporting requirement involves notifying the Department of Legal Affairs. A related bill made the information contained in the notification or obtained through a related investigation confidential and exempt from this state's public records laws.[21]

Florida Information Protection Act of 2014

The Florida Information Protection Act requires covered entities to notify the Department of Legal Affairs and affected individuals in the event of a breach of data security involving access to the personal information of at least 500 individuals.

A breach of security is defined as an unauthorized access of data in electronic form containing personal information. Personal information includes a person's name in combination with:

- A social security number;
- A driver license or identification card number, passport number, military identification number or other similar number issued on a government document used to verify identity;
- A financial account number or credit or debit card number in combination with a required security or access code or password necessary to gain access to a person's financial account;
- Certain medical information; or
- A person's health insurance policy number or subscriber identification number or similar identifier identification.

Personal information also includes a username or e-mail address in combination with a password or security question and answer that permits access to an online account.

Confidential and Exempt Information

Under the public records exemption related to the Act, certain information received by the Department of Legal Affairs related to a security breach is confidential and exempt from this state's public records requirements. The exempt information includes that received by the Department in a notification required by the Act or through an investigation by the Department or a law enforcement agency. As explained below, some information is exempt only until an investigation is completed or ceases to be active.

While an investigation is active, the Department may disclose confidential and exempt information for any of the following reasons:

- In furtherance of its official duties and responsibilities.
- For print, publication, or broadcast if the Department determines that the release would assist in notifying the public or in locating or identifying a person that the department believes to have been a victim of the breach or improper disposal of customer records. However, this does not justify disclosing confidential and exempt information if that information is covered by another public records exemption, is personal information or a computer forensic report, would reveal weaknesses in a covered entity's data security, or would disclose a covered entity's proprietary information.
- To another governmental agency in the furtherance of the Department's official duties and responsibilities.

[21] *See* SB 1526 (2014 Reg. Session).

After the completion of an investigation or once the investigation is no longer active, the following information must remain confidential and exempt from public records requirements:

- All information to which another public records exemption applies;
- Personal information;
- A computer forensic report;
- Information that would reveal weaknesses in a covered entity's data security; and
- Information that would disclose a covered entity's proprietary information.

Proprietary information means information that:

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

Propriety information also includes trade secrets or competitive interests, which, if disclosed, would impair the competitive business of the covered entity that is the subject of the information.

Sunset Review

Because the exemption relates to security-breach information received by the Department of Legal Affairs, staff sent a survey to the Department to learn of its experience in interpreting and applying the exemption. From the completed survey and follow-up conversations, staff learned the following.

The Department has received an estimated 685 security-breach notifications since the law took effect on July 1, 2014. Of the notifications, nearly 90 percent came from private organizations.

The Department has investigated each notification that it received. By way of the notifications and ensuing investigations, the Department has received various types of information, including:

- A description of the type of attack or compromise that caused a breach;
- A description of the location of an attack within an IT enterprise;
- An explanation of the means of stopping an attack;
- The number of Florida residents affected by a breach;
- Services being offered to affected consumers;
- Customer lists;
- Patient data;
- Forensic reports relating to a covered entity's data security and IT vulnerabilities;
- Trade secrets; and
- Internal policies and procedures.

Most of this information obtained by the Department is not generally available to the public–it would be available only if the Department releases it on one of the bases enumerated in the

exemption statute. However, some general information is available publicly through technology blogs, news articles, and consumer advocacy websites.

Since July 1, 2014, the Department has received more than 30 requests for records relating to security breaches—the records that the exemption under review, s. 501.171(11), F.S., has made confidential and exempt. The Department has never released these records during an active investigation and has not needed to. However, on three or four occasions, the Department has released information after an investigation when the information requested was no longer confidential and exempt.

Under the statute, some types of information remain confidential and exempt even after an investigation is completed or ceases to be active. This information includes all information to which another public records exemption applies, personal information, and information that would reveal weaknesses in a covered entity's data security. The Department has not released any information of these types even after an investigation was complete or ceased to be active.

III. Effect of Proposed Changes:

SPB 7008 continues the current public records exemption relating to information received by the Department of Legal Affairs following a data-security breach of a covered entity by deleting its scheduled repeal date. The exemption is scheduled for repeal on October 2, 2019.

The exemption protects from public disclosure information received by the Department of Legal Affairs through a notification of a data security breach from a covered entity or through an investigation of a breach by the Department or a law enforcement agency.

The reasons provided as justifications for the public records exemption in the bill creating the exemption remain valid. Therefore, the bill removes the scheduled repeal of the public records exemption. By repealing the automatic repeal of the exemption, the exemption is no longer subject to a review under the Open Government Sunset Review Act unless the exemption is later broadened or expanded.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue. Likewise, it does reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill continues a public records exemption by repealing its scheduled expiration. If the Legislature chooses to expand the exemption, it must include a statement of public

necessity and vote to approve the exemption by a two-thirds vote of the members present and voting in each house.

Otherwise, the Legislature may reenact or narrow the existing exemption through a simple majority vote without a new public necessity statement. To reenact or narrow the exemption, the Legislature may simply strike the sunset provision so that the exemption becomes permanent or amend the date of the sunset provision and require that the exemption be reviewed again in 5 years (2024).

If the Legislature chooses to "sunset" the exemption, no action need be taken. The exemption will be automatically repealed in 2019.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill, by preserving the public records exemption, will continue to protect sensitive personal and data-security information from public disclosure or from premature public disclosure. Allowing the exemption to sunset would appear to increase the risk of identity theft or the divulgence of a covered entity's data-security vulnerabilities.

C. Government Sector Impact:

By preserving the public records exemption, which protects governmental entities' data-security weaknesses from public disclosure, it appears likely that the government will continue to experience a decreased risk of potentially costly data breaches.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 501.171, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

FOR CONSIDERATION By the Committee on Judiciary

590-00946-19 20197008pb

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 501.171, F.S., which provides a public records exemption for information received by the Department of Legal Affairs pursuant to a notification of a security breach or during the course of an investigation of such breach; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) of section 501.171, Florida Statutes, is amended to read:

501.171 Security of confidential personal information.—

(11) PUBLIC RECORDS EXEMPTION.—

(a) All information received by the department pursuant to a notification required by this section, or received by the department pursuant to an investigation by the department or a law enforcement agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2)(c).

(b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the department:

1. In the furtherance of its official duties and responsibilities;

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2. For print, publication, or broadcast if the department determines that such release would assist in notifying the public or locating or identifying a person that the department believes to be a victim of a data breach or improper disposal of customer records, except that information made confidential and exempt by paragraph (c) may not be released pursuant to this subparagraph; or

3. To another governmental entity in the furtherance of its official duties and responsibilities.

(c) Upon completion of an investigation or once an investigation ceases to be active, the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. All information to which another public records exemption applies.

2. Personal information.

3. A computer forensic report.

4. Information that would otherwise reveal weaknesses in a covered entity's data security.

5. Information that would disclose a covered entity's proprietary information.

(d) For purposes of this subsection, the term "proprietary information" means information that:

1. Is owned or controlled by the covered entity.

2. Is intended to be private and is treated by the covered entity as private because disclosure would harm the covered entity or its business operations.

3. Has not been disclosed except as required by law or a

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

private agreement that provides that the information will not be released to the public.

4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department.

5. Includes:

a. Trade secrets as defined in s. 688.002.

b. Competitive interests, the disclosure of which would impair the competitive business of the covered entity who is the subject of the information.

~~(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2019.

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 Judiciary

BILL:	SPB 7010
INTRODUCER:	Judiciary Committee
SUBJECT:	OGSR/Treatment-based Drug Court Programs
DATE:	January 23, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**JU Submitted as Comm. Bill/Fav**
2.				

I. Summary:

SPB 7010 continues the current public records exemption for health-related records, reports, and evaluations concerning applicants to or participants in treatment-based drug court programs. Treatment-based drug court programs identify and treat eligible individuals whose involvement in the justice system is largely due to substance abuse or addiction. In providing substance abuse treatment, drug court programs aim to reduce criminal recidivism and domestic violence by addressing one of the underlying causes of such behavior.

In order to determine an individual's eligibility for the drug court program, or to monitor a participant's progress in the program, a treatment provider must share the individual's health-related information with the judge and other relevant parties on the participant's drug court multidisciplinary team. Because an individual's health information becomes part of the court's record, the public records exemption makes the following health-related records, reports, and evaluations both confidential and exempt from inspection and copying by the public:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

The exemption was initially enacted in 2014 and is scheduled for repeal on October 2, 2019, unless reenacted by the Legislature.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.[3] The Public Records Act states that

> [i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[4]

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.[5] Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[7]

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] Public records laws are found throughout the Florida Statutes.
[4] Section 119.01(1), F.S.
[5] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).
[6] 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" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).

under supervision by the custodian of the public record.[8] A violation of the Public Records Act may result in civil or criminal liability.[9]

Only the Legislature may create an exemption to public records requirements.[10] An exemption must be created by general law and must specifically state the public necessity justifying the exemption.[11] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions[12] and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.[13]

When creating or expanding a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'[14] Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.[15]

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,[16] with specified exceptions.[17] It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[18] The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.[19]

OGSR Review Process

In examining an exemption, the Review Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public

[8] Section 119.07(1)(a), F.S.
[9] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[10] FLA. CONST., art. I, s. 24(c).
[11] *Id*.
[12] The bill may, however, contain multiple exemptions that relate to one subject.
[13] FLA. CONST., art. I, s. 24(c).
[14] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).
[15] *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).
[16] Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).
[17] Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.
[18] Section 119.15(3), F.S.
[19] Section 119.15(6)(b), F.S.

purpose and is no broader than necessary.[20] An exemption serves an identifiable purpose if it meets one of the following purposes of the OGSR, the Legislature finds that the purpose of the exemption outweighs open government policy, *and* the purpose cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[21]
- Releasing sensitive personal information would be defamatory 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;[22] or
- It protects trade or business secrets.[23]

The OGSR also requires specified questions to be considered during the review process.[24] 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?

OGSR Review Outcomes

At the conclusion of the review process, the Legislature may choose to (1) continue the existing exemption, (2) continue and narrow the exemption, (3) continue and expand the exemption, or (4) "sunset" (automatically repeal) the exemption. As a matter of historic practice, when choosing to continue an exemption, continuation has been accomplished by repealing the sunset date rather than reenacting the exemption.

If the Legislature chooses to either (1) continue the exemption without substantive changes or (2) continue and narrow the exemption, then it may do so *without* a public necessity statement and two-thirds vote for passage.

However, if the exemption is (3) continued and *expanded*, then a public necessity statement and two-thirds vote for passage are required.[25]

On the other hand, if (4) the Legislature allows the exemption to sunset (repeal automatically), no action need be taken. The previously exempt records will remain exempt unless provided for by law.[26]

[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S
[25] FLA. CONST. art. I, s. 24(c).
[26] Section 119.15(7), F.S.

Overview of Treatment Based Drug Courts

Treatment-based drug courts are a type of problem-solving court aimed at addressing one of the root causes of criminal behavior and domestic violence: substance abuse and addiction.[27] Generally, drug court programs identify individuals in either the criminal justice or dependency system who may benefit from substance abuse treatment. Those individuals may either be diverted to a substance abuse treatment center shortly after entering the justice system, or may be required to complete treatment later, as a condition of probation/community control or a dependency case plan. To help these individuals successfully complete treatment, drug courts provide incentives (such as reduced penalties) and support[28] to the individual to help him or her succeed.[29]

In Florida, s. 397.334, F.S., the exemption under review, authorizes a county to fund a treatment-based drug court program to provide individualized treatment to eligible individuals in the criminal justice or dependency system.[30] The goal in providing treatment is to reduce criminal recidivism as well as to break the cycle of domestic violence, child abuse, and neglect owing to substance abuse.[31] Ultimately, entry into a treatment-based drug court program is *voluntary*, and the written consent and agreement of the potential participant is necessary for a court to order him or her into a treatment program.[32]

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[27] *See* Florida Courts, *Problem-Solving Courts*, http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/ (last visited Jan. 14, 2019).

[28] Section 397.334(1), F.S. Each county opting to fund a drug court program must implement the following 10 therapeutic jurisprudence principles: (1) integration of alcohol, drug treatment, and mental health services into justice system case processing; (2) nonadversarial approach; (3) early identification of eligible participants; (4) continuum of services; (5) alcohol and drug testing for abstinence; (6) coordinated strategy for responses to participants' compliance; (7) ongoing judicial interaction; (8) monitoring and evaluation for program effectiveness; (9) interdisciplinary education; and (10) partnerships with stakeholders. s. 397.334(4)(a)-(j), F.S. Note, because drug court programs are individually operated by each county and are not uniform, the Office of State Court Administrators (OSCA) publishes a guide setting out the best practice standards for drug courts to follow. This guide is based largely on the research and analysis by the National Association of Drug Court Professionals (NADP). *See* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, June 2017, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.

[29] *See* n. 20, *supra*.

[30] *See* n. 21, *supra*.

[31] *See* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "Introduction," June 2017, p. 2 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf. *See also* s. 397.305(1), F.S. ("Substance abuse impairment is a disease which affects the whole family and the whole society and requires a system of care that includes prevention, intervention, clinical treatment, and recovery support services that support and strengthen the family unit."); s. 397.305(8), F.S. ("It is the intent of the Legislature to provide an alternative to criminal imprisonment for substance abuse impaired adults and juvenile offenders by encouraging the referral of such offenders to service providers not generally available within the juvenile justice and correctional systems, instead of or in addition to criminal penalties."); s. 39.001(6)(d), F.S. ("It is the intent of the Legislature to encourage the use of . . . the drug court program model established under s. 397.334 and authorize courts to assess children and persons who have custody or are requesting custody of children where good cause is shown to identify and address mental illnesses and substance abuse disorders as the court deems appropriate at every stage of the dependency process.").

[32] Section 397.334(2), F.S. As part of giving voluntary consent, the individual must be given a written copy of the "coordinated strategy" for treatment developed by the multidisciplinary team that will monitor the participant's progress. *See* s. 397.334(5), F.S. and "Participation" discussion, *infra*.

Throughout the drug court evaluation and treatment process, records of a drug court participant's screenings, diagnosis, and progress are made part of the participant's court record.[33] This process is discussed in more detail as follows.

Eligibility Screening Records

First, a potential participant must be screened for eligibility. Generally, a potential drug court participant is identified by one of the parties involved either when an individual enters the criminal justice system or when the state intervenes in a domestic matter.[34] The potential participant is then screened for eligibility by the appropriate agencies and mental health treatment professionals using "evidence-based assessment tools and procedures" in order to determine the individual's level of risk and whether he or she can be treated safely and effectively.[35]

If an individual is determined to be eligible by the appropriate agency and mental health treatment professional, the applicant's screening information, including mental health assessments, will be referred to the presiding judge who will ultimately decide whether to permit the individual to participate. As stated above, the participant must voluntarily agree to enter the program and give written consent.[36] However, it does not appear that an individual must consent to be screened for eligibility.

Treatment Records

Next, participants accepted to the drug court programs generally receive outpatient evaluation and treatment over the course of 9 to 12 months.[37] Treatment is conducted in phases which are more intensive in the beginning, and consists of group counseling, individual counseling, and peer support groups.[38] Participants must also submit to drug and alcohol testing throughout the

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[33] *See generally Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 11 (On file with Senate Judiciary Committee).

[34] Section 397.334(1), F.S. (contemplating involvement of and encouraging participation by "the Department of Corrections, the Department of Children and Families, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and such agencies, local governments, law enforcement agencies, other interested public or private sources, and individuals to support the creation and establishment of these problem-solving court programs."). The drug court administrators surveyed noted that many agencies and individuals refer individuals to the drug court programs, from the individual's attorney, public defender, or family member to the individual's arresting officer or probation officer. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 2: "how are cases referred to the program?" (On file with Senate Judiciary Committee).

[35] *See* s. 397.334(2)-(3), (5), F.S. (providing for pre and post-trial intervention programs and for a coordinated strategy for screening and treatment among a drug court team, respectively); s. 948.08, F.S. (providing that, for pre-trial drug court diversion programs, first time felony offenders (regardless of misdemeanor record) and non-violent felony offenders may be eligible if the judge, drug court manager, prosecutor, and victim agree); s. 948.16, F.S. (setting out eligibility for participation drug and alcohol-related misdemeanor pre-trial program). *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "I. Target Population," June 2017, pp. 3-4 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf (noting that those with a criminal record are not automatically disqualified from participating in drug court programs).

[36] *See* note 25, *supra*.

[37] Section 397.334(4), F.S. *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "V. Substance Abuse Treatment," June 2017, pp. 12-14 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.

[38] *Id.*

program.[39] As appropriate, the drug court program may also assist the participant in obtaining additional services and treatments, such as finding drug-free housing, receiving medical treatment, or obtaining family or mental health counseling.[40]

A participant's treatment plan and progress is overseen by a multi-disciplinary drug court team, usually consisting of the judge or judicial officer, a case manager or treatment provider, the participant's legal representative, the participant, and representatives from any relevant state agencies.[41] Pursuant to the participant's written consent and agreement, the members of the multidisciplinary team share information about the participant both when developing the initial treatment plan and as necessary throughout treatment in order to assess the participant's progress and compliance.[42] Treatment evaluation and reports are part of the participant's court file.

Additionally, the team members attend status hearings where relevant information about the participant's treatment and progress may be shared in open court.[43]

Exemption and Confidentiality of Treatment-based Drug Court Program Records

Before s. 397.334, F.S. was enacted in 2014, a drug court participant's court file was not automatically sealed as confidential and exempt from public inspection.[44] Rather, each individual drug court participant had to make a motion to seal the court record from public inspection.[45] For each individual motion filed, the judge had to hold a hearing and issue an order granting or denying the participant's motion.[46] This motion-driven process reportedly had a significant impact on the workload for both the judges and the court clerks' (administrative) offices. [47]

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[39] Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VII. Drug and Alcohol Testing," June 2017, pp. 18-19, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[40] Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VI. Additional Treatment and Social Services," June 2017, pp. 15-19, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[41] Section 397.334(5), F.S. ("While enrolled in a treatment-based drug court program, the participant is subject to a coordinated strategy developed by a drug court team under subsection (4)."). *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VIII. Multidisciplinary Team," June 2017, p. 20-21 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[42] Section 397.334(5), F.S. *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "IV. Incentives, Sanctions, and Therapeutic Adjustments," June 2017, pp. 9-11, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[43] *See* n. 32, *supra*. *See also Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 7.c. & 15.d. (On file with Senate Judiciary Committee).
[44] *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So. 3d 228, 229-230 (Fla. 2011). Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 280* (December 2, 2013) (on file with the Senate Committee on Judiciary).
[45] *Id. See* Fla. R. Jud. Admin. 2.420. Rule 2.420 made certain enumerated categories automatically exempt "but only insofar as [those categories] were confidential under [Florida's Sunshine Law] as of the date of adoption of Rule 2.420." *Poole v. South Dade Nursing & Rehab. Ctr*., 139 So. 3d 436, 439 & n.4 (Fla. 3d DCA 2014) (holding that criminal competency evaluations are not confidential under Rule 2.420 or as a patient treatment record).
[46] *Id.*
[47] Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 280* (December 2, 2013) (on file with the Senate Committee on Judiciary).

Florida Laws Protecting Patient Treatment Records

Generally, a patient's treatment records are protected from disclosure by Florida's Constitutional Right to Privacy[48] and s. 456.057(7)(a), F.S. The patient's written consent is generally required before the patient's medical and treatment information may be disclosed to a third party.[49] Additionally, certain communications between a patient and psychotherapist will be deemed privileged and confidential, and cannot be disclosed without the consent of the patient to a third party.[50]

While the foregoing laws protect a patient's treatment records from disclosure to third parties, the protection does not extend to certain court-ordered evaluations, like criminal pre-trial competency evaluations, because the person under evaluation is not a "patient" who is "seeking care and treatment."[51] Rather, the purpose of such evaluations is to share information with a "third party," i.e., the trial court, in order to assist the trial court in making a decision; e.g., to assess whether a criminal defendant is competent to stand trial.[52]

Federal Law Protecting Patient Treatment Records

Under Federal law, an individual's health information is generally made private and protected from release by the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA restricts the release of "protected health information" that is "created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse" concerning the "past, present, and future physical or mental health" of an individual and any treatment received.[53]

Federal law also protects the confidentiality of substance abuse patients[54] in "federally-assisted" treatment-based drug court program.[55] Specifically, federal law prohibits the disclosure of (1) the identity of both applicants to and participants in a substance abuse treatment program, and (2) information about both applicants and patients used for diagnosis or treatment purposes.[56]

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[48] FLA. CONST. art. I, s. 23. However, the right to privacy in medical records is not absolute and may give way when the state has a "compelling government interest" such as controlling and prosecuting criminal activity. *State v. Carter*, 23 So. 3d 798, 801 (Fla. 1st DCA 2009). For example, individuals filling a prescription generally have only "'a limited expectation of privacy in pharmacy records.'" *Id.* (*quoting Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533, 539 (2003)).

[49] Although exceptions are listed, section 456.057(7)(a) provides that "records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient." *See also Poole*, 139 So. 3d at 441 (discussing Florida privacy laws).

[50] Section 90.503, F.S. (defining a psychotherapist as one who is authorized to diagnose and treat "alcoholism and other drug addiction," including medical practitioners, psychologists, clinical social workers, therapists, mental health counselors, and personnel of treatment facilities who provide treatment,). *See also Poole* at 441.

[51] *Poole* at 441 (citing *Miami Herald Publishing Co. v. Chappell*, 403 So. 2d 1342, 1344-45 (Fla. 3d DCA 1981).

[52] *Id.*

[53] 42 U.S.C. s 1320d(4). S*ee also* 45 C.F.R. s. 160.103.

[54] *See* 42 C.F.R. Part 2.

[55] 42 C.F.R. s. 2.12(b).

[56] See 42 C.F.R. ss. 2.11-2.12. The definition of "federally assisted" is broad enough that Florida's drug court program would likely be deemed "federally assisted" such that 42 C.F.R. Part 2 applies. The drug court program received federal grant money until 2013. *See* Florida Courts, *Florida's Adult Post-Adjudicatory Drug Court Expansion Program Facts*, July 2017, https://www.flcourts.org/content/download/216244/1963410/PADC_Fact_Sheet.pdf. If the state courts receive federal grant money that *could* be used toward the drug court, the drug court program meets the definition of "federally assisted." 42 C.F.R.. 2.12(b)(3)(ii)(Federally assisted if supported by funds provided by federal department or agency and being

However, "the HIPAA and other applicable confidentiality statutes . . . do *not* prohibit treatment professionals and or criminal justice professionals from sharing information related to substance abuse and mental health treatment" with one another.[57] For example, courts have already held that law enforcement officers and prosecutors are not specifically "covered entities" whose behavior is governed by HIPAA's standards.[58] "Rather, these statutes control how and under what circumstances such information may be disclosed."[59] "Treatment professionals are generally permitted to share confidential treatment information with criminal justice professionals pursuant to a voluntary, informed, and competent waiver of a patient's confidentiality and privacy rights[[60]] or pursuant to a court order[[61]]."[62] However, "[t]he scope of the disclosure must be limited to the minimum information necessary to achieve the intended aims of the disclosure."[63]

Staff Research of Practitioners and Interested Parties

With the assistance of the Office of State Court Administrators (OSCA), Staff sent a survey to each drug court program coordinator or administrator.[64] None of the judicial circuits reported any problems understanding or administering the current exemption, nor did any report any litigation over the exemption. Additionally, none of the drug courts recommended repealing the exemption. Rather, half of the 20 judicial circuits (10) recommended keeping the existing public records exemption, while a quarter (5) recommended expanding the exemption to cover participant records in other problem-solving courts (e.g., Veterans courts).[65] The remaining judicial circuits had no recommendation.[66]

When the exemption was passed in 2014, the stated public necessity for the exemption was to encourage participation in the drug court program. In response to the survey, drug court program administrators reported observing no direct correlation between participation in the drug court

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"[c]onducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program"). In any event, the drug courts surveyed indicated that they regard themselves as subject to 42 C.F.R. Part 2. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 16.a. (On file with Senate Judiciary Committee).

[57] *See* note 32, *supra*, "C. Team Communication and Decision-Making" at p. 68.

[58] *Id. See Carter*, 23 So. 3d at 800 (holding that HIPAA standards did not apply nor, alternatively, provide for suppression of medical history received by law enforcement officer from a pharmacy under s. 893.07(4), F.S.) (*citing* 45 C.F.R. §§ 160.102(a), 160.104(a); *State v. Straehler*, 307 Wis.2d 360, 745 N.W.2d 431 (2007) with parenthetical "HIPAA standards not applicable to police officers"; *State v. Downs*, 923 So.2d 726 (La.App. 1st Cir.2005) with parenthetical "HIPAA standards not applicable to district attorney.").

[59] *See* note 48, *supra* (citation omitted).

[60] 45 C.F.R.164.502(a).

[61] 45 C.F.R. §164.512(e).

[62] *See* note 48, *supra* (citation omitted).

[63] *Id.* (citing 45 C.F.R. ss.164.502(b) & 164.514(d).

[64] Nineteen out the 20 judicial circuits have at least one active adult drug court. The third judicial circuit no longer operates a drug court. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, (On file with Senate Judiciary Committee).

[65] *See* Florida Courts, *Problem-Solving Courts*, https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts (last visited Jan. 14, 2019).

[66] *Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 12, 14, 17, August 2018, (On file with Senate Judiciary Committee).

program and the passage of the public records exemption.[67] Additionally, none of the drug court programs reported that anyone had declined to participate because some information may be discussed in open court. However, several programs reported that participants needing to discuss sensitive information with the court may go last when the court is less populated or may request to speak to the judge at a sidebar rather than speak in open court.[68]

Of the 19 circuits having active drug court programs, only four reported receiving public records requests concerning drug court participants since 2014. Those four circuits reported receiving eight requests from either the participant or the participant's attorney, or from the news media. In seven of the eight requests, the information sought in the public records request was not released without the participant's consent. However, the Sixth Circuit reported releasing the names of participants and the treatment centers they were attending to the Tampa Tribune because the information was already publicly disclosed in a court order.[69]

Conclusion and Recommendation

Absent the exemption, a drug court participant's health information could be at risk for public disclosure in several respects. First, initial screening records used to determine eligibility for participation must be shared with the court but may not necessarily be considered a protected treatment record under health privacy laws because the applicant is not yet a "patient." Second, while a participant's treatment records are protected from disclosure to a third party by other state and federal laws, drug court program participants have given written consent to share this information by virtue of their agreement to participate in the drug court program. As such, a drug court participant's treatment information and progress is shared between treatment providers, agencies, and the court and becomes part of the participant's court record. To ensure the public records law is not used to circumvent a participant's privacy in his or her treatment records and to ensure the participant's health records are sealed as quickly as possible, it appears the exemption should be reenacted.[70]

III. Effect of Proposed Changes:

This legislation continues a public records exemption that was created in 2014 and is scheduled to repeal on October 2, 2019. The exemption makes the following health-related records contained in a drug court participant's court file confidential and exempt without the need to file a motion to seal that portion of the record:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

[67] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 10, August 2018, (On file with Senate Judiciary Committee). In fact, several courts reported that there was a decrease in participation in some of the years between 2014 and 2018 but that this was due to other factors, such as prosecutorial decisions in certain districts. *Id.*

[68] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 7.c. and 15.d., August 2018, (On file with Senate Judiciary Committee).

[69] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 13, August 2018, (On file with Senate Judiciary Committee).

[70] However, it should be noted that sensitive participant information may still be discussed in open court.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue. Likewise, it does reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill continues a public records exemption by repealing its scheduled expiration. If the Legislature chooses to expand the exemption, it must include a statement of public necessity and vote to approve the exemption by a two-thirds vote of the members present and voting in each house.

Otherwise, the Legislature may reenact or narrow the existing exemption through a simple majority vote without a new public necessity statement. To reenact or narrow the exemption, the Legislature may simply strike the sunset provision so that the exemption becomes permanent or amend the date of the sunset provision and require that the exemption be reviewed again in 5 years (2024).

If the Legislature chooses to "sunset" the exemption, no action need be taken. The exemption will be automatically repealed in 2019.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill makes health-related treatment records contained in the court file of a drug court participant automatically confidential and exempt from public inspection. By preserving

the public records exemption, the bill may encourage some individuals to participate in the drug court program by alleviating any concern that his or her substance abuse or other medical history will be released to the public unless his or her attorney can get the file sealed. Additionally, individuals paying private counsel will not accrue the costs and fees associated with the motion-driven process to have the court file sealed.[71]

C. Government Sector Impact:

By preserving the public records exemption, the bill permits the courts to automatically seal a participant's court record and avoid the lengthier motion-driven process, thereby reducing the workload of the judges and court administration as well as associated due process costs.[72]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 397.334, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[71] *See* note 44 and text, *supra*.
[72] *Id.*

FOR CONSIDERATION By the Committee on Judiciary

590-00947-19 20197010pb

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 397.334, F.S., relating to an exemption from public records requirements for certain information relating to screenings for participation in treatment-based drug court programs and subsequent treatment status reports; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) of section 397.334, Florida Statutes, is amended to read:

397.334 Treatment-based drug court programs.—

(10)(a) Information relating to a participant or a person considered for participation in a treatment-based drug court program which is contained in the following records is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. Records created or compiled during screenings for participation in the program.

2. Records created or compiled during substance abuse screenings.

3. Behavioral health evaluations.

4. Subsequent treatment status reports.

(b) Such confidential and exempt information may be disclosed:

1. Pursuant to a written request of the participant or

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person considered for participation, or his or her legal representative.

2. To another governmental entity in the furtherance of its responsibilities associated with the screening of a person considered for participation in or the provision of treatment to a person in a treatment-based drug court program.

(c) Records of a service provider which pertain to the identity, diagnosis, and prognosis of or provision of service to any person shall be disclosed pursuant to s. 397.501(7).

(d) This exemption applies to such information described in paragraph (a) relating to a participant or a person considered for participation in a treatment-based drug court program before, on, or after the effective date of this exemption.

~~(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2019.

CourtSmart Tag Report

Room: EL 110 **Case No.:** **Type:**
Caption: Senate Judiciary Committee **Judge:**

Started: 1/22/2019 12:34:57 PM
Ends: 1/22/2019 1:33:02 PM Length: 00:58:06

12:35:03 PM Meeting called to order by Chair Simmons
12:35:15 PM Comments from Chair Simmons
12:35:32 PM Roll call by Administrative Assistant, Joyce Butler
12:35:37 PM Quorum Present
12:35:46 PM Comments from Chair Simmons
12:37:43 PM Introduction of Tab 1, SB 58, Legislature
12:38:36 PM Explanation of Late-filed Strike-all Amendment No. 122310 to SB 58 by Senator Gibson
12:40:25 PM Comments from Chair Simmons
12:40:35 PM Question from Senator Hutson
12:40:59 PM Response from Senator Gibson
12:41:30 PM Chair passed to Vice Chair Rodriguez
12:41:43 PM Explanation of Strike-all Amendment by Chair Simmons
12:45:29 PM Question from Vice Chair Rodriguez
12:45:35 PM Response from Chair Simmons
12:45:47 PM Additional question from Vice Chair Rodriguez
12:46:15 PM Response from Chair Simmons
12:48:01 PM Question from Senator Stargel
12:48:09 PM Response from Chair Simmons
12:49:18 PM Follow-up question from Senator Stargel
12:49:30 PM Response from Chair Simmons
12:50:28 PM Question from Senator Gibson
12:51:08 PM Response from Chair Simmons
12:52:29 PM Follow-up question from Senator Gibson
12:52:48 PM Response from Chair Simmons
12:53:06 PM Additional question from Senator Gibson
12:53:49 PM Response from Chair Simmons
12:55:15 PM Question from Senator Baxley
12:56:37 PM Comments from Vice Chair Rodriguez
12:56:52 PM Comments from Chair Simmons
12:58:55 PM Follow-up question from Senator Baxley
12:59:04 PM Response from Chair Simmons
1:00:23 PM Comments from Vice Chair Rodriguez
1:00:34 PM Question from Senator Hutson
1:00:49 PM Response from Chair Simmons
1:03:54 PM Question from Vice Chair Rodriguez
1:04:45 PM Response from Chair Simmons
1:06:24 PM Chair passed to Chair Simmons
1:06:38 PM Chair Simmons explains the Amendment to the Amendment
1:07:02 PM Amendment is adopted with lines 34-35 is deleted
1:08:03 PM Speaker Rich Templin, Florida AFL-CIO in support
1:09:45 PM Comments from Chair Simmons
1:10:16 PM Senator Baxley in debate

1:11:06 PM Senator Rodriguez in debatre
1:12:18 PM Senator Gibson waives closure
1:12:40 PM Amendment as amended adopted
1:13:18 PM Roll call on CS/SB 58 by Administrative Assistant, Joyce Butler
1:13:28 PM CS/SB 58 reported favorably
1:13:46 PM Tab 2 SJR 74 introduced by Chair Simmons
1:14:15 PM Explanation of SJR 74, Single subject Limitation for Constitution Revision by Senator Bradley
1:15:46 PM Comments from Chair Simmons
1:16:26 PM Trish Nealy, Consultant, League of Women Voters waives in support
1:16:40 PM Rich Templin Florida AFL-CIO waives in support
1:16:57 PM Edward Labrador, Legislative Counsel, Broward County waives in support
1:17:19 PM Senator Rodriguez in debate
1:18:46 PM Senator Baxley in debate
1:20:17 PM Senator Bradley closes on SJR 74
1:20:50 PM Roll call on SJR 74 by Administrative Assistant, Joyce Butler
1:20:59 PM SJR 74 presented favorably
1:21:13 PM Tab 3, SJR 86 introduced by Chair Simmons
1:21:25 PM SJR 86 is withdrawn
1:21:52 PM Tab 4 SPB 7006 introduced by Chair Simmons
1:22:07 PM Chair passed to Vice Chair Rodriguez
1:22:21 PM Comments from Vice Chair Rodriguez
1:22:37 PM Explanation of SPB 7006 by Chair Simmons
1:24:48 PM Bob Harris waives in support of Bill
1:24:57 PM Chair passed to Chair Simmons
1:25:25 PM Introduction of Amendment No. 880802 by Senator Rodriguez
1:25:33 PM Explanation of Amendment No. 880802
1:25:39 PM Comments by Chair Simmons
1:25:50 PM Explanation of Substitute Amendment No. 746004 by Chair Simmons
1:26:07 PM Comments from Chair Simmons regarding Substitute Amendment
1:26:22 PM Bob Harris, Trial Lawyers Section, The Florida Bar waives in support of Substitute Amendment
1:26:29 PM Comments from Chair Simmons
1:26:42 PM Senator Rodriguez waives closure
1:26:59 PM Substitute Amendment No. 746004 is adopted
1:27:22 PM Chair passed to Vice Chair Rodriguez
1:27:33 PM No debate on the bill
1:27:42 PM Closure on the Bill by Chair Simmons
1:28:31 PM Roll call on SPB 7006 by Administrative Assistant, Joyce Butler
1:28:54 PM SPB 7006 reported favorably
1:29:09 PM Chair passed to Senator Rodriguez
1:29:24 PM Explanation of SPB 7008 by Chair Simmons
1:30:27 PM Comments from Vice Chair Rodriquez
1:30:42 PM Roll call on SPB 7008 by Administrative Assistant, Joyce Butler
1:30:53 PM SPB 7008 reported favorably
1:31:01 PM Introduction of SPB 7010 by Vice Chair Rodriguez
1:31:18 PM Explanation of SPB 7010 by Chair Simmons
1:31:35 PM Comments from Vice Chair Rodriguez
1:31:47 PM Roll call on SPB 7010 by Administrative Assistant, Joyce Butler
1:31:57 PM SPB 7010 reported favorably
1:32:04 PM Chair passed to Chair Simmons
1:32:10 PM Comments from Chair Simmons

1:32:56 PM Senator Baxley moves to adjourn, meeting adjourned