

exploitation that resulted in serious mental, emotional, or physical injury, if the department Secretary determines that release is in the public interest.

The bill requires the department, at least three business days prior to releasing confidential and exempt records, to make an attempt to provide notice of the release. After receiving notice, any person notified may petition a circuit court for an order preventing the department from releasing the records, and the circuit court may order the department not to release the records only after finding that the best interests of the petitioner outweigh the public interest.

This bill substantially amends ss. 39.202, 39.2021, 402.115, 415.107, 415.1071, F.S., and creates s. 39.00145, F.S.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.²

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency records are available for public inspection.⁴ Section 119.011(11), F.S., defines the term “public record” very broadly to include “all documents, ... tapes, photographs, films, sounds recordings, ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Unless made exempt, all such materials are open for public inspection.⁵

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption.⁶ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸

Section 119.10, F.S., prescribes the penalties for violations of ch. 119, F.S., as follows:

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² Fla. Const. art. I, s. 24.

³ Chapter 119, F.S.

⁴ Section 119.011(2), F.S., defines *agency* as “any state, county, ... or municipal officer, department, ... or other separate unit of government created or established by law ... and any other public or private agency, person, ... acting on behalf of any public agency.”

⁵ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁶ Fla. Const. art. I, s. 24.

⁷ *Id.*

⁸ *Id.*

- Any public officer who:
 - Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding \$500.
 - Knowingly violates the provisions of s. 119.07(1), F.S., relating to the inspection and copying of public records, is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree.
- Any person who willfully and knowingly violates:
 - Any of the provisions of ch. 119, F.S., commits a misdemeanor of the first degree.
 - Section 119.105, F.S., relating to police reports, commits a felony of the third degree.

Public records do not necessarily lose their exempt status once they are disclosed. In *Ragsdale v. State*, the Supreme Court held that:

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record . . . the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁰ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹¹ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.¹² An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which . . . would be defamatory . . . or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or

⁹ 720 So.2d 203, 206 (Fla. 1998). See also, *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995) in which the court held, “[T]he primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests. Had the legislature intended the exemption . . . to evaporate upon the sharing of that information . . . , it would have expressly provided so in the statute.”

¹⁰ Section 119.15, F.S.

¹¹ Section 119.15(6)(b), F.S.

¹² *Id.*

- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.¹³

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁴

Department of Children and Family Services

The department is an executive branch agency headed by a Secretary appointed by the Governor and confirmed by the Senate.¹⁵ As part of its responsibilities, the department investigates reports of abuse, abandonment, neglect or exploitation of children and vulnerable adults.¹⁶ Sensitive information regarding children, vulnerable adults, and alleged perpetrators is collected during those investigations.

Public Record Exemptions for the Department

Current law provides public record exemptions for all records held by the department concerning reports of abuse, neglect or abandonment of a child¹⁷ and reports of abuse, neglect or exploitation of a vulnerable adult.¹⁸ This includes reports made to the central abuse hotline and all records generated as a result of such reports.

The exemption authorizes release of the confidential and exempt information¹⁹ to certain agencies and persons or under certain circumstances.²⁰ For example, the department may release information to the Department of Health, the Agency for Persons with Disabilities, or county agencies responsible for carrying out child or adult protective investigations, ongoing child or adult protective services, early intervention and prevention services, Healthy Start services, licensure or approval of adoptive homes, foster homes, or child care facilities or services for victims of domestic violence.²¹

Current law also authorizes any person or organization, including the department, to petition the court for an order making public the records of the department pertaining to investigations of alleged abuse, neglect, or abandonment of a child²² or alleged abuse, neglect or exploitation of a

¹³ *Id.*

¹⁴ Section 119.15(6)(a), F.S.

¹⁵ Section 20.19, F.S.

¹⁶ See chapters 39 and 415, F.S.

¹⁷ Section 39.202(1), F.S.

¹⁸ Section 415.107(1), F.S.

¹⁹ There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute. If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information. *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA), *review denied*, 892 So.2d 1015 (Fla. 2004).

²⁰ See s. 39.202(2), *et. seq.*, F.S., and s. 415.107(2), *et. seq.*, F.S.

²¹ Section 39.202(2)(a), F.S.

²² Section 39.202(1), F.S.

vulnerable adult.²³ The court must determine whether good cause exists for public access. In making this determination, the court must balance the best interests of the:

- Child and that child's siblings, together with the privacy rights of other persons identified in the reports, against the public interest.²⁴
- Vulnerable adult, together with the privacy rights of other persons identified in the reports, against the public interest.²⁵

The law also authorizes the department to petition the court for an order for the immediate public release of department records pertaining to cases that involve serious bodily injury.²⁶ The court, within 24 hours after the department files the petition,²⁷ must determine whether good cause exists.²⁸ If the court determines that good cause exists for public access, the court must direct the department to redact²⁹ the name and other identifying information of any person identified in any protective investigation report until the court finds that there is probable cause to believe that the person identified committed an act of abuse, abandonment, neglect or exploitation.³⁰

Federal Confidentiality Laws

The Family Educational Rights and Privacy Act (FERPA) and Individuals with Disabilities Education Act (IDEA) strictly limit the authority of schools to release student records to third parties.³¹ School records may be released to a parent, defined by FERPA to include a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.³² This definition may be interpreted to include foster parents or child welfare agencies with legal custody of a child.³³

²³ Section 415.1071(1), F.S.

²⁴ Section 39.2021(1), F.S.

²⁵ Section 415.1071(1), F.S.

²⁶ Sections 39.2021(2) and 415.1071(2), F.S. In cases involving a child, the petition must be personally served upon the child, the child's parent or guardian, and any person named as an alleged perpetrator in the report of abuse, abandonment, or neglect. In cases involving a vulnerable adult, the petition must be personally served upon the vulnerable adult, the vulnerable adult's legal guardian, if any, and any person named as an alleged perpetrator in the report of abuse, neglect, or exploitation.

²⁷ If the court does not grant or deny the petition within the 24-hour period, the department may release to the public summary information that includes a confirmation that an investigation has been conducted concerning the alleged victim; the dates and brief description of procedural activities undertaken during the department's investigation; and the date of each judicial proceeding, a summary of each participant's recommendations made at the judicial proceeding, and the ruling of the court. The information cannot include the name of, or other identifying information with respect to, any person identified in any investigation.

²⁸ Sections 39.2021(2) and 415.1071(2), F.S.

²⁹ Section 119.011(12), F.S., defines "redact" to mean "to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information."

³⁰ Sections 39.2021(3) and 415.1071(3), F.S.

³¹ Steve Christian, *Educating Children in Foster Care* (December 2003). See also, s. 1002.22(3), F.S., which, consistent with federal law, makes student educational records confidential and exempt from ch. 119, F.S.

³² 34 C.F.R. s. 99.3.

³³ Steve Christian, *Educating Children in Foster Care* (December 2003).

Otherwise, information from a student's education record can only be released with a parent's consent or pursuant to court order.³⁴ The FERPA does allow schools to disclose records, without consent, to the following:³⁵

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials³⁶ in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific state law.

The Health Insurance Portability and Accountability Act (HIPAA) of 1996³⁷ prohibits disclosure of identifiable health information held or transmitted by covered entities. HIPAA does not restrict the use of "de-identified" health information, which is information that neither identifies nor provides a reasonable basis to identify an individual.³⁸

III. Effect of Proposed Changes:

Section 1

Child Case File Records

Committee Substitute for Senate Bill 2762 requires that a case file for a child under the supervision of or in the custody of the department be maintained in a complete and accurate manner. The case file must contain at least the following:

- The child's case plan; and
- The full name and street address of all shelters, foster parents, group homes, treatment facilities, or locations where the child is placed.

If the child or the child's caregiver, guardian ad litem, or attorney requests a copy of the case file, a complete and accurate copy of the entire case file must be provided. In addition, at the time that a prospective adoptive parent is identified for a child whose parents have had their rights terminated pursuant to ch. 39, F.S., the adoption entity must be provided with a copy of that child's case file upon request.

³⁴ See U.S. Dept. of Education, Family Education and Privacy Rights Act (FERPA), available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. (last visited March 27, 2008).

³⁵ *Id.*

³⁶ 34 C.F.R. s. 99.36(b) provides that educational information in connection with an emergency to protect the health and safety of a student may be released to teachers in the school and at other schools.

³⁷ Pub. Law 104-191 (1996).

³⁸ 45 C.F.R. ss. 164.502(d)(2); 164.514(a)and(b). See <http://www.hhs.gov/ocr/privacysummary.pdf> (last visited March 27, 2008).

If the child or the child's caregiver, guardian ad litem, or attorney requests to review the case file, the case file must be made available for review at no cost. A request to review the file must be submitted in writing if made by the attorney or guardian ad litem.

“Caregiver” is defined in s. 39.01(10), F.S., to mean “the parent, legal custodian, permanent guardian, adult household member, or other person responsible for the child’s welfare . . .” The term “other person responsible for a child’s welfare” includes the child’s legal guardian or foster parent; an employee of any school, public or private child day care center, residential home, institution, facility, or agency; a law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice; or any other person legally responsible for the child’s welfare in a residential setting; and also includes an adult sitter or relative entrusted with a child’s care.

The bill provides that release of information to the child's caregiver or guardian ad litem does not waive the confidentiality of the records, and that any person who fails to provide records as provided by the bill is subject to sanctions under s.119.10, F.S.

The bill authorizes the court to determine whether sharing information in the case file is necessary to ensure access to appropriate services or for the safety of the child. If such determination is made, the court may approve release of the records. The bill provides that for purposes of FERPA, the disclosure of information in health and safety emergencies applies to sheltered and dependent children.

The bill authorizes the sharing of confidential and exempt information between all state and local agencies and programs that provide services to children or are responsible for children's safety, if the information is reasonably necessary to assure access to services or the safety of the child, including the:

- Department of Juvenile Justice;
- Department of Health;
- Agency for Health Care Administration;
- Agency for Persons with Disabilities;
- Department of Education;
- Individual school districts; and
- Statewide Guardian ad Litem Office.

The sharing of confidential and exempt information described in this section is not limited to the agencies and programs listed, so it may be interpreted to include a myriad and unlimited number of agencies and programs that provide services to children.

The bill specifies that shared information remains exempt and confidential, and that information otherwise made confidential by federal law, as well as information related to the records and clients of domestic violence centers, may not be released.

Sections 2 and 3**Reports and Records in Cases of Child Abuse**

The bill amends s. 39.202, F.S., to authorize access to confidential and exempt child abuse records by community-based care lead agencies and their subcontracted providers, as well as by persons with whom placement of a child is being considered or has been granted, including foster parents and preadoptive parents.

The bill requires any entity granted access to confidential and exempt child abuse records to provide access to any other entity or individual entitled to access, and authorizes any individual or entity entitled to access child abuse records to petition a circuit court to enforce the provisions of the statute.

The bill authorizes the department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a child that resulted in serious mental, emotional, or physical injury to a child (except the name of the reporter), if the department Secretary determines that release is in the public interest and that the public interest outweighs any privacy interest in the records. The bill provides that the public interest includes the need for the public to know about and be able to evaluate the actions of the department and the court system. **[See Constitutional Issues]**

Prior to releasing the confidential and exempt records, the department must make an attempt to notify the child, the child's caregiver, the child's attorney, the guardian ad litem assigned to the case, any person named as an alleged perpetrator, and any law enforcement agency actively involved in the investigation. Notification must be made via hand or overnight delivery service with evidence of delivery, and must take place at least three business days before release of the records.

After receiving notice, any of the notified persons may petition a circuit court for an order preventing the department from releasing the records. If the department is notified that such a petition has been filed, it may not release the records without a court order. The court may order the department not to release the records only if it finds that the best interest of the petitioner outweigh the public interest.

Sections 6, 7, and 8**Reports and Records in Cases of Abuse or Neglect of a Vulnerable Adult**

The bill amends s. 402.115, F.S., to include the Department of Juvenile Justice among the entities that may share confidential information concerning individuals who are served by the agencies.

The bill amends s. 415.107, F.S., to authorize any individual or entity that is entitled to access records under ch. 415, F.S., to petition a circuit court to enforce the statute's provisions.

The bill authorizes the department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a child that resulted in serious mental, emotional, or physical injury to a vulnerable adult (except the name of the reporter), if the department Secretary determines that release is in the public interest and that the public interest

outweighs any privacy interest in the records. The bill provides that the public interest includes the need for the public to know about and be able to evaluate the actions of the department and the court system. **[See Constitutional Issues]**

Prior to releasing the confidential and exempt records, the department must make an attempt to notify the adult, the adult's guardian (if any), any person named as an alleged perpetrator, and any law enforcement agency actively involved in the investigation. Notification must be made via hand or overnight delivery service with evidence of delivery, and must take place at least three business days before release of the records.

After receiving notice, any of the notified persons may petition a circuit court for an order preventing the department from releasing the records. If the department is notified that such a petition has been filed, it may not release the records without a court order. The court may order the department not to release the records only if it finds that the best interest of the petitioner outweigh the public interest.

Section 9

The bill provides an effective date of July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Authorizing the Secretary of the department to release confidential and exempt records, upon his or her determination that release is in the public interest, may be an unconstitutional delegation of legislative authority.³⁹

³⁹ See *Florida State Bd. of Architecture v. Wasserman*, 377 So.2d 653, 655 (Fla. 1979) ("The legislature is prohibited by the constitution from conferring upon administrative agencies authority which the constitution assigns exclusively to the legislature itself.") See also, *Microtel, Inc. v. Florida Public Service Com'n.*, 464 So.2d 1189, 1191 (Fla. 1985) ("Unbridled discretion is prohibited by this state's adherence to the doctrine of nondelegation of legislative power, pursuant to article II, section 3, Florida Constitution. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.")

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

None.

B. Private Sector Impact:

To the extent private contractors (community-based care providers) will be required to supply copies of case files to persons identified by the bill upon request and at no cost, the bill may have an indeterminate fiscal impact on those providers.

Individuals who object to disclosure of confidential and exempt information have no remedy except through the court system, which may impose a financial barrier on some individuals. The bill does require the department to toll the proposed disclosure upon notification that an affected party has filed a petition objecting to the disclosure, but does not require the department to toll the disclosure upon notification that an affected party *intends* to petition the court for relief, and disclosure may cause irrevocable harm in some cases.

C. Government Sector Impact:

The bill requires the department to provide notification to affected parties via hand or overnight delivery three business days prior to releasing information relating to an abuse case involving serious mental, emotional, or physical injury to a child or adult. According to the department, this may have a fiscal impact, but the department expects to fund it within existing resources.⁴⁰

VI. Technical Deficiencies:

In Section 1, the bill requires that a child's case file be made available for review by the child, or by the child's caregiver, guardian ad litem, or attorney, upon request (written if made by guardian ad litem or attorney) and at no cost. It is unclear how a review of a file would create a cost. It is also unclear why a request to *review* the file must be made in writing, although no writing is required for a complete *copy* of the record.

The bill provides that for purposes of FERPA, "the disclosure of information in health and safety emergencies applies to a child placed in shelter care or found to be dependent." The intent of this language is unclear.

The bill permits agencies, including the Department of Education and local school districts, to share confidential information if necessary to ensure access to services or safety of dependent children. It may be contrary to state and federal law to include the Department of Education and individual school districts among the entities that are required to share confidential information.

⁴⁰ E-mail from Molly Jones, Deputy Director, Legislative Affairs, DCF (March 29, 2008).

The bill requires any entity that is granted access to records to grant access to any other entity or individual entitled to access. It is unclear how an entity or individual authorized to receive confidential and exempt records would know whether any other entity or individual also is granted such access. It is the responsibility of the department to make such determinations.

VII. Related Issues:

The bill provides that the department must release a child's case file to the child upon request, without exception. As such, the department has no discretion if, for example, the child is very young or may be psychologically damaged by information contained in the records.

The bill provides that the release of a child's case file does not waive the confidential status of the information contained in the file. Although the records do not necessarily lose their status as confidential and exempt upon disclosure, nothing in the law precludes a private citizen (i.e., a child's caregiver) from further disclosing the information.

With respect to the sections that authorize the department Secretary to release confidential and exempt information in certain circumstances, the following may be significant:

- There is no requirement that the Secretary make or publish findings (written or otherwise) regarding the public interest in the particular incident, the factors considered in the decision to release the information, or the scope of the information that is being released.
- "Attempt" in the context of providing notice to affected parties that the information will be released, is not defined.
- There is no provision that would allow a notified person to request reconsideration of the decision to release information from the Secretary.
- It is unclear whether the department may release the records after the three business days have passed if an affected party has notified the department that it objects to the release, but has not yet filed a petition with a court.

VIII. Additional Information:

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

CS by Children, Families and Elder Affairs on April 1, 2008:

- Provides that an adoption entity shall be provided with a child's case file in specified circumstances.
- Clarifies that a court may approve the release of confidential records to any entity (rather than to certain specified entities) to ensure safety or access to services.
- Clarifies that records shall not be shared if they are otherwise confidential under federal law.
- Deletes provision that defined the department as a parent for the purpose of receiving and sharing education records.
- Clarifies that the provisions related to sharing of information among agencies does not apply to clients or records of domestic violence centers.

- Clarifies who is a person with whom placement of a child is being considered for purposes of having access to records.
- Reinstates the option for the department to petition a court for an order for immediate release of records pertaining to investigations of abuse or neglect of a child or adult.
- Provides that the Secretary must balance the privacy interest of the affected adult or child against the public interest in disclosure of confidential information.
- Replaces “make a good faith effort” with “attempt” to describe DCF’s responsibilities with respect to notification before release of confidential information.
- Replaces 72 hours with three business days.
- Provides that DCF may not release records if it is notified that a petition to prevent release has been filed.
- Deletes provisions relating to disclosure to adoptive parents.
- Makes technical amendments.

B. Amendments:

None.