

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/SB 256

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Garcia

SUBJECT: Public Records/Forensic Behavioral Health Evaluation

DATE: March 10, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<b>Fav/CS</b>
3.	<u>Cellon</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 256 makes forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records requirements.

The bill provides a statement of public necessity for the exemption as required by the State Constitution. Because the exemption applies only to court records, the Open Government Sunset Review Act does not apply.

This bill requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

**II. Present Situation:**

Article I, Section 24 of the Florida Constitution provides the public the right to access records created or received in connection with governmental duties, including records kept by Florida courts.<sup>1</sup> The State Constitution provides that the Legislature may create an exemption to public records requirements.<sup>2</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>3</sup> Furthermore, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption

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<sup>1</sup> FLA. CONST., art. I, s. 24

<sup>2</sup> FLA. CONST., art. I, s. 24(c).

<sup>3</sup> FLA. CONST., art. I, s. 24(c).

may not contain other substantive provisions<sup>4</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>5</sup>

In the Forensic Client Services Act, Chapter 916, F.S., the Legislature addressed the needs of criminal defendants “who have been found to be incompetent to proceed due to their mental illness, intellectual disability, or autism, or who have been acquitted of a felony by reason of insanity” and have been committed to the Department of Children and Families (DCF) or to the Agency for Persons with Disabilities (ADP).<sup>6</sup> Court appointed mental health experts perform evaluations to determine if a defendant has a mental illness and whether a defendant is competent to proceed.<sup>7</sup>

While the clinical records of a forensic client<sup>8</sup> (defendants who have been committed to the DCF or ADP) are currently confidential and exempt from being disclosed as public records,<sup>9</sup> most mental health records filed with court are neither confidential nor exempt from public disclosure.<sup>10</sup> In most cases, mental health records filed with the court only become confidential after a party (or an affected nonparty) makes a motion and the court holds a hearing and issues an order.<sup>11</sup> A general public records exemption for forensic behavioral health evaluations filed with the court can only be created by the Legislature.<sup>12 13</sup>

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<sup>4</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>5</sup> FLA. CONST., art. I, s. 24(c).

<sup>6</sup> Section 916.105(1), F.S.

<sup>7</sup> Section 916.12(1), F.S.

<sup>8</sup> Section 916.106(9), F.S., defines “forensic client” to mean a criminal defendant who has been committed to the Department of Children and Families or to the Agency for Persons with Disabilities because he or she has been:

- Adjudicated incompetent,
- Adjudicated not guilty by reason of insanity, or
- Determined to be incompetent to proceed.

<sup>9</sup> Section 916.107(8), F.S. This statutory exemption was then included into Florida Rules of Judicial Administration 2.420(d)(B)(x), which provides “[c]linical records of criminal defendants found incompetent to proceed or acquitted by reason of insanity” are confidential.

<sup>10</sup> Office of the State Courts Administrator, 2013 Judicial Impact Statement dated March 15, 2013 (on file with the Senate Governmental Oversight and Accountability Committee).

<sup>11</sup> Florida Rules of Judicial Administration 2.420.

<sup>12</sup> See FLA. CONST., art. I, s. 24(c) and *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

<sup>13</sup> The Supreme Court “declined to suspend application of rule 2.420(d) in criminal cases until the Legislature can address the issue of confidentiality of mental health evaluations and reports, as suggested by the Task Force [on Substance Abuse and Mental Health Issues in the Court].” *In re Amendments to Florida Rule of Judicial Admin. 2.420*, 68 So. 3d 225, 229 (2011). The Supreme Court adopted the Task Force’s reasoning “that the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added” to the list of documents treated as confidential under Rule 2.420(d)(1)(B) by the clerk of court. *In re Amendments to Florida Rule of Judicial Admin. 2.420*, 68 So. 3d 225, 229 (2011).

### III. Effect of Proposed Changes:

This bill creates s. 916.1065, F.S., to make forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records disclosure requirements. The term “forensic behavioral health evaluation” is defined in the bill as meaning:

any record, including supporting documentation, derived from a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation of an individual.

This bill would increase judicial economy by reducing the number of motion hearings necessary when defendants’ mental health records were filed with the court.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

#### B. Public Records/Open Meetings Issues:

##### **Vote Requirement**

Article I, s. 24(c), of the State Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created public records exemption. Because this bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

##### **Public Necessity Statement**

Article I, s. 24(c), of the State Constitution requires a public necessity statement for a newly created public records exemption. Because this bill creates new public records exemptions, it includes a public necessity statement.

#### C. Trust Funds Restrictions:

None.

### V. Fiscal Impact Statement:

#### A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) anticipates that this bill will help to reduce court workload related to disposing of defense motions and the necessity for a hearing to protect forensic behavioral health evaluation information records. OSCA is unable to quantify the fiscal impact resulting from the workload reduction due to the unavailability of data.<sup>14</sup> OSCA predicts that Supreme Court will amend the Rules of Judicial Administration so that forensic behavioral health evaluations could be made exempt from public records.<sup>15</sup>

**VI. Technical Deficiencies:**

This bill makes forensic behavioral health evaluations filed with the court “confidential and exempt” and does not provide for conditions for when these records may be released.<sup>16</sup> It is arguable a court has the inherent ability to release a confidential and exempt record in its files pursuant to an order, thereby providing a mechanism for the release should the need arise. This problem could also potentially be remedied by making the records simply “exempt” (rather than “confidential and exempt”) or by the addition of conditions for release.

Forensic behavioral health evaluations that are not filed with the court, but are held by other entities, will not be included in this exemption.

**VII. Related Issues:**

Florida’s courts are generally open to the public.<sup>17</sup> While this bill makes the actual behavioral health evaluation filed with the court exempt from public disclosure, this bill does not keep members of the public outside of the courtroom when the subject matter contained in the behavioral health evaluations are being heard by the court.

**VIII. Statutes Affected:**

This bill creates section 916.1065 of the Florida Statutes.

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<sup>14</sup> Office of the State Courts Administrator 2014 Judicial Impact Statement, December 3, 2013 (on file with the Senate Committee on Governmental Oversight and Accountability).

<sup>15</sup> Office of the State Courts Administrator 2014 Judicial Impact Statement, December 3, 2013 (on file with the Senate Committee on Governmental Oversight and Accountability).

<sup>16</sup> In *WFTV, Inc. v. School Bd. Of Seminole*, 876 So.2d 48, 53 (2004), the Fifth District Court of Appeals stated: “there is a difference between records the Legislature has determined to be exempt from the Florida Public Records Act and those which the Legislature has determined to be exempt from the Florida Public Records Act and confidential. If the information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute.”

<sup>17</sup> *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (1988).

**IX. Additional Information:**

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

**CS by Governmental Oversight and Accountability on March 6, 2014:**

The CS adds a retroactivity clause, and provides that forensic behavioral health evaluations are confidential and exempt from public inspection and copying pursuant to s.119.07(1), F.S.

- B. **Amendments:**

None.

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

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