

**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 Governmental Oversight and Accountability

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**BILL:** CS/SB 762

**INTRODUCER:** Governmental Oversight and Accountability Committee and Senator Abruzzo

**SUBJECT:** Public Records/Involuntary Assessment and Stabilization Petition

**DATE:** February 3, 2016      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	<b>Favorable</b>
2.	Kim	McVaney	GO	<b>Fav/CS</b>
3.			RC	

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 762 amends s. 397.6815, F.S., to create a public records exemption for records related to the involuntary assessment and stabilization of a person impaired due to substance abuse under the Marchman Act. The exemption makes confidential and exempt from public disclosure requirements petitions, court orders, and related records, as well as personal identifying information on a docket, relating to Marchman Act Proceedings.

The confidential and exempt information may be released:

- With the approval of the respondent, or other specified individuals, if necessary to ensure continuity of the respondent's health care.
- Upon the court's order for good cause.
- To the Department of Corrections if the respondent is committed or is to be returned to the custody of the Department of Corrections from the Department of Children and Families.

The bill includes a public necessity statement and provides for retroactive application of the public records exemption.

Because this bill creates a new public records exemption, a two-thirds vote by both chambers is required for passage.

The bill has an effective date of July 1, 2016.

## II. Present Situation:

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> 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.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

it 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.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> 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.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

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

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

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” to mean “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</sup> Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.<sup>14</sup>

### **The Marchman Act**

Section 397.301, F.S., creates the Hal. S. Marchman Alcohol and Other Drug Services Act (the “Marchman Act”). This act was created by the Legislature to provide assistance to substance abuse impaired persons through health and rehabilitative services. Currently, s. 397.6811, F.S., allows a petition for involuntary assessment and stabilization to be filed by a person’s spouse or guardian, any relative, a private practitioner, the director of a licensed service provider or any three adults who have personal knowledge of the person’s substance abuse impairment.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 397.6815, F.S., to provide that petitions for involuntary assessment and stabilization, court orders, and related documents filed with the court under this part are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. In addition, the bill makes personal identifying information on a docket held pursuant to the Marchman Act confidential and exempt from public disclosure. Petitions, orders, related documents and personal identifying information must be released under the following circumstances:

- With the approval of the respondent, or other specified individuals, if necessary to ensure continuity of the respondent’s health care.
- Upon the court’s order for good cause.
- To the Department of Corrections if the respondent is committed or is to be returned to the custody of the Department of Corrections from the Department of Children and Families.

The bill also provides that a copy of the petition and notice of hearing may be released to a guardian advocate,<sup>15</sup> which current law does not permit.

The bill provides for retroactive application of the public records exemption.<sup>16</sup>

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important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>13</sup> 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 School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>14</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> A guardian advocate is a person who has been appointed by a circuit court for a person with developmental disabilities if that person lacks some decision making skills necessary for his or her care. In addition, a guardian advocate may also be appointed by voluntary petition. Section 393.12(2), F.S.

<sup>16</sup> The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla.2001).

**Section 2** provides a statement of public necessary as required by the State Constitution.<sup>17</sup> The public necessity statement provides the justification for making petitions, orders, related records, and personal identifying information on a docket confidential and exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution. The bill states that the news media have published details about people's struggles with substance abuse after obtaining Marchman Act records. The bill provides that the exemption is necessary because it protects a person's personal health information and sensitive personal information which, if released, could cause unwarranted damage to the person's reputation. Additionally, the knowledge that such information could be disclosed could have a chilling effect on the willingness of individuals to seek or comply with treatment.

#### **IV. Constitutional Issues:**

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

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

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

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

The State Constitution requires the exemption to be no broader than necessary to accomplish the stated purpose of the law. The exemption is no broader than the public necessity statement. The public necessity statement appears to support the public policy for the exemption.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

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<sup>17</sup> Section 24(c), Art. I of the State Constitution.

C. **Government Sector Impact:**

Indeterminate. Clerks of court may incur additional costs associated with training court personnel and performing more redactions of personal identifying information from dockets. It is anticipated that these costs will be absorbed within the existing resources of the offices of the clerks of court.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends section 397.6815 of the 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 Governmental Oversight and Accountability on February 1, 2016:**

The CS makes the following changes:

- Removes references to the Open Government in the Sunshine Review Act (OGSR), as the OGSR is not required for records held solely by the State Court System pursuant to s. 119.15(2)(b), F.S.;<sup>18</sup>
- Expands the exemption to include court orders, related records, and personal identifying information will include information about the proceedings; and
- Modifies and strengthens the public necessity statement to conform to the exemption.

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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<sup>18</sup> The Open Government Sunset Review Act, s. 119.15, F.S., prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions. The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment, unless the exemption is continued by the Legislature.