

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 369 Pub. Rec./Prearrest Diversion Programs

**SPONSOR(S):** Judiciary Committee; Criminal Justice Subcommittee; Plakon

**TIED BILLS:** CS/HB 367; CS/CS/HB 205; CS/CS/CS/HB 857 **IDEN./SIM. BILLS:** CS/CS/CS/SB 450

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Hall	White
2) Oversight, Transparency & Administration Subcommittee	11 Y, 0 N	Grosso	Harrington
3) Judiciary Committee	16 Y, 1 N, As CS	Merlin	Camechis

### SUMMARY ANALYSIS

*Public Records Exemption for Adult Diversion Program Records:* Under current Florida law, there is no public records exemption for the records associated with an adult who participates in a civil citation or similar prearrest diversion program for adults. This bill amends s. 904.10, F.S., created in HB 205 (2017), to create a public records exemption for the personal identifying information of adults who successfully participate in such programs.

The bill provides for the repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature, and sets forth a statement of public necessity as required by the Florida Constitution. This portion of the bill takes effect on the same date that HB 205 or similar legislation takes effect. HB 205 takes effect on July 1, 2017.

*Public Records Exemption for Administratively Sealed Records:* Currently, s. 943.059(4), F.S., provides that if a criminal history record is ordered sealed by the court, it is confidential and exempt from public disclosure, and is available only in limited circumstances. HB 857 (2017), which is tied to this bill, creates s. 943.0586, F.S., allowing FDLE to administratively seal the criminal history record of a person upon notice by the clerk of the court that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or not guilty verdict was entered. This changes current law which requires a person to apply to the Florida Department of Law Enforcement ("FDLE") and pay a \$75 fee to seal such records. It also allows an unlimited number of administrative sealings by FDLE rather than one sealing and court approval.

The bill expands the public records exemption in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., as created by HB 857. The bill also provides for the repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature, and sets forth a statement of public necessity as required by the Florida Constitution. This portion of the bill takes effect on July 1, 2018, and only if HB 857 or similar legislation is adopted in the same legislative session.

The bill may have a minimal fiscal impact on the state and local governments. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

**Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program and an exemption for records that are administratively sealed, and therefore requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

###### Public Records, Generally

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, s. 24(a) of the Florida Constitution provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.<sup>1</sup>

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review ("OGSR") Act<sup>2</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and 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."<sup>3</sup> However, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.<sup>4</sup>

The OGSR Act requires the automatic repeal of a public records exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>5</sup>

##### **Public Records Exemptions for Certain Criminal Records**

###### Adult Criminal History Records

A criminal history record includes the disposition of an arrest, whether it results in a conviction, acquittal, or dismissal of the charges before trial.<sup>6</sup> Generally, Florida law allows dissemination of criminal justice information<sup>7</sup> to the public. Section 943.053, F.S., provides that an adult's criminal

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

<sup>2</sup> s. 119.15, F.S.

<sup>3</sup> s. 119.15(6)(b), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> s. 119.15(3), F.S.

<sup>6</sup> Florida Department of Law Enforcement, *Seal and Expunge Frequently Asked Questions*, [http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Frequently-Asked-Questions.aspx#Charges\\_dropped\\_dismissed](http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Frequently-Asked-Questions.aspx#Charges_dropped_dismissed) (last visited Feb. 5, 2017).

<sup>7</sup> "Criminal Justice Information" means information on individuals collected or disseminated as a result of arrest, detention, or the initiation of a criminal proceeding by criminal justice agencies, including arrest record information, correctional and release information, criminal history record information, conviction record information, offender registration information, identification record information, and wanted persons record information." s. 943.045(12), F.S.

history information<sup>8</sup> is available to criminal justice agencies for criminal justice purposes free of charge, and to persons in the private sector upon payment of a fee.<sup>9</sup> Persons seeking to prevent such disclosure may obtain a court order making criminal history records confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution by petitioning for:

- Court-ordered sealing;<sup>10</sup> or
- Court-ordered expunction.<sup>11</sup>

### Effect of a Criminal History Record

Research estimates that as many as one in three adults in the United States have a criminal record.<sup>12</sup> The Federal Bureau of Investigation maintains a database of records compiled when a suspected offender is arrested and fingerprinted by local, state, or federal law enforcement agencies.<sup>13</sup> Private consumer reporting agencies offer background reports for sale to employers, but often times utilize databases that may include outdated court records.<sup>14</sup> Consequently, any contact with the criminal justice system, including arrests that do not lead to conviction, can have long-lasting effects on a person's employment, housing, education and other opportunities.<sup>15</sup>

### Sealing of Criminal History Records

To be eligible for the sealing of a criminal history record, an applicant must petition the court, under s. 943.059(1), F.S., by providing a sworn statement attesting that he or she:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation;
- Has not been adjudicated guilty for any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never had a prior sealing or expunction of criminal history record; and
- Is otherwise eligible and does not have any other petition to seal or expunge pending before any court.<sup>16</sup>

A person seeking to have a criminal history record sealed must first obtain a certificate of eligibility ("COE") from the Florida Department of Law Enforcement ("FDLE") by paying a \$75 processing fee and satisfying other criteria.<sup>17</sup> A petition to a court to seal a criminal history record is complete only when accompanied by a valid COE issued by FDLE and a sworn statement attesting that the petitioner satisfies the criteria in s. 943.059(1), F.S., for sealing such a record.

Section 943.059(4), F.S., provides that if a criminal history record is ordered sealed by the court, it is confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, and available only to:

- The person who is the subject of the record, or their attorney;
- Criminal justice agencies for criminal justice purposes;<sup>18</sup>

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<sup>8</sup> "Criminal history information" means "information collected by criminal justice agencies on persons, which information consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and the disposition thereof. The term does not include identification information, such as biometric records, if the information does not indicate involvement of the person in the criminal justice system." s. 943.045(5), F.S.

<sup>9</sup> s. 943.053(3)(a), F.S.

<sup>10</sup> s. 943.059, F.S.

<sup>11</sup> s. 943.0585, F.S.

<sup>12</sup> Matthew Friedman, Brennan Center for Justice at New York University School of Law, *Just Facts: As Many Americans Have Criminal Records As College Diplomas*, <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> (last visited Feb. 6, 2017).

<sup>13</sup> *Id.*

<sup>14</sup> The result being that even some expunged arrests are reported to employers. Brendan Lynch, Talk Poverty, *Never Convicted, but Held Back by a Criminal Record*, <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/> (last visited Feb. 6, 2017).

<sup>15</sup> Justice Center, The Council of State Governments, *Clean Slate Clearinghouse*, <https://csgjusticecenter.org/cleanslate> (last visited Feb. 6, 2017).

<sup>16</sup> s. 943.059(1)(b)1.-4., F.S.

<sup>17</sup> S. 943.059(2)(a)-(f), F.S.

<sup>18</sup> Such purposes include conducting criminal history background check for firearms purchases and transfers. s. 943.059(4), F.S.

- Judges; and
- Certain entities for licensing, access authorization, and employment purposes.<sup>19</sup>

An order sealing a criminal history record does not require the record be destroyed and criminal justice agencies may continue to maintain the record. An adult, whose criminal history record has been sealed, may lawfully deny or fail to acknowledge the arrest covered by the sealed record, except in certain specific instances.<sup>20</sup>

### Expunction of Criminal History Records

To be eligible for expunction, an applicant must petition the court providing a sworn statement that he or she:

- Has never been adjudicated guilty of a criminal offense or comparable ordinance violation;<sup>21</sup>
- Has not been adjudicated guilty for any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains;
- Has not received a prior sealing or expunction of a criminal history record;<sup>22</sup> and
- Is otherwise eligible and does not have any other petition to expunge or seal before any court.<sup>23</sup>

He or she must also obtain a written statement of the state attorney or statewide prosecutor indicating that a charging document was not issued in the case, or the case was dismissed or nolle prossed, and did not result in a trial.<sup>24</sup>

If a court orders expunction, the criminal history record must be physically destroyed by any criminal justice agency having custody of the record, except that it must be retained by Florida Department of Law Enforcement (FDLE). The record retained by FDLE is confidential and exempt from the provisions of s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution, and is not available to any person or entity without a court order. When a criminal history record has been expunged, the subject of the record may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except in certain specified circumstances.<sup>25</sup>

### Prearrest Diversion Programs

HB 205 (2017), which is tied to this bill, creates s. 901.40, F.S., to encourage local communities and public or private educational institutions to implement prearrest diversion programs. The bill provides a framework for a model Adult Civil Citation Program (“ACCP”) that allows a law enforcement officer, at the officer’s sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who:

- Commits a qualifying misdemeanor offense (as determined by the program);
- Does not contest that he or she committed the offense; and

<sup>19</sup> *Id.*

<sup>20</sup> The subject of the record may not deny the existence of the sealed record when they are seeking employment with a criminal justice agency; a defendant in a criminal prosecution; concurrently or subsequently petitions for either expunction or sealing; seeking admission to the Florida Bar; seeking certain employment or professional licenses; seeking appointment as a guardian; subject to a background check when attempting to purchase a firearm; or seeking a license to carry a concealed weapon or firearm. s. 943.059(4)(a), F.S.

<sup>21</sup> A pardon does not have the effect of erasing guilt so that a conviction is treated as though it never occurred. A pardoned individual cannot satisfy the requirements for a certificate of eligibility for an expunction. *R.J.L. v. State*, 887 So. 2d 1268, 1281 (Fla. 2004).

<sup>22</sup> Unless expunction is sought of a criminal history record that was previously sealed for 10 years and the record is now otherwise eligible for expunction. s. 943.0585(1)(b)3., F.S.

<sup>23</sup> s. 943.0585(1), F.S.

<sup>24</sup> s. 943.0585(2), F.S.

<sup>25</sup> A person may not deny the existence of the expunged record when they are seeking employment with a criminal justice agency; a defendant in a criminal prosecution; concurrently or subsequently petitions for either expunction or sealing; seeking admission to the Florida Bar; seeking certain employment or professional licenses; or seeking appointment as a guardian. The existence of the expunged record is confidential, except that FDLE must disclose the record of expunction to these entities for their respective licensing, access authorization, or licensure decisions. s. 943.0585(4), F.S.

- Has not previously been arrested or previously received an adult civil citation or similar notice, unless the terms of the program allow otherwise.

The ACCP provides an adult with appropriate assessment, intervention, education, and behavioral health care services, while requiring them to complete community service hours and pay restitution. If the adult successfully completes the ACCP, an arrest record may not be associated with the offense.

Due to the prearrest nature of the programs, records held by a civil citation or similar prearrest diversion program are created before any arrest occurs and, thus, do not become part of the criminal history record system. As such, there is no ability to seal or expunge a civil citation or prearrest diversion program record. Instead, such records are subject to public disclosure because there is no public records exemption applicable under current Florida law.

### **Effect of the Bill as to Public Records Exemption for Adult Diversion Program Records**

The bill amends s. 901.40, F.S., to provide a public records exemption for the personal identifying information of an adult participating in a civil citation or prearrest diversion program. The exemption applies to the following individuals or entities before, on, or after the effective date of that exemption:

- A law enforcement agency;
- A program services provider;
- A clerk of the circuit court; or
- The entity operating an adult civil citation or prearrest diversion program.

The exemption does not apply to the personal identifying information of an adult who fails to complete the civil citation or prearrest diversion program.

The bill repeals the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature, pursuant to the OGSR Act.

The bill provides a statement of public necessity as required by the State Constitution.<sup>26</sup> The statement includes the following findings:

- The Legislature finds that it is a public necessity that the personal identifying information of an adult participating in a civil citation or prearrest diversion program be exempt from s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution.
- The exemption does not apply to the personal identifying information of an adult who fails to complete the civil citation or prearrest diversion program.
- The goal of such programs is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record.
- Such a goal would be defeated if the personal identifying information of such adults were not exempt from disclosure and would create negative consequences for these adults.
- If the public were able to obtain the personal identifying information of these adults, the disclosure might adversely impact the civil citation or prearrest diversion program.

This portion of the bill takes effect on the same date that HB 205 or similar legislation takes effect. HB 205 takes effect on July 1, 2017.

### **Effect of the Bill as to Public Records Exemption for Administratively Sealed Records**

HB 857 (2017), which is tied to this bill, creates s. 943.0586, F.S., allowing FDLE to administratively seal the criminal history record of a person upon notice by the clerk of the court that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or not guilty verdict was entered. This changes current law which requires a person to apply to the Florida Department of Law Enforcement ("FDLE") and pay a \$75 fee to seal such records. It also allows an unlimited number of administrative sealings by FDLE rather than one sealing and court approval.

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<sup>26</sup> FLA. CONST. art. I, s. 24(c).  
**STORAGE NAME:** h0369e.JDC  
**DATE:** 4/26/2017

The bill expands the public records exemption<sup>27</sup> in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., as created by HB 857 (2017). The bill also provides that administratively sealing a record under s. 943.0586, F.S., has the same effect as sealing under s. 943.059, F.S.

The bill repeals the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature, pursuant to the OGSR Act.

The bill provides a statement of public necessity as required by the State Constitution.<sup>28</sup> The statement includes the following findings:

- The Legislature finds that it is a public necessity that the criminal history records of a minor or an adult, which have been administratively sealed pursuant to s. 943.0586, F.S., be made confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution.
- The presence of a criminal history record in an individual's past which has not been validated through a criminal proceeding can jeopardize a person's ability to obtain education, employment, and other achievements necessary in becoming a productive, contributing, self-sustaining member of society.
- Such negative consequences are unwarranted in cases in which the individual was not found to have committed the offense that is the subject of the sealed criminal history record.

This portion of the bill takes effect on July 1, 2018, and only if HB 857 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 901.40, F.S., relating to prearrest diversion programs, and provides a contingent effective date.

Section 2. Provides a public necessity statement and a contingent effective date.

Section 3. Amends s. 943.0586, F.S., as created by HB 857 (2017), relating to administrative sealing of criminal history records, and provides a contingent effective date.

Section 4. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records, and provides a contingent effective date.

Section 5. Provides a public necessity statement and a contingent effective date.

Section 6. Provides an effective date of July 1, 2017 except as expressly provided in the bill.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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<sup>27</sup> There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute.

<sup>28</sup> FLA. CONST. art. I, s. 24(c).

The bill does not appear to have any impact on state revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could have a minimal impact on agencies because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or newly expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a limited public record exemption for the personal identifying information of an adult who participates in a civil citation or similar prearrest diversion program which does not appear to be in

conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

**B. RULE-MAKING AUTHORITY:**

This bill does not appear to create a need for rulemaking or require additional rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 15, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS narrows the public records exemption so that it only applies to the personal identifying information of an individual participating in an ACCP.

On April 20, 2017, the Judiciary Committee adopted a “strike all” amendment and reported the bill favorably as a CS. The CS differs from the bill as filed in that the CS provides a public records exemption for:

- Records containing the personal identifying information of adults who participate in a civil citation program or similar program if they successfully complete the program.
- Records that are sealed under the new administrative sealing provision created in HB 857 (2017). The bill requires FDLE to automatically seal records when notified by the clerk of court that a person’s charges were dropped or dismissed or a not guilty verdict was entered.

This analysis is drafted to the CS as passed by the Judiciary Committee.