

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 Governmental Oversight and Accountability

BILL: CS/CS/SB 450

INTRODUCER: Governmental Oversight and Accountability Committee; Criminal Justice Committee and Senator Brandes

SUBJECT: Public Records

DATE: March 29, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Jones</u>	<u>Hrdlicka</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 450, which is linked to the passage of CS/SB 448, creates a public records exemption for personal identifying information of an adult who participates in a civil citation or prearrest diversion program. The personal identifying information becomes public, however, if the participant fails to complete the program. This public records exemption has retroactive application.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2022, unless reviewed and saved from repeal by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

The Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage because it creates a new public records exemption.

The bill takes effect on the same date that CS/SB 448 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law.

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

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.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 A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ 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.¹¹ A statutory

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

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” to mean 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).

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹³ 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” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.¹⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶

The OGSR 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.¹⁷ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and 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;¹⁸
- 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;¹⁹ or
- It protects trade or business secrets.²⁰

The OGSR also requires specified questions to be considered during the review process.²¹ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

¹³ 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).

¹⁴ *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²² If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²³

Adult Criminal History Records

A criminal history record is any nonjudicial record maintained by a criminal justice agency containing criminal history information.²⁴ Criminal history information includes information on a person's arrests, detentions, indictments, informations (formal criminal charges), and the disposition of the charges.²⁵

An adult's criminal history information is available free of charge to criminal justice agencies and to the public with payment of a fee.²⁶ Adults seeking to prevent such disclosure may petition the court to seal²⁷ or expunge the record.²⁸

Sections 943.059 and 943.0585, F.S., provide the procedures for sealing and expunging criminal history records. When a record is sealed, it is not destroyed, but access is limited to:

- The subject of the record;
- His or her attorney;
- Criminal justice agencies for criminal justice purposes;
- Judges; and
- Certain agencies for licensing and employment purposes.²⁹

When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. FDLE is required to retain expunged records.³⁰

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain

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3. What is the identifiable public purpose or goal of the exemption?
 4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
 5. Is the record or meeting protected by another exemption?
 6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ Section 943.045(6), F.S.

²⁵ Section 943.045(5), F.S.

²⁶ Section 943.053(3)(a), F.S.

²⁷ Section 943.059, F.S.

²⁸ Section 943.0585, F.S.

²⁹ Section 943.059(4), F.S.

³⁰ Section 943.0585(4), F.S.

types of employment,³¹ petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.³²

Sealed or expunged records are confidential and exempt from the public records law.³³ It is a first degree misdemeanor³⁴ to divulge their existence.³⁵

Model Prearrest Diversion Program

CS/SB 448, is the public records bill linked to CS/SB 450. CS/SB 448 creates s. 901.40, F.S., which encourages local communities and public or private educational institutions to implement a prearrest diversion program, and provides a framework for a model adult civil citation program that may be adopted. The model program 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 misdemeanor offense (as determined by the program);
- Admits to committing the offense or does not contest the offense;
- Has not previously been arrested; and
- Has not previously received an adult civil citation or similar prearrest diversion program unless the terms of the local adult prearrest diversion program allows otherwise.

The model program requires an adult who receives a civil citation to complete the required community service hours and pay restitution. If the adult does not successfully complete the program, the officer must determine if there is good cause to arrest the adult for the original misdemeanor offense and refer the case to the state attorney to determine if prosecution is appropriate or allow the adult to continue in the program.

A civil citation or similar prearrest diversion program notice is issued in lieu of an arrest so no criminal history record is created. However, records of a civil citation or similar prearrest diversion program notice held by the issuing law enforcement agency and by a model program are subject to disclosure. Currently, Florida law does not provide a public records exemption for records associated with a civil citation.

III. Effect of Proposed Changes:

The bill creates a public records exemption for the personal identifying information of an adult who participates in a civil citation or prearrest diversion program. A participant's personal identifying information becomes public, however, if he or she fails to successfully complete the program.

³¹ These include candidates for appointment as a guardian, admission to The Florida Bar, employment with a criminal justice agency, a license by the Division of Insurance Agent and Agent Services of the Department of Financial Services, or a position with an agency which is responsible for the protection of vulnerable persons, including children, disabled persons, and elderly persons.

³² Sections 943.0585(4)(a) and 943.059(4)(a), F.S.

³³ Sections 943.059(4)(c) and 943.0585(4)(c), F.S.

³⁴ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

³⁵ Sections 943.059 and 943.0585, F.S., require FDLE to disclose sealed and expunged criminal history records to specified entities for specified purposes.

The public records exemption would apply to records held by a law enforcement agency, the operators of a civil citation or prearrest diversion program or to records held by a service provider.

The bill provides a statement of public necessity as required by the Florida Constitution.³⁶ The statement includes the following findings:

- The goal of a civil citation or prearrest diversion program is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record.
- If the personal identifying information of such adults were not exempt from disclosure, it would defeat the goal of giving adults who commit misdemeanor offenses a means to avoid arrest and prosecution.
- If such information were able to be obtained by the public, that disclosure might negatively impact the effectiveness of the civil citation or prearrest diversion program.

The exemption has retroactive application so that it will apply to people who have already participated in a 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 takes effect on the same date that CS/SB 448 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a new public record exemption. Therefore, the following constitutional requirements apply.

Vote Requirement

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

³⁶ Article I, s. 24(c), FLA. CONST.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, this public records exemption appears to be no broader than necessary to accomplish its stated purpose.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a minimal fiscal impact on agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record. However, these costs should be able to be absorbed with existing resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill is linked to the passage of CS/SB 448.

VIII. Statutes Affected:

This bill creates section 901.40 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/CS by Governmental Oversight and Accountability on March 27, 2017:

The CS/CS does the following:

- Provides that the exemption applies to civil citation programs as well as prearrest diversion programs;
- Specifies that the public records exemption is limited to certain records custodians, and is not a public records exemption of general applicability;
- Specifies that the exemption only applies to the records of those people who complete a civil citation or prearrest diversion program, rather than to all participants regardless of whether they complete the program;
- Provides for retroactive application so that current and past participants can have the benefit of the exemptions; and,
- Removes ambiguous language.

CS by Criminal Justice on March 13, 2017:

The committee substitute:

- Creates a public records exemption for the personal identifying information of an adult who participates in a prearrest diversion program; and
- Makes technical and stylistic changes.

- B. **Amendments:**

None.