

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1199 Pub. Rec./Diversion Programs

**SPONSOR(S):** Ahern

**TIED BILLS:** CS/CS/HB 1197

**IDEN./SIM. BILLS:** SB 1394

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N	Bruno	Sumner
2) Oversight, Transparency & Administration Subcommittee	12 Y, 0 N	Toliver	Harrington
3) Judiciary Committee	17 Y, 0 N	Bruno	Poche

### SUMMARY ANALYSIS

Under Florida law, there is no public records exemption for the records of an adult who participates in a prearrest diversion program. HB 1199 amends s. 904.10, F.S., created by CS/CS/HB 1197 (2018), to create a public records exemption for the personal identifying information of an adult who participates in such a program. Specifically, the exemption protects the personal identifying information held by a law enforcement agency, a program services provider, a clerk of the circuit court, or the entity operating the prearrest diversion program before, on, or after the effective date of this exemption. The exemption does not apply to an adult who fails to complete the prearrest diversion program.

The bill repeals the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature, and includes a statement of public necessity as required by the Florida Constitution.

The bill may have a minimal fiscal impact on state and local governments.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This 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 for the exemption of records from the requirements of Article I, section 24(a), by general law,<sup>1</sup> which must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.<sup>2</sup> A bill enacting an exemption must pass by a two-thirds vote of the members present and voting.<sup>3</sup>

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>4</sup> (the Act) provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than 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.
- Protect trade or business secrets.<sup>5</sup>

The Act also requires the automatic repeal of a public records exemption on October 2<sup>nd</sup> of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup>

##### Prearrest Diversion Programs

CS/CS/HB 1197 (2018), which is linked to this bill, creates s. 901.40, F.S., to encourage local communities and public or private educational institutions to implement prearrest diversion programs. CS/CS/HB 1197 creates a model prearrest diversion program for adults that allows a law enforcement officer, at the officer's sole discretion, to offer prearrest diversion to an adult who meets eligibility requirements, as determined by local stakeholders.

Participants in a prearrest diversion program must be provided appropriate assessment, intervention, education, and behavioral health care services. The program must also require the participant to perform community service and pay restitution to the victim. If the participant does not successfully complete the program's requirements, the officer then determines whether there is good cause to arrest the individual for the original offense and, if so, refers the case to the state attorney.

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

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> S. 119.15, F.S.

<sup>5</sup> S. 119.15(6)(b), F.S.

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

CS/CS/HB 1197 (2018) further requires a diversion program operator to submit a participant's personal identifying information to the clerk of courts, who must maintain the information in a statewide database.

## 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>7</sup> Generally, Florida law allows dissemination of criminal justice information<sup>8</sup> to the public. Section 943.053, F.S., provides that an adult's criminal history information<sup>9</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>10</sup> Adults 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>11</sup> or
- Court-ordered expunction.<sup>12</sup>

### *Pre-Arrest Diversion Program Records*

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 Proposed Changes**

HB 1199 amends s. 904.10, F.S., created by CS/CS/HB 1197 (2018), to create a public records exemption related to adult prearrest diversion programs. Under the bill, the personal identifying information of an adult who participates in a prearrest diversion program is exempt<sup>13</sup> from the requirements of s. 119.07(1), F.S., and art. I, s. 24(a) of the Florida Constitution. The exemption applies to personal identifying information held by a law enforcement agency, a program services provider, a clerk of the circuit court, or the entity operating the prearrest diversion program before, on, or after the effective date of this exemption.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2023, unless reviewed and saved from repeal by the Legislature.

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<sup>7</sup> Florida Department of Law Enforcement, *Seal and Expunge Frequently Asked Questions*, available at: [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 February 16, 2018).

<sup>8</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.

<sup>9</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>10</sup> S. 943.053(3)(a), F.S.

<sup>11</sup> S. 943.059, F.S.

<sup>12</sup> S. 943.0585, F.S.

<sup>13</sup> There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See *WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); Op. Att'y Gen. Fla. 85-692 (1985).

The bill provides a statement of public necessity as required by the Florida Constitution,<sup>14</sup> specifying that the Legislature finds that the goal of prearrest diversion programs is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record. As such, prearrest diversion program records must be exempt, as disclosure would defeat the program's goal of giving adults who commit misdemeanor offenses a means to avoid the negative consequences of an arrest and prosecution, and disclosure might negatively impact the effectiveness of the program.

The bill is effective on the same date that CS/CS/HB 1197 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. CS/CS/HB 1197 provides an effective date of July 1, 2018.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 901.40, F.S., as created by CS/CS/HB 1197 (2018), relating to prearrest diversion programs.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date of the same date that CS/CS/HB 1197 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The bill could have a minimal impact on state agencies because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. 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.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

The bill could have a minimal impact on local governments because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. Local governments 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 local governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

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<sup>14</sup> FLA. CONST. art. I, s. 24(c).  
STORAGE NAME: h1199e.JDC  
DATE: 2/21/2018

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect municipal or county governments.

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 records or public meetings exemption. The bill creates a public records 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 records or public meetings exemption. The bill creates a public records 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 records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a limited public records 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**