

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/SB 1364

INTRODUCER: Health Policy Committee and Senator Rader

SUBJECT: Public Records/Substance Abuse Service Providers

DATE: February 19, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke</u>	<u>Stovall</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1364 amends s. 119.071, F.S., to exempt from public records laws certain personal identifying information of current and former directors, managers, supervisors, nurses, and clinical employees of a substance abuse service provider licensed under part II of ch. 397, F.S., as well as certain personal identifying and location information of their spouses and children. The bill provides in its statement of public necessity as justification for the exemption that the public records exemption is needed as the release of this information may place these employees and their families at risk of harm from hostile persons based on the actions of the employees.

The bill provides for an Open Government Sunset Review and an automatic repeal date of October 2, 2023, unless reviewed and saved from repeal by the Legislature before that date.

This bill requires a two-thirds vote of each chamber for passage because it creates a public records exemption.

The bill takes effect July 1, 2018.

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 by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

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 Legislature 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” 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 FLA. CONST., art. I, s. 24(c).

¹¹ *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.’¹² 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 under certain circumstances.¹³

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.¹⁴ 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.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.¹⁶ 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;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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.
¹² 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).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ 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 s. 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ 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.²²

Substance Abuse Treatment Service Regulation

Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.²³ Substance abuse disorders occur when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.²⁴ Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance abuse disorder.²⁵ Substance abuse causes physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.²⁶

A diagnosis of substance abuse disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.²⁷ The most common substance abuse disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.²⁸

Substance Abuse Treatment

The Department of Children and Families (DCF) regulates substance abuse treatment by licensing individual treatment components under ch. 397, F.S., and Rule 65D-30, F.A.C. Licensed service components include a continuum of substance abuse prevention, intervention, and clinical treatment services.²⁹

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2. Whom does the exemption uniquely affect, as opposed to the general public?
 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?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ World Health Organization, *Substance Abuse*, available at: http://www.who.int/topics/substance_abuse/en/ (last visited Feb. 16, 2018).

²⁴ Substance Abuse and Mental Health Services Administration, *Substance Use Disorders* (Oct. 27, 2015), available at: <https://www.samhsa.gov/disorders/substance-use> (last visited Feb. 16, 2018).

²⁵ National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction* (July 2014), available at: <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last visited Feb. 16, 2018).

²⁶ *Id.*

²⁷ Substance Abuse and Mental Health Services Administration, *supra* note 244.

²⁸ *Id.*

²⁹ Section 397.311(26), F.S.

Prevention is a process involving strategies that are aimed at the individual, family, community, or substance and that preclude, forestall, or impede the development of substance use problems and promote responsible lifestyles.³⁰ Substance abuse prevention is best accomplished through the use of ongoing strategies such as increasing public awareness and education, community-based processes, and evidence-based practices.³¹

Intervention involves structured services directed toward individuals or groups at risk of substance abuse and focused on reducing or impeding those factors associated with the onset or early stages of substance abuse and related problems.³²

Clinical treatment is a professionally directed, deliberate, and planned regimen of services and interventions that are designed to reduce or eliminate the misuse of drugs and alcohol and promote a healthy, drug-free lifestyle.³³ Clinical treatment services include the following licensable service components:

- Addictions receiving facility;
- Day or night treatment;
- Day or night treatment with community housing;
- Detoxification;
- Intensive inpatient treatment;
- Intensive outpatient treatment;
- Medication-assisted treatment for opiate addiction;
- Outpatient treatment; and
- Residential treatment.³⁴

Researchers find a substantial link between a criminal history and substance abuse. In a study conducted by the U.S. Department of Justice, about 58 percent of state prisoners and 63 percent of sentenced jail inmates met the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, (DSM-IV) criteria for drug dependence or abuse.³⁵ Additionally, individuals who use illicit drugs are more likely to commit crimes, and it is common for many offenses, including violent crimes, to be committed by individuals who had used drugs or alcohol prior to committing the crime, or who were using at the time of the offense.³⁶

³⁰ Section 397.311(26)(c), F.S.

³¹ Department of Children and Families, *Substance Abuse: Prevention*, <http://www.myflfamilies.com/service-programs/substance-abuse/prevention>, (last visited Feb. 16, 2018). These prevention programs are focused primarily on youth, and, recent years, have shifted to the local level, giving individual communities the opportunity to identify their own unique prevention needs and develop action plans in response. This community focus allows prevention strategies to have a greater impact on behavioral change by shifting social, cultural, and community environments.

³² Section 397.311(26)(b), F.S.

³³ Section 397.311(26)(a), F.S.

³⁴ *Id.*

³⁵ Jennifer Bronson, et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, (June 2017) available at: <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf> (last visited Feb. 16, 2018).

³⁶ U.S. Department of Health and Human Services, National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide*, p. 12, available at: https://d14rmgrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice_0.pdf (last visited Feb. 16, 2018).

Some substance abuse treatment facilities are owned by county governments or county government agencies. Because these facilities are government-owned, the public has a right to access their records, including records of the home addresses, telephone numbers, dates of birth, and photographs of employees of those facilities, as well as information about their families. In at least one instance in Broward County, a client at the Broward Addiction Recovery Center (BARC) spontaneously came to the home of a BARC employee seeking after hours counseling. The client had found the employee's home address through an internet search.³⁷

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., to exempt the following information from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution:

- The home addresses, telephone numbers, dates of birth, and photographs of current or former directors, managers, supervisors, nurses, and clinical employees of a substance abuse service provider that is licensed under part II of ch. 397, F.S., and whose duties include the counseling and treatment of persons who have mental health or substance abuse disorders;
- The home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and
- The names and locations of schools and day care facilities attended by the children of such personnel.

The bill establishes an Open Government Sunset Review Act automatic repeal date of October 2, 2023, unless reviewed and saved from repeal by the Legislature.

Section 2 provides the public necessity statement required by s. 24(c), Art. I of the Florida Constitution. The bill states that it is a public necessity to establish the public records exemption since the release of the information protected by the exemption may place the specified personnel of a licensed substance abuse provider and their family members in danger of physical and emotional harm from hostile persons who may react inappropriately and violently to actions taken by such personnel. The bill states that such personnel provide services that are necessary and appropriate for persons who have mental health or substance abuse disorders and provide valuable and supportive services to the state's most vulnerable residents. Despite the value of such services, some persons may become hostile toward the personnel and may pose a threat to them indefinitely. The harm that may result from the release of such personal identifying and location information outweighs any public benefit that may be derived from the disclosure of the information.

Section 3 of the bill establishes an effective date of July 1, 2018.

³⁷ Broward Addiction Recovery Center, Broward County, Florida, *Public Records Exemption* (on file with the Senate Committee on Governmental Oversight and Accountability and the Senate Committee on Health Policy).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:**Voting Requirement**

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for public records exemptions to pass.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that the exemption is needed to protect the safety of the licensed substance abuse treatment provider's directors, managers, supervisors, nurses, or clinical employees and their family members since those individuals treat clients who have mental health and substance abuse disorders and who may become hostile toward the treatment provider.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts the home addresses, telephone numbers, dates of birth, and photographs of current or former directors, managers, supervisors, nurses, and clinical employees of a substance abuse service provider that is licensed under part II of ch. 397, F.S., and whose duties include the counseling and treatment of persons who have mental health or substance abuse disorders. Additionally, the bill exempts the home addresses, telephone numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071 of the Florida Statutes.

This bill creates one undesignated section of Florida Law.

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 Health Policy on February 13, 2018:

The CS removes all references to social security numbers as protected by the provisions of the bill. All government employee social security numbers and social security numbers collected by any government agency³⁸ are made confidential and exempt by current law in ss. 119.071(4)(a) and (5)(a), F.S.

B. Amendments:

None.

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

³⁸ Defined in s. 119.011, F.S., to include 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.