

**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 Criminal Justice

BILL: SB 1394

INTRODUCER: Senator Brandes

SUBJECT: Public Records/Prearrest Diversion Program

DATE: January 19, 2018 REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Storch	Jones	CJ	Pre-meeting
2.		GO	
3.		RC	

## I. Summary:

SB 1394, which is linked to the passage of SB 1392, creates a public records exemption for personal identifying information of an adult who participates and successfully completes a prearrest diversion program.

The exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2023, unless reviewed and saved from repeal by the Legislature.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 SB 1392 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:

The Florida Constitution provides that every individual has a right of access to public records which are made or received in connection with official public business unless the records are exempt. This right applies to records of the legislative, executive, and judicial branches.<sup>1</sup>

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

The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record<sup>2</sup> at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.<sup>3</sup>

Only the Legislature may create an exemption to public records requirements.<sup>4</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.

The Open Government Sunset Review Act (OGSR) requires a newly created or expanded public records exemption be repealed on October 2 of the fifth year after enactment, unless reviewed and reenacted by the Legislature.<sup>5</sup> It further provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet the public purpose it serves.<sup>6</sup>

An exemption serves an identifiable purpose if it meets one of the following purposes 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.
- The release of 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.
- It protects trade or business secrets.<sup>7</sup>

In addition, the Legislature must find that the purpose of the exemption overrides Florida's public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.<sup>8</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of the exemption. These specified questions are:

- What specific records or meetings are affected by the exemption?

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<sup>2</sup> Section 119.011(12), F.S., defines "public record" as 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.

<sup>3</sup> Section 119.07(1)(a), F.S.

<sup>4</sup> Article I, s. 24(c), FLA CONST. There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School 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 1994); and *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, then such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in the statutory exemption. See Op. Att'y Gen, Fla. 85-62, August 1, 1985.

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

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

<sup>7</sup> Section 119.15(6)(b)1.-3., F.S.

<sup>8</sup> Section 119.15(6)(a), F.S.

- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?<sup>9</sup>

To enact an exemption, the bill may not contain other substantive provisions<sup>10</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>11</sup>

### **Adult Criminal History Records**

A criminal history record is any nonjudicial record maintained by a criminal justice agency containing criminal history information.<sup>12</sup> Criminal history information includes information on a person's arrests, detentions, indictments, informations (formal criminal charges), and the disposition of the charges.<sup>13</sup>

An adult's criminal history information is available free of charge to criminal justice agencies and to the public with payment of a fee.<sup>14</sup> Adults seeking to prevent such disclosure may petition the court to seal<sup>15</sup> or expunge the record.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

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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<sup>9</sup> Section 119.15(6)(a)1.-6., F.S.

<sup>10</sup> The bill may, however, contain multiple exemptions that relate to one subject.

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

<sup>12</sup> Section 943.045(6), F.S.

<sup>13</sup> Section 943.045(5), F.S.

<sup>14</sup> Section 943.053(3)(a), F.S.

<sup>15</sup> Section 943.059, F.S.

<sup>16</sup> Section 943.0585, F.S.

<sup>17</sup> Section 943.059(4), F.S.

<sup>18</sup> Section 943.0585(4), F.S.

types of employment,<sup>19</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>20</sup>

Sealed or expunged records are confidential and exempt from the public records law.<sup>21</sup> It is a first degree misdemeanor<sup>22</sup> to divulge their existence.<sup>23</sup>

## Pearrest Diversion Program

SB 1392, which is linked to SB 1394, creates s. 901.40, F.S., requiring each judicial circuit to establish and implement a pearrest diversion program. SB 1392 encourages counties, municipalities, and public or private educational institutions to participate in the pearrest diversion program created by their judicial circuit. SB 1392 grants the state attorney, public defender, clerk of the court for each county in the circuit, and representatives of participating law enforcement agencies in the circuit full discretion to develop a circuit-wide pearrest diversion program. Each judicial circuit's pearrest diversion program must specify:

- The misdemeanor offenses that qualify an adult for participation in the program;
- The eligibility criteria for the program;
- The program's implementation and operation;
- The program's requirements, including, but not limited to:
  - The completion of community service hours;
  - Payment of restitution, if applicable; and
  - Intervention services indicated by a needs assessment of the adult, such as urinalysis monitoring and substance abuse and mental health treatment services; and
- A program fee, if any, to be paid by an adult participating in the program.<sup>24</sup>

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.

Upon intake of an adult participating in the pearrest diversion program, the state attorney or the person operating the independent pearrest diversion program must electronically provide the adult's personal identifying information to the clerk of the court for the county in which the adult is participating in the pearrest diversion program. Such information is not a court record and the clerk of the court must maintain the confidentiality of the adult's personal identifying information. The clerk of the court must maintain such information in a statewide database, which must provide a single point of access for all such statewide information.

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<sup>19</sup> These include candidates for appointment as 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.

<sup>20</sup> Sections 943.0585(4)(a) and 943.059(4)(a), F.S.

<sup>21</sup> Sections 943.059(4)(c) and 943.0585(4)(c), F.S.

<sup>22</sup> 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.

<sup>23</sup> Sections 943.059 and 943.0585, F.S., require the FDLE to disclose sealed and expunged criminal history records to specified entities for specified purposes.

<sup>24</sup> If the program imposes a fee, the clerk of the court of the applicable county must receive a reasonable portion of the fee.

A prearrest diversion program notice is issued in lieu of an arrest so no criminal history record is created. However, records of a prearrest diversion program notice 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 prearrest diversion program.

The bill provides a statement of public necessity as required by the Florida Constitution.<sup>25</sup> The statement includes the following findings:

- The goal of the 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, the subsequent disclosure of the information would create negative consequences for these adults.
- If such information were able to be obtained by the public, such disclosure might negatively impact the prearrest diversion program.

The bill provides that the exemption does not apply to the personal identifying information of an adult who fails to complete the prearrest diversion program.

The bill specifies that 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.

The exemption applies to personal identifying information held by any of the listed individuals or entities before, on, or after the effective date of the exemption.

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

The bill takes effect on the same date that SB 1392 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.

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<sup>25</sup> Article I, s. 24(c), FLA. CONST.

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

This bill creates one new public records exemption. Therefore, the following constitutional requirements apply.

**Substance of the Bill**

Article I, s. 24(c) of the State Constitution requires that laws enacted to exempt records from public inspection must contain only exemptions and relate to one subject. This bill creates a new public records exemption related to records of a prearrest diversion program.

**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 one new public records exemption; thus, it requires a two-thirds vote for final passage.

**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 one new public records exemption and includes a public necessity statement for such exemption.

**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 each statement of public necessity, this public records exemption appears to be no broader than necessary to accomplish the 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 SB 1392.

**VIII. Statutes Affected:**

This bill creates section 901.40 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**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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