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 Rules

BILL:	SB 7010
INTRODUCER:	Judiciary Committee
SUBJECT:	OGSR/Treatment-based Drug Court Programs
DATE:	March 20, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Tulloch	Cibula		**JU Submitted as Committee Bill**
1.	Hackett	McVaney	GO	**Favorable**
2.	Tulloch	Phelps	RC	**Pre-meeting**

I. Summary:

SB 7010 amends s. 397.334, F.S. to save from repeal a public records exemption for health-related records, reports, and evaluations concerning applicants to or participants in treatment-based drug court programs that is scheduled to repeal on October 2, 2019.

Treatment-based drug court programs identify and treat eligible individuals whose involvement in the justice system is largely due to substance abuse or addiction. In providing substance abuse treatment, drug court programs aim to reduce criminal recidivism and domestic violence by addressing one of the underlying causes of such behavior.

In order to determine an individual's eligibility for the drug court program, or to monitor a participant's progress in the program, a treatment provider must share the individual's health-related information with the judge and other relevant parties on the participant's drug court multidisciplinary team. Because an individual's health information becomes part of the court's record, the public records exemption makes the following health-related records, reports, and evaluations both confidential and exempt from inspection and copying by the public:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

The bill removes the scheduled repeal date to continue the public records exemption for information relating to participants and persons considered for participation in treatment-based drug court programs.

The bill takes effect October 1, 2019.

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]

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.[3] The Public Records Act states that

> [i]t 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.[4]

The Public Records Act contains general exemptions that apply across agencies. Agency- or program-specific exemptions are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.[5] Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

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]

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] Public records laws are found throughout the Florida Statutes.
[4] Section 119.01(1), F.S.
[5] *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).
[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).

under supervision by the custodian of the public record.[8] A violation of the Public Records Act may result in civil or criminal liability.[9]

Only the Legislature may create an exemption to public records requirements.[10] An exemption must be created by general law and must specifically state the public necessity justifying the exemption.[11] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions[12] and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.[13]

When creating or expanding a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'[14] Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.[15]

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,[16] with specified exceptions.[17] It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[18] The Act 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 to meet such public purpose.[19]

OGSR Review Process

In examining an exemption, the Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. The Act 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

[8] Section 119.07(1)(a), F.S.
[9] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[10] FLA. CONST., art. I, s. 24(c).
[11] *Id*.
[12] The bill may, however, contain multiple exemptions that relate to one subject.
[13] FLA. CONST., art. I, s. 24(c).
[14] 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).
[15] *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).
[16] Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).
[17] Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.
[18] Section 119.15(3), F.S.
[19] Section 119.15(6)(b), F.S.

broader than necessary.[20] An exemption serves an identifiable purpose if it meets one of the following purposes of the Act, the Legislature finds that the purpose of the exemption outweighs open government policy, *and* the purpose 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;[21]
- 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;[22] or
- It protects trade or business secrets.[23]

The Act also requires specified questions to be considered during the review process.[24] The specified questions are:

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

OGSR Review Outcomes

At the conclusion of the review process, the Legislature may choose to (1) continue the existing exemption, (2) continue and narrow the exemption, (3) continue and expand the exemption, or (4) "sunset" (automatically repeal) the exemption. As a matter of historic practice, when choosing to continue an exemption, continuation has been accomplished by repealing the sunset date rather than reenacting the exemption.

If the Legislature chooses to either (1) continue the exemption without substantive changes or (2) continue and narrow the exemption, then it may do so *without* a public necessity statement and two-thirds vote for passage.

However, if the exemption is (3) continued and *expanded*, then a public necessity statement and two-thirds vote for passage are required.[25]

On the other hand, if (4) the Legislature allows the exemption to sunset (repeal automatically), no action need be taken. The previously exempt records will remain exempt unless provided for by law.[26]

[20] Section 119.15(6)(b), F.S.
[21] Section 119.15(6)(b)1., F.S.
[22] Section 119.15(6)(b)2., F.S.
[23] Section 119.15(6)(b)3., F.S.
[24] Section 119.15(6)(a), F.S
[25] FLA. CONST. art. I, s. 24(c).
[26] Section 119.15(7), F.S.

Overview of Treatment Based Drug Courts

Treatment-based drug courts are a type of problem-solving court aimed at addressing one of the causes of criminal behavior and domestic violence: substance abuse and addiction.[27] Generally, drug court programs identify individuals in either the criminal justice or dependency system who may benefit from substance abuse treatment. Those individuals may either be diverted to a substance abuse treatment center shortly after entering the justice system, or may be required to complete treatment later, as a condition of probation/community control or a dependency case plan. To help these individuals successfully complete treatment, drug courts provide incentives (such as reduced penalties) and support[28] to the individual to help him or her succeed.[29]

Section 397.334, F.S., the statute under review, authorizes a county to fund a treatment-based drug court program to provide individualized treatment to eligible individuals in the criminal justice or dependency system.[30] The goal in providing treatment is to reduce criminal recidivism as well as to break the cycle of domestic violence, child abuse, and neglect owing to substance abuse.[31] Ultimately, entry into a treatment-based drug court program is *voluntary*, and the written consent and agreement of the potential participant is necessary for a court to order him or her into a treatment program.[32]

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[27] *See* Florida Courts, *Problem-Solving Courts*, http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/ (last visited Jan. 14, 2019).

[28] Section 397.334(1), F.S. Each county opting to fund a drug court program must implement the following 10 therapeutic jurisprudence principles: (1) integration of alcohol, drug treatment, and mental health services into justice system case processing; (2) nonadversarial approach; (3) early identification of eligible participants; (4) continuum of services; (5) alcohol and drug testing for abstinence; (6) coordinated strategy for responses to participants' compliance; (7) ongoing judicial interaction; (8) monitoring and evaluation for program effectiveness; (9) interdisciplinary education; and (10) partnerships with stakeholders. s. 397.334(4)(a)-(j), F.S. Note, because drug court programs are individually operated by each county and are not uniform, the Office of State Court Administrators (OSCA) publishes a guide setting out the best practice standards for drug courts to follow. This guide is based largely on the research and analysis by the National Association of Drug Court Professionals (NADP). *See* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, June 2017, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.

[29] *See supra*, n. 20.

[30] *See supra*, n. 21.

[31] *See* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "Introduction," June 2017, p. 2 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf. *See also* s. 397.305(1), F.S. ("Substance abuse impairment is a disease which affects the whole family and the whole society and requires a system of care that includes prevention, intervention, clinical treatment, and recovery support services that support and strengthen the family unit."); s. 397.305(8), F.S. ("It is the intent of the Legislature to provide an alternative to criminal imprisonment for substance abuse impaired adults and juvenile offenders by encouraging the referral of such offenders to service providers not generally available within the juvenile justice and correctional systems, instead of or in addition to criminal penalties."); s. 39.001(6)(d), F.S. ("It is the intent of the Legislature to encourage the use of . . . the drug court program model established under s. 397.334 and authorize courts to assess children and persons who have custody or are requesting custody of children where good cause is shown to identify and address mental illnesses and substance abuse disorders as the court deems appropriate at every stage of the dependency process.").

[32] Section 397.334(2), F.S. As part of giving voluntary consent, the individual must be given a written copy of the "coordinated strategy" for treatment developed by the multidisciplinary team that will monitor the participant's progress. *See* s. 397.334(5), F.S. and "Participation" discussion, *infra*.

Throughout the drug court evaluation and treatment process, records of a drug court participant's screenings, diagnosis, and progress are made part of the participant's court record.[33] This process is discussed in more detail as follows.

Eligibility Screening Records

First, a potential participant must be screened for eligibility. Generally, a potential drug court participant is identified by one of the parties involved either when an individual enters the criminal justice system or when the state intervenes in a domestic matter.[34] The potential participant is then screened for eligibility by the appropriate agencies and mental health treatment professionals using "evidence-based assessment tools and procedures" in order to determine the individual's level of risk and whether he or she can be treated safely and effectively.[35]

If an individual is determined to be eligible by the appropriate agency and mental health treatment professional, the applicant's screening information, including mental health assessments, will be referred to the presiding judge who will ultimately decide whether to permit the individual to participate. As stated above, the participant must voluntarily agree to enter the program and give written consent.[36]

Treatment Records

Next, participants accepted to the drug court programs generally receive outpatient evaluation and treatment over the course of 9 to 12 months.[37] Treatment is conducted in phases which are more intensive in the beginning, and consists of group counseling, individual counseling, and peer support groups.[38] Participants must also submit to drug and alcohol testing throughout the

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[33] *See generally Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 11 (On file with Senate Judiciary Committee).

[34] Section 397.334(1), F.S. (contemplating involvement of and encouraging participation by "the Department of Corrections, the Department of Children and Families, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and such agencies, local governments, law enforcement agencies, other interested public or private sources, and individuals to support the creation and establishment of these problem-solving court programs."). The drug court administrators surveyed noted that many agencies and individuals refer individuals to the drug court programs, from the individual's attorney, public defender, or family member to the individual's arresting officer or probation officer. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 2: "how are cases referred to the program?" (On file with Senate Judiciary Committee).

[35] *See* s. 397.334(2)-(3), (5), F.S. (providing for pre and post-trial intervention programs and for a coordinated strategy for screening and treatment among a drug court team, respectively); s. 948.08, F.S. (providing that, for pre-trial drug court diversion programs, first time felony offenders (regardless of misdemeanor record) and non-violent felony offenders may be eligible if the judge, drug court manager, prosecutor, and victim agree); s. 948.16, F.S. (setting out eligibility for participation drug and alcohol-related misdemeanor pre-trial program). *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "I. Target Population," June 2017, pp. 3-4 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf (noting that those with a criminal record are not automatically disqualified from participating in drug court programs).

[36] *See supra,* n. 25.

[37] Section 397.334(4), F.S. *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "V. Substance Abuse Treatment," June 2017, pp. 12-14. https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.

[38] *Id.*

program.[39] As appropriate, the drug court program may also assist the participant in obtaining additional services and treatments, such as finding drug-free housing, receiving medical treatment, or obtaining family or mental health counseling.[40]

A participant's treatment plan and progress is overseen by a multi-disciplinary drug court team, usually consisting of the judge or judicial officer, a case manager or treatment provider, the participant's legal representative, the participant, and representatives from any relevant state agencies.[41] Pursuant to the participant's written consent and agreement, the members of the multidisciplinary team share information about the participant both when developing the initial treatment plan and as necessary throughout treatment in order to assess the participant's progress and compliance.[42] Treatment evaluation and reports are part of the participant's court file.

Additionally, the team members attend status hearings where relevant information about the participant's treatment and progress may be shared in open court.[43]

Exemption and Confidentiality of Treatment-based Drug Court Program Records

Before s. 397.334, F.S. was enacted in 2014, a drug court participant's court file was not automatically sealed as confidential and exempt from public inspection.[44] Rather, each individual drug court participant had to make a motion to seal the court record from public inspection.[45] For each individual motion filed, the judge had to hold a hearing and issue an order granting or denying the participant's motion.[46] This motion-driven process reportedly had a significant impact on the workload for both the judges and the court clerks' (administrative) offices. [47]

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[39] Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VII. Drug and Alcohol Testing," June 2017, pp. 18-19, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[40] Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VI. Additional Treatment and Social Services," June 2017, pp. 15-19, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[41] Section 397.334(5), F.S. ("While enrolled in a treatment-based drug court program, the participant is subject to a coordinated strategy developed by a drug court team under subsection (4)."). *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "VIII. Multidisciplinary Team," June 2017, p. 20-21 https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[42] Section 397.334(5), F.S. *See also* Florida Courts, *Florida Adult Drug Court Best Practice Standards*, "IV. Incentives, Sanctions, and Therapeutic Adjustments," June 2017, pp. 9-11, https://www.flcourts.org/content/download/216679/1966020/Florida_Adult_Drug_Court_Standards_Full_Document.pdf.
[43] *See* n. 32, *supra*. *See also Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 7.c. & 15.d. (On file with Senate Judiciary Committee).
[44] *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So. 3d 228, 229-230 (Fla. 2011). Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 280* (December 2, 2013) (on file with the Senate Committee on Judiciary).
[45] *Id. See* Fla. R. Jud. Admin. 2.420. Rule 2.420 made certain enumerated categories automatically exempt "but only insofar as [those categories] were confidential under [Florida's Sunshine Law] as of the date of adoption of Rule 2.420." *Poole v. South Dade Nursing & Rehab. Ctr*., 139 So. 3d 436, 439 & n.4 (Fla. 3d DCA 2014) (holding that criminal competency evaluations are not confidential under Rule 2.420 or as a patient treatment record).
[46] *Id.*
[47] Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 280* (December 2, 2013) (on file with the Senate Committee on Judiciary).

Florida Laws Protecting Patient Treatment Records

Generally, a patient's treatment records are protected from disclosure by Florida's Constitutional Right to Privacy[48] and s. 456.057(7)(a), F.S. The patient's written consent is generally required before the patient's medical and treatment information may be disclosed to a third party.[49] Additionally, certain communications between a patient and psychotherapist will be deemed privileged and confidential, and cannot be disclosed without the consent of the patient to a third party.[50]

While the foregoing laws protect a patient's treatment records from disclosure to third parties, the protection does not extend to certain court-ordered evaluations, like criminal pre-trial competency evaluations, because the person under evaluation is not a "patient" who is "seeking care and treatment."[51] Rather, the purpose of such evaluations is to share information with a "third party," i.e., the trial court, in order to assist the trial court in making a decision; e.g., to assess whether a criminal defendant is competent to stand trial.[52]

Federal Law Protecting Patient Treatment Records

Under Federal law, an individual's health information is generally made private and protected from release by the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA restricts the release of "protected health information" that is "created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse" concerning the "past, present, and future physical or mental health" of an individual and any treatment received.[53]

Federal law also protects the confidentiality of substance abuse patients[54] in "federally-assisted" treatment-based drug court program.[55] Specifically, federal law prohibits the disclosure of (1) the identity of both applicants to and participants in a substance abuse treatment program, and (2) information about both applicants and patients used for diagnosis or treatment purposes.[56]

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[48] FLA. CONST. art. I, s. 23. However, the right to privacy in medical records is not absolute and may give way when the state has a "compelling government interest" such as controlling and prosecuting criminal activity. *State v. Carter*, 23 So. 3d 798, 801 (Fla. 1st DCA 2009). For example, individuals filling a prescription generally have only "'a limited expectation of privacy in pharmacy records.'" *Id.* (*quoting Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533, 539 (2003)).

[49] Although exceptions are listed, section 456.057(7)(a) provides that "records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient." *See also Poole*, 139 So. 3d at 441 (discussing Florida privacy laws).

[50] Section 90.503, F.S. (defining a psychotherapist as one who is authorized to diagnose and treat "alcoholism and other drug addiction," including medical practitioners, psychologists, clinical social workers, therapists, mental health counselors, and personnel of treatment facilities who provide treatment,). *See also Poole* at 441.

[51] *Poole* at 441 (citing *Miami Herald Publishing Co. v. Chappell*, 403 So. 2d 1342, 1344-45 (Fla. 3d DCA 1981).

[52] *Id.*

[53] 42 U.S.C. s 1320d(4). S*ee also* 45 C.F.R. s. 160.103.

[54] *See* 42 C.F.R. Part 2.

[55] 42 C.F.R. s. 2.12(b).

[56] See 42 C.F.R. ss. 2.11-2.12. The definition of "federally assisted" is broad enough that Florida's drug court program would likely be deemed "federally assisted" such that 42 C.F.R. Part 2 applies. The drug court program received federal grant money until 2013. *See* Florida Courts, *Florida's Adult Post-Adjudicatory Drug Court Expansion Program Facts*, July 2017, https://www.flcourts.org/content/download/216244/1963410/PADC_Fact_Sheet.pdf. If the state courts receive federal grant money that *could* be used toward the drug court, the drug court program meets the definition of "federally assisted." 42

However, "the HIPAA and other applicable confidentiality statutes . . . do *not* prohibit treatment professionals and or criminal justice professionals from sharing information related to substance abuse and mental health treatment" with one another.[57] For example, courts have already held that law enforcement officers and prosecutors are not specifically "covered entities" whose behavior is governed by HIPAA's standards.[58] "Rather, these statutes control how and under what circumstances such information may be disclosed."[59] "Treatment professionals are generally permitted to share confidential treatment information with criminal justice professionals pursuant to a voluntary, informed, and competent waiver of a patient's confidentiality and privacy rights[[60]] or pursuant to a court order[[61]]."[62] However, "[t]he scope of the disclosure must be limited to the minimum information necessary to achieve the intended aims of the disclosure."[63]

Staff Research of Practitioners and Interested Parties

With the assistance of the Office of State Court Administrators (OSCA), staff sent a survey to each drug court program coordinator or administrator.[64] None of the judicial circuits reported any problems understanding or administering the current exemption, nor did any report any litigation over the exemption. Additionally, none of the drug courts recommended repealing the exemption. Rather, half of the 20 judicial circuits (10) recommended keeping the existing public records exemption, while a quarter (5) recommended expanding the exemption to cover participant records in other problem-solving courts (e.g., veterans' courts).[65] The remaining judicial circuits had no recommendation.[66]

When the exemption was passed in 2014, the stated public necessity for the exemption was to encourage participation in the drug court program.[67] In response to the survey, drug court

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C.F.R.. 2.12(b)(3)(ii)(Federally assisted if supported by funds provided by federal department or agency and being "[c]onducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program"). In any event, the drug courts surveyed indicated that they regard themselves as subject to 42 C.F.R. Part 2. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, Q. 16.a. (On file with Senate Judiciary Committee).

[57] *See* note 32, *supra*, "C. Team Communication and Decision-Making" at p. 68.

[58] *Id. See Carter*, 23 So. 3d at 800 (holding that HIPAA standards did not apply nor, alternatively, provide for suppression of medical history received by law enforcement officer from a pharmacy under s. 893.07(4), F.S.) (*citing* 45 C.F.R. §§ 160.102(a), 160.104(a); *State v. Straehler*, 307 Wis.2d 360, 745 N.W.2d 431 (2007) with parenthetical "HIPAA standards not applicable to police officers"; *State v. Downs*, 923 So.2d 726 (La.App. 1st Cir.2005) with parenthetical "HIPAA standards not applicable to district attorney.").

[59] *See supra*, n. 48 (citation omitted).

[60] 45 C.F.R.164.502(a).

[61] 45 C.F.R. §164.512(e).

[62] *See supra*, n. 48 (citation omitted).

[63] *Id.* (citing 45 C.F.R. ss. 164.502(b) & 164.514(d).

[64] Nineteen out the 20 judicial circuits have at least one active adult drug court. The third judicial circuit no longer operates a drug court. *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, August 2018, (On file with Senate Judiciary Committee).

[65] *See* Florida Courts, *Problem-Solving Courts*, https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts (last visited Jan. 14, 2019).

[66] *Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 12, 14, 17, August 2018, (On file with Senate Judiciary Committee).

[67] Ch. 2014-174, Laws of Fla.

program administrators reported observing no direct correlation between participation in the drug court program and the passage of the public records exemption.[68] Additionally, none of the drug court programs reported that anyone had declined to participate because some information may be discussed in open court. However, several programs reported that participants needing to discuss sensitive information with the court may go last when the court is less populated or may request to speak to the judge at a sidebar rather than speak in open court.[69]

Of the 19 circuits having active drug court programs, only four reported receiving public records requests concerning drug court participants since 2014. Those four circuits reported receiving eight requests from either the participant or the participant's attorney, or from the news media. In seven of the eight requests, the information sought in the public records request was not released without the participant's consent. However, the Sixth Circuit reported releasing the names of participants and the treatment centers they were attending to the Tampa Tribune because the information was already publicly disclosed in a court order.[70]

Conclusion and Recommendation

Absent the exemption, a drug court participant's health information could be at risk for public disclosure in several respects. First, initial screening records used to determine eligibility for participation must be shared with the court but may not necessarily be considered a protected treatment record under health privacy laws because the applicant is not yet a "patient." Second, while a participant's treatment records are protected from disclosure to a third party by other state and federal laws, drug court program participants have given written consent to share this information by virtue of their agreement to participate in the drug court program. As such, a drug court participant's treatment information and progress is shared between treatment providers, agencies, and the court and becomes part of the participant's court record. To ensure the public records law is not used to circumvent a participant's privacy in his or her treatment records and to ensure the participant's health records are sealed as quickly as possible, it appears the exemption should be reenacted.[71]

III. Effect of Proposed Changes:

This legislation continues a public records exemption that was created in 2014 and is scheduled to repeal on October 2, 2019. The exemption makes the following health-related records contained in a drug court participant's court file confidential and exempt without the need to file a motion to seal that portion of the record:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

[68] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 10, August 2018, (On file with Senate Judiciary Committee). In fact, several courts reported that there was a decrease in participation in some of the years between 2014 and 2018 but that this was due to other factors, such as prosecutorial decisions in certain districts. *Id.*

[69] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 7.c. and 15.d., August 2018, (On file with Senate Judiciary Committee).

[70] *See Open Government Sunset Review Questionnaire: Section 397.334, Florida Statutes*, Q. 13, August 2018, (On file with Senate Judiciary Committee).

[71] However, it should be noted that sensitive participant information may still be discussed in open court.

By removing the scheduled repeal of the exemption, the exemption is no longer subject to review under the Open Government Sunset Review Act unless the exemption is later broadened or expanded.

The bill takes effect October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue. Likewise, it does reduce the percentage of a state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

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 bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect health-related information of applicants and participants in treatment-based drug court programs. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill makes health-related treatment records contained in the court file of a drug court participant automatically confidential and exempt from public inspection. By preserving the public records exemption, the bill may encourage some individuals to participate in the drug court program by alleviating any concern that his or her substance abuse or other medical history will be released to the public unless his or her attorney can get the file sealed. Additionally, individuals paying private counsel will not accrue the costs and fees associated with the motion-driven process to have the court file sealed.[72]

The private sector will continue to be subject to the cost associated with an agency making redactions in response to a public records request.

C. Government Sector Impact:

By preserving the public records exemption, the bill permits the courts to automatically seal a participant's court record and avoid the lengthier motion-driven process, thereby reducing the workload of the judges and court administration as well as associated due process costs.[73]

Governmental agencies will continue to incur costs related to the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 397.334, Florida Statutes.

[72] *See supra,* n. 44 and text.
[73] *Id.*

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.