

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: CS/SB 838

INTRODUCER: Committee on Children, Families, and Elder Affairs and Senator Powell

SUBJECT: Public Records/Mental Health Treatment and Services

DATE: March 12, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Delia	Hendon	CF	<b>Fav/CS</b>
2.			GO	
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 838 creates new exemptions from the public records inspection and access requirements of Art. 1, s. 24(a) of the State Constitution and s. 119.07(1), F.S. This bill makes confidential and exempt pleadings, orders, and personal identifying information on a docket relating to Baker Act proceedings. The information may be disclosed upon request to certain persons involved in the proceedings or when directed by the court.

The exemptions will be repealed on October 2, 2024, unless reenacted by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

The bill has an effective date of July 1, 2019.

## II. Present Situation:

### Public Records Law

The Florida Constitution provides the public the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> 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.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act. The Public Records Act states:

[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.<sup>4</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or the method of transmission.<sup>5</sup> 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.”<sup>6</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>7</sup>

The Legislature may create an exemption to public records requirements.<sup>8</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>9</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>10</sup> A statutory exemption that does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>11</sup>

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

<sup>2</sup> *Id.*

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Section 119.01(1), F.S.

<sup>5</sup> Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” to mean “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.”

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>8</sup> FLA. CONST., art. I, s. 24(c).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *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.”<sup>12</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>13</sup>

### Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.<sup>14</sup> Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting where official acts are taken or public business is transacted or discussed.<sup>15</sup> This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.<sup>16</sup>

Section 286.011, F.S., which is known as the “Government in the Sunshine Law,”<sup>17</sup> or the “Sunshine Law,”<sup>18</sup> requires all meetings of any board or commission of any state or local agency or authority where official acts are to be taken be open to the public.<sup>19</sup> The board or commission must provide the public reasonable notice of such meetings.<sup>20</sup> Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status or operates in a manner that unreasonably restricts the public’s access to the facility.<sup>21</sup> Minutes of a public meeting must be promptly recorded and open to public inspection.<sup>22</sup> Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.<sup>23</sup> A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.<sup>24</sup>

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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.

<sup>12</sup> 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).

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>14</sup> FLA. CONST., art. I, s. 24(b).

<sup>15</sup> *Id.*

<sup>16</sup> FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

<sup>17</sup> *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

<sup>18</sup> *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

<sup>19</sup> Section 286.011(1)-(2), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> Section 286.011(6), F.S.

<sup>22</sup> Section 286.011(2), F.S.

<sup>23</sup> Section 286.011(1), F.S.

<sup>24</sup> Section 286.011(3), F.S.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.<sup>25</sup> 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.<sup>26</sup> A statutory exemption that does not meet these two criteria may be unconstitutional and may not be judicially saved.<sup>27</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.<sup>28</sup> The OGSR provides that an exemption automatically repeals on October 2 of the fifth year after creation or substantial amendment. The Legislature must reenact an exemption in order to save the exemption from repeal.<sup>29</sup> 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 necessary to accomplish the stated purpose of the exemption.<sup>30</sup> The Legislature must find that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. An exemption serves an identifiable purpose if it meets one of the following criteria:

- Allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>31</sup>
- Release of sensitive personal information would be defamatory or would jeopardize an individual's safety;<sup>32,33</sup> or
- Protects trade or business secrets.<sup>34</sup>

The OGSR requires specific questions be considered during the review process.<sup>35</sup> The OGSR asks the Legislature to question carefully the purpose and necessity of reenacting the exemption.

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

<sup>26</sup> *Id.*

<sup>27</sup> *See supra* note 12.

<sup>28</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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.

<sup>29</sup> Section 119.15(3), F.S.

<sup>30</sup> Section 119.15(6)(b), F.S.

<sup>31</sup> Section 119.15(6)(b)1., F.S.

<sup>32</sup> Section 119.15(6)(b)2., F.S.

<sup>33</sup> Only personal identifying information is exempt if this public purpose is cited as the basis of an exemption.

<sup>34</sup> Section 119.15(6)(b)3., F.S.

<sup>35</sup> Section 119.15(6)(a), F.S. 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?

A public necessity statement and a two-thirds vote of the members present and voting in each house of the Legislature are required for final passage if the Legislature expands an exemption.<sup>36</sup> A public necessity statement and a two-thirds vote of the members present and voting in each house of the Legislature are not required for final passage if the exemption is reenacted without substantive changes or if the exemption is narrowed. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.<sup>37</sup>

### **The Baker Act**

The Legislature adopted the Florida Mental Health Act, also known as The Baker Act, in 1971.<sup>38</sup> It is designed to help people receive treatment who are suffering with mental, emotional, and behavioral disorders. Baker Act proceedings provide people with emergency services, sometimes through temporary detention, to obtain a mental health evaluation and treatment. The treatment may be voluntary or involuntary. The Baker Act requires that programs offer comprehensive services to people who need intensive short-term treatment and continued treatment to aid in their recovery. The Baker Act also provides protections and rights for people examined or treated for mental illness. Legal procedures are established for mental health examination and treatment, including voluntary admission, involuntary admission, involuntary inpatient treatment, and involuntary outpatient treatment.

### **Confidentiality of Records under the Baker Act**

The concern has been expressed that while “clinical records”<sup>39</sup> under the Baker Act are designated and maintained as confidential by the clerk of the court, it is not clear whether other Baker Act records are open to the public for review.<sup>40</sup> There appears to be a difference of opinion among various clerks of court as to what is and what is not exempt from disclosure. If the petitions, orders, and identifying information in this bill were all classified as confidential and exempt, then there would be uniformity among the clerks of the court in administering these provisions statewide.

## **III. Effect of Proposed Changes:**

**Section 1** creates s. 394.464, F.S., to provide that all petitions for voluntary and involuntary assessment and stabilization, court orders, and related records filed with or by a court under Part I of Section 397, F.S., are confidential and exempt from s. 119.071(1), F.S., and s. 24(a), Art. I of the State Constitution. The pleadings and other documents may be disclosed by the clerk of

<sup>36</sup> FLA. CONST., art. I, s. 24(c).

<sup>37</sup> Section 119.15(7), F.S.

<sup>38</sup> Chapter 71-131, s. 1, Laws of Fla. The Baker Act is contained in Part I of chapter 394, Florida Statutes.

<sup>39</sup> Section 394.4615, F.S., states that “[a] clinical record is confidential and exempt from the provisions of s. 119.07(1).” The Judicial Administration Rules also provide for the confidentiality of clinical records under the Baker Act. Fla. R. Jud. Admin. 2.420(d)(1)(B)(viii).

<sup>40</sup> Section 394.455(3), F.S. Clinical records are defined as being all parts of the record required to be maintained, including medical records, progress notes, charts, admission and discharge data, and other information recorded by the facility that pertains to the patient’s hospitalization or treatment. In lay terms, this is often characterized as records requiring a medical signature.

court, upon request, to certain persons or agencies, such as the petitioner, the respondent and their legal representatives, as well as the Department of Corrections. The bill provides that records made confidential and exempt from public disclosure can be submitted by the clerk of the court to the Florida Department of Law Enforcement as required by s. 790.065, F.S.<sup>41</sup>

The bill provides that the newly created public records exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides for retroactive application of the public records exemption.

**Section 2** provides a statement of public necessity as required by the State Constitution.<sup>42</sup> The bill provides that making petitions and court records filed under the Baker Act confidential and exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution protects a person's personal health information and sensitive personal information which, if released, could cause unwarranted damage to the person's reputation. Additionally, the knowledge that such information could be disclosed could have a chilling effect on the willingness of individuals to seek treatment.

**Section 3** provides that the bill shall take effect on July 1, 2019.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The county/municipality mandates provision of Art. VII, section 18, of the State Constitution may apply because clerks of the court may incur additional costs relating to redacting information made confidential and exempt under this bill. However, an exemption may apply based on the limited fiscal impact that is anticipated to be incurred.

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

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

The State Constitution requires the exemption to be no broader than necessary to accomplish the stated purpose of the law. The exemption is no broader than the public necessity statement. The public necessity statement appears to support the public policy for the exemption.

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<sup>41</sup> Section 790.065, F.S., concerns the sale and delivery of firearms. Clerks of the court are required to transfer the records of certain impaired people to FDLE.

<sup>42</sup> FLA. CONST. art. I, s. 24(c).

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Clerks of court may incur additional costs associated with training court personnel and performing more redactions of personal identifying information from dockets. It is anticipated that these costs will be absorbed within the existing resources of the offices of the clerks of court.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 394.464 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.)

**CS by Children, Families, and Elder Affairs on March 11, 2019:**

The CS provides an effective date of July 1, 2019.

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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