

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: CS/SB 938

INTRODUCER: Criminal Justice Committee and Senator Bracy

SUBJECT: Public Records/Criminal History Records

DATE: March 11, 2019 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Storch	Jones	CJ	Fav/CS
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 938, which is linked to the passage of CS/SB 936, expands an existing public records exemption for sealed criminal history records to include *administratively sealed* criminal history records as authorized by CS/SB 936.

An administratively sealed criminal history record is a record of a minor arrested or charged with a felony, misdemeanor, or violation of a comparable rule or ordinance by a state, county, municipal, or other law enforcement agency that is sealed upon notification by the clerk of the court that all the charges related to the arrest or incident of alleged criminal activity:

- Were declined to be filed by the state attorney or statewide prosecutor;
- Were dismissed or nolle prosequi before trial; or
- Resulted in a judgment of acquittal or a not guilty verdict.

The fiscal impact of the bill is indeterminate at this time. However, agencies that are responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record may incur costs as a result. See Section V. Fiscal Impact Statement.

The expansion of the exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2024, unless reviewed and saved from repeal by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

Because the bill expands a current public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill is effective on the same date that CS/SB 936 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:

Public Records Law

The State 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 typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often 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

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).

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 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 provisions¹² 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

Court-ordered Sealing of a Criminal History Record

Florida law makes adult criminal history records accessible to the public unless the record has been sealed or expunged.¹⁶ A criminal history record that is sealed is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein.¹⁷ Section 943.059, F.S., authorizes a court-ordered sealing process, which places a criminal history record under highly restricted access pursuant to court order.

A person seeking to have his or her criminal history record sealed must obtain a certificate of eligibility for sealing pursuant to requirements set forth in s. 943.059(2), F.S., and subsequently petition the court to seal the record.¹⁸

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 Florida Department of Law Enforcement, *Seal and Expunge Process*, available at <http://www.fdle.state.fl.us/cms/Seal-and-Expunge-Process/Seal-and-Expunge-Home.aspx> (last visited March 4, 2019). See s. 943.053, F.S.

¹⁷ Section 943.045(19), F.S.

¹⁸ Section 943.059, F.S.

A criminal history record of a minor or an adult which is ordered sealed by a court pursuant to s. 943.059, F.S., is confidential and exempt from the provisions of s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution.¹⁹ Such record is available only to:

- The person who is the subject of the record;
- The subject's attorney;
- Criminal justice agencies for their respective criminal justice purposes;
- Judges in the state courts system for the purpose of assisting them in their case-related decisionmaking responsibilities; and
- Entities set forth in s. 943.059(4)(a), F.S.²⁰

Additionally, a person who has their criminal history record sealed may lawfully deny or fail to acknowledge the records that were sealed, unless he or she is:

- A candidate for employment with a criminal justice agency;
- A defendant in a criminal prosecution;
- Petitioning to have a court-ordered criminal history record sealed or expunged;²¹
- A candidate for admission to The Florida Bar;
- Seeking appointment as a guardian or a position with an agency that is responsible for the protection of vulnerable persons, including children, the disabled, or the elderly;
- Seeking to be licensed by the Division of Insurance Agent and Agency Services within the Department of Financial Services or the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services to carry a concealed weapon or concealed firearm; or
- Attempting to purchase a firearm from a licensed importer, licensed manufacturer, or licensed dealer and is subject to a criminal history check under state or federal law.²²

The Florida Department of Law Enforcement must disclose the sealed criminal history record to the entities listed above for their respective licensing, access authorization, and employment purposes. An employee of an entity listed above may only disclose information relating to the existence of a sealed criminal history record to the person to whom the criminal history record relates or to persons having direct responsibility for employment, access authorization, or licensure decisions.²³

If a person has his or her criminal record sealed, he or she may not be held under any provision of law of this state to commit perjury or otherwise be liable for giving a false statement for failure to acknowledge a sealed criminal history record.²⁴

¹⁹ Section 943.059(4), F.S.

²⁰ Section 943.059(4), F.S.

²¹ See ss. 943.0583 and 943.0585, F.S.

²² *Supra*, n 20.

²³ Section 943.059(4)(c), F.S.

²⁴ This is subject to the exceptions enumerated in s. 943.059(4)(a), F.S., whereby a person must acknowledge a sealed criminal history record under certain circumstances. See s. 943.059(4)(b), F.S.

Administrative Sealing of a Criminal History Record

CS/SB 936, which is linked to CS/SB 938, creates a process for the administrative sealing of certain criminal history records of a minor.

Specifically, CS/SB 936 requires a criminal history record of a minor arrested or charged with a felony, misdemeanor, or violation of a comparable rule or ordinance by a state, county, municipal, or other law enforcement agency to be administratively sealed upon notification by the clerk of the court that all the charges related to the arrest or incident of alleged criminal activity:

- Were declined to be filed by the state attorney or statewide prosecutor;
- Were dismissed or nolle prosequi before trial; or
- Resulted in a judgment of acquittal or a not guilty verdict.

Additionally, all appeals must have been exhausted by the prosecution or the time to file an appeal must have expired in order for a record to be administratively sealed.

III. Effect of Proposed Changes:

The bill expands the public records exemption for sealed criminal history records in s. 943.059, F.S., to include records *administratively sealed* pursuant to s. 943.0586, F.S.

An administratively sealed criminal history record would be treated the same as a record sealed pursuant to s. 943.059, F.S., making such record confidential and exempt and only available to certain entities. Additionally, the person who is the subject of the criminal history record that is administratively sealed would be permitted to lawfully deny or fail to acknowledge the existence of the record, with limited exceptions.²⁵

The bill provides a statement of public necessity as required by the State Constitution.²⁶ The statement provides that the presence of a criminal history record in a minor's past which has not been validated through criminal proceedings can jeopardize his or her ability to obtain education, employment, and other opportunities necessary to becoming a productive, contributing, self-sustaining member of society. Furthermore, such negative consequences are unwarranted in cases in which a minor was not found to have committed the offense that is the subject of the sealed criminal history record.

The bill repeals the expansion of the exemption on October 2, 2024, unless reviewed and saved from repeal by the Legislature.

The bill provides that s. 943.059, F.S., shall revert to that in existence on June 30, 2019, if the expansion of the exemption is not saved from repeal. The bill provides that any amendments made to s. 943.059, F.S., shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of text which are not saved from repeal.

²⁵ *Supra*, n 20.

²⁶ FLA CONST., art. I, s. 24(c).

The bill is effective on the same date that CS/SB 936 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.

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 expands a current exemption for sealed criminal history records. Thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding exemptions to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the expansion.

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 minors from having his or her ability to obtain education, employment, and other opportunities jeopardized by a criminal history record from his or her past that has not been validated through criminal proceedings. The law protects such minors by narrowly expanding the public records exemption to apply to criminal history records that have been administratively sealed. There are substantial legislative findings in the statement of public necessity in support of the public records exemption expansion. For these reasons, the bill appears to be no broader than necessary to accomplish its stated purpose.

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:

None.

C. Government Sector Impact:

The bill may have a 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:

CS/SB 936 is the related bill linked to this bill. CS/SB 936 establishes an administrative sealing process for certain criminal history records of a minor.

VIII. Statutes Affected:

This bill substantially amends section 943.059 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 Criminal Justice on March 11, 2019:

The Committee Substitute updates a reference to CS/SB 936.

B. Amendments:

None.