

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 Appropriations

BILL: CS/SB 470

INTRODUCER: Judiciary Committee and Senator Bracy

SUBJECT: Public Records/Expunged Criminal History Records

DATE: April 14, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2. <u>Stokes</u>	<u>Jones</u>	<u>CJ</u>	Favorable
3. <u>Forbes</u>	<u>Sadberry</u>	<u>AP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 470 is the public records exemption bill linked to CS/SB 468. The bill provides that criminal history records relating to certain misdemeanor cannabis offenses that have been expunged and are retained by the Florida Department of Law Enforcement (FDLE) are confidential and exempt from public disclosure. Exceptions permit specified entities to access such records for limited purposes. CS/SB 468 creates section 943.0586, Florida Statutes, providing for the expunction of certain criminal history records relating to the misdemeanor offense of possession of 20 grams or less of cannabis, regardless of disposition.

Additionally, the bill provides that it is a first degree misdemeanor for any employee of a specified entity to disclose information relating to the existence of an expunged criminal history record of a person seeking employment, access authorization, or licensure with such entity or contractor, except to:

- The person to whom the record relates.
- Persons having direct responsibility for employment, access authorization, or licensure decisions.

This bill is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2026, unless reviewed and saved from the repeal through reenactment by the Legislature.

Because this bill creates a public records exemption, it will require a two-thirds vote of each house in order to pass.

This bill takes effect on the same date as CS/SB 468 or similar legislation takes effect. CS/SB 468 is effective on July 1, 2021.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

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 the statutory definition of “public record” to include “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 See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. 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.”

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.”

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 public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any 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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ 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.¹⁹

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. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ Section 119.15(2)(a) and (b), F.S., provides 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.

¹⁹ Section 119.15(3), F.S.

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.²⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the 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 information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁶

Expunction

A criminal history record includes any non-judicial record maintained by a criminal justice agency²⁷ that contains criminal history information.²⁸ Criminal history information is information collected by criminal justice agencies and consists of identifiable descriptions of

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. 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?

²⁵ *See generally* s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Section 943.045(11), F.S., provides that criminal justice agencies include the court, the FDLE, the Department of Juvenile Justice, components of the Department of Children and Families, and other governmental agencies that administrate criminal justice.

²⁸ Section 943.045(6), F.S.

individuals and notations of arrests, detentions, indictments, information, other formal criminal charges, and criminal dispositions.²⁹

A person may have his or her criminal history record expunged under certain circumstances.³⁰ When a record is expunged, the criminal justice agencies possessing such record must physically destroy or obliterate it. The FDLE maintains a copy of the record to evaluate subsequent requests for sealing or expunction, and to recreate the record in the event a court vacates the order to expunge.³¹ The criminal history record retained by the FDLE is confidential and exempt.³² Once the record is expunged, a person may lawfully deny or fail to acknowledge the arrests covered by the expunged record, subject to exceptions.³³

SB 468 Expunction of Criminal History Records Relating to Certain Cannabis Offenses

CS/SB 468 creates s. 943.0586, F.S., providing for the expunction of certain criminal history records relating to the misdemeanor offense of possession of 20 grams or less of cannabis, regardless of disposition. The language in the bill closely mirrors the procedures and requirements for court ordered expunction under s. 943.0585, F.S.

The bill provides that a person may only receive one expunction under this section, and may only petition the court for an expunction after at least one year has elapsed since the disposition of the criminal activity to which the petition pertains, and he or she is no longer under court supervision. A person who receives an expunction under this section is not precluded from seeking a sealing or expunction provided under any other section of law.

III. Effect of Proposed Changes:

CS/SB 470 is the public records exemption bill linked to CS/SB 468. The bill provides that criminal history records relating to certain misdemeanor cannabis offenses that have been expunged and are retained by the FDLE are confidential and exempt from s. 119.07(1), F.S., and article I, section 24(a) of the State Constitution. The bill provides exceptions to permit specified entities to access such records for limited purposes. The FDLE must disclose the existence of a criminal history record ordered expunged to specified entities for their respective licensing, access authorization, employment purposes, and to criminal justice agencies for criminal justice purposes. Such entities include:

- Criminal justice agencies.
- The Florida Bar.
- The Department of Children and Families.
- The Division of Vocational Rehabilitation with the Department of Education.
- The Agency for Health Care Administration.
- The Agency for Persons with Disabilities.
- The Department of Health.
- The Department of Elderly Affairs.

²⁹ Section 943.045(5), F.S.

³⁰ Sections 943.0581, 943.0582, 943.0583, and 943.0585, F.S.

³¹ Section 943.045(16), F.S.

³² Section 943.0585(6)(a), F.S.

³³ Section 943.0585(6), F.S.

- The Department of Juvenile Justice.
- Any district school board, university laboratory school, charter school, private or parochial school, or local governmental entity that licenses child care facilities.
- The Division of Insurance Agent and Agency Services within the Department of Financial Services.
- The guardian ad litem program.

The bill creates a first degree misdemeanor for any employee of an entity listed above to disclose information relating to the existence of an expunged criminal history record of a person seeking employment, access authorization, or licensure with such entity or contractor, except to:

- The person to whom the record relates.
- Persons having direct responsibility for employment, access authorization, or licensure decisions.

This subsection is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2026, unless reviewed and saved from the repeal through reenactment by the Legislature.

This bill provides a public necessity statement as required by article I, section 24(c) of the State Constitution. The public necessity statement provides that:

The Legislature finds that it is a public necessity that individuals who petition a court and are granted expunction of certain low-level and nonviolent criminal history records have such criminal history records made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The Legislature recognizes the disproportionate harm that criminalizing the purchase or possession of small amounts of cannabis has had on minorities and disadvantaged communities. The Legislature further recognizes the trends in this state, and nationally, of counties and localities decriminalizing the purchase or possession of small amounts of cannabis. Without this public records exemption, individuals with such low-level and nonviolent criminal history records who are granted expunction of such records might not be able to seek gainful employment and become productive, contributing members of this state. For these reasons, the Legislature finds that it is a public necessity that such records be made confidential and exempt.

This bill takes effect on the same date as CS/SB 468 or similar legislation takes effect. As currently in the Senate, CS/SB 468 is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

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 newly created or expanded public records or public meeting exemption. The bill creates a public record exemption for a judicial record that is expunged, and therefore, 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 a public record exemption for a judicial record that is expunged. Section 2 of the bill provides a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill makes confidential and exempt limited criminal history records. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its 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:

VI. None. Technical Deficiencies:

The Open Government Sunset Review repeal language refers to repeal of the entire section, but perhaps should only repeal subsection (8) of s. 943.0586, F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates subsection (8) in section 943.0586, Florida Statutes, which section is created by companion bill, CS/SB 468.

IX. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 15, 2020:

The committee substitute added references to the companion bill SB 468, added exceptions to the public records exemption consistent with changes made by amendment to SB 468 at the same committee meeting, and added a first degree misdemeanor related to those exceptions, which is consistent with similar public records laws.

B. Amendments:

None.