

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 Children, Families, and Elder Affairs Committee

BILL: CS/SB 126

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Dockery

SUBJECT: Confidential Records of Abused Children

DATE: March 25, 2009 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Toman | Walsh | CF | Fav/CS |
| 2. | | | JU | |
| 3. | | | GO | |
| 4. | | | HA | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The Committee Substitute for Senate Bill 126 creates a new section of statute, requiring that a case record for a child under the supervision of or in the custody of the Department of Children and Families (DCF or the department) be maintained in a complete and accurate manner, and be made available for inspection and copying, upon the request of and at no cost to, the child, and the child's guardian ad litem, attorney, and caregiver.

Pursuant to ch. 39, F.S., the term "caregiver" is broadly defined to include parents, legal custodians, permanent guardians, adult household members, foster parents, employees of any school, public or private child day care center, residential home, institution, facility, or agency, law enforcement officers, adult sitters or relatives entrusted with a child's care and other individuals legally responsible for a child's welfare in a residential setting.

The release of the case record must be in a manner and setting appropriate to the age and maturity of the child and the nature of the information being released.

This bill authorizes a court to approve the release of confidential information contained in a case record if the court determines that the information is necessary to ensure access to appropriate services for the child or for the safety of the child.

This bill authorizes the sharing of confidential and exempt information among all state and local agencies and programs that provide services to children or are responsible for children's safety, if the information is reasonably necessary to assure access to services or the safety of the child. The bill provides that records or information made confidential by federal law may not be shared.

The bill adds individuals with whom the department is seeking to place a child to the list of individuals allowed to have access to information contained in abuse records that is otherwise confidential and exempt from public disclosure.

This bill substantially amends s. 39.202 and creates s. 39.00145 of the Florida Statutes.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁴ records are available for public inspection. Section 119.011(11), F.S., defines the term "public record" very broadly to include "all documents, ... tapes, photographs, films, sounds recordings, ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Unless made exempt, all such materials are open for public inspection at the moment they become records.⁵

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁶

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

³ Chapter 119, F.S.

⁴ Section 119.011(2), F.S., defines *agency* as "any state, county, ... or municipal officer, department, ... or other separate unit of government created or established by law ... and any other public or private agency, person, ... acting on behalf of any public agency."

⁵ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁶ FLA. CONST. art. I, s. 24(c).

Section 119.10, F.S., prescribes the penalties for violations of ch. 119, F.S., as follows:

- Any public officer who:
 - Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding \$500.
 - Knowingly violates the provisions of s. 119.07(1), F.S., relating to the inspection and copying of public records, is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree.
- Any person who willfully and knowingly violates:
 - Any of the provisions of ch. 119, F.S., commits a misdemeanor of the first degree.
 - Section 119.105, F.S., relating to police reports, commits a felony of the third degree.

Public records do not necessarily lose their exempt status once they are disclosed. In *Ragsdale v. State*, the Florida Supreme Court held:

[T]he applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record ... the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands.⁷

In *City of Riviera Beach v. Barfield*, the court stated, “[T]he primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests. Had the legislature intended the exemption ... to evaporate upon the sharing of that information ... , it would have expressly provided so in the statute.”⁸

Public Record Exemptions for the Department of Children and Family Services

The department is an executive branch agency headed by a Secretary appointed by the Governor and confirmed by the Senate.⁹ The Secretary must ensure that the mission of the department is fulfilled in accordance with state and federal laws, rules, and regulations.¹⁰ As part of its responsibilities, the department investigates reports of abuse, neglect, or abandonment of children and abuse, neglect, or exploitation of vulnerable adults.¹¹ Sensitive information regarding children, vulnerable adults, and alleged perpetrators is collected during those investigations.

⁷ *Ragsdale v. State*, 720 So.2d 203, 205-06 (Fla. 1998).

⁸ *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994). In *Barfield*, Barfield argued that once the City of West Palm Beach shared its active criminal investigative information with the City of Riviera Beach the public record exemption for such information was waived. Barfield based that argument on a statement from the 1993 *Government-In-The-Sunshine Manual* (a booklet prepared by the Office of the Attorney General). The Attorney General opined “once a record is transferred from one public agency to another, the record loses its exempt status.” As noted, the court declined to accept the Attorney General’s view.

⁹ Section 20.19(2), F.S.

¹⁰ Section 20.19(2)(d), F.S.

¹¹ See chapters 39 and 415, F.S.

Current law provides public record exemptions for all records held by the department concerning reports of abuse, neglect, or abandonment of a child¹² and reports of abuse, neglect, or exploitation of a vulnerable adult.¹³ This includes reports made to the central abuse hotline and all records generated as a result of such reports.

The exemptions authorize release of the confidential and exempt information¹⁴ to certain agencies and persons or under certain circumstances.¹⁵ For example, the department may release information to the Department of Health, the Agency for Persons with Disabilities, or county agencies responsible for carrying out child or adult protective investigations, ongoing child or adult protective services, early intervention and prevention services, Healthy Start services, licensure or approval of adoptive homes, foster homes, or child care facilities, or services for victims of domestic violence.¹⁶

The department may also release information to the child or adult who is the subject of the records.¹⁷ In its Operating Procedure relating to the sharing of records with children, the department recognizes that a “child is absolutely entitled to copies of any official court records, except adoption records, pertaining to his or her case.” The procedure provides that documents filed with the court and included in the case record may be provided to the child, after consultation with a child welfare attorney. Documents that may be provided include:

- Petitions;
- Orders;
- Predisposition reports;
- Judicial review social studies;
- Psychological reports;
- Child Protection Team reports; and
- Medical reports.¹⁸

¹² Section 39.202(1), F.S.

¹³ Section 415.107(1), F.S.

¹⁴ There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and *confidential*. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute. If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information. *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53-54 (Fla. 5th DCA).

¹⁵ See s. 39.202(2), F.S., and s. 415.107(2) and (3), F.S.

¹⁶ Section 39.202(2)(a), F.S.

¹⁷ Sections 39.202(2)(d) and 415.107(3)d), F.S. See also, s. 39.0132(3), F.S., which provides that a child always has the right to inspect and copy any official record pertaining to him or her, subject only to the provisions of section 63.162, F.S., pertaining to adoption records; s. 39.601(1)(a), F.S., which requires that case plans be developed in conference with the parent, guardian, or custodian of the child, and, if appropriate, the child; and s. 39.521(1)(a), F.S., which requires that a copy of the predisposition study and case plan must be furnished to all parties (the definition of “parties” in s. 39.01(51), F.S. includes the child).

¹⁸ DCF, *Operating Procedure No. 175-37* (December 15, 2006). See also, *C.E.B. v. Birkin*, 566 So.2d 907 (Fla. 4th DCA 1990) (child has clear right to inspection of the official record in a dependency case; the “official record” includes any documents that were considered by the court in reaching its decision). The department’s operating procedures do not expressly apply to the department’s contracted providers (e.g., CBCs) and, according to former foster youth who now advocate for changes in the foster care system in Florida, the procedure is not uniformly applied to allow foster children to have complete access to their records.

Current law also authorizes any person or organization, including the department, to petition the court for an order making public the records of the department pertaining to investigations of alleged abuse, neglect, or abandonment of a child¹⁹ or alleged abuse, neglect, or exploitation of a vulnerable adult.²⁰ The court must determine whether good cause exists for public access. In making this determination, the court must balance the public interest against the best interests of the:

- Child and that child's siblings, together with the privacy rights of other persons identified in the reports;²¹ or
- Vulnerable adult, together with the privacy rights of other persons identified in the reports.²²

The law also authorizes the department to petition the court for an order for the immediate public release of department records pertaining to cases that involve serious bodily injury.²³ The court, within 24 hours after the department files the petition,²⁴ must determine whether good cause exists.²⁵ If the court determines that good cause exists for public access, the court must direct the department to redact²⁶ the name and other identifying information of any person identified in any protective investigation report until the court finds that there is probable cause to believe that the person identified committed an act of abuse, abandonment, neglect, or exploitation.²⁷

Federal Confidentiality Laws

Family Educational Rights and Privacy Act (FERPA)

The FERPA strictly limits the authority of schools to release student records to third parties.²⁸ School records may be released to a parent, defined by FERPA to include a natural parent, a

¹⁹ Section 39.2021(1), F.S.

²⁰ Section 415.1071(1), F.S.

²¹ Section 39.2021(1), F.S.

²² Section 415.1071(1), F.S.

²³ Sections 39.2021(2) and 415.1071(2), F.S. In cases involving a child, the petition must be personally served upon the child, the child's parent or guardian, and any person named as an alleged perpetrator in the report of abuse, abandonment, or neglect. In cases involving a vulnerable adult, the petition must be personally served upon the vulnerable adult, the vulnerable adult's legal guardian, if any, and any person named as an alleged perpetrator in the report of abuse, neglect, or exploitation.

²⁴ If the court does not grant or deny the petition within the 24-hour period, the department may release to the public summary information that includes a confirmation that an investigation has been conducted concerning the alleged victim; the dates and brief description of procedural activities undertaken during the department's investigation; and the date of each judicial proceeding, a summary of each participant's recommendations made at the judicial proceeding, and the ruling of the court. The information cannot include the name of, or other identifying information with respect to, any person identified in any investigation. Sections 39.2021(2) and 415.107(2), F.S.

²⁵ *Id.*

²⁶ Section 119.011(12), F.S., defines "redact" to mean "to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information."

²⁷ Sections 39.2021(3) and 415.1071(3), F.S.

²⁸ Steve Christian, *Educating Children in Foster Care*, NAT'L CONFERENCE OF STATE LEGISLATURES 11 (December 2003), available at <http://www.ncsl.org/programs/cyf/cpieducate.pdf> (last visited February 19, 2009). See also, s. 1002.22(3), F.S., which, consistent with federal law, makes student educational records confidential and exempt from ch. 119, F.S.

guardian, or an individual acting as a parent in the absence of a parent or a guardian.²⁹ This definition is sometimes interpreted to include foster parents and child welfare agencies,³⁰ although there appears to be no legal authority expressly addressing whether a foster parent or a child welfare agency meets the definition of “parent” for purposes of FERPA.³¹

Otherwise, information from a student’s education record can only be released with a parent’s consent or pursuant to court order.³² The FERPA does allow schools to disclose records, without consent, to:

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- Comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific state law.³³

Section 1002.22(3)(d)14., F.S., provides that a child’s education records may be released to the department or its community-based care providers without the consent of the child or the child’s parent. The provision is limited to the extent the disclosure is consistent with FERPA, which appears to mean that one of the above-noted exceptions to FERPA’s rule against disclosure must also be applicable.

FERPA was recently amended, with final regulations published in December 2008. In its discussion of the amendments to the section allowing disclosure in connection with an emergency to protect the health and safety of the student or others, the agency noted:

[T]he word “protect” generally means to keep from harm, attack, or injury. As such, the statutory text underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury. Moreover, to be “in connection with an emergency” means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an

²⁹ *Id.*

³⁰ *Id.*

³¹ Judith M. Gerber and Sheryl Strickland, *Children Adrift: Addressing the Educational Needs of New York’s Foster Children*, ALBANY LAW REVIEW (Winter 2005).

³² U.S. Dep’t of Education, *Family Education and Privacy Rights Act (FERPA)*, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited February 19, 2009).

³³ *Id.*

educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.³⁴

An educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records without the written consent of the parent or eligible student, except as provided by law.³⁵ If an educational agency or institution determines that it cannot comply with FERPA due to a conflict with state or local law, it must notify the Department of Education within 45 days.³⁶ An actual conflict of laws arises if it is impossible for a party to comply with both federal and state law, or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law.³⁷

*Health Insurance Portability and Accountability Act of 1996 (HIPAA)*³⁸

The HIPAA prohibits disclosure of identifiable health information held or transmitted by covered entities. The federal act does not restrict the use of “de-identified” health information, which is information that neither identifies nor provides a reasonable basis to identify an individual.³⁹

III. Effect of Proposed Changes:

This bill creates s. 39.00145, F.S., requiring that a case record⁴⁰ for a child under the supervision of or in the custody of the department, or the department’s agents or contracted providers, be maintained in a complete and accurate manner. The case record must contain at least the following:

- The child’s case plan;⁴¹ and
- The full name and street address of all shelters, foster parents, group homes, treatment facilities, or locations where the child is placed.

³⁴ Family Educational Rights and Privacy; Final Rule, 73 Fed. Reg. 74,806, 74,838 (December 9, 2008) (to be codified at 34 C.F.R. pt. 99).

³⁵ Letter to Grossmont-Cuyamaca Community College District (CA) re: Potential Conflict with State Law, FERPA Online Library (January 16, 2004), available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/suarezconflict.html> (last visited February 23, 2009).

³⁶ 34 C.F.R. s. 99.61.

³⁷ *Taubman Realty Group Ltd. Partnership v. Norman Mineta*, 198 F.Supp. 2d 744, 761 (E.D. Va. 2002), citing *English v. General Electric*, 496 U.S. 72 (1990).

³⁸ Pub. Law 104-191.

³⁹ U.S. Dep’t of Health & Human Servs., *Summary of the HIPAA Privacy Rule 4* (May 2003), available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited February 19, 2009). See also 45 C.F.R. ss. 164.502(d)(2) and 164.514(a) and (b).

⁴⁰ Rule 65C-15.031, F.A.C., entitled “Child’s Case Records,” requires the department to maintain current records for each child placed in a foster, adoptive or group home. The rule prescribes the minimum information that must be included in each file, including demographic information, copies of legal documents such as birth certificates, medical history, social assessments, educational records, and a record of the child’s placements.

⁴¹ Section 39.01(11), F.S. defines “case plan” to mean “a document . . . prepared by the department with input from all parties. The case plan follows the child from the provision of voluntary services through any dependency, foster care, or termination of parental rights proceeding or related activity or process.”

The bill provides that a child's case record must be made available for inspection, upon request, to the:

- Child;
- Child's caregiver;
- Child's guardian ad litem; and
- Child's attorney.

Chapter 39, F.S., defines the term **caregiver** to mean "the parent, legal custodian, permanent guardian, adult household member, or *other person responsible for the child's welfare*."⁴² The term **other person responsible for the child's welfare** includes:

- The child's legal guardian or foster parent;
- An employee of any:
 - School;
 - Public or private child day care center; or
 - Residential home, institution, facility, or agency;
- A law enforcement officer employed in any facility, service, or program for children that is operated or contracted by the Department of Juvenile Justice;
- An adult sitter or relative entrusted with a child's care; or
- Any other person legally responsible for the child's welfare in a residential setting.⁴³

The bill provides that a copy of the case record must be provided, upon request and at no cost, to the same individuals. The release of the case record as prescribed must be made in a setting appropriate to the age and maturity of the child and the nature of the information being released.

The bill authorizes a court to approve the release of confidential information contained in a case record if the court determines that the information is necessary "to ensure access to appropriate services for the child or for the safety of the child."

The bill authorizes the sharing of confidential and exempt information among "all state and local agencies and programs that provide services to children or that are responsible for a child's safety," if the information is reasonably necessary to assure access to services or the safety of the child, and unless the information is made confidential by federal law. The following agencies and their contracted providers are expressly included in this sharing provision:

- Department of Juvenile Justice;
- Department of Health;
- Agency for Health Care Administration;
- Agency for Persons with Disabilities;
- Department of Education;
- Individual school districts; and
- Statewide Guardian ad Litem Office.

⁴² Section 39.01(10), F.S.,

⁴³ Section 39.01(47), F.S.

Information relating to clients and records of certified domestic violence centers are excluded from the sharing provision. However, the sharing of confidential and exempt information described in this portion of the bill is not otherwise limited to the agencies and programs listed, so it may be interpreted to include a myriad and unlimited number of agencies and programs that provide services to children.

The bill amends s. 39.202, F.S., to allow persons with whom the department is seeking to place a child, or to whom placement has been granted, to have access to otherwise confidential and exempt information contained in records relating to reports of child abuse, neglect or abandonment. The individuals entitled to the exception include:

- Foster parents;
- Designees of a licensed residential group home;
- Relatives or nonrelatives with whom the child is placed;
- Preadoptive parents;
- Adoptive parents; and
- Adoption entities.

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have an indeterminate fiscal impact on community-based care providers, to the extent those providers will be required to supply copies of case files to persons identified by the bill upon request and at no cost.

C. **Government Sector Impact:**

The bill may have an indeterminate fiscal impact on the department, to the extent the department will be required to supply copies of case files to persons identified by the bill upon request and at no cost.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

Generally, the bill requires the department to provide a dependent child with a copy of his or her records upon request. It appears that current law, as well as the department's rules and operating procedures, already authorize or require the department to provide a child with documents relating to his or her case. Certain provisions of this bill may be somewhat redundant.

The bill requires the department to allow a child's caregiver to inspect or obtain a copy of a child's case record. Chapter 39, F.S., defines the term **caregiver** broadly. It is unclear if the intent of the bill is to allow access to all of the individuals encompassed by the definition of **caregiver**.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

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

CS by Children, Families, and Elder Affairs on March 25, 2009:

The Committee Substitute for Senate Bill 126 removes provisions relating to confidential and exempt records of abuse, neglect, and abandonment of children and abuse, neglect, and exploitation of vulnerable adults, and makes other technical amendments.

B. **Amendments:**

None.