SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1152

SPONSOR: Senator Klein

SUBJECT: Public Records Exemption/Sealed Investigative Incident Reports

DATE: February 28, 2002 REVISED: 03/05/02

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Fav/1 amendment
2.	Rhea	Wilson	GO	Fav/1 amendment
3.			RC	
4.				
5.				
6.				

I. Summary:

Senate Bill 1152 makes confidential and exempt an investigative incident report of a minor or adult that is sealed by a court. A sealed investigative incident report would remain available to the subject of the report, his or her attorney, or law enforcement agencies in the performance of their duties. Certain other specified agencies are permitted to inspect a sealed investigative incident report if the subject of the report is seeking employment or licensing by that agency.

Additionally, the bill makes information relating to the existence of a sealed investigative incident report confidential and exempt. The agency that prepared the report must disclose it to specified entities under limited circumstances. The bill makes it a first degree misdemeanor for an employee of an agency with access to a report to divulge the existence of a sealed investigative incident report except to the person who is the subject of the report or to the persons with direct responsibility for employment or licensure decisions.

This bill creates section 943.0596 of the Florida Statutes.

II. Present Situation:

Article I, s. 24 of the State Constitution states Florida's public policy regarding access to public records:

> (a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency

> or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, s. 24 of the Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of public records. A law exempting a public record must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in statute. Section 119.07, F.S., requires every person who has custody of a public record to permit the record to be inspected and copied by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision of the custodian or a designee.

Under s. 119.15, F.S., an exemption may be created or maintained only if it serves an identifiable public purpose and if it is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or

- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Further, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and that it cannot be accomplished without the exemption.

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The definition of "criminal history record" in s. 943.045, F.S., includes notations of arrests, detentions, indictments, informations, or other formal criminal charges and dispositions. It does not include investigative activity contained in an investigative incident report that does not result in an arrest or in criminal charges being filed.

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the FDLE. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. FDLE, on the other hand, is required

to retain expunged records. When a record is sealed it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment (e.g., law enforcement; the Florida Bar; or working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities), and when they are petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.

III. Effect of Proposed Changes:

Senate Bill 1152 is linked to Senate Bill 1154, which amends ch. 943, F.S. That chapter relates to the Florida Department of Law Enforcement. Senate Bill 1154 defines "investigative incident report" to mean

> . . . any nonjudicial record maintained by a criminal justice agency which documents criminal investigative activity and the results of such activity, including, but not limited to, the facts and circumstances relating to alleged or suspected criminal activity, and for which there is a final decision by the criminal justice agency that an arrest will not be made and criminal charges will not be filed with respect to the alleged or suspected activity under investigation which is the subject of the report. The term does not include a criminal history record.

Senate Bill 1154 states that any court of competent jurisdiction may order a criminal justice agency to seal an investigative incident report if a minor or adult who is the subject of the report complies with certain requirements. Senate Bill 1154 requires the person seeking to seal the report to apply for and receive a certificate of eligibility for sealing. In order to obtain a certificate of eligibility, an applicant must show that he or she has not been adjudicated guilty of a criminal offense or comparable ordinance violation or adjudicated delinquent for committing a felony or misdemeanor prior to the date the application for the certificate is filed; has not been arrested, charged, or prosecuted as a result of any incident reported in the investigative incident report; has not secured a prior sealing of an investigative incident report or a prior expunction or sealing of a criminal history record, or from any jurisdiction outside of the state. These same requirements must be attested to in a petition to seal an investigative record that is filed with the court.

This bill, Senate Bill 1152, makes confidential and exempt an investigative incident report of a minor or adult that is sealed by a court. A sealed investigative incident report would remain available to the subject of the report, his or her attorney, or law enforcement agencies in the

performance of their duties. Certain other specified agencies are permitted to inspect or copy a sealed investigative incident report if the subject of the report is seeking employment or licensing by that agency. The bill specifies that an appropriate licensing or employment entity may have access to a sealed investigative incident report if the subject of the report is:

- A candidate for employment with a criminal justice agency;
- A candidate for admission to The Florida Bar;
- Seeking to be employed or licensed by or to contract with the Department of Children and Family Services or the Department of Juvenile Justice or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children, the developmental disabled, the aged, or the elderly as provided in s. 110.1127(3),[1] s. 393.063(15),[2] s. 394.4572(1),[3] s. 397.451,[4] s. 402.302(3),[5] s. 402.313(3),[6] s. 409.175(2)(i),[7] s. 415.102(4),[8] s. 415.103,[9] s. 985.407,[10] or chapter 400;[11] or

[1] Section 110.1127(3)(a), F.S., requires employee security checks for all positions in programs providing care to children, the developmentally disabled, or vulnerable adults for 15 hours or more per week; all permanent and temporary employee positions of the central abuse hotline; and all persons working under contract who have access to abuse records are deemed to be persons and positions of special trust or responsibility, and require employment screening pursuant to chapter 435, using the level 2 standards set forth in that chapter.

[2] Section 393.063(15), F.S., defines "direct-service provider," (which is also known as "caregiver" in chapters 39 and 415, F.S., or "caretaker" in provisions relating to employment security checks) to mean a person 18 years of age or older who has direct contact with individuals with developmental disabilities and is unrelated to the individuals with developmental disabilities.

[3] Section 394.4572, F.S., relates to the screening of "mental health personnel," which includes all program directors, professional clinicians, staff members, and volunteers working in public or private mental health programs and facilities who have direct contact with unmarried patients under the age of 18 years.

[4] Section 397.451, F.S., relates to service provide personnel under substance abuse programs.

[5] Section 402.302(3), F.S., defines "child care personnel" to mean ". . . all owners, operators, employees, and volunteers working in a child care facility. The term does not include persons who work in a child care facility after hours when children are not present or parents of children in Head Start. For purposes of screening, the term includes any member, over the age of 12 years, of a child care facility operator's family, or person, over the age of 12 years, residing with a child care facility operator if the child care facility is located in or adjacent to the home of the operator or if the family member of, or person residing with, the child care facility operator has any direct contact with the children in the facility during its hours of operation. . . . For purposes of screening, the term shall also include persons who work in child care programs which provide care for children 15 hours or more each week in public or nonpublic schools, summer day camps, family day care homes, or those programs otherwise exempted under s. 402.316. . . ."

[6] Section 402.313(3), F.S., states that "[c]hild care personnel in family day care homes shall be subject to applicable screening provisions contained in sections 402.305(2) and 402.3055. For purposes of screening in family day care homes, the term includes any member over the age of 12 years of a family day care home operator's family, or persons over the age of 12 years residing with the operator in the family day care home. Members of the operator's family, or persons residing with the operator, who are between the ages of 12 years and 18 years shall not be required to be fingerprinted, but shall be screened for delinquency records."

[7] Section 409.175(2)(i), F.S., defines "personnel" in the foster care context to mean ". . . all owners, operators, employees, and volunteers working in a child-placing agency, family foster home, or residential child-caring agency who may be employed by or do volunteer work for a person, corporation, or agency which holds a license as a child-placing agency or a residential child-caring agency, but the term does not include those who do not work on the premises where child care is furnished and either have no direct contact with a child or have no contact with a child outside of the presence of the child's parent or guardian. For purposes of screening, the term shall include any member, over the age of 12 years, of the family of the owner or operator or any person other than a client, over the age of 12 years, residing with the owner or operator if the agency or family foster home is located in or adjacent to the home of the owner or operator or if the family member of, or person residing with, the owner or operator has any direct contact with the children. . . ."

[8] Section 415.102(4), F.S., defines "caregiver" for purposes of adult protective services to mean ". . . a person who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a

- Seeking to be employed or licensed by the Office of Teacher Education, Certification, Staff Development, and Professional Practices of the Department of Education, any district school board, or any local governmental entity that licenses child care facilities.

Additionally, the bill makes information relating to the existence of a sealed investigative incident report confidential and exempt. The agency that prepared the report must disclose it to specified entities under limited circumstances. The bill makes it a first-degree misdemeanor for an employee of an agency with access to a report to divulge the existence of a sealed investigative incident report except to the person who is the subject of the report or to persons with direct responsibility for employment or licensure decisions.

The exemptions created by the bill would be repealed October 2, 2007, and would be reviewed by the Legislature before that date in accordance with the Open Government Sunset Review Act of 1995.

The bill also contains a statement of public necessity for the exemption. The bill states that the Legislature finds that the public policy related to the newly created statute allowing investigative incident reports to be sealed would best be served if the confidentiality of such reports is maintained and released only for the limited purpose of licensing or employment.

The effective date of the bill is October 1, 2002, the same effective date as SB 1154, which is the bill that would create the new statute authorizing the sealing of investigative incident reports.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution permits the Legislature to create exemptions from public records requirements provided that the law creating the exemption states with specificity the public necessity justifying the exemption and provided that the exemption is no broader than necessary to accomplish the purpose of the exemption.

The statement of public necessity merely concludes that ". . . it is a public necessity that an investigative incident report that is ordered sealed by a court be made confidential and exempt. . . . " and does not state the justification for that public necessity with any

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temporary or permanent basis and who has a commitment, agreement, or understanding with that person or that person's guardian that a caregiver role exists. . . ."

[9] Section 415.103, F.S., provides that the Department of Children and Family Services must ". . . establish and maintain a central abuse hotline. . . ."

[10] Section 985.407, F.S., authorizes the Department of Juvenile Justice to contract with the Federal Government, other state departments and agencies, county and municipal governments and agencies, public and private agencies, and private individuals and corporations in carrying out the purposes and the responsibilities of the delinquency services and programs of the department.

[11] Chapter 400, F.S., regulates nursing homes and related health care facilities.

specificity. As a result, the statement of public necessity appears deficient under the requirements of *Halifax Hospital Medical Center v. News-Journal Corporation.*[12]

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

A technical amendment is recommended on page 3, line 23 to add the bill number of the "linked" bill, SB 1154, to the contingent effective date language.

VII. Related Issues:

Senate Bill 1154 is the bill "linked" to this bill in that it would authorize law enforcement investigative incident reports to be sealed.

VIII. Amendments:

#1 by Governmental Oversight and Productivity:
Expands the statement of public necessity to clarify the need for the exemption.

#1 by Criminal Justice:
Technical amendment that adds the bill number of the "linked" bill, SB 1154, to the contingent effective date language.

[12] 724 So.2d 567 (Fla. 1999).