

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1467

Access to Confidential Records of Children

**SPONSOR(S):** Weatherford

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 2762

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on State Affairs</u>	<u>10 Y, 0 N</u>	<u>Williamson</u>	<u>Williamson</u>
2) <u>Government Efficiency &amp; Accountability Council</u>	<u></u>	<u></u>	<u></u>
3) <u></u>	<u></u>	<u></u>	<u></u>
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### SUMMARY ANALYSIS

The Department of Children and Family Services (Department) is an executive branch agency headed by a Secretary appointed by the Governor and confirmed by the Senate. As part of its responsibilities, the Department investigates reports of abuse, abandonment, or neglect of children and vulnerable adults.

Current law provides public record exemptions for all records held by the Department concerning reports of abandonment, abuse, or neglect of a child or vulnerable adult. This includes reports made to the central abuse hotline and all records generated because of such reports.

The bill creates requirements regarding case files for children under the supervision of or in the custody of the Department, and, at no cost, authorizes access to those files by the child or the child's caregiver, guardian ad litem, or attorney on behalf of the child. The bill also authorizes the court to determine whether sharing information in the case file is necessary to ensure access to appropriate services or for the safety of the child.

The bill authorizes release of a child's records to a prospective adoptive parent. Information available for release includes: family social and medical history form; biological mother's medical records; complete set of the child's medical records; all mental health, psychological, and psychiatric records concerning the child; child's educational records; records documenting all incidents that require the Department to provide services to the child; and written information relating to the availability of adoption subsidies for the child.

Current law authorizes the Department to petition the court for an order for the immediate public release of Department records pertaining to investigations of abuse or neglect of a child or vulnerable adult. This bill removes that additional option for court approved immediate release of confidential information.

The bill also authorizes the Department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a child or vulnerable adult that resulted in serious mental, emotional, or physical injury to that child or adult; however, the records may be released only if the Secretary determines that it is in the public interest. It further provides criteria that must be met by the Department prior to release of the records.

The bill appears to raise constitutional concerns. See CONSTITUTIONAL ISSUES section for further details.

The bill does not appear to create a fiscal impact on state or local governments.

**The bill appears to require a two-thirds vote of the members present and voting for passage.**

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 4/2/2008

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill creates new requirements related to the maintenance of child records. It decreases access to public records by removing a current option available for release of confidential and exempt information held by the Department of Children and Family Services (Department). The bill, however, creates a new opportunity for release of confidential and exempt information by authorizing release upon determination by the Secretary of the Department that release is in the public interest. Thus, the bill creates new responsibilities for the Secretary.

Safeguard individual liberty – The bill decreases safeguards afforded individuals by allowing the Secretary of the Department to release confidential and exempt information regarding an individual if he or she determines that release is in the public interest. The bill only appears to provide continued protection for the name of any person reporting abuse, abandonment, or neglect. It does not appear to continue to protect the name of the victim of such abuse, abandonment, or neglect.

Empower families – The bill authorizes access to confidential and exempt information by prospective adoptive parents. Such access could increase the opportunity for an adopted child to thrive in the custody of his or her adoptive parents.

### B. EFFECT OF PROPOSED CHANGES:

#### **BACKGROUND**

##### Public Records Law

Article I, s. 24(a) of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or
- Protecting trade or business secrets.

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<sup>1</sup> Article I, s. 24(c) of the Florida Constitution.

<sup>2</sup> Section 119.15, F.S.

## Department of Children and Family Services

The Department of Children and Family Services (Department) is an executive branch agency headed by a Secretary appointed by the Governor and confirmed by the Senate.<sup>3</sup> As part of its responsibilities, the Department investigates reports of abuse, abandonment, or neglect of children and vulnerable adults.<sup>4</sup> Sensitive information regarding children, vulnerable adults, and alleged perpetrators is collected during those investigations.

### Public Record Exemptions for the Department

Current law provides public record exemptions for all records held by the Department concerning reports of abandonment, abuse, or neglect of a child<sup>5</sup> or vulnerable adult.<sup>6</sup> This includes reports made to the central abuse hotline and all records generated because of such reports.

The exemption authorizes release of the confidential and exempt<sup>7</sup> information to certain agencies and persons or under certain circumstances. For example, the Department may release such information to the Department of Health, the Agency for Persons with disabilities, 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.<sup>8</sup>

If a child under investigation or supervision is determined to be missing, the Department may release to the public the name of the child and the child's date of birth, a physical description of the child,<sup>9</sup> and a photograph of the child.<sup>10</sup> The law enforcement agency primarily responsible for the investigation may release any information received from the Department regarding the investigation, if it believes release is likely to assist efforts in locating the child or to promote the safety or well-being of the child.<sup>11</sup>

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, abandonment, or neglect of a child<sup>12</sup> or vulnerable adult.<sup>13</sup> The court must determine whether good cause exists for public access. In making this determination, the court must balance the best interests of the:

- Child and that child's siblings, together with the privacy rights of other persons identified in the reports, against the public interest.<sup>14</sup>
- Vulnerable adult with the privacy right of other persons identified in the reports against the public interest.<sup>15</sup>

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<sup>3</sup> Section 20.19, F.S.

<sup>4</sup> See chapters 39 and 415, F.S.

<sup>5</sup> Section 39.202(1), F.S.

<sup>6</sup> Section 415.107(1), F.S.

<sup>7</sup> There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>8</sup> See ss. 39.202(2)(a) and 415.107(3)(a), F.S.

<sup>9</sup> The physical description includes, at a minimum, the height, weight, hair color, eye color, gender, and any identifying physical characteristics of the child.

<sup>10</sup> Section 39.202(4)(a), F.S.

<sup>11</sup> Section 39.202(4)(c), F.S.

<sup>12</sup> Section 39.202(1), F.S.

<sup>13</sup> Section 415.107(1), F.S.

<sup>14</sup> Section 39.202(1), F.S.

<sup>15</sup> Section 415.107(1), F.S.

The law also authorizes the Department to petition<sup>16</sup> the court for an order for the immediate public release of Department records pertaining to such investigations. The court, within 24 hours after the Department files the petition,<sup>17</sup> must determine whether good cause exists.<sup>18</sup> If the court determines that good cause exists for public access, the court must direct the Department to redact<sup>19</sup> 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 alleged abuse, abandonment, or neglect.<sup>20</sup>

## **Effect of Bill**

### Child Case File Records

The bill requires that a case file for a child under the supervision of or in the custody of the Department of Children and Family Services (Department) be maintained in a complete and accurate manner. The case file must contain the child's case plan as required by part VIII of chapter 39, F.S., and the full name and street address of all shelters, foster parents, group homes, treatment facilities, or locations where the child is placed. At no cost, the child must be provided with a complete and accurate copy of the entire case file upon request of the child or the child's caregiver, guardian ad litem, or attorney on behalf of the child.

The bill further authorizes review of the case file by the child or the child's caregiver, guardian ad litem, or attorney, at no cost. A request to review the file must be submitted in writing if made by the attorney or guardian ad litem. First, it is unclear how a person's "review" of the file would create a cost. Second, it is unclear why a request to review the file must be made in writing but no written requirement is required for a complete *copy* of the record.

The bill also authorizes the court to determine whether sharing information in the case file is necessary to ensure access to appropriate services or for the safety of the child. If such determination is made, the court may approve direct release of the records to the Department of Juvenile Justice or its contractors, to the child's school, or to the child's physical health care, mental health care, or developmental disabilities provider. It is unclear why court determined access is limited to only these entities. The question arises as to whether other entities might need such information in order to ensure access to appropriate services or for the safety of the child.

The bill authorizes the sharing of confidential and exempt information between all state and local agencies and programs that provide services that benefit children, including the Department, the Department of Juvenile Justice, the Department of Health, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Education, individual school districts, the Statewide Guardian Ad Litem program, and the Office of Child Abuse Prevention. With this broad exception to the exemption, it is unclear why the provision allowing the court to provide for release to similar entities is necessary. This provision would appear to allow for easier access to confidential and exempt records in lieu of going to the court for a determination that release would ensure receipt of appropriate services.

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<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> Section 39.2021(2), F.S.

<sup>19</sup> 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."

<sup>20</sup> Sections 39.2021(3) and 415.1071(3), F.S.

## Adoption Records

The bill authorizes release of a child's records to a prospective adoptive parent. It is unclear, however, what criteria must be met in order for a person to be categorized as a "prospective" adoptive parent. This could authorize release to 10 prospective adoptive parents for one child.

The following information, if available to the adoption entity, must be provided to the prospective adoptive parent:

- The family social and medical history form.<sup>21</sup>
- The biological mother's medical records documenting her prenatal care and the birth and delivery of the child.
- A complete set of the child's medical records documenting all medical treatment and care since the child's birth.
- All mental health, psychological, and psychiatric records, reports, and evaluations concerning the child.
- The child's educational records.<sup>22</sup>
- Records documenting all incidents that require the Department to provide services to the child.<sup>23</sup>
- Written information relating to the availability of adoption subsidies for the child.

The prospective adoptive parent must receive the information by the date the final hearing on the adoption is noticed with the court, and the following information must be redacted: information identifying the child; information identifying the child's parents, siblings, and relatives; and information identifying perpetrators of crimes against the child or involving the child.

It is unclear whether providing access to the mother's medical records regarding prenatal care and the birth and delivery of the child is in violation of the federal Health Insurance Portability and Accountability Act. Further review of the federal law is required.

## Reports and Records in Cases of Child Abuse or Neglect

Current law provides that all records held by the Department concerning reports of child abandonment, abuse, or neglect are confidential and exempt from public records requirements. It also provides for release of such records to certain entities or under certain circumstances.<sup>24</sup>

The bill authorizes access to the confidential and exempt records by community-based care lead agencies and their subcontracted providers and by a person with whom placement of a child is being considered or has been granted. It is unclear what criteria must be met in order for a person to be categorized as "being considered" for a child being placed in his or her home.

The bill also requires any entity granted access to such confidential and exempt child abuse or neglect records to provide access to any other entity or individual entitled to access under s. 39.202, F.S. It is unclear how an entity or individual authorized to receive confidential and exempt records would know whether any other entity or individual also is granted such access. It is the responsibility of the Department to make that determination and not the responsibility of the receiving entity or individual who is granted an exception to the Department's public record exemption.

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<sup>21</sup> This form is completed pursuant to s. 63.082(3), F.S.

<sup>22</sup> The educational records include all records relating to any special educational needs of the child.

<sup>23</sup> This includes all orders of adjudication of dependency or termination of parental rights issued pursuant to chapter 39, F.S., any case plans drafted to address the child's needs, all protective services investigations identifying the child as a victim, and all guardian ad litem reports filed with the court concerning the child.

<sup>24</sup> See s. 39.202(2), F.S.

Current law authorizes the Department to petition the court for an order for the immediate public release of Department records pertaining to investigations of abuse or neglect of a child.<sup>25</sup> This bill removes that additional option for court approved immediate release of confidential information. As such, this bill appears to expand the current public record exemption by eliminating a possible means for release of confidential and exempt records.

The bill authorizes the Department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a child that resulted in serious mental, emotional, or physical injury to that child; however, the records may be released only if the Secretary determines that it is in the public interest. Public interest includes the need for the public to know of and adequately evaluate the actions of the Department and the court system in providing children with the protections enumerated in s. 39.001, F.S. The name of the person reporting the abuse, abandonment, or neglect remains confidential and exempt.

There is no requirement that the Secretary balance the best interests of the child or vulnerable adult against the public interest. Further, this could be considered an unlawful delegation of legislative authority as it is the responsibility of the Legislature to determine when confidential and exempt records can be released. Merely authorizing the Secretary to make that determination based upon whether it will prove the Department or court is performing its job does not seem to be adequate criteria.

Prior to releasing the confidential and exempt records, the Department must make a good faith effort to notify the child, the child's caregiver, the child's attorney, the guardian ad litem assigned to the case, any person named as an alleged perpetrator, and any law enforcement agency actively involved in investigating the alleged abuse, abandonment, or neglect. Notification must be made via hand or overnight delivery service, with evidence of delivery. Notification must take place at least 72 hours before release of the records. After receiving notice, any of the notified persons may petition a circuit court for an order preventing the Department from releasing the records. The circuit court may order the Department not to release the records only after finding that the best interests of the petitioner outweigh the public interest.

#### Reports and Records in Cases of Abuse or Neglect of a Vulnerable Adult

Current law authorizes the Department to petition the court for an order for the immediate public release of Department records pertaining to investigations of abuse or neglect of a vulnerable adult.<sup>26</sup> This bill removes that additional option for court approved immediate release of confidential information. As such, this bill appears to expand the current public record exemption by eliminating a possible means for release of confidential and exempt records.

The bill authorizes the Department to release confidential and exempt records pertaining to investigations of abuse, abandonment, or neglect of a vulnerable adult that resulted in serious mental, emotional, or physical injury to that adult; however, the records may be released only if the Secretary determines that it is in the public interest. Public interest includes the need for the public to know of and adequately evaluate the actions of the Department and the court system in providing vulnerable adults with the protections enumerated in s. 415.101, F.S. The name of the person reporting the abuse, abandonment, or neglect remains confidential and exempt. Once again, this could be considered an unlawful delegation of legislative authority as discussed previously.

Prior to releasing the confidential and exempt records, the Department must make a good faith effort to notify the vulnerable adult, the vulnerable adult's legal guardian (if any), any person named as an alleged perpetrator, and any law enforcement agency actively involved in investigating the alleged abuse, abandonment, or neglect. The same notification and petition criteria are afforded vulnerable adults as that afforded children who are the victim of abuse, abandonment, or neglect.

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<sup>25</sup> Section 39.2021(2), F.S.

<sup>26</sup> Section 415.1071(2), F.S.

## Confidential and Exempt Status

The bill requires any person or entity with authorized access to confidential and exempt records to maintain the confidential status. In *Ragsdale v. State*,<sup>27</sup> the Supreme Court held that:

[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.<sup>28</sup>

In *City of Riviera Beach v. Barfield*,<sup>29</sup> the court stated, “[h]ad the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.”<sup>30</sup> As such, the provision is unnecessary because had the Legislature intended for the confidential and exempt status of such records to evaporate then the Legislature would have stated as much.

### C. SECTION DIRECTORY:

Section 1 creates s. 39.00145, F.S., to create requirements regarding the case file of a child under the supervision or in the custody of the Department of Children and Family Services.

Section 2 amends s. 39.202, F.S., to clarify who has access to a child’s records and who may bring an action to require access to confidential records.

Section 3 amends s. 39.2021, F.S., to make changes regarding access to confidential and exempt records of the Department of Children and Family Services.

Section 4 amends s. 63.038, F.S., to allow prospective adoptive parents access to confidential and exempt information.

Section 5 amends s. 402.115, F.S., to authorize the Department of Juvenile Justice to share confidential or exempt information with specified entities.

Section 6 amends s. 415.107, F.S., to clarify who may bring an action to require access to confidential records held by the Department of Children and Family Services.

Section 7 amends s. 415.1071, F.S., to make changes regarding access to confidential and exempt records of the Department of Children and Family Services.

Section 8 provides an effective date of July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

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<sup>27</sup> 720 So.2d 203 (Fla. 1998).

<sup>28</sup> *Id.* at 206, 207.

<sup>29</sup> 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). 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.” The court declined to accept the Attorney General’s view. As a result, that statement has been removed from the *Government-In-The-Sunshine Manual*.

<sup>30</sup> *Id.* at 1137.

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Article I, s. 24(c) of the State Constitution, authorizes the Legislature to create exemptions from public records requirements. The exemption must be provided by general law passed by a two-thirds vote of each house. In addition, the law must state with specificity the public necessity (public necessity statement) justifying the exemption.

The bill limits access to confidential and exempt records regarding the abuse, abandonment, or neglect of a child or vulnerable adult. In essence, it expands the current public record exemptions thus triggering the need for a public necessity statement and a two-thirds vote for passage. The bill does not have a public necessity statement, thereby raising constitutional concerns.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Open Government Sunset Review Act

The bill limits access to confidential and exempt records regarding the abuse, abandonment, or neglect of a child or vulnerable adult, thereby expanding the current public record exemptions. As such, the



exemptions should be made subject to the Open Government Sunset Review Act,<sup>31</sup> which provides for future legislative review and repeal of the exemptions five years after expansion.

#### D. STATEMENT OF THE SPONSOR

No statement submitted.

### IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 2, 2008, the Committee on State Affairs adopted a strike-all amendment and reported the bill favorably with amendment. The strike-all amendment addresses several issues raised by the bill analysis.

The strike-all amendment removes from the bill provisions related to the release of a child's confidential records to a prospective adoptive parent. Removing this provision addresses concerns regarding who is deemed a "prospective" adoptive parent.

The bill authorized access to confidential records by a person with whom placement of a child is "being considered." The amendment provides that such persons include foster parents, pre-adoptive and adoptive parents, and adoption agencies considered for placement for a child.

The strike-all amendment reinstates the court petition process for access to confidential records, which was removed by the bill. Reinstating the petition process addresses the constitutional concerns raised by the bill analysis. The strike-all amendment also removes from the bill the authority of the Department Secretary to release those confidential records.

The strike-all amendment clarifies that the provisions of the bill do not apply to information concerning clients and records of certified domestic violence centers.

Finally, it removes redundant provisions related to a person's right to access records under the Public Records Act, which already are codified in chapter 119, F.S.

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<sup>31</sup> Section 119.15, F.S.