

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 Governmental Oversight and Accountability

BILL: SB 1014

INTRODUCER: Senator Garcia

SUBJECT: Public Records/Participants in Treatment-based Drug Court Programs

DATE: April 8, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Shankle	Cibula	JU	Favorable
2.	Naf	McVaney	GO	Pre-meeting
3.			RC	
4.				
5.				
6.				

I. Summary:

SB 1014 creates a public records exception for substance abuse screenings, behavioral health evaluations, and subsequent treatment status reports relating to a participant in a treatment-based drug court program under s. 397.344, F.S. The exemption is subject to legislative review and repeal under the Open Government Sunset Review Act. The bill also contains a statement of public necessity as required by the Florida Constitution.

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

This bill substantially amends section 397.334, Florida Statutes.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ 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.¹¹ 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 to meet such public purpose.¹²

Treatment-Based Drug Court Programs

Section 397.334, F.S., allows counties to fund a treatment-based drug court program (program) under which persons in the justice system identified as having a substance abuse problem can

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" to mean 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." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

receive individually tailored treatment.¹³ Such programs may include pretrial intervention programs, treatment-based drug court programs, post-adjudicatory programs, and review of the status of compliance or noncompliance of sentenced offenders through a treatment based drug court program.¹⁴

Entry into a treatment-based drug court program must be voluntary, and written consent of the individual is necessary for a court to order him or her into a program.¹⁵ As part of a program, a person may be required to receive substance abuse screenings and continual monitoring and evaluations.¹⁶ Records of the screenings and evaluations may be reviewed by court officials as part of a process of determining the individual's compliance with the treatment-based drug court program.

Confidentiality of Treatment-based Drug Court Program Records

There is no existing public records exemption for records relating to participation in a treatment-based drug court program. A court may order records to be made confidential on a case-by-case basis; however, only the Legislature may create a new general public records exemption for judicial records.¹⁷

However, federal law restricts disclosure of information that:

- Would identify a person has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program and includes any individual who, after arrest on a criminal charge, is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in a treatment program; and
- Is drug abuse or alcohol abuse information obtained by a federally assisted drug abuse or alcohol abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.¹⁸

An alcohol abuse or drug abuse program is considered to be federally assisted if it is:

- Conducted in whole or in part by any department or agency of the United States;
- Carried out under a license or other authorization granted by any department or agency of the United States;
- Supported by funds provided by any department or agency of the United States; or
- Assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.¹⁹

Federal law, therefore, may afford some level of protection to certain state court records relating to participation in treatment-based drug court program.

¹³ Section 397.334(1), F.S.

¹⁴ Section 397.334(5), F.S.

¹⁵ Section 397.334(2), F.S.

¹⁶ Section 397.334(4), F.S.

¹⁷ *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

¹⁸ See 42 C.F.R. 2.

¹⁹ *Id.*

III. Effect of Proposed Changes:

The bill provides that initial screenings for participation in a treatment-based drug court program, substance abuse screenings, behavioral health evaluations, and subsequent treatment status reports relating to a participant in a treatment-based drug court program under s. 397.344, F.S., are confidential and exempt from public records requirements.

The bill provides that the public records exemption is subject to legislative review and repeal under the Open Government Sunset Review Act and as such, stands repealed October 2, 2018, unless reviewed and saved from repeal by reenactment of the Legislature.

The bill also contains a statement of public necessity as required by the Florida Constitution.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public records or open meetings exemption to pass by a two-thirds vote of the members present and voting in each house. This bill creates a new public records exemption; therefore, a two-thirds vote is required.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain a public necessity statement. This bill creates a new public records exemption; therefore, this bill includes a public necessity statement.

The public necessity statement appears to be primarily focused on the privacy rights of participants in treatment-based drug court programs and the chilling effect release of the records would have upon such participants. However, the exemption may also prevent unwarranted damage to an individual's reputation and promote the efficient administration of treatment-based drug court programs.²⁰ Therefore, the Legislature may wish to consider adding such reasons to the public necessity statement.

²⁰ Art. I, s. 23 of the Florida Constitution guarantees every person's right to be let alone and free from governmental intrusion into the person's private life; however, the section specifies that it does not limit the public's right of access to public records and meetings as provided by law. The Open Government Sunset Review Act provides that a public records or meetings

Single Subject Requirement

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding a public records or open meetings exemption to contain no other substantive provisions. Because this bill creates a public records exemption, it does not contain other substantive provisions.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides, in part, that “initial screenings” for participation in a treatment-based drug court program are confidential and exempt from public records requirements. However, “screening” is currently defined in the relevant chapter of law to mean the gathering of initial information to be used in determining a person’s need for assessment, services, or referral.²¹ Therefore, the Legislature may wish to clarify that the exemption protects information gathered during initial screenings, not the screening itself, as that appears to be a process.

The bill makes specified information confidential and exempt from public records requirements; however, line 34 of the bill provides that it is public necessity that the information be made exempt. It is suggested that the Legislature clarify that it is a public necessity that the information be made *confidential and exempt*.

exemption may be created or maintained only if it is necessary to meet specified purposes. Such specified purposes include, but are not limited to, allowing the state to effectively and efficiently administer a governmental program, and protecting information of a sensitive personal nature concerning individuals, the release of which would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals (s. 119.15 (6)(b), F.S.).

²¹ Section 397.311(30), F.S.

Lines 37-39 of the bill's public necessity statement provide that the records protected by the exemption are federally recognized as confidential. As it is unclear whether all records protected by the exemption are already protected by federal law, the Legislature may wish to remove that statement to avoid confusion.

VIII. Additional Information:

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

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
