

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 824

INTRODUCER: Senator Garcia

SUBJECT: Public Records/Forensic Behavioral Health Evaluation

DATE: April 8, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Favorable
2.	Naf	McVaney	GO	Pre-meeting
3.			RC	
4.				
5.				
6.				

I. Summary:

SB 824 makes forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records requirements.

The bill specifies that the exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and reenacted by the Legislature. It also provides a statement of public necessity for the exemption as required by the Florida Constitution.

Because the bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

This bill creates section 916.1065 of the 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

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.

Forensic Mental Health¹³

Forensic Services

Chapter 916, F.S., addresses the treatment and adjudication of individuals who have been charged with felonies and found incompetent to proceed to trial due to mental illness, mental retardation, or autism, or who are acquitted by reason of insanity.

Department of Children and Family Services

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed to trial due to mental illness or who have been adjudicated not guilty by reason of insanity. Persons committed under ch. 916, F.S., are committed to the custody of the Department of Children and Family Services (DCF).

Section 916.12(3), F.S., authorizes the court to appoint experts to evaluate a criminal defendant's mental condition. In determining whether a defendant is competent to proceed, the examining expert must provide a report to the court regarding the defendant's capacity to appreciate the charges or allegations against him, appreciate the range and nature of possible penalties, understand the adversarial nature of the legal process, consult with counsel, behave appropriately in court, and testify relevantly. A defendant must be evaluated by at least two experts prior to being involuntarily committed.¹⁴ A defendant charged with a felony who is found incompetent to proceed may be involuntarily committed if the court finds by clear and convincing evidence: (1) that the defendant is mentally ill; (2) all available, least restrictive alternatives are inadequate; and (3) there is a substantial probability that the mental illness will respond to treatment and that the defendant will be restored to competency.¹⁵

DCF provides mental health assessment, evaluation, and treatment of individuals who are committed following adjudication as incompetent to proceed or not guilty by reason of insanity. These individuals are charged with a felony offense and must be admitted to a treatment facility within 15 days of the department's receipt of the commitment packet from the court.¹⁶

Agency for Persons with Disabilities

The Agency for Persons with Disabilities (APD) provides forensic services to defendants charged with a felony who have been found incompetent to proceed due to retardation or autism. Defendants with retardation or autism must be evaluated by at least one expert with expertise in evaluating persons with retardation or autism in order to evaluate the mental condition of the defendant.¹⁷ A defendant is considered incompetent to proceed if the expert finds that the defendant:

- Meets the definition of retardation or autism;

¹³ Much of the information included in this portion of the analysis is from the Interim Report by the Senate Committee on Children, Families, and Elder Affairs, *Forensic Hospital Diversion Pilot Program* (Oct. 2010). The report is available at <http://www.flsenate.gov/Committees/InterimReports/2011/2011-106cf.pdf> (last visited March 12, 2013).

¹⁴ s. 916.12(2), F.S.

¹⁵ s. 916.13(1), F.S. *See also*, s. 916.302, F.S.

¹⁶ *See* s. 916.107(1)(a), F.S.

¹⁷ s. 916.301, F.S.

- Does not have the sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding; and
- Has no rational and factual understanding of the proceedings.¹⁸

If the expert finds that the defendant is incompetent to proceed due to the defendant's retardation or autism, the expert must prepare a report for the court recommending training for the defendant in order to attain competency.¹⁹ Individuals charged with a felony and found incompetent to proceed due to retardation or autism are committed to APD for appropriate training.²⁰ In certain circumstances, the court may order the conditional release of a defendant found incompetent to proceed due to retardation or autism based on an approved plan for providing community-based training.²¹

Restoration of Competency

Competency restoration is designed to help defendants meaningfully participate in their own defense. If the court determines that the defendant is a danger to himself or others, it may involuntarily commit the defendant to a secure forensic facility.²² If the court finds that the defendant does not pose a risk to public safety, it may place the defendant on conditional release to receive competency restoration training in the community.²³

A defendant who is committed or placed on conditional release pursuant to ch. 916, F.S., is returned to court periodically for a review and report on his or her condition.²⁴ Generally, a review is conducted:

- No later than 6 months after the date of admission;
- At the end of any extended period of commitment;
- At any time upon the facility administrator's communication to the court that the defendant no longer meets commitment criteria; and
- Upon counsel's Motion for Review having been granted.

Once a defendant is determined to have regained his or her competence to proceed, the court is notified and a hearing is set for the judge to determine the defendant's competency.²⁵ If the court finds the defendant to be competent, the criminal proceeding resumes. If, however, the court finds the defendant incompetent to proceed, the defendant is returned to a forensic facility or community restoration on conditional release until competency is restored.²⁶

Confidentiality of Forensic Behavioral Health Evaluations

¹⁸ s. 916.3012, F.S.

¹⁹ s. 916.3012(4), F.S.

²⁰ s. 916.302, F.S.

²¹ s. 916.304, F.S.

²² s. 916.13, F.S.

²³ s. 916.17, F.S.

²⁴ ss. 916.13(2), 916.15(3) and 916.302(2)(a), F.S. See also s. 985.19(4)(e), (5) and (6), F.S., related to the court's jurisdiction and reporting requirements in juvenile cases.

²⁵ Rule 3.212, Fla.R.Crim.P.

²⁶ *Id.*

According to the Office of the State Courts Administrator, most forensic behavioral health evaluations filed with the court are neither confidential nor exempt under existing law or court rules.²⁷

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.²⁸

III. Effect of Proposed Changes:

The bill creates s. 916.1065, F.S., to make forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records requirements. The term “forensic behavioral health evaluation” is defined in the bill as meaning:

[A]ny record, including supporting documentation, derived from a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation of an individual.

The types of records included in the bill are already afforded confidentiality pursuant to s. 916.107(8), F.S., if they become a clinical record. The bill recognizes that in such cases, release of the records is governed by the provisions of that subsection.

The bill specifies that the exemptions are subject to the Open Government Sunset Review Act and provides the following statement of public necessity for the exemptions as required by the Florida Constitution:

The Legislature finds that it is a public necessity that forensic behavioral health evaluations filed with the court pursuant to chapter 916, Florida Statutes, be confidential and exempt from disclosure under public records requirements. The personal health of an individual and the treatment he or she receives is an intensely private matter. An individual’s forensic behavioral health evaluation should not be made public merely because it is filed with the court. Protecting forensic behavioral health evaluations is necessary to consistently protect the health care privacy rights of all persons. This exemption applies during all judicial proceedings unless such records are released as provided by law. This exemption is limited and no broader than necessary to accomplish the stated purpose.

The bill specifies that the exemptions stand repealed October 2, 2018, pursuant to the Open Government Sunset Review Act, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill takes effect upon becoming a law.

²⁷ *Senate Bill 824 Judicial Impact Statement*, Office of the State Courts Administrator, March 15, 2013 (on file with the Senate Governmental Oversight and Accountability Committee).

²⁸ *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. This bill does not appear to affect county or municipal governments.

B. Public Records/Open Meetings Issues:**Vote Requirement**

Article I, s. 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created public records exemption. Because the bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

Public Necessity Statement

Article I, s. 24(c), of the Florida Constitution requires a public necessity statement for a newly created public records exemption. Because this bill creates new public records exemptions, it includes a public necessity statement.

The public necessity statement appears to be primarily focused on the health care privacy rights of a person subjected to a forensic behavioral health evaluation, but the exemption may also prevent unwarranted damage to an individual's reputation and promote the efficient administration of court actions relating to incompetent individuals.²⁹ Therefore, the Legislature may wish to consider adding such reasons to the public necessity statement.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

None.

²⁹ 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 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.).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Applicability of Ch. 119, F.S.

Judicial records are not subject to the provisions of ch. 119, F.S., which includes the Open Government Sunset Review Act.³⁰ Therefore, it is suggested that the reference to s. 119.07(1), F.S., in line 22 and the provision subjecting the exemption to the Open Government Sunset Review Act be removed from the bill.

Drafting Comments: Public Necessity Statement

The public necessity statement specifies that the exemption applies during all judicial proceedings. That specification may be more appropriately located in the main body of the exemption.

The public necessity statement states that the exemption is limited and no broader than necessary to accomplish its stated purpose. That specification does not appear to add meaningful information to the public necessity statement.

Other Drafting Comments

Lines 30-32 of the bill specify that as provided by law, if a forensic behavioral health evaluation becomes part of a clinical record, the evaluation may be released as provided in s. 916.107(8), F.S. It is unclear whether the phrase “as provided by law” refers to a provision that is in addition to that found in s. 916.107(8), F.S.

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.

³⁰ See *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992) (holding that ch. 119, F.S. does not apply to judicial records) and s. 119.15(2)(b), F.S. (specifying, in pertinent part, that the Open Government Sunset Review Act does not apply solely to the State Court System).

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