

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 111 Pub. Rec./Forensic Behavioral Health Evaluations

**SPONSOR(S):** Government Operations Subcommittee; Criminal Justice Subcommittee; Gibbons

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 256

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Cox	Cunningham
2) Government Operations Subcommittee	9 Y, 0 N, As CS	Williamson	Williamson
3) Judiciary Committee			

### SUMMARY ANALYSIS

Rule 2.420 of the Florida Rules of Judicial Administration states the public must have access to the records of the judicial branch. Rule 2.420 also establishes 20 categories of court record information which the clerk of the court must automatically designate and maintain as confidential (Type I information). Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing. Forensic behavioral health records filed with the courts in ch. 916, F.S., proceedings are not automatically exempt from public records as Type I information.

In 2011, it was suggested that Rule 2.420 be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports (which would include behavioral health records) as Type I information. However, the Florida Supreme Court held that "the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list."

The bill creates a public record exemption for forensic behavioral health evaluations filed with the courts in ch. 916, F.S., proceedings. It defines the term "forensic behavioral health evaluation" to mean any 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 bill provides for retroactive application of the public record exemption. It also provides a public necessity statement as required by the State Constitution.

The bill eliminates the need to file motions and conduct hearings to make forensic behavioral health evaluations confidential. As such, the Office of State Courts Administrator determined the bill will result in a reduction in judicial and court system workload, but that the precise impact cannot be accurately determined.

**Article I, Section 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This 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 State 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., 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. In addition, it may be no broader than is necessary to meet 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 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.
- Protects trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Open Government Sunset Review Act does not apply to an exemption that applies solely to the State Court System.<sup>3</sup>

##### Public Access to Judicial Records

Rule 2.420 of the Florida Rules of Judicial Administration (Rule), states the public must have access to the records of the judicial branch.<sup>4,5</sup> The Rule identifies 20 categories of court record information which the clerk of the court must automatically designate and maintain as confidential (Type I information).<sup>6</sup>

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> See s. 119.15, F.S.

<sup>3</sup> Section 119.15(2)(b), F.S.

<sup>4</sup> Fla. R. Jud. Admin 2.420(b)(1) defines "records of the judicial branch" as all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consist of:

- "Court records," which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and
- "Administrative records," which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

<sup>5</sup> Fla. R. Jud. Admin 2.420(b)(2) defines "judicial branch" as the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all entities established by or operating under the authority of the supreme court or the chief justice.

<sup>6</sup> *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011); Fla. R. Jud Admin 2.420(d)(3).

Information not listed as Type I information may still be treated as confidential, but only upon motion and only after a judicial hearing.<sup>7</sup>

In 2011, it was suggested that the Rule be amended to include pretrial and post-trial psychological and psychiatric evaluations and reports as Type I information. However, the Florida Supreme Court held that because such information was not expressly exempt from public access by the laws in effect on July 1, 1993, or court rules in effect on September 1992, such information was not appropriate for inclusion as Type I information.<sup>8</sup> The opinion further stated “the Legislature would have to expressly make mental health evaluations filed with the court exempt from public access before those evaluations can properly be added to that list.”<sup>9</sup>

### Forensic Clients

The Department of Children and Families (DCF) and the Agency for Persons with Disabilities (APD) establish, locate, and maintain separate and secure forensic facilities and programs for the treatment and training of defendants who have been charged with a felony and found to be incompetent to proceed due to their mental illness, mental retardation, or autism.<sup>10</sup> These agencies also provide services for individuals who have been acquitted of a felony by reason of insanity. In fiscal year 2012-2013, DCF provided services to a total of 2,885 individuals in accordance with ch. 916, F.S.<sup>11,12</sup>

Competency restoration training and mental health services are provided by DCF in four state forensic mental health treatment facilities with a total secure capacity of 1108 beds. There are also 435 non-secure, forensic step-down beds in civil hospitals. Evaluators employed at state mental health treatment facilities, as well as court-appointed evaluators, are tasked with evaluating defendants to determine if they meet criteria for involuntary commitment. Those reports are received by the circuit clerks of courts, presiding judges, defense counsel, and opposing counsel.<sup>13</sup>

### Clinical Records of Forensic Clients

Clinical records<sup>14</sup> for individuals adjudicated as incompetent to proceed due to mental illness, mental retardation, or autism, or who have been acquitted of a felony by reason of insanity are confidential and exempt from public records requirements.<sup>15</sup> These records may be released to specified individuals, including persons authorized by order of the court, and to the client’s counsel when the records are needed by counsel for adequate representation.<sup>16</sup>

Individuals evaluated pursuant to ch. 916, F.S., who are not adjudicated incompetent to proceed or acquitted by reason of insanity also have their records filed with the courts.<sup>17</sup> However, these individuals’ records have not been deemed exempt from public records requirements by the Legislature and thus, are not automatically exempt under Rule 2.420 as Type I information. Such records include those created as a result of a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation.

Since forensic behavioral health evaluations contained in court files are not currently listed as Type I information, a motion must be filed and the trial court must hold a hearing in each case in order to make these records confidential. The Office of State Courts Administrator (OSCA) reports that in every

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<sup>7</sup> *Id.*

<sup>8</sup> *In re: Amendments to the Florida Rule of Judicial Administration 2.420*, 68 So.3d 228 (Fla. 2011).

<sup>9</sup> *Id.*

<sup>10</sup> Section 916.105, F.S., further provides that forensic facilities must be designed and administered so that entry and exit may be strictly controlled by staff responsible for security in order to protect the defendant, facility personnel, other clients, and citizens in adjacent communities.

<sup>11</sup> Chapter 916, F.S., governs mentally deficient and mentally ill defendants.

<sup>12</sup> Electronic mail from Gina Sisk with DCF, dated February 24, 2014 (on file with the Criminal Justice Subcommittee).

<sup>13</sup> Department of Children and Families, Analysis of HB 1183 (2013), which is similar to this bill (on file with the Criminal Justice Subcommittee).

<sup>14</sup> Section 916.107(8), F.S., states a clinical record must include data pertaining to admission and such other information as may be required under rules of DCF or APD.

<sup>15</sup> Section 916.107(8), F.S.

<sup>16</sup> Section 916.107(8)(a)2., F.S.

<sup>17</sup> *See s. 916.107*, F.S.

applicable case, in essentially every circuit, these motions are being filed and granted after being unopposed by the State.<sup>18</sup>

### Effect of the Bill

The bill creates s. 916.1065, F.S., to provide that forensic behavioral health evaluations *filed with the court* under ch. 916, F.S., are confidential and exempt<sup>19</sup> from the public records requirements. Since this exemption is limited to records filed with the court, the requirements of the Open Government Sunset Review Act do not apply.

The bill defines the term “forensic behavioral health evaluation” to mean any 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 bill provides for retroactive application of the public record exemption.<sup>20</sup> It also provides a statement of public necessity as required by the State Constitution.

#### B. SECTION DIRECTORY:

Section 1. Creates s. 916.1065, F.S., relating to confidentiality of forensic behavioral health evaluations.

Section 2. Provides a public necessity statement.

Section 3. Provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill eliminates the need to file motions and conduct hearings to make forensic behavioral health evaluations confidential. OSCA determined the bill will result in a reduction in judicial and court system workload.<sup>21</sup> However, the precise impact cannot be accurately determined due to the unavailability of data needed to quantifiably establish the reduction in workload.<sup>22</sup>

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

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<sup>18</sup> Electronic mail from Sarah Naf, dated February 27, 2014 (on file with the Criminal Justice Subcommittee).

<sup>19</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems 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, 53 (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 1994); *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 85-62 Fla. Op. Att’y Gen. (1985).

<sup>20</sup> The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001)

<sup>21</sup> Office of the State Courts Administrator, Analysis of HB 111 (on file with the Criminal Justice Subcommittee).

<sup>22</sup> *Id.*

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for forensic behavioral health evaluations filed with the court; thus, providing similar protections afforded other behavioral health evaluations. As such, the exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Criminal Justice Subcommittee

On March 5, 2014, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment adds the necessary reference to s. 119.07(1), F.S., which was omitted from the original bill.

Government Operations Subcommittee

STORAGE NAME: h0111c.GVOPS

DATE: 3/18/2014

On March 18, 2014, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with committee substitute. The amendment provided for retroactive application of the public record exemption, and corrected a drafting error.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.