

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 280

INTRODUCER: Senator Garcia

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

DATE: March 25, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 280 creates a public records exemption for information relating to a participant or a person considered for participation in a treatment-based drug court program which is contained in the following records, reports, and evaluations:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

The bill provides that 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.

II. Present Situation:

Treatment-Based Drug Court Programs

Section 397.334, F.S., allows counties to fund a treatment-based drug court program under which persons in the justice system identified as having a substance abuse problem can receive individually tailored treatment.¹ Entry into a treatment-based drug court program must be voluntary. Written consent of the individual is necessary for a court to order him or her into a program.² As part of a program, a person may be required to receive substance abuse screenings

¹ Section 397.334(1), F.S.

² Section 397.334(2), F.S.

and continual monitoring and evaluations.³ Records of the screenings and evaluations can be reviewed by court officials as part of a process of determining the individual's compliance with the treatment-based drug court program.⁴

Confidentiality of Treatment-based Drug Court Program Records

There is no existing public records exemption for records specific 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.⁵ Under existing law, drug court-related records contained in court files are not confidential, and a motion to make the records confidential must be filed, a hearing on the motion must be held, and the court must issue an order granting or denying the motion.⁶ This motion driven process has a significant impact on judicial and court workload.⁷

Nevertheless, federal law may restrict the disclosure of some records relating to participants in a treatment-based drug court program. Specifically, federal law prohibits the disclosure of information that:

- Identifies a person who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program. Such individuals include 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.
- Is 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.⁸

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.⁹

Confidentiality of Substance Abuse Treatment Records

Florida law provides a public records exemption for substance abuse service providers. A service provider can be public agency, a private or not-for-profit agency, a practitioner or hospital.¹⁰

³ Section 397.334(4), F.S.

⁴ Section 397.334(5), F.S.

⁵ *In re Amendments to Florida Rule of Judicial Administration 2.420*, 68 So. 3d 228, 229-230 (Fla. 2011).

⁶ Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 280* (December 2, 2013) (on file with the Senate Committee on Judiciary).

⁷ *Id.*

⁸ See 42 C.F.R. ss. 2.11-2.12.

⁹ 42 C.F.R. s. 2.12(b).

¹⁰ Section 397.331(33), F.S.

Current law provides that the records of service providers revealing the identity, diagnosis, and prognosis of and service provision to any individual are confidential and exempt from public disclosure.¹¹ These records may be released with the written consent of the individual receiving treatment. If written consent is not given, records may be released in a medical emergency, to provide treatment or by court order. Records that do not identify an individual may be released for auditing and research purposes without written consent.

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.¹² The records of the legislative, executive, and judicial branches are specifically included.¹³

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.¹⁴

Only the Legislature may create an exemption to public records requirements.¹⁵ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption. 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 provisions and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁶

¹¹ Section 397.501(7), F.S. provides:

RIGHT TO CONFIDENTIALITY OF INDIVIDUAL RECORDS.—

(a) The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential in accordance with this chapter and with applicable federal confidentiality regulations and are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such records may not be disclosed without the written consent of the individual to whom they pertain except that appropriate disclosure may be made without such consent:

1. To medical personnel in a medical emergency.
2. To service provider personnel if such personnel need to know the information in order to carry out duties relating to the provision of services to an individual.
3. To the secretary of the department or the secretary's designee, for purposes of scientific research, in accordance with federal confidentiality regulations, but only upon agreement in writing that the individual's name and other identifying information will not be disclosed.
4. In the course of review of service provider records by persons who are performing an audit or evaluation on behalf of any federal, state, or local government agency, or third-party payor providing financial assistance or reimbursement to the service provider; however, reports produced as a result of such audit or evaluation may not disclose names or other identifying information and must be in accordance with federal confidentiality regulations.
5. Upon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, the court shall examine whether the public interest and the need for disclosure outweigh the potential injury to the individual, to the service provider and the individual, and to the service provider itself.

¹² FLA. CONST., Art. I, s. 24(a).

¹³ *Id.*

¹⁴ Section 119.07(1)(a), F.S.

¹⁵ FLA. CONST., Art I s. 24(c).

¹⁶ *Id.*

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁷ It requires the automatic repeal of such exemptions on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption. 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.¹⁸

III. Effect of Proposed Changes:

The bill provides that information relating to a participant or a person considered for participation in a treatment-based drug court program which is contained in the following records, reports, and evaluations is confidential and exempt from public records disclosure requirements:

- Records relating to initial screenings for participation in the program.
- Records relating to substance abuse screenings.
- Behavioral health evaluations.
- Subsequent treatment status reports.

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, 2019, 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:

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

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption. To become law, bills creating a public records exemption must be approved by a two-thirds vote of the members present and voting in each house of the Legislature.

According to the public necessity statement included in the bill, maintaining the confidentiality of records is necessary to encourage individuals to participate in treatment-based drug court programs.

¹⁷ Section 119.15, F.S.

¹⁸ *Id.*

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

Information relating to a person's participation in a treatment-based drug court program will be kept confidential.

C. Government Sector Impact:

By maintaining the confidentiality of records relating to a person's participation in a treatment-based drug court program, more people may be willing to participate. The exemption for drug court-related records will eliminate the need for motions, hearings, and orders to protect these records from disclosure. The Office of the State Court Administrator did not have any statewide statistics but did estimate that there were 70-100 motion hearings to make drug court records confidential annually in Broward County.¹⁹ The precise impact will depend upon the number of motions and hearings that will be eliminated statewide. The fiscal impact on the expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify the decreased court workload.²⁰

VI. Technical Deficiencies:

This bill makes records confidential and exempt but does not provide a mechanism for a records custodian to release treatment related records.²¹ This may be problematic because drug court participants are involved in several agencies and court systems.²²

¹⁹ Email from the Office of the State Courts Administrator, on file with the Senate Governmental Oversight and Accountability Committee.

²⁰ Office of the State Courts Administrator, *supra* note 6.

²¹ 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).

²² Section 397.334(5), F.S., provides:

Treatment-based drug court programs may include pretrial intervention programs as provided in ss. 948.08, 948.16, and 985.345, treatment-based drug court programs authorized in chapter 39, postadjudicatory programs as provided in ss. 948.01, 948.06, and 948.20, and review of the status of compliance or noncompliance of sentenced offenders through a treatment-based drug court program. While enrolled in a treatment-based drug court program, the participant is subject to a coordinated strategy developed by a drug court team under subsection (4). The coordinated strategy may include a protocol of sanctions

This exemption may be overly broad. The bill provides that “records related to initial screenings” and “records related to substance abuse screenings” but does not define what “related to” means.

Florida courts are generally open to the public²³ and drug courts are no exception. The public necessity statement provides that this bill is necessary because the public disclosure of sensitive information could have a chilling effect on participation. While this bill makes certain drug court records confidential and exempt from public disclosure, this bill does not keep the public outside of the courtroom when the subject matter contained in the records are being discussed.

This bill does not provide for retroactive application of the public records exemption.

VII. Related Issues:

This is a general records exemption for all agencies and courts participating in a treatment-based drug court program. To the extent that this exemption applies to records held by a service provider (which includes private entities), s. 397.501, F.S., already provides a more comprehensive public records exemption.

VIII. Statutes Affected:

This bill substantially amends section 387.334 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of 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.

that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of secure detention under chapter 985 if a child or a period of incarceration within the time limits established for contempt of court if an adult. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a treatment-based drug court program.

²³ *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (1988).