

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 7016

INTRODUCER: Judiciary Committee

SUBJECT: OGSR/Minor Identifying Information

DATE: March 16, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Davis</u>	<u>Cibula</u>		JU Submitted as Committee Bill
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7016 continues an existing public record exemption. The exemption makes confidential and exempt information that might be used to identify a minor petitioning for a judicial waiver of parental notice under the Parental Notice of Abortion Act. The exemption protects from disclosure any identifying information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission. These offices are in possession of the information when either the office of criminal conflict and civil regional counsel represents the minor in a court proceeding. The Justice Administrative Commission may possess this information as a result of it processing payments for a court-appointed private attorney who represents the minor.

It is essential that any identifying information of a minor held by either of these agencies be exempted from public disclosure or the current statute will not meet constitutional requirements.

The original exemption was enacted in 2010 and is scheduled for repeal on October 2, 2015, unless continued by the Legislature.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution

Under the Florida Constitution, the public is guaranteed the right of access to government records and meetings. The public may 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 persons acting on their behalf, unless the record is exempted or specifically made confidential.¹

¹ FLA. CONST., art. I, s. 24(a).

The public is also guaranteed the right to be notified and have access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless an exception is provided for in the Constitution.³

The Florida Statutes

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., which deals with public records access, guarantees every person's right to inspect and copy any state or local government public record.⁴ Section 286.011, F.S., which is often referred to as the state's sunshine law, requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁵

The Legislature may create an exemption to public records or open meetings requirements.⁶ An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law.⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.⁸ The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Section 119.011(12), F.S., defines "public record" 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 "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 chapter does not apply to legislative records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁵ Section 286.011(1) and (2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

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. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released, to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.⁹

The Sunset Review Act provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.¹⁰ An exemption serves an identifiable purpose if it meets one of the stated requirements below *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. The exemption must:

- Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption;¹¹
- Protect sensitive personal information that would be defamatory or damaging to someone's reputation or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹² or
- Protect confidential information of entities including trade or business secrets.¹³

The act also requires specified questions to be considered during the review process.¹⁴ In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁵ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.¹⁶

Parental Notice of Abortion Act

The Legislature first enacted a Parental Notice of Abortion Act in 1999. As its name indicates, the act required that a parent be given advance notice of a child's intent to have an abortion.¹⁷ The statute was challenged in court on the basis that the law violated a person's right to privacy

⁹ Section 119.15(3), F.S.

¹⁰ Section 119.15(6)(b), F.S.

¹¹ Section 119.15(6)(b)1., F.S.

¹² Section 119.15(6)(b)2., F.S.

¹³ Section 119.15(6)(b)3., F.S.

¹⁴ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ Section 119.15(7), F.S.

¹⁷ Chapter 99-322, Laws of Fla. (Creating s. 390.01115, F.S., effective July 1, 1999. A companion measure, the public records exemption bill that would shield identifying information of the minor, was passed that same session and became Chapter 99-321, Laws of Fla.)

under the Florida Constitution.¹⁸ The Florida Supreme Court determined that the law violated the state's constitutional right to privacy because the minor was not given a method to "bypass" the parental notification provision when certain circumstances existed.¹⁹ In response to the Florida Supreme Court's decision, the Legislature proposed a constitutional amendment that authorized the Legislature, notwithstanding a minor's right to privacy under the State Constitution, to require a physician to notify a minor's parent or guardian prior to the abortion. The amendment was ratified by the voters in 2004.²⁰

In response to the adoption of the proposed amendment, the Legislature passed another Parental Notice of Abortion Act in 2005.²¹ In its current version, the statute requires an attending physician to give actual notice, in person or by phone, to a parent or legal guardian of the minor, at least 48 hours before the inducement or performance of a termination of a pregnancy on the minor.²² If actual notice is not possible after a reasonable effort, the physician performing or inducing the termination of the pregnancy or the referring physician must give constructive notice.²³ Parental notice is not required under the act if certain circumstances are present.²⁴

Judicial Waiver of Parental Notice or the Judicial Bypass Proceeding

The Parental Notice of Abortion Act provides that a minor may petition the circuit court where she resides for a waiver of the notice requirements under the act.²⁵ To initiate the process, she may file the petition under a pseudonym or by using initials, as provided by court rule. The petition must contain a statement that the petitioner is pregnant and notice has not been waived. The court must advise the petitioner that she has a right to court-appointed counsel and must provide her with counsel, if she requests, at no cost to the young woman.²⁶

¹⁸ FLA. CONST., art. I s. 23.

¹⁹ *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

²⁰ FLA. CONST. art. X. s. 22. The amendment states:

The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

²¹ Chapter 2005-52, s. 2, Laws of Fla.

²² Section. 390.01114(3)(a), F.S. and s. 390.01114(2)(a), F.S.

²³ Section 390.01114(3)(a), F.S. Constructive notice is defined to mean notice given in writing, signed by the physician, and mailed at least 72 hours before the procedure to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested with delivery restricted to the parent or legal guardian. Notice is deemed to have occurred after 72 hours have passed pursuant to s. 390.01114(2)(c). F.S.

²⁴ Parental notice is not necessary under s. 390.01114(3)(b), F.S., if: In the good faith clinical judgment of the physician, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements; notice is waived in writing by the person entitled to notice and the waiver is notarized; notice is waived by the minor who is or has been married or has had the disability of nonage removed in compliance with law; notice is waived by the patient because she has a minor child dependent on her; or notice is waived by a circuit court in a judicial bypass proceeding according to statute.

²⁵ Section 390.01114(4)(a), F.S.

²⁶ *Id.*

Once a petition is filed, the court must rule and issue written findings of fact and conclusions of law within three business days after the petition is filed. This time period may be extended at the request of the minor.²⁷

If the circuit court determines, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian. If the court finds that the minor does not possess the requisite maturity to make that determination, it must dismiss the petition.²⁸ If the court determines by a preponderance of the evidence, that the minor is a victim of child abuse or sexual abuse inflicted by her parent or guardian, or if the court determines by clear and convincing evidence that the notification of a parent or guardian is not in her best interest, the court must issue an order authorizing the minor to consent to the performance or inducement of a termination of the pregnancy without the notification of a parent or guardian.²⁹

Court Records Exemption for Judicial Bypass Cases

When the current Florida Parental Notice of Abortion Act was passed in 2005, the Legislature created a corresponding public records exemption that prohibited public access to judicial records pertaining to parental notification bypass proceedings. Any information contained in documents related to the petition, which could be used to identify the minor, were made confidential and exempt from the disclosure requirements in the Florida Statutes and Florida Constitution.³⁰ The Florida Rules of Juvenile Procedure³¹ provide that “any information including the petition, documents, transcripts, recording of cases, and any other information that” might be used to identify the young woman are confidential and exempt. Additionally, to ensure that the minor’s identity remains anonymous, the court file must be sealed unless otherwise ordered by the court.³²

The public records exemption, enacted in 2005, was set to be repealed on October 2, 2010, but the Legislature reviewed and saved the exemption from repeal.³³ Accordingly, all information held by a circuit court or an appellate court remains confidential and exempt.

²⁷ Section 390.01114(4)(b)1., F.S. If the court does not rule within the required three business days and the minor has not requested an extension, the minor may immediately petition for a hearing with the chief judge of the circuit. The chief judge is responsible for guaranteeing that a hearing is held within 48 hours after the receipt of the minor’s petition and an order must be entered within 24 hours after the hearing. If the circuit court does not grant a judicial waiver of the required parental notice, the minor has a right to appeal and that ruling must be issued within seven days after receipt of the appeal. Section 390.01114(4)(b) 2., F.S.

²⁸ Section 390.01114(4)(c), F.S.

²⁹ Section 390.01114(4)(d), F.S.

³⁰ Chapter 2005-104, Laws of Fla. (amending s. 390.01116, F.S.).

³¹ FLA. R. JUV. P. 8.835.

³² *Id.*

³³ Chapter 2010-41, Laws of Fla. The measure made an editorial change and the statute now provides that identifying information that can be used to identify a minor seeking a judicial bypass is confidential and exempt only from s. 24(a), art. I of the State Constitution. The previous reference to an exemption pursuant to s. 119.07(1), F.S., was deleted because that provision pertains to agencies, and the court is not deemed to fall within the definition of an agency.

Expansion of the Initial Exemption

When reenacted in 2010, the public records exemption was expanded to include records in possession of additional entities – the offices of criminal conflict and civil regional counsel and the Justice Administrative Commission. Section 390.01116(2)(a), F.S. provides that any information that can be used to identify a minor petitioning a circuit court for a judicial waiver is confidential and exempt from section 119.071(1), F.S., and Article I, section 24(a) of the Florida Constitution if held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission.

The exemption for those two agencies was made subject to the Open Government Sunset Review Act in accordance with statute and will stand repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature.

In the statement of public necessity³⁴ detailing the need to create the exemption for information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission, the Legislature recognized that:

The information contained in these records is of a sensitive, personal nature regarding a minor petitioner, the release of which could harm the reputation of the minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the minor in instances in which child abuse or child sexual abuse against her is present by exposing her to further acts of abuse from an abuser who, without the public record exemption, could learn of the minor's pregnancy, her plans to terminate the pregnancy, and her petition to the court. The Legislature further finds that it is a public necessity to keep this identifying information in records held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission confidential and exempt in order to protect the privacy of the minor.

Additionally, the Legislature took notice of the constitutional requirements expressed through case law in the statement of public necessity. After acknowledging that the State Constitution contains an express right of privacy it noted that:

the United States Supreme Court has repeatedly required parental-notification laws to contain judicial-bypass procedures and to preserve confidentiality at every level of court proceedings in order to protect the privacy rights of the minor. Without the public record exemption provided in this act, the disclosure of personal identifying information would violate the right of privacy of the minor. Further, without the confidential and exempt status for this information, the constitutionality of the state's program providing for notification of a minor's termination of pregnancy, and the judicial-bypass procedure in particular, would be in question. Thus, the public record exemption provided in this act is necessary

³⁴ Chapter 2010-41, s. 2, Laws of Fla,

for the effective administration of the state's program, which administration would be impaired without the exemption.³⁵

Roles of the office of criminal conflict and civil regional counsel and the Justice Administrative Commission

When a minor initiates a judicial bypass proceeding in the circuit court, a private court-appointed attorney is available to represent her should she request counsel.³⁶ The statute is clear that private court-appointed counsel approved for this type of work are to be used first for minors who request counsel, but if no attorney is available through the clerk's list of attorneys, then the office of criminal conflict and civil regional counsel in that area will supply an attorney for the proceedings.³⁷ Court precedent interpreting the U.S. Constitution says it is essential that the office's records be exempt from public access.

The Justice Administrative Commission serves in the capacity of paying the invoices for the attorneys who volunteer for these cases through the clerk of court's list of attorneys. Similarly, their records which could identify a minor should be exempt from public disclosure. It should be noted that the Justice Administrative Commission records do not contain the full name of the minor, but only her initials or a pseudonym.

The public records exemption will stand repealed on October 2, 2015, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.³⁸

Data Obtained from the Office of the State Courts Administrator

The Florida Supreme Court, through the Office of the State Courts Administrator, is required to report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives the number of petitions filed for judicial bypass waivers in the previous year for each circuit court. The report must also contain the timing and manner of disposal of the petitions by each circuit.³⁹ Below is a statewide summary of the number of petitions filed in recent years.

<u>Year</u>	<u>Total Petitions Filed</u>
2013	319
2012	353
2011	391
2010	381
2009	476 ⁴⁰

³⁵ *Id.*

³⁶ The chief judge of the circuit maintains a list of qualified attorneys in private practice, by county and by category of cases, and provides the list to the clerk of court in each county. Section 27.40(3)(a), F.S.

³⁷ Section 27.511(6)(a), F.S.

³⁸ Chapter 2010-41, s. 1, Laws of Fla.

³⁹ Section 390.01114(6), F.S.

⁴⁰ Florida Office of the State Court Administrator, *Fiscal Years 2009-2013, Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December* (on file with the Senate Committee on Judiciary).

Judiciary Committee's Open Government Sunset Review

Based upon a review of this public record exemption under the Open Government Sunset Review Act and discussions with the different offices of criminal conflict and civil regional counsel and the Justice Administrative Commission, the professional staff of the Judiciary Committee recommends that the Legislature retain the public records exemption established in s. 390.01116(2)(a), F.S. The exemption is necessary to comply with the requirements of the decisions of the U.S. Supreme Court. The identifying information held by either of these two entities must remain confidential at every level of court proceedings to protect the privacy rights of the minor seeking to bypass parental notification. If this exemption did not remain in statute, the disclosure of the identifying information would violate the right of privacy of the minor and the constitutionality of the state's program would be in jeopardy.

Staff has concluded that, in addition to ensuring the privacy of the minor, the exemptions are necessary to administer the Parental Notice of Abortion Act and are also essential to the constitutionality of the act.

III. Effect of Proposed Changes:

This legislation continues a public record exemption that was created in 2010 and which otherwise is subject to repeal on October 2, 2015. The exemption protects from disclosure any identifying information of a minor seeking a judicial bypass under the Parental Notice of Abortion Act if the information is held by the office of criminal conflict and civil regional counsel or by the Justice Administrative Commission.

Section 1 amends s. 390.01116(2)(b), F.S., to remove the scheduled repeal of the public records exemption for identifying information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission.

Section 2 provides that the bill takes effect on October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

The office of criminal conflict and civil regional counsel and the Justice Administrative Commission will need to redact confidential information from their records if the records are disclosed to the public. This is their current practice and will not impose an additional burden on them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 390.01116 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.