

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: CS/CS/SB 1278

INTRODUCER: Governmental Oversight and Accountability Committee, Judiciary Committee and Senator Ring

SUBJECT: Public Records/Petitions to Determine Incapacity

DATE: February 3, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1278 creates new exemptions from the public records inspection and access requirements of Art. 1, s. 24(a) of the State Constitution and s. 119.07(1), F.S. This bill makes confidential and exempt pleadings, orders, and personal identifying information on a docket relating to Baker Act proceedings. The information may be disclosed upon request to certain enumerated persons involved in the proceedings or when directed by the court.

The exemptions will be repealed on October 2, 2021, unless reviewed and reenacted by the Legislature before that date. The bill also provides a statement of public necessity as required by the State Constitution.

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

The bill takes effect on July 1, 2016.

II. Present Situation:

Public Records Law

The Florida Constitution

Under the State 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 This right of access to records and meetings specifically includes the legislative, executive, and judicial branches of government, their agencies and departments, local governmental entities, and any person acting on behalf of the government.²

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 is known as the Public Records Act, provides that the public may access legislative and executive branch records.³ According to the Public Records Act, a public record includes most any document, recording, or other material, regardless of its physical form or characteristics or how it is transmitted.⁴ Anyone who violates the Public Records Act may be punished by civil or criminal penalties or suspension and removal or impeachment from office.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 narrowly to accomplish the stated purpose of the law.⁷ Additionally, the exemption must pass by two-thirds vote of the House and Senate.⁸ An exemption that does not meet these criteria may be held unconstitutional.⁹

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

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."

⁵ Section 119.10, F.S.

⁶ FLA. CONST., art. I, s. 24(c).

⁷ *Id.*

⁸ *Id.*

⁹ *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (1999). In this case the Florida Supreme Court determined that a public meeting exemption was unconstitutional because the statement of public necessity did not define essential terms and the exemption was written too broadly. The Court also decided that it could not move into the legislature's realm to narrow the exemption to save the statute.

When the Legislature creates a public records exemption, it may classify the record as “confidential and exempt” or “exempt.” When designated as “confidential and exempt,” the record may be released by the records custodian only under the limited circumstances defined by the Legislature. When a record is designated as “exempt,” it may be released at the discretion of the records custodian.

The Florida Mental Health Act, also known as The Baker Act

The Legislature adopted the Florida Mental Health Act, also known as The Baker Act, in 1971.¹⁰ It is designed to help people receive treatment who are suffering with mental, emotional, and behavioral disorders. Baker Act proceedings provide people with emergency services, sometimes through temporary detention, to obtain a mental health evaluation and treatment. The treatment may be voluntary or involuntary. The Baker Act requires that programs offer comprehensive services to people who need intensive short-term treatment and continued treatment to aid in their recovery. The Baker Act also provides protections and rights for people examined or treated for mental illness. Legal procedures are established for mental health examination and treatment, including voluntary admission, involuntary admission, involuntary inpatient treatment, and involuntary outpatient treatment.

Confidentiality of Records under the Baker Act

The concern has been expressed that while “clinical records”¹¹ under the Baker Act are designated and maintained as confidential by the clerk of the court, it is not clear whether other Baker Act records are open to the public for review.¹² There appears to be a difference of opinion among various clerks of court as to what is and what is not exempt from disclosure. If the petitions, orders, and identifying information in this bill were all classified as confidential and exempt, then there would be uniformity among the clerks of the court in administering these provisions statewide.

III. Effect of Proposed Changes:

Newly Created Public Records Exemptions in the Baker Act

CS/CS/SB 1278 provides a public records exemption for pleadings, orders, related records, and personal identifying information contained on a docket held pursuant to the Baker Act, which would include involuntary examinations,¹³ involuntary outpatient placement,¹⁴ and involuntary

¹⁰ Chapter 71-131, s. 1, Laws of Fla. The Baker Act is contained in Part I of chapter 394, Florida Statutes.

¹¹ Section 394.4615, F.S., states that “[a] clinical record is confidential and exempt from the provisions of s. 119.07(1).” The Judicial Administration Rules also provide for the confidentiality of clinical records under the Baker Act. Fla. R. Jud. Admin. 2.420(d)(1)(B)(viii).

¹² Section 394.455(3), F.S. Clinical records are defined as being all parts of the record required to be maintained, including medical records, progress notes, charts, admission and discharge data, and other information recorded by the facility that pertains to the patient’s hospitalization or treatment. In lay terms, this is often characterized as records requiring a medical signature.

¹³ Section 394.463, F.S.

¹⁴ Section 394.4655, F.S.

inpatient placement.¹⁵ This exemption also applies to voluntary admissions, if judicial involvement were necessary.¹⁶

The bill makes confidential and exempt from public inspection and copying those pleadings, orders, and related records, and personal information contained on a docket, held pursuant to the Baker Act.

A clerk of court may release the confidential and exempt record or information to the following people, upon request:

- The petitioner or the petitioner’s attorney;
- The respondent or the respondent’s attorney;
- The respondent’s guardian or guardian advocate;
- The respondent’s parent, guardian, custodian, or guardian advocate¹⁷ if the respondent is a minor;
- The respondent’s health care practitioner;
- The respondent’s patient representative;¹⁸ or
- An agency or person who is authorized to receive clinical records.

In addition, a clerk may release confidential and exempt records or information to a person who is authorized to view records and who has obtained a court order finding that there is good cause to release the records. In order to determine if there is good cause, a court must use a balancing test to weigh the need for the information to be disclosed against the harm to the respondent.

The bill provides that anyone who receives Baker Act records or personal identifying information must maintain its confidential and exempt status.

The bill has retroactive application.

The bill also includes a public necessity statement, as required by s. 24(c), Art. I of the State Constitution. The public necessity statement of the bill provides that Baker Act records and personal identifying information should be confidential and exempt from public disclosure in order to preserve the privacy of a person who has or is alleged to have mental illness. A person’s health and mental health are intensely private matters, and the exemption will protect sensitive personal information which may cause unwarranted damage to an individual reputation if it is

¹⁵ Section 394.467, F.S.

¹⁶ Section 394.4625, F.S.

¹⁷ A guardian advocate is a person who has been appointed by a circuit court for a person with developmental disabilities if that person lacks some decision making skills necessary for his or her care. In addition, a guardian advocate may also be appointed by voluntary petition. Section 393.12(2), F.S.

¹⁸ Section 408.051, F.S., provides that patient representative “means a parent of a minor patient, a court-appointed guardian for the patient, a health care surrogate, or a person holding a power of attorney or notarized consent appropriately executed by the patient granting permission to a health care facility or health care provider to disclose the patient’s health care information to that person. In the case of a deceased patient, the term also means the personal representative of the estate of the deceased patient; the deceased patient’s surviving spouse, surviving parent, or surviving adult child; the parent or guardian of a surviving minor child of the deceased patient; the attorney for the patient’s surviving spouse, parent, or adult child; or the attorney for the parent or guardian of a surviving minor child.”

released. In addition, the public necessity statement provides that publication of a docket containing personal identifying information is confidential and exempt because it is a record of a Baker Act proceeding and should also be protected. Finally, the public necessity statement provides that public dissemination of sensitive personal information would have a chilling effect on people who may wish to seek or comply with mental health treatment.

This bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The county/municipality mandates provision of Art. VII, section 18, of the State Constitution may apply because clerks of the court may incur additional costs relating to redacting information made confidential and exempt under this bill. However, an exemption may apply based on the limited fiscal impact that is anticipated to be incurred.

B. Public Records/Open Meetings Issues:

Because the bill creates a public records exemption, the State Constitution requires passage by a two-thirds vote in each house of the Legislature.

The State Constitution requires the exemption to be no broader than necessary to accomplish the stated purpose of the law. The exemption is no broader than the public necessity statement. The public necessity statement appears to support the public policy for the exemption.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate. Clerks of court may incur additional costs associated with training court personnel and performing more redactions of personal identifying information from dockets. It is anticipated that these costs will be absorbed within the existing resources of the offices of the clerks of court.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following section 394.4615 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Governmental Oversight and Accountability on February 1, 2016:

The CS/CS makes the following changes:

- Consolidates three exemptions into one central location for the entire Baker Act;
- Removes referenced to the Open Government in the Sunshine Review Act (OGSR), as the OGSR is not required for records held solely by the State Court System pursuant to s. 119.15(2)(b), F.S.;¹⁹
- Expands the exemption to include pleading other than the petition, so that responses filed the person who is being Baker Acted are not public, and any supplementary pleadings are included in the exemption;
- Expands the exemption to include related records, such as recording of the proceeding or any notes taken by a clerk;
- Provides that the clerk of court may release court records to the petitioner; the petitioner’s counsel; the respondent’s guardian advocate; a minor’s parents, guardians, legal custodian, or guardian advocate;
- Provides a ‘good cause’ standard for release of records;
- Provides that personal identifying information on a docket relating to a Baker Act proceeding is confidential and exempt;
- Modifies and strengthens the public necessity statement to conform to the exemption; and,
- Provides for retroactive application of the exemption.

CS by Judiciary on January 20, 2016:

The committee substitute makes technical changes to ss. 394.4655(3)(d) and 394.467(3)(b), F.S. by adding the phrase “under this section.” The court has not been mentioned at this time in the chronology of the sections, so for clarity, the sentence is

¹⁹ The Open Government Sunset Review Act, s. 119.15, F.S., prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions. The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment, unless the exemption is continued by the Legislature.

rephrased to state that “The petition and any order entered by the court *under this section* are confidential and exempt . . .”

Also, the singular verb “is” is replaced with the plural verb “are” for correct subject-verb agreement in the first sentence of s. 394.467(3)(b), F.S.

B. Amendments:

None.