

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 1436

INTRODUCER: Judiciary Committee and Senator Braynon

SUBJECT: Public Records

DATE: February 19, 2016

REVISED: \_\_\_\_\_

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

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 1436 creates two new public records exemptions related to court documents.

Current law prohibits a clerk of the court from placing an image or a copy of a public record on a publicly available website if it is an image or copy of a military discharge, death certificate, or a court file, record, or paper relating to a matter or case governed by the Florida Family Law Rules of Procedure. These court records relate to alimony, dissolution of marriage, parenting plans, paternity, and related matters. This bill makes confidential and exempt from public record inspection and copying requirements those public records relating to a matter or case governed by the Florida Family Law Rules of Procedure which are prohibited from being displayed on a publicly available website.

Current law authorizes a person to petition the court for several types of injunctions for protection, including injunctions against domestic violence;<sup>1</sup> repeat violence;<sup>2</sup> dating violence;<sup>3</sup> sexual violence;<sup>4</sup> and stalking. This bill makes confidential and exempt from public inspection and disclosure requirements those petitions, and the contents thereof, for injunctions that are dismissed without a hearing or at an ex parte hearing due to the petitioner's failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency of the petition itself.

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<sup>1</sup> Section 741.30(1), F.S.

<sup>2</sup> Section 784.046(2), F.S.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Because this bill creates new public records exemptions, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

Both public record exemptions are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2021, unless reviewed and saved from repeal through legislative reenactment.

## 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.<sup>5</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>6</sup>

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act<sup>7</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>8</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>9</sup>

Only the Legislature may create an exemption to public records requirements.<sup>10</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>11</sup> 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<sup>12</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>13</sup>

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<sup>5</sup> FLA. CONST. art. I, s. 24(a).

<sup>6</sup> *Id.*

<sup>7</sup> Chapter 119, F.S.

<sup>8</sup> 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." The Public Records Act does not apply to legislature or its members. (*See Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)); *but see* s. 11.0431, F.S. (providing public access to records of the Senate and the House of Representatives received in connection with the official business of the Legislature, subject to specified exemptions).

<sup>9</sup> Section 119.07(1)(a), F.S.

<sup>10</sup> 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 Sch. Bd. of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, the 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* Op. Att'y Gen. Fla. 85-62 (1985).

<sup>11</sup> FLA. CONST. art. I, s. 24(c).

<sup>12</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>13</sup> FLA. CONST. art. I, s. 24(c).

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.<sup>14</sup> It requires the automatic repeal of the exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>15</sup> 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.<sup>16</sup>

### **Clerk of the Court**

The clerk of the court is considered to be the county recorder.<sup>17</sup> As county recorder, the clerk must record all instruments in one general series called “official records.”<sup>18</sup>

The clerk of the circuit court is responsible for:

- Keeping and maintaining all court documents and electronic filings in the clerk’s office;<sup>19</sup>
- Affixing a stamp, which may be electronic, to each document indicating the date and time that the submission was filed;<sup>20</sup>
- Maintaining a progress docket on which the filing of each pleading or motion is noted;<sup>21</sup> and
- Implementing an electronic filing process.<sup>22</sup>

The clerk may keep minutes of court proceedings.<sup>23</sup>

All instruments recorded in the official records must always be available to the public for inspection.<sup>24</sup> The term “public records” includes each official record.<sup>25</sup>

### **Electronic Access to Official Records**

Florida law prohibits a county recorder or a clerk of the court from placing certain images or copies of public records, including an official record, on a publicly available Internet website.<sup>26</sup> Specifically, a court file, record, or paper relating to matters or cases governed by the Florida Rules of Family Law may not be placed on a public website.<sup>27</sup>

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<sup>14</sup> 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. 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.

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> Section 28.222(1), F.S.

<sup>18</sup> Section 28.222(2), F.S. Official records consist of each instrument that the clerk is required or authorized to record. Sections 28.001(1), F.S.

<sup>19</sup> Section 28.13, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> Section 28.211, F.S.

<sup>22</sup> Section 28.22205, F.S.

<sup>23</sup> Section 28.212, F.S.

<sup>24</sup> Section 28.222, F.S.

<sup>25</sup> Section 28.001(2), F.S.

<sup>26</sup> Section 28.2221(5)(a), F.S.

<sup>27</sup> *Id.*

## Injunctions

A person may petition the court for several types of injunctions for protection, including injunctions against domestic violence;<sup>28</sup> repeat violence;<sup>29</sup> dating violence;<sup>30</sup> sexual violence;<sup>31</sup> and stalking.<sup>32</sup>

Domestic violence is an assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.<sup>33</sup>

Repeat violence constitutes two incidents of violence or stalking committed by the respondent, one of which must have been within six months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member.<sup>34</sup>

Dating violence is violence between individuals who have or have had a continuing and significant romantic relationship.<sup>35</sup> The existence of a dating relationship is determined based on the following:

- A dating relationship must have existed within the past six months;
- The nature of the relationship must have been characterized by the expectation of affection or sexual involvement; and
- The frequency and type of interaction must have included that the persons have been involved over time and on a continuous basis during the course of the relationship.

Sexual violence is any one incident of:

- Sexual battery;
- A lewd or lascivious act committed upon or in the presence of a person younger than 16 years of age;
- Luring or enticing a child;
- Sexual performance by a child; or
- Any other forcible felony wherein a sexual act is committed or attempted, regardless of whether criminal charges were filed, reduced, or dismissed by the state attorney.<sup>36</sup>

A form for a petition for injunction against domestic violence is provided in Florida law.<sup>37</sup> A similar form for a petition for injunction for protection against the other types of violence noted above is provided in sections 784.046(4)(b) and 784.0485(3)(b), F.S.

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<sup>28</sup> Section 741.30(1), F.S.

<sup>29</sup> Section 784.046(2), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Section 784.0485(1), F.S.

<sup>33</sup> Section 741.28(2), F.S.

<sup>34</sup> Section 784.046(1)(b), F.S.

<sup>35</sup> Section 784.046(1)(d), F.S.

<sup>36</sup> Section 784.046(1)(c), F.S.

<sup>37</sup> Section 741.30(3)(b), F.S., provides a petition for injunction for protection against domestic violence.

Upon the filing of a petition for injunction, the court must hold a hearing at the earliest possible time.<sup>38</sup>

If an immediate and present danger of domestic violence appears to exist, the court may grant a temporary injunction ex parte prior to the full hearing.<sup>39</sup>

### **Florida Family Law Rules of Procedure**

The Florida Family Law Rules of Procedure govern a wide variety of court cases. The Florida Family Law Rule of Procedure Rule 12.010(a)(1) provides that:

These rules apply to all actions concerning family matters, including injunctions for protection against domestic, repeat, dating, and sexual violence, and stalking, .... “Family matters,” “family law matters,” or “family law cases” as used within these rules include, but are not limited to, matters arising from dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, an action involving a parenting plan for a minor child or children ... proceedings for temporary or concurrent custody of minor children by extended family, adoption, proceedings for emancipation of a minor, declaratory judgment actions related to premarital, marital, or postmarital agreements ... injunctions for protection against domestic, repeat, dating, and sexual violence, and stalking, and all proceedings for modification, enforcement, and civil contempt of these actions.

The Florida Family Law Rules of Procedure protect from disclosure certain sensitive information recorded in family law cases.<sup>40</sup> Rule 12.004(a), Florida Family Law Rules of Procedure, authorizes a judge hearing a family law case to access and review files of any related case. However, parties, judges, and court personnel are prohibited from disclosing confidential information and documents contained in related case files unless disclosure complies with state and federal law.<sup>41</sup>

Identifying information, as sensitive information, in any pleading or exhibit, such as account numbers, social security numbers, employee identification numbers, driver’s license numbers, passport numbers, or other personal identifying information is considered to be sensitive information, may not be filed with the court.<sup>42</sup>

A petitioner for a domestic violence injunction may request that his or her address be kept confidential and exempt from public records disclosure pursuant to statute,<sup>43</sup> and the address is then considered a confidential court record.<sup>44</sup>

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<sup>38</sup> Sections 741.30(4) and 784.046(5), F.S.

<sup>39</sup> Section 741.30(5)(a), F.S.

<sup>40</sup> RULE 12.012, FLA. FAM. L. R. P.

<sup>41</sup> RULES 12.004(c) and 12.007(c), FLA. FAM. L. R. P.

<sup>42</sup> RULE 12.130(c), FLA. FAM. L. R. P., referencing RULE 2.425, FLA. R.J.A., which restricts the filing of sensitive information, including identifying information.

<sup>43</sup> Section 741.30(3)(b), F.S., authorizes a petitioner to furnish his or her address in a separate confidential filing.

<sup>44</sup> RULE 12.007(b), FLA. FAM. L. R. P.

A family law court may consider closing proceedings or records or sealing records, including ordering the conditional sealing of financial information.<sup>45</sup>

The Federal Parent Locator Service (FPLS) helps state and local child support agencies locate parents for participation in child support.<sup>46</sup> A family violence indicator is a notation in the FPLS that has been placed on a record when a state has reasonable evidence of domestic violence or child abuse.<sup>47</sup> In parent locator cases, a state court may override a family violence indicator to release information from the FPLS.<sup>48</sup> The state clerk of the court, however, must ensure the protection of records of open cases relating to family violence. All court records in these proceedings are confidential and not available for public inspection until the court issues a final judgment.<sup>49</sup>

### III. Effect of Proposed Changes:

This bill creates two new public records exemptions. The bill provides that the following records are confidential and exempt from disclosure:

- A public record relating to a matter or case governed by the Florida Family Law Rules of Procedure; and
- A petition for an injunction that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency of the petition itself without an injunction being issued, and the contents of the petition.

This bill applies to all types of injunctions for protection, including injunctions against domestic violence;<sup>50</sup> repeat violence;<sup>51</sup> dating violence;<sup>52</sup> sexual violence;<sup>53</sup> and stalking.

The main types of cases governed by the Florida Family Law Rules of Procedure are matters arising from dissolution of marriage, annulment, support including child support, paternity, adoption, and injunctions for protection.<sup>54</sup>

The bill includes statements of public necessity. Regarding the public records exemption on family law cases, the public necessity asserted to justify the exemption is that the records:

- Often contain material that is of a personal, sensitive nature and that a person's privacy and potential for damage outweighs any public benefit in making the information accessible; and
- May include financial information the disclosure of which could lead to identity theft or other criminal activity.

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<sup>45</sup> RULE 12.400(a) through (c), FLA. FAM. L. R. P.

<sup>46</sup> The Federal Office of Child Support Enforcement administers the program. More at <http://www.acf.hhs.gov/programs/css> (Last visited Feb. 8, 2016).

<sup>47</sup> RULE 12.650(b)(4), FLA. FAM. L. R. P.

<sup>48</sup> 42 U.S.C. s. 653; RULE 12.650(a), FLA. FAM. L. R. P.

<sup>49</sup> RULE 12.650(b)(4)(i), FLA. FAM. L. R. P.

<sup>50</sup> Section 741.30(1), F.S.

<sup>51</sup> Section 784.046(2), F.S.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> RULE 12.010(a)(1), FLA. FAM. L. R. P.

Regarding the public records exemption on injunctions that are dismissed, the public necessity asserted to justify the exemption is that the records may be defamatory to the person named in the petition and cause unwarranted damage to his or her reputation.

The bill requires petitions for a protective injunction that are confidential and exempt under this bill to be removed from publically available websites. The process for removal, however, differs depending on when the petition is placed on a website. If a petition is placed on a website, and later dismissed on or after the effective date of the bill, the webmaster with the clerk of the court or county recorder must remove the petition and any related documents. If the petition is placed on the website prior to the effective date of the bill, it is the responsibility of the person named in the petition to request removal. The request must be in writing, signed, and include the case name and number, document heading, and page number. The person requesting removal must deliver the request by mail, fax, electronic transmission, or in person to the clerk of the court. The clerk may not charge a fee for removal.

Both public record exemptions are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2021, unless reviewed and saved from repeal through legislative reenactment.

The bill takes effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The bill does not appear to require counties or municipalities to take an action requiring the significant expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

##### **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 or expanded public records or public meetings exemption. Because the bill creates new public records exemptions, it requires a two-thirds vote for passage.

###### **Public Necessity Statement**

Article I, s.24(c), of the Florida Constitution requires a public necessity statement for a newly-created or expanded public records or public meetings exemption. The bill creates a two new public records exemptions and includes a public necessity statement for each exemption.

Article I, s. 24(c), of the Florida Constitution, requires all public records exemptions “to state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.”

### ***Public Necessity Statement for Family Law Records***

Whether a court may consider the public records exemption for all family law records to be overbroad is unknown. The public necessity for the exemption provides that “such records often contain material that is of a personal, sensitive nature and that the damage to the privacy interest of persons involved outweighs the public benefit of making such information” public. The public necessity statement also finds that the records contain financial information which could facilitate identity theft. The exemption could also be made narrower by redacting information that is personal and sensitive, and including a definition of ‘personal and sensitive’ information. The exemption could be made no broader than necessary to accomplish the public necessity statement by redacting financial information only. The information within the records could be redacted without making entire court files confidential and exempt from public disclosure.

A definition of personal and sensitive information would be useful because a public records exemption was once declared unconstitutional because it did not define an important term. The Florida Supreme Court struck down an exemption afforded to a public hospital’s governing board meetings when a strategic plan is discussed.<sup>55</sup> In so doing, the Court held that a strategic plan may cover any range of topics relating to the operation of facilities, some of which may not necessitate confidential treatment.<sup>56</sup>

The scope of coverage of the exemption in the bill, for “a matter or case governed by the Florida Family Law Rules of Procedure which may not be placed on a publicly available website” may be too broad. Moreover, the Florida Family Law Rules of Procedure includes a number of restrictions and blanket prohibitions on disclosure of certain information recorded in family law cases.

### ***Public Necessity Statement for Petitions for Injunction***

The justification of necessity provided in this bill for a petition for injunction is that disclosure could otherwise defame and damage the reputation of the person identified in the petition. Other court cases, such as criminal charges filed but dismissed, may similarly damage the reputation of the person named as a defendant. This bill does not include those cases with this exemption, however. If this exemption is challenged, a court may consider as suspect the statement of public necessity in light of the lack of an exemption afforded to other court filings which are later dismissed.

One way to narrow this exemption to match the public necessity statement would be to redact the name and address of a person whose case was disposed of in the manner described in the bill.

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<sup>55</sup> *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 570 (Fla. 1999).

<sup>56</sup> *Id.*



The Legislature may wish to consider narrowing the exemption to weaken arguments that the bill is overly broad.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida Constitution provides that its citizens have a right to privacy, but that those rights may be limited by the right to access public records. Article 1, section 23, of the Florida Constitution states:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill creates two public records exemptions designed to protect the privacy of persons named in the documents. The bill may preserve the reputation of these persons. The exemption provided to records maintained in family law cases may prevent information in these documents from being used for identity theft, although that information may already be kept confidential under the Florida Family Law Rules of Procedure.

C. Government Sector Impact:

Indeterminate. Clerks of Court will have to take information off of their websites as well as train their staff on what information will not be subject to release if a request is made in the future.

**VI. Technical Deficiencies:**

The meaning of the phrase 'records that relate to a matter' (lines 79 and 90) is unclear.

The bill does not provide for any means of releasing confidential and exempt records. This may be problematic since it may be necessary for the records to be released after the cases have been closed. As currently drafted, someone seeking a record may need to get a court order in order to get access.

On line 122, the term "publically" should be replaced with the term "publicly."

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 28.2221 and 119.0714.

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

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

**CS by Judiciary on February 9, 2016:**

This CS corrects and replaces the term “Florida Rules of Family Law” with “Florida Family Law Rules of Procedure” in several places in the bill.

**B. Amendments:**

None.