

**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 Appropriations

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**BILL:** CS/CS/CS/SB 450

**INTRODUCER:** Appropriations Committee; Governmental Oversight and Accountability Committee; Criminal Justice Committee; and Senator Brandes

**SUBJECT:** Public Records

**DATE:** April 17, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Jones</u>	<u>Hrdlicka</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>McAuliffe</u>	<u>Hansen</u>	<u>AP</u>	<u>Fav/CS</u>
4.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/CS/SB 450 is linked to the passage of PCS/CS/SB 448, and CS/CS/CS/SB 118.

The bill makes personal identifying information of an adult who participates in a civil citation or prearrest diversion program exempt from public inspection and copying. The personal identifying information is no longer exempt from disclosure if the participant fails to complete the program. This exemption from public inspection and copying has retroactive application.

The bill also expands the public records exemption in section 943.059(4), Florida Statutes, to include criminal history records that are sealed administratively under section 943.0586, Florida Statutes, (created by CS/CS/CS/SB 118).

This bill may have a minimal fiscal impact on agencies responsible for complying with public records requests and redacting exempt information prior to releasing a record. However, these costs should be absorbed within existing resources.

The exemptions are subject to the Open Government Sunset Review Act and are repealed on October 2, 2022, unless reviewed and saved from repeal by the Legislature. The bill provides a statement of public necessity for each public records exemption, as required by the State Constitution.

The State Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage because it creates new public records exemptions.

The bill is effective on July 1, 2017. The new public records exemption for the civil citation program takes effect on the same date that PCS/CS/SB 448 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law. The public records exemption for administratively sealed records takes effects July 1, 2018, and only if CS/CS/CS/SB 118 or similar legislation is adopted in the same legislative session or extension thereof and becomes law.

## II. Present Situation:

### Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

In addition to the State Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that:

[I]t is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> 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 as “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.”

agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>13</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>14</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>15</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>16</sup>

The OGSR 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.<sup>17</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>18</sup>

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<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

<sup>13</sup> 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).

<sup>14</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> 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 section 119.15(2), F.S.

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(b), F.S.

<sup>18</sup> Section 119.15(6)(b)1., F.S.

- Releasing sensitive personal information would be defamatory 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;<sup>19</sup> or
- It protects trade or business secrets.<sup>20</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>21</sup> In examining an exemption, the OGSR asks 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.<sup>22</sup> 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.<sup>23</sup>

### **Criminal History Records**

A criminal history record is any nonjudicial record maintained by a criminal justice agency containing criminal history information.<sup>24</sup> Criminal history information includes information on a person's arrests, detentions, indictments, informations (formal criminal charges), and the disposition of the charges.<sup>25</sup>

A criminal history information is available free of charge to criminal justice agencies and to the public with payment of a fee.<sup>26</sup> Adults or minors seeking to prevent such disclosure may petition the court to seal<sup>27</sup> or expunge the record.<sup>28</sup>

Sections 943.059 and 943.0585, F.S., provide the procedures for sealing and expunging criminal history records. When a record is sealed, it is not destroyed, but access is limited to:

- The subject of the record;
- His or her attorney;
- Criminal justice agencies for criminal justice purposes;

<sup>19</sup> Section 119.15(6)(b)2., F.S.

<sup>20</sup> Section 119.15(6)(b)3., F.S.

<sup>21</sup> Section 119.15(6)(a), F.S. The specified questions are:

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

<sup>22</sup> FLA. CONST. art. I, s. 24(c).

<sup>23</sup> Section 119.15(7), F.S.

<sup>24</sup> Section 943.045(6), F.S.

<sup>25</sup> Section 943.045(5), F.S.

<sup>26</sup> See s. 943.053, F.S.

<sup>27</sup> Section 943.059, F.S.

<sup>28</sup> Section 943.0585, F.S.

- Judges; and
- Certain agencies for licensing and employment purposes.<sup>29</sup>

When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. FDLE is required to retain expunged records.<sup>30</sup>

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,<sup>31</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>32</sup>

Sealed or expunged records are confidential and exempt from the public records law.<sup>33</sup> It is a first degree misdemeanor<sup>34</sup> to divulge their existence.<sup>35</sup>

### **Model Prearrest Diversion Program**

PCS/CS/SB 448 creates s. 901.40, F.S., which encourages local communities and public or private educational institutions to implement a prearrest diversion program, and provides a framework for a model adult civil citation program that may be adopted. The model program allows a law enforcement officer, at the officer's sole discretion, to issue a civil citation or similar prearrest diversion program notice to an adult who:

- Commits a misdemeanor offense (as determined by the program);
- Admits to committing the offense or does not contest the offense;
- Has not previously been arrested; and
- Has not previously received an adult civil citation or similar prearrest diversion program unless the terms of the local adult prearrest diversion program allows otherwise.

The model program requires an adult who receives a civil citation to complete the required community service hours and pay restitution. If the adult does not successfully complete the program, the officer must determine if there is good cause to arrest the adult for the original misdemeanor offense and refer the case to the state attorney to determine if prosecution is appropriate or allow the adult to continue in the program.

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<sup>29</sup> Section 943.059(4), F.S.

<sup>30</sup> Section 943.0585(4), F.S.

<sup>31</sup> These include candidates for appointment as a guardian, admission to The Florida Bar, employment with a criminal justice agency, a license by the Division of Insurance Agent and Agent Services of the Department of Financial Services, or a position with an agency which is responsible for the protection of vulnerable persons, including children, disabled persons, and elderly persons.

<sup>32</sup> Sections 943.0585(4)(a) and 943.059(4)(a), F.S.

<sup>33</sup> Sections 943.059(4)(c) and 943.0585(4)(c), F.S.

<sup>34</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>35</sup> Sections 943.059 and 943.0585, F.S., require FDLE to disclose sealed and expunged criminal history records to specified entities for specified purposes.

A civil citation or similar prearrest diversion program notice is issued in lieu of an arrest so no criminal history record is created. However, records of a civil citation or similar prearrest diversion program notice held by the issuing law enforcement agency, or by a clerk of the circuit court and by a model program are subject to disclosure. Currently, Florida law does not exempt records associated with a civil citation from public inspection and copying.

### **Administrative Sealing of Criminal History Records**

CS/CS/CS/SB 118 creates s. 943.0586, F.S., which requires the Criminal Justice Information Program, within the Florida Department of Law Enforcement (FDLE), to administratively seal the criminal history records pertaining to an arrest or incident of alleged criminal activity of an adult or minor if all of the charges:

- Were declined to be filed by the state attorney or statewide prosecutor;
- Were dismissed or nolle prosequi before trial: or
- Resulted in a judgment of acquittal or a verdict of not guilty at trial.

All appeals by the prosecution must also have been exhausted or the time to file an appeal has expired for the criminal history records to be administratively sealed.

### **III. Effect of Proposed Changes:**

#### **Model Prearrest Diversion Program Public Records Exemption (Sections 1 and 2).**

This bill exempts the personal identifying information of an adult who participates in a civil citation or prearrest diversion program (created by PCS/CS/SB 448) from public inspection and copying. A participant's personal identifying information is no longer exempt if the participant fails to successfully complete the program.

The public records exemption will apply to records held by a law enforcement agency, a program provider, a clerk of the circuit court, or the operators of a civil citation or prearrest diversion program.

The bill provides a statement of public necessity as required by the State Constitution.<sup>36</sup> The statement includes the following findings:

- The goal of a civil citation or prearrest diversion program is to give a second chance to adults who commit misdemeanor offenses and allow them the opportunity to avoid having an arrest record.
- If the personal identifying information of such adults were not exempt from disclosure, it would defeat the goal of giving adults who commit misdemeanor offenses a means to avoid arrest and prosecution.
- If such information were able to be obtained by the public, that disclosure might negatively impact the effectiveness of the civil citation or prearrest diversion program.

The exemption has retroactive application so that it will apply to people who have already participated in a civil citation or prearrest diversion program.

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<sup>36</sup> Article I, s. 24(c), FLA. CONST.

The bill repeals the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature, pursuant to the OGSR Act.

This portion of the bill takes effect on the same date that PCS/CS/SB 448 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes a law.

#### **Administrative Sealing of Criminal History Records (Sections 3, 4, and 5).**

The bill expands the public records exemption in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., (created by CS/CS/CS/SB 118). The bill provides that administratively sealing a record under s. 943.0586, F.S., has the same effect as sealing under s. 943.059, F.S. The bill allows a person to lawfully deny the arrest or fail to acknowledge the arrested covered by the administratively sealed record. A person also cannot be held under any provision of law as committing perjury or be liable for giving a false statement for failing to acknowledge an administratively sealed record.

The bill repeals the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature, pursuant to the OGSR Act.

The bill provides a statement of public necessity as required by the State Constitution.<sup>37</sup> The statement includes the following findings:

- The presence of a criminal history record in an individual's past which has not been validated through a criminal proceeding can jeopardize a person's ability to obtain education, employment, and other achievements necessary in becoming a productive, contributing, self-sustaining member of society.
- Such negative consequences are unwarranted in cases in which the individual was not found to have committed the offense that is the subject of the sealed criminal history record.

These portions of the bill are effective July 1, 2018, and only if CS/CS/CS/SB 118 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law. Otherwise, the bill is effective July 1, 2017.

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

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

None.

##### **B. Public Records/Open Meetings Issues:**

This bill creates two new public record exemptions. Therefore, the following constitutional requirements apply.

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<sup>37</sup> Article I, s. 24(c), FLA. CONST.

**Substance of the Bill**

Article I, s. 24(c) of the State Constitution requires that laws enacted to exempt records from public inspection must contain only exemptions and relate to one subject. This bill creates two new public records exemptions, one related to records of a civil citation program and one related to criminal history records that are administratively sealed by the FDLE.

**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 two new public record exemptions; 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 two new public record exemptions and includes a public necessity statement for each.

**Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in each statement of public necessity, these public records exemptions appear to be no broader than necessary to accomplish their stated purpose.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The public records exemption for model prearrest diversion programs may have a minimal fiscal impact on agencies responsible for complying with public records requests and redacting exempt information prior to releasing a record. However, these costs should be absorbed within existing resources.



The portion of the bill that expands the public records exemption in s. 943.059(4), F.S., to include the criminal history records that are sealed administratively under s. 943.0586, F.S., may have a negative impact on FDLE revenues but likely insignificant.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The public records exemption for model prearrest diversion programs is linked to the passage of PCS/CS/SB 448 and the portion of the bill that expands the public records exemption in s. 943.059(4), F.S., to include records that are sealed administratively under s. 943.0586, F.S., is linked to the passage of CS/CS/CS/SB 118.

**VIII. Statutes Affected:**

This bill creates the following sections of the Florida Statutes: 901.40 and 943.0586.

This bill amends section 943.059 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/CS by Appropriations on April 13, 2017:**

The committee substitute adds an additional public records exemption to the bill:

- Expands the public records exemption in s. 943.059(4), F.S., to include the criminal history records that are sealed administratively under s. 943.0586, F.S., (created by CS/CS/CS/SB 118).
- Provides a statement of public necessity as required by the State Constitution.
- Specifies that this expansion of the public records exemption in s. 943.059, F.S., is effective July 1, 2018 and only if CS/CS/CS/SB 118 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

The committee substitute also adds the clerk of the circuit court to the public records exemption created for civil citations.

**CS/CS by Governmental Oversight and Accountability on March 27, 2017:**

The CS/CS does the following:

- Provides that the exemption applies to civil citation programs as well as prearrest diversion programs;
- Specifies that the public records exemption is limited to certain records custodians, and is not a public records exemption of general applicability;

- Specifies that the exemption only applies to the records of those people who complete a civil citation or prearrest diversion program, rather than to all participants regardless of whether they complete the program;
- Provides for retroactive application so that current and past participants can have the benefit of the exemptions; and,
- Removes ambiguous language.

**CS by Criminal Justice on March 13, 2017:**

The committee substitute:

- Creates a public records exemption for the personal identifying information of an adult who participates in a prearrest diversion program; and
- Makes technical and stylistic changes.

**B. Amendments:**

None.