

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/SB 862

INTRODUCER: Criminal Justice Committee and Senator Bracy

SUBJECT: Public Records/Sealing of Criminal History Records

DATE: February 5, 2018 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Storch</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 862, which is linked to the passage of CS/SB 860, expands an existing public records exemption to include administratively sealed criminal history records.

An administratively sealed record is a criminal history record of a minor arrested or charged with a felony, misdemeanor, or violation of a comparable rule or ordinance by a state, county, municipal, or other law enforcement agency that is sealed upon notification by the clerk of the court that all the charges related to the arrest or incident of alleged criminal activity:

- 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 not guilty verdict.

The expansion of the exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2023, unless reviewed and saved from repeal by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

The Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage because it expands an existing public records exemption.

The bill takes effect on the same date that CS/SB 860 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ 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.²

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ 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.¹¹ A statutory

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). 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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.”

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

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹³ 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.¹⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records.¹⁵ 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.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.¹⁷ 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;¹⁸
- 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;¹⁹ or
- It protects trade or business secrets.²⁰

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹³ 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).

¹⁴ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.²¹ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.²² 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 otherwise provided for by law.²³

Court-ordered Sealing of Criminal History Records

Florida law makes adult criminal history records accessible to the public unless the record has been sealed or expunged.²⁴ Section 943.059, F.S., provides the procedure for sealing a criminal history record, which places a record under highly restricted access pursuant to court order.²⁵

A person seeking to have his or her criminal history record sealed must obtain a certificate of eligibility for sealing pursuant to requirements set forth in s. 943.059(2), F.S., and subsequently petition the court to seal the record.²⁶

A criminal history record of a minor or an adult which is ordered sealed by a court pursuant to s. 943.059, F.S., is confidential and exempt from the provisions of s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution.²⁷ Such record is available only to:

- The person who is the subject of the record;
- The subject's attorney;
- Criminal justice agencies for their respective criminal justice purposes;
- Judges in the state courts system for the purpose of assisting them in their case-related decision making responsibilities; and
- Specified entities set forth in s. 943.059(4)(a), F.S., for their respective licensing, access authorization, and employment purposes.²⁸

²¹ 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?

²² FLA. CONST., art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ Florida Department of Law Enforcement, *Seal and Expunge Process*, available at <http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Seal-and-Expunge-Home.aspx> (last visited January 22, 2018). *See* s. 943.053, F.S.

²⁵ "Sealing of a criminal history record" is the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein. Section 943.045(19), F.S.

²⁶ Section 943.059, F.S.

²⁷ Section 943.059(4), F.S.

²⁸ *Id.*

The person who has their criminal history record sealed may lawfully deny or fail to acknowledge the records that were sealed, unless they are:

- A defendant in a criminal prosecution;
- Seeking appointment as a guardian, a position with a criminal justice agency, or a license by the Division of Insurance Agent and Agency Services within the Department of Financial Services;
- Seeking to be employed or licensed by or to contract with the Department of Children and Families, the Division of Vocational Education within the Department of Education, the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice or to be employed or used by such contractor or licensee in a sensitive position having direct contact with children, the disabled, or the elderly;
- Seeking to be employed or licensed by the Department of Education, a district school board, a university laboratory school, a charter school, a private or parochial school, or a local governmental entity that licenses child care facilities;
- Petitioning to have a court-ordered criminal history record expunged or sealed²⁹ or petitioning for relief under s. 943.0583, F.S.;³⁰
- A candidate for admission to The Florida Bar;
- Attempting to purchase a firearm from a licensed imported, licensed manufacturer, or licensed dealer and is subject to a criminal history check under state or federal law; or
- Seeking to be licensed by the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services to carry a concealed weapon or concealed firearm.³¹

The Florida Department of Law Enforcement (FDLE) must disclose the sealed criminal history record to the entities listed above for their respective licensing, access authorization, and employment purposes. An employee of an entity listed above may only disclose information relating to the existence of a sealed criminal history record to the person to whom the criminal history record relates or to persons having direct responsibility for employment, access authorization, or licensure decisions.³²

If a person has his or her criminal record sealed, he or she may not be held under any provision of law of this state to commit perjury or otherwise be liable for giving a false statement for failure to acknowledge a sealed criminal history record.³³

Administrative Sealing

CS/SB 860, which is linked to CS/SB 862, creates a process for the administrative sealing of certain criminal history records of a minor.

²⁹ Section 943.0585, F.S.

³⁰ Section 943.0583, F.S., provides for expunction of criminal history record for victims of human trafficking.

³¹ Section 943.059(4)(a), F.S.

³² Section 943.059(4)(c), F.S.

³³ This is subject to the exceptions enumerated in s. 943.059(4)(a), F.S., whereby a person must acknowledge a sealed criminal history record under certain circumstances. *See* s. 943.059(4)(b), F.S.

A criminal history record of a minor arrested or charged with a felony, misdemeanor, or violation of a comparable rule or ordinance by a state, county, municipal, or other law enforcement agency is administratively sealed upon notification by the clerk of the court that all the charges related to the arrest or incident of alleged criminal activity:

- 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 not guilty verdict.

Additionally, all appeals must have been exhausted by the prosecution or the time to file an appeal must have expired in order for a record to be administratively sealed.

III. Effect of Proposed Changes:

Section 1 expands the public records exemption for sealed records in s. 943.059, F.S., to include records administratively sealed pursuant to s. 943.0586, F.S.

An administratively sealed criminal history record would be treated the same as a record sealed pursuant to s. 943.059, F.S., making such record confidential and exempt and only available to certain people. Additionally, the person who is the subject of the criminal history record that is administratively sealed would be permitted to lawfully deny or fail to acknowledge the existence of the record, with limited exceptions.³⁴

The bill repeals the expansion of the exemption on October 2, 2023, unless reviewed and saved from repeal by the Legislature.

The bill provides that s. 943.059, F.S., shall revert to that in existence on June 30, 2018, if the expansion of the exemption is not saved from repeal. The bill provides that any amendments made to s. 943.059, F.S., shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of text which are not saved from repeal.

Section 2 provides a statement of public necessity as required by the Florida Constitution.³⁵ The statement includes the following findings:

- The presence of a criminal history record in a minor's past which has not been validated through criminal proceedings can jeopardize his or her ability to obtain education, employment, and other opportunities necessary to become a productive, contributing, self-sustaining member of society; and
- Such negative consequences are unwarranted in cases in which a minor was not found to have committed the offense that is the subject of the sealed criminal history record.

Section 3 provides that the bill takes effect on the same date that CS/SB 860 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law.

³⁴ See s. 943.059(4), F.S.

³⁵ Article I, s. 24(c), FLA. CONST.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

This bill expands a public records exemption. Therefore, the following constitutional requirements apply.

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 expands a public records exemption related to sealed criminal history records.

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 expands a public records exemption; 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 expands a public records exemption and includes a public necessity statement for the expansion.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a public records exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, this expansion of a public records exemption appears to be no broader than necessary to accomplish the 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 bill may have a minimal fiscal impact on agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record. However, these costs should be able to be absorbed with existing resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 860 is the related administrative sealing bill linked to this bill.

VIII. Statutes Affected:

This bill substantially amends section 943.059 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.)

CS by Criminal Justice on January 29, 2018:

The Committee Substitute updates a reference to CS/SB 860.

B. Amendments:

None.