

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1397 Pub. Rec./Abortion  
**SPONSOR(S):** Grall  
**TIED BILLS:** HB 1335 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	11 Y, 3 N	McElroy	McElroy
2) Oversight, Transparency & Public Management Subcommittee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

HB 1335 prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives notarized, written parental consent or an order from a court waiving the parental consent requirement.

HB 1397, linked to HB 1335, expands an existing public record exemption for any information that can be used to identify a minor petitioning a circuit court for a judicial waiver of parental notification for an abortion to exempt the same information when a minor petitions a circuit court for judicial waiver for parental consent for an abortion.

The bill provides for repeal of the exemption for judicial waiver of parental consent on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides that if the parental consent exemption is not saved from repeal, then the statute reverts to that in existence on June 30, 2019, thereby preserving the exemption for judicial waiver of parental notification.

The bill also provides a public necessity statement as required by the State Constitution.

The bill has no fiscal impact on state or local governments.

The bill will become effective on the same date that HB 1335 or similar legislation takes effect.

**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 a public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access 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 of persons acting on their behalf.<sup>1</sup> The public also has a right to have notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.<sup>2</sup> The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>4</sup> guarantees every person's right to inspect and copy any state or local government public record.<sup>5</sup> The Sunshine Law<sup>6</sup> requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.<sup>7</sup>

The Legislature, however, may create an exemption to public record or open meetings requirements.<sup>8</sup> An exemption must specifically state the public necessity justifying the exemption<sup>9</sup> and must be tailored to accomplish the stated purpose of the law.<sup>10</sup> There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act and also confidential.

##### *Exempt Records*

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not

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

<sup>2</sup> FLA. CONST., art. I, s. 24(b).

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

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> Section 119.011(12), F.S., defines "public record" as 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" 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. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to section 11.0431, F.S.

<sup>6</sup> Section 286.011, F.S.

<sup>7</sup> Section 286.011(1)-(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 provide 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.

<sup>8</sup> FLA. CONST., art. I, s. 24(c).

<sup>9</sup> *Id.*

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

prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.<sup>11</sup>

### *Confidential Records*

The term "confidential" is not defined in the Public Records Act; however, it is used in Article I, s. 24 of the Florida Constitution, which provides that every person has the right to inspect or copy any public record, except with respect to records exempted or specifically made confidential by the Constitution. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.<sup>12</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public record or open meetings exemptions.<sup>13</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>14</sup>

The OGSR provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>15</sup> An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;
- It protects sensitive personal information, the release of which 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; or
- It protects trade or business secrets.<sup>16</sup>

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.<sup>17</sup>

The OGSR also requires specific questions to be considered during the review process.<sup>18</sup> In examining an exemption, the OGSR asks the Legislature to 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>19</sup> If the exemption is reenacted without

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<sup>11</sup> See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." *Id.* at 686.

<sup>12</sup> *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), rev. denied, 892 So. 2d 1015 (Fla. 2004). See also, 04-09 Fla Op. Att'y Gen. (2004) and 86-97 Fla Op. Att'y Gen. (1986).

<sup>13</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. Section 119.15(2), F.S.

<sup>14</sup> Section 119.15(3), F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Section 119.15(6)(a), F.S. The questions are: What specific records or meetings are affected by the exemption? Whom does the exemption uniquely affect, as opposed to the 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?

<sup>19</sup> FLA. CONST., art. I, s. 24(c).

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 retain their exempt status unless provided for by law.<sup>20</sup>

### Judicial Waiver of Parental Notice

The Parental Notice of Abortion Act (Act) requires a physician to notify a parent or legal guardian prior to performing or inducing an abortion. The Act provides that a minor may petition the circuit court where she resides for a waiver of the notice requirements.<sup>21</sup> To initiate the process, she may file the petition under a pseudonym or by using her 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 a court-appointed counsel and must provide her with counsel, if she requests, at no cost to the minor.<sup>22</sup>

Judicial waiver proceedings must be given precedence over other pending matters to the extent necessary to ensure the court reaches a decision promptly.<sup>23</sup> Once a petition is filed, the court must rule and issue written findings of fact and conclusions of law within three business days. This time period may be extended at the request of the minor.<sup>24</sup> If the court fails to rule within three business days, the minor may immediately petition for a hearing to the chief judge, who must ensure a hearing is held within 48 hours after the petition; an order must be entered within 24 hours after the hearing.<sup>25</sup>

If the circuit court decides 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.<sup>26</sup> If the court finds the minor does not possess the requisite maturity to make the determination, the court must dismiss the petition.<sup>27</sup> 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 the minor's best interest, the court must issue an order authorizing the minor to consent to the abortion without notification of a parent or guardian.<sup>28</sup> In 2018, 193 petitions for judicial bypass were filed.<sup>29</sup>

### *Public Record Exemption for Judicial Bypass Proceedings*

Current law provides a public record exemption for judicial records pertaining to parental notification bypass proceedings. Specifically, any information held by a circuit court or appellate court which could be used to identify the minor is confidential and exempt<sup>30</sup> from public disclosure.

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<sup>20</sup> Section 119.15(7), F.S.

<sup>21</sup> Section 390.01114(4)(a), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> Section 390.01114(4)(b)1., F.S.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Section 390.01114(4)(c), F.S.

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

<sup>28</sup> Section 390.01114(4)(d), F.S.

<sup>29</sup> Florida Office of the State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December 2018* (January 2019).

<sup>30</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

## Judicial Waiver of Consent

HB 1335, linked to this bill, prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives notarized, written parental consent or an order from a court waiving the parental consent requirement. HB 1335 allows a minor to petition for a judicial waiver of parental consent in the identical manner which a minor currently petitions for a judicial waiver of parental notification. As such, a minor faces the same potential harm when seeking a judicial waiver of parental consent as she does when seeking a judicial waiver of parental notification.

## Effect of Proposed Changes

HB 1397 expands the existing public records exemption for judicial records pertaining to parental notification bypass proceedings to include judicial records pertaining to parental consent bypass proceedings. Specifically, any information held by a circuit court or appellate court which could be used to identify the minor is confidential and exempt<sup>31</sup> from public disclosure.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2024, unless saved from repeal through reenactment by the Legislature. It also provides that if the parental consent exemption is not saved from repeal, then the statute reverts to that in existence on June 30, 2019, thereby preserving the exemption for judicial waiver of parental notification.

The bill provides a public necessity statement as required by the State Constitution, which states:

The information contained in these records is of a sensitive, personal nature regarding a minor petitioner, release of which could harm the reputation of the pregnant minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the pregnant minor in instances when child abuse or child sexual abuse against her is present by exposing her to further acts of abuse from an abuser who, if the information was not held confidential, could learn of her pregnancy, her plans to obtain an abortion, and her petition to the court.

The bill takes effect on the same date that HB 1335 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 390.01116, relating to public records exemptions; minors seeking waiver of notice requirements.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides a contingent effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

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<sup>31</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

**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 new 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 a new public record exemption; thus, it includes a public necessity statement.

**Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for certain information contained in and related to nonviable birth records, which does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**