

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 Rules

BILL: CS/CS/SB 160

INTRODUCER: Rules Committee; Judiciary Committee; and Senators Perry and Hooper

SUBJECT: Peer-to-peer Support for First Responders

DATE: March 3, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Hendon</u>	<u>CF</u>	Favorable
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	<u>Delia</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 160 generally prohibits the disclosure of a first responder's peer support communication made to a first responder peer.

The bill defines a peer support communication as one or more oral communications between a first responder and a first responder peer. The communication must be made with a mutual expectation of confidentiality and for the purpose of discussing physical, emotional, or issues associated with the first responder's employment.

Under the bill, a first responder peer is a first responder who is not a health care practitioner and who has received training in providing physical or emotional support to first responders.

The bill protects the confidentiality of the communications by prohibiting the person providing support from divulging the communications or from testifying in civil, criminal, administrative, and disciplinary proceedings regarding the communications.

The bill, however, allows peer support communications to be disclosed if: the first responder provides written consent, the first responder files a complaint against the person providing peer support, or if the person providing peer support suspects that the first responder committed a criminal act or has reason to believe that the first responder is a threat to himself or herself or others.

The bill does not limit the disclosure of information obtained by a first responder peer from a source other than a peer support communication.

The bill is effective July 1, 2020.

II. Present Situation:

First Responders

Under Florida law, a first responder is either a (1) law enforcement officer, (2) firefighter, or (3) emergency medical technician or paramedic, employed, or volunteering, with a state or local government. Florida has an estimated 50,000 law enforcement officers,¹ 22,000 firefighters,² and over 60,000 emergency medical technicians and paramedics.³

A study of 1,500 Florida first responders revealed that 60 percent displayed low levels of secondary traumatic stress, 39 percent displayed moderate levels, and 1 percent displayed high levels.⁴ A 2017 study of first responders nationwide found that 84 percent experienced a traumatic event on the job, while 34 percent received a formal diagnosis for a mental health disorder such as depression or post-traumatic stress disorder.⁵ It is estimated that 30 percent of first responders develop behavioral health conditions such as post-traumatic stress disorder and depression, in comparison to 20 percent for the general population.⁶

Peer Support Programs

Some law enforcement agencies offer peer support programs, available either during crisis events or through full-time staff. In 2018, a study published by the *Journal of Police and Criminal Psychology* analyzed 110 different law enforcement agencies' suicide prevention strategies for their employees.⁷ Thirty-one of these agencies had formal peer support programs. These agencies used peers as "para-professionals within the agency to address concerns officers had in using formal mental health/EAP services."⁸ Some of these agencies likewise worked under a policy, or law within their jurisdiction, that assured confidentiality with these services.

¹ Florida Department of Law Enforcement, *Criminal Justice Agency Profile Report 2016*, <https://www.fdle.state.fl.us/CJSTC/Publications/CJAP/CJAP-2016/Statewide-Ratios.aspx> (last visited Oct 29, 2019).

² Bureau of Labor Statistics, United States Department of Labor, *Occupational Employment and Wages, May 2018: 33-2011 Firefighters*, <https://www.bls.gov/OES/Current/oes332011.htm> (last visited Oct 29, 2019).

³ Florida Department of Health, *Emergency Medical Services System*, <http://www.floridahealth.gov/licensing-and-regulation/ems-system/index.html> (last visited Oct 29, 2019).

⁴ University of Central Florida, *UCF Study Examines First Responder Stress & Support Needs UCF Today*, <https://www.ucf.edu/news/ucf-study-examines-first-responder-stress-support-needs/> (last visited Oct 29, 2019).

⁵ University of Phoenix, *Majority of First Responders Face Mental Health Challenges in the Workplace* (Apr. 18, 2017), https://www.phoenix.edu/about_us/media-center/news/uopx-releases-first-responder-mental-health-survey-results.html.

⁶ Abbot, C., Barber, E., Burke, B., Harvey, J., Newland, C., Rose, M., & Young, A., Ambulance Service Manager Program, *Reviving Responders, What's killing our medics?* (Apr. 2015), <http://www.revivingresponders.com/originalpaper>.

⁷ Rajeev Ramchand et al., *Suicide Prevention in U.S. Law Enforcement Agencies: a National Survey of Current Practices*, 34(1) *Journal of Police and Criminal Psychology*, 55–66 (2019).

⁸ *Id.*

Usually, officers apply and train to become a part of the program, and are overseen either by a mental health professional or agency leadership. While the officers can be officially recognized as “peer supporters,” they typically perform their roles informally without routine duties or office hours to provide support.

Similar to peer support, some agencies offer embedded services such as agency-affiliated chaplains and social workers to provide support to employees. Twelve of the 110 agencies studied used a method similar to this.

Large law enforcement agencies may have offices responsible for mental and emotional support for employees. The Psychological Services Section of the Miami-Dade Police Department, for example, offers consultation and referral services to employees.⁹ Officers and staff are on call 24 hours a day for officer-involved shootings, suicide interventions, and other crises. The office likewise supervises Police Chaplain Volunteers who provide support services to employees. Employees may also refer themselves to the county Employee Support Services, who provide a variety of personal and mental health services and referrals with strict confidentiality.¹⁰

The Baltimore Police Department¹¹ and New York Police Departments¹² have similar divisions incorporating mental health and suicide prevention programs. New York currently includes a peer-support program with confidentiality protections. While the Baltimore program does not, the Baltimore Police Commissioner has introduced a draft policy proposal to incorporate one.¹³

Privileged Communications

When communications are protected from disclosure, typically, these protections are created by an evidentiary privilege codified in chapter 90, F.S., the Florida Evidence Code. Evidentiary privileges allow individuals to refuse to disclose certain protected information and conversations. These privileges are meant to promote honest communications between individuals involved. The Legislature recognizes the existence of an evidentiary privilege when it “judges that the protection of an interest or relationship is sufficiently important to society to justify the sacrifice of facts that might be needed for the administration of justice.”¹⁴

⁹ Miami-Dade Police Department, *Department Review, 2018 ed.*, 15, <https://www.miamidade.gov/police/library/2018-mdpd-review.pdf>.

¹⁰ Miami-Dade County, *Employee Support Services*, https://www8.miamidade.gov/global/service.page?Mduid_service=ser1544819611878399 (last visited Oct 30, 2019).

¹¹ Baltimore Police Department, *Officer Safety & Wellness Section*, <https://www.baltimorepolice.org/organization/officer-safety-wellness-section> (last visited Oct 30, 2019).

¹² New York City Police Department, *Employee Assistance Unit: Sometimes You Just Need Someone to Listen...*, <https://www1.nyc.gov/site/nypd/careers/human-resources-info/employee-assistance-unit.page> (last visited Oct 30, 2019).

¹³ Baltimore Police Department, *Policy 1711: Draft Peer Support Team Policy* (Aug. 21, 2019), <https://www.powerdms.com/public/BALTIMOREMD/documents/575672>.

¹⁴ 21 FLA. JUR. 2D *Evidence and Witnesses* s. 672 (2019) (citing *Miami Herald Pub. Co. v. Morejon*, 561 So. 2d 577, 581 (Fla. 1990)).

On the other hand, “[t]he public ‘has a right to every man’s evidence.’”¹⁵ As such, evidentiary privileges are not favored, and the privilege not to disclose relevant evidence is an extraordinary exception to the duty to testify.¹⁶

Florida has a few examples of evidentiary privileges that have some similarities to peer support confidentiality.

Domestic Violence Advocate-Victim Privilege

Under the domestic violence advocate-victim privilege, a victim of domestic violence has a “privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim.”¹⁷ A victim advocate must be an employee of a domestic violence program or volunteer who has at least 30 hours of training in assisting victims of domestic violence.

Sexual assault counselor-victim privilege

Under the sexual assault counselor-victim privilege, a victim of a sexual assault has a “privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim.”¹⁸ A sexual assault counselor must be an employee of a rape crisis center or a trained volunteer. A trained volunteer must be supervised by a rape crisis center and have at least 30 hours of training in assisting victims of sexual violence and other related topics.

Psychotherapist-Patient Privilege

Under the psychotherapist patient privilege, “a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient’s mental or emotional condition.”¹⁹

Privilege with Respect to Communications to Clergy

“A person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a member of the clergy in his or her capacity as spiritual adviser.”²⁰ A communication is confidential if it is made privately for the “purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.”²¹

¹⁵ *Miami Herald Pub. Co. v. Morejon*, 561 So. 2d 577, 581 (Fla. 1990) (quoting 8 Wigmore, *Evidence* § 2192, at 70 (McNaughten rev.1961)).

¹⁶ *Id.*

¹⁷ Section 90.5036, F.S.

¹⁸ Section 90.5035, F.S.

¹⁹ Section 90.503, F.S.

²⁰ Section 90.505(2), F.S.

²¹ Section 90.505(1)(b), F.S.

Florida law, however, does not offer an evidentiary privilege or confidentiality for peer support communications not involving health care practitioners. As such, first responder agencies may offer confidentiality for services administrated internally, but that confidentiality would not supersede state or federal laws requiring disclosure.

When dealing with civil claims or defenses based on a state law, the Federal courts can interpret the privilege of evidence and witnesses in accordance with state law.²² This does not apply, however, to cases based solely on federal claims, or to cases based on both state and federal claims.²³

The Florida Supreme Court and Evidentiary Privileges

The Florida Evidence Code as enacted by the Legislature contains both procedural and substantive law for the courts to apply. However, rules of evidence that are procedural in nature, even those passed by the Legislature, must be approved by Supreme Court. Occasionally, the Court rejects the legislative changes.

In 2000, for example, the Court refused to adopt a recently enacted hearsay exception, noting that applying the statute would go against long standing rules of evidence and violate a defendant's right of confrontation.²⁴ A concurring opinion by Justice Lewis also found that the statute was an unacceptable rule of procedure, and therefore infringed on the Court's ability to adopt rules under Article V, § 2(a), of the Florida Constitution. In 2014, the Court refused to adopt a statute that was not part of the evidence code requiring certain qualifications for medical negligence expert witnesses on the grounds that the statute was procedural.²⁵

Peer Support Laws

Several states including Oregon, Hawaii, Colorado, Washington, and Mississippi offer evidentiary privileges for peer support personnel covering communications between first responders and peer support personnel. Oregon,²⁶ Hawaii,²⁷ Colorado,²⁸ and Washington²⁹ require peer supporters to be trained in providing emotional and moral support to first responders and must be designated by the agency for their role(s). Peer supporters in Mississippi must be a law enforcement officer, fireman, or emergency medical technician with a peer support certification from the State Board of Health or the Department of Public Safety.³⁰

In four of the five example states, all but Washington, the peer support privilege does not cover admissions to criminal conduct, information relating to the abuse of spouses, children, or the elderly, or threats of suicide or homicide. Mississippi adds that the privilege does not apply if the

²² [Fed. R. Evid. 501](#)

²³ *Von Bulow by Auersperg v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987).

²⁴ *In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339, 341 (Fla. 2000). The statute in question stripped the former testimony of witnesses hearsay exception of the requirement that the witness be unavailable.

²⁵ *In re: Amendments to the Fla. Evidence Code*, 144 So. 3d 536, 537 (Fla. 2014).

²⁶ Or. Rev. Stat. Ann. § 181A.835.

²⁷ Haw. Rev. Stat. Ann. § 78-52.

²⁸ Colo. Rev. Stat. § 13-90-107.

²⁹ Wash. Rev. Code Ann. § 5.60.060. The Washington peer support privilege also applies to jail staff.

³⁰ Miss. Code Ann. § 13-1-22.1.

peer supporter was a witness, party, or responder to the incident that lead to the peer support event, which is Washington's only exception to the privilege.

Mississippi is the only state of the five example states that makes it a criminal act to reveal or attempt to coerce another to reveal the privileged communication.³¹

III. Effect of Proposed Changes:

The bill allows first responders to have confidential peer support communications with first responder peers. As defined by the bill, first responders include law enforcement officers, fire fighters, emergency medical technicians, public communications officers, dispatchers, 911 operators and other phone system operators whose job duties include providing support or services to first responders, correctional officers, and correctional probation officers. A first responder peer must either be an individual who has received training in providing physical or emotional support to first responders. The bill excludes health care practitioners from being first responder peers for the purpose of the confidentiality protection. However, existing laws may protect the confidentiality of communications with a health care practitioner.

A peer support communication is one or more oral communication between a first responder and a first responder peer. The communication must be made with a mutual expectation of confidentiality and for the purpose of discussing physical, emotional, or issues associated with the first responder's employment.

The first responder peer generally may not testify in any civil, criminal, administrative, or disciplinary proceeding regarding information obtained during their peer support or otherwise divulge confidential peer support communications. However, a first responder peer may testify or divulge information if:

- The first responder peer is a defendant in a civil, criminal, administrative, or disciplinary proceeding arising from a complaint filed by the first responder in which case such information may be divulged but is limited to the scope of the proceeding.
- The first responder agrees, in writing, to allow the person to testify or divulge information related to the peer-to-peer support.
- The first responder peer has reason to fear for the safety of the first responder, another person, or society. The first responder peer may relay information based on this fear to the potential victims, appropriate family members, or law enforcement or other authorities. If a first responder peer discloses information based on the above, there is no liability or cause of action based on the disclosure.
- The communications by the first responder cause the first responder peer to suspect that the first responder has committed a criminal act.

The bill does not limit the disclosure, discovery, or admissibility of information, testimony, or evidence that is obtained by a first responder peer from a source other than a peer support communication.

The bill is effective July 1, 2020

³¹ A misdemeanor in Mississippi is punishable by up to 6 months in jail and a \$500 fine.

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

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or received states-shared revenues.

B. Public Records/Open Meetings Issues:

Article 1, s. 24 of the Florida Constitution requires exemptions from public records to state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law. The Legislature may adopt exemptions from public records and public meetings by a general law that is passed by two-thirds vote of each house.

To the extent that peer support communications are made in a record, those records may be public records that must be disclosed under the public records law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill exempts communications between a first responder and a first responder peer from being used in any criminal proceeding. The Confrontation Clause of the 6th amendment to the United State Constitution grants criminal defendants a right to confront their accusers. Criminal defendants have a right to cross examine prosecution witnesses for bias and impeachment purposes.

There is conflicting case law on this. Criminal defendants have a right to confront, and impeach, witnesses based on their juvenile records if they are relevant, despite any law regarding strict confidentiality of those records.³² However, criminal defendants are not entitled to inspect confidential records, and courts must use a balancing approach to protect the interests of the defendant and verify any relevant exculpatory evidence while likewise protecting the confidentiality of the information.³³

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

None.

³² *Davis v. Alaska*, 415 U.S. 308, 320, 94 S. Ct. 1105, 1112 (1974).

³³ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S. Ct. 989, 1002-03 (1987).

B. Private Sector Impact:

The bill may limit the availability of evidence in civil trials against first responder agencies.

C. Government Sector Impact:

The bill may limit the availability of information to first responder agencies when engaging in disciplinary functions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 111.09 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS by Rules on March 2, 2020:**The committee substitute differs from the underlying bill by:

- Specifying that “first responder” includes 911 public safety telecommunicators as defined in s. 401.465, F.S., as well as correctional officers and correctional probation officers.
- Defines “first responder peer” as someone who has experience working as a first responder regarding any physical or emotional conditions or issues associated with their employment. Previously, the bill required the peer to be from the same agency as the first responder and also provided for someone who can provide moral support in addition to physical and emotional support.
- Modifying the definition of “peer support communication” to specify that it includes only communications made by a peer in their official capacity.
- Removing a provision which allows the privilege to extend for “a period of 3 days.”
- Specifying that a first responder peer may not divulge privileged communications unless the first responder has committed a criminal act; previously, the bill allowed a break of the privilege if either the first responder has committed, or if the peer suspects they will commit, a criminal act.
- Providing that a first responder peer who divulges information in violation of the bill is subject to disciplinary action by the appropriate licensing agency, and information improperly divulged is inadmissible in any civil, criminal, administrative, or disciplinary proceeding.

CS by Judiciary on November 12, 2019:

The committee substitute differs from the underlying bill by:

- Restricting peer support communications to oral communications made with a mutual expectation of confidentiality which may extend for a period of 3 days.
- Limiting who may provide peer support to other first responders within the same agency or agency designated individuals who have been trained in providing physical, emotional, or moral support to first responders.
- Allowing suspected criminal activity to be disclosed by the person providing peer support.
- Clarifying that the confidentiality protections do not apply to disclosures or information obtained outside of a peer support communication.

B. Amendments:

None.