

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/CS/SB 1728

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

SUBJECT: Public Meetings and Records/Conditional Medical Release Program

DATE: February 10, 2020 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cox</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1728, which is linked to CS/SB 556, adds a new subsection to s. 945.0911, F.S., as created in the linked bill, exempting certain records and portions of public meetings from the related conditional medical release (CMR) program.

Specifically, the bill provides that the portion of a panel review hearing conducted in accordance with s. 945.0911, F.S., during which the panel determining release into or revocation from the CMR program will discuss information that is exempt under state law or confidential under federal law is exempt from s. 286.011, F.S., and s. 24(b), Art. I of the Florida Constitution. The bill also provides that certain requirements must be met if the panel must discuss exempt information during the course of its meeting.

The bill also provides that the portion of the records the panel uses to determine the appropriateness of CMR which includes any of the inmate's protected information is confidential and exempt from disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.

Further, the bill exempts from public records requirements any portion of the audio or video recording of, any transcript of, and any minutes and notes generated during, a closed hearing of the panel or closed portion of a hearing of the panel. The bill requires that such audio or video recording and minutes and notes be retained pursuant to s. 119.021, F.S.

The bill authorizes certain persons to be present during the closed portion of the meeting and provides that any closure of the meetings must be limited so that the public meetings policy of the state is maintained.

The bill provides that the exemptions in the bill are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

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

Because the bill creates a new public meetings and public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill does not appear to have a fiscal impact on state or local governments. Costs incurred by the DOC in closing such meetings and responding to public records requests regarding these exemptions should be offset by savings realized through the CMR program. See Section V. Fiscal Impact Statement.

The bill is effective on the same date that CS/CS/SB 556 or similar legislation takes effect if such legislation is enacted in the same legislative session or an extension thereof and becomes a law.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

General exemptions from the public records requirements are contained in the Public Records Act.¹⁰ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹¹

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹² Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹³

⁵ Section 119.01(1), F.S. 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.”

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.”

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

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ *See, e.g.*, s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹¹ *See, e.g.*, s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹² *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹³ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

Open Meetings Laws

The Florida Constitution provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., known as the “Government in the Sunshine Law,”¹⁷ or the “Sunshine Law,”¹⁸ 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 open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.²¹ Minutes of a public meeting must be promptly recorded and open to public inspection.²² Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

Constitutional Requirements for Passage of Public Records or Open Meetings Exemptions

The Legislature may create an exemption for public records or open meetings requirements by passing a general law by a two-thirds vote of both the House and the Senate.²⁵ The exemption must state with specificity the public necessity justifying the exemption and must be no broader

¹⁴ FLA. CONST., art. I, s. 24(b).

¹⁵ *Id.*

¹⁶ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all 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 formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

²¹ Section 286.011(6), F.S.

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST. art. I, s. 24(c).

than necessary to accomplish the stated purpose of the exemption.²⁶ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act²⁸ (the Act) prescribes a legislative review process for newly created or substantially amended²⁹ public records or open meetings exemptions, with specified exceptions.³⁰ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.³¹

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.³² 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;³³
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;³⁴ or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.³⁵

²⁶ *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

²⁷ *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 public records 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.

²⁸ Section 119.15, F.S.

²⁹ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

³⁰ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

³¹ Section 119.15(3), F.S.

³² Section 119.15(6)(b), F.S.

³³ Section 119.15(6)(b)1., F.S.

³⁴ Section 119.15(6)(b)2., F.S.

³⁵ Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.³⁶ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.³⁷ If the exemption is continued without substantive changes or if the exemption is continued and 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.³⁸

Conditional Medical Release

Conditional Medical Release (CMR), outlined in s. 947.149, F.S., was created by the Florida Legislature in 1992,³⁹ as a discretionary release of inmates who are “terminally ill” or “permanently incapacitated” and who are not a danger to themselves or others.⁴⁰ The Florida Commission on Offender Review (FCOR), which consists of three members, reviews eligible inmates for release under the CMR program pursuant to the powers established in s. 947.13, F.S.⁴¹ In part, s. 947.149, F.S., authorizes the FCOR to determine what persons will be released on CMR, establish the conditions of CMR, and determine whether a person has violated the conditions of CMR and take actions with respect to such a violation.

Florida Statistics for CMR

The FCOR has approved and released 73 inmates for CMR in the last three fiscal years, including:

- 38 in FY 2018-19;
- 21 in FY 2017-2018; and
- 14 in FY 2016-2017.⁴²

³⁶ 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?

³⁷ See generally s. 119.15, F.S.

³⁸ Section 119.15(7), F.S.

³⁹ Chapter 92-310, L.O.F.

⁴⁰ The FCOR, *Release Types, Post Release*, available at <https://www.fcor.state.fl.us/postrelease.shtml#conditionalMedicalRelease> (last visited January 23, 2020).

⁴¹ Section 947.149(3), F.S. Section 947.01, F.S., provides that the membership of the FCOR is three-members.

⁴² Emails from Alexander Yarger, Legislative Affairs Director, Florida Commission on Offender Review, RE: Conditional Medical Release Data and RE: Updated Conditional Medical Release Numbers (attachments on file with the Senate Committee on Criminal Justice) (December 15, 2017 and November 1, 2019, respectively). See also FCOR Annual Report FY 2017-18, p. 8, available at <https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202018%20WEB.pdf> (last visited January 23, 2020).

The DOC has recommended 149 inmates for release in the past three fiscal years, including:

- 76 in FY 2018-19;
- 39 in FY 2017-2018; and
- 34 in FY 2016-2017.⁴³

Currently, the DOC's only role in the CMR process is to make the initial designation of medical eligibility and to refer the inmate's case to the FCOR for an investigation and final decision.

Conditional Medical Release Program Created By CS/SB 556

PCS/CS/SB 556 repeals s. 947.149, F.S., which establishes the CMR program within the FCOR and creates s. 945.0911, F.S., to establish a CMR program within the DOC with the purpose of determining whether release is appropriate for eligible inmates, supervising the released inmates, and conducting revocation hearings. The CMR program established within the DOC retains similarities to the program currently in existence within the FCOR, including that the CMR program must include a panel of at least three people.

The bill provides that an inmate is eligible for consideration for release under the CMR program when the inmate, because of an existing medical or physical condition, is determined by the DOC to meet a specific definition enumerated in PCS/CS/SB 556. The bill requires the DOC to identify inmates who may be eligible for CMR based upon available medical information and authorizes the DOC to require additional medical evidence, including examinations of the inmate, or any other additional investigations it deems necessary for determining the appropriateness of the eligible inmate's release.

The bill requires the director of inmate health services to review specified evidence and provide a recommendation to the three-member panel, who must conduct a hearing within 45 days of the referral to determine whether CMR is appropriate for the inmate. A majority of the panel members must agree that release on CMR is appropriate for the inmate. Confidential records that are produced in the above-mentioned investigation may be discussed in the hearings by the panel members to aid in the determination of whether the inmate is appropriate for release.

Additionally, PCS/CS/SB 556 establishes a process for the revocation of CMR which may be based on two specified circumstances. The revocation hearing must be conducted by the three-member panel discussed above and a majority of the panel members must agree that revocation is appropriate for the medical releasee's CMR to be revoked. The bill requires the director of inmate health services or his or her designee to review any medical evidence pertaining to the medical releasee and provide the panel with a recommendation regarding the medical releasee's improvement and current medical or physical condition.

The panel may need to discuss confidential information in a similar manner during the revocation hearings as is possible during the original release hearing.

⁴³ *Id.*

III. Effect of Proposed Changes:

The bill adds a new subsection to s. 945.0911, F.S., to create an exemption to the public records and public meetings requirements related to the hearings conducted for the CMR program. Specifically, the bill provides that the portion of a panel review hearing conducted in accordance with s. 945.0911, F.S., during which the panel will discuss protected information that is exempt under state law or confidential under federal law, such as protected health information covered by the Health Insurance Portability and Protection Act, is exempt from s. 286.011, F.S., and s. 24(b), Art. I of the Florida Constitution. The bill also provides that certain requirements must be met if the panel must discuss exempt or confidential information during the course of its meeting, including that:

- The panel must announce at the public meeting that, in connection with the performance of the panel's duties, exempt or confidential information must be discussed;
- The panel must declare the specific reasons that it is necessary to close the meeting, or a portion thereof, in a document that is a public record and filed with the official records of the program; and
- The entire closed hearing must be recorded where the recording, which must be maintained by the DOC, includes the times of commencement and termination of the closed hearing or portion thereof, all discussion and proceedings, and the names of the persons present.

The bill also provides that the portion of the records the panel uses to determine the appropriateness of CMR which includes any of the inmate's exempt or confidential information is confidential and exempt from disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.

Further, the bill provides that any audio or video recording of, any transcript of, and any minutes and notes generated during, a closed hearing of the panel or closed portion of a hearing of the panel are confidential and exempt from disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution. The bill requires that such audio or video recording, transcript, and minutes and notes be retained pursuant to s. 119.021, F.S.

The bill authorizes certain persons to be present during the closed portion of the meeting, including members of the panel, staff supporting the panel's functions, the inmate for whom the panel has convened, and licensed medical personnel the panel has called to provide testimony. The panel must limit any closure of its meetings so that the public meetings policy of the state is maintained.

The bill provides that the exemptions in the bill are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature.

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

The Legislature finds that it is a public necessity that the hearings or portions of hearings during which exempt or confidential information is discussed by the review panel considering the inmate's conditional

medical release be made exempt from s. 286.011, Florida Statutes, and s. 24(b), Article I of the State Constitution. The Legislature finds that the rights of an inmate afforded under other state or federal laws that deem certain personal information confidential, such as protected health information covered by the Health Insurance Portability and Accountability Act, be upheld and that the inmate's personal information not be disclosed to the public during such hearings. The Legislature also finds that the recordings of a panel review hearing and the records used by the panel to make its determination be made confidential and exempt from disclosure under s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The inmate's exempt or confidential information, if publicly available, could be used to invade his or her personal privacy. Making these reports and discussions of such information confidential and exempt from disclosure will protect information of a sensitive personal nature, the release of which could cause unwarranted damage to the privacy rights of the inmate. The Legislature therefore finds that it is a public necessity that such information remain confidential and exempt.

The bill is effective on the same date that CS/CS/SB 556 or similar legislation takes effect if such legislation is enacted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and 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 for final passage of a bill creating or expanding an exemption to the public records or open meeting requirements. This bill enacts a new exemption for portions of a panel meeting that discusses confidential information related to an inmate being considered for release into the CMR program from open meetings requirements as well as any records that are created in support of such exemptions. Thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a bill creating or expanding an exemption to the public records or open meeting requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires an exemption to the public records requirements and open meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect confidential and exempt information of an inmate or medical releasee who is being considered for the program or for revocation of the release, respectively. This bill exempts only that portion of a panel meeting that discusses confidential information related to the inmate or releasee from open meetings requirements as well as any records that are created in support of such exemptions. The exemption does not appear to be broader than necessary to accomplish the purpose of the law

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill does not appear to have a fiscal impact on state or local governments. Costs incurred by the DOC in closing such meetings and responding to public records requests regarding these exemptions should be offset by savings realized through the CMR program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 945.0911 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 Governmental Oversight and Accountability on February 10, 2020:

The CS:

- Revises the description of the information subject to the exemption to include all information exempt under state law or confidential under federal law.
- Adds to the public records portion an exemption for any transcript of the closed meeting produced.
- Revises the provision that the panel may authorize anyone they deem appropriate to remain in the closed meeting to be a list including the inmate for whom the panel has convened and licensed medical personnel called by the panel to provide testimony.
- Makes conforming changes to the public necessity statement and title.

CS by Criminal Justice on January 28, 2020:

The committee substitute provides the public records exempted by the bill are confidential and exempt, rather than just exempt, ensuring that the confidential status of protected health information that may be discussed in such hearings is maintained.

- B. **Amendments:**

None.