

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 406

INTRODUCER: Health Policy Committee and Senator Stargel

SUBJECT: Public Records/Minor's Petition to Waive Consent/Abortion

DATE: January 10, 2020 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------------|----------------|-----------|------------------|
| 1. | <u>Looke / Kibbey</u> | <u>Brown</u> | <u>HP</u> | Fav/CS |
| 2. | <u>Ponder</u> | <u>McVaney</u> | <u>GO</u> | Favorable |
| 3. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 406 creates s. 390.01118, F.S., to make confidential and exempt from public inspection and copying any information that can be used to identify a minor who is petitioning a circuit court for a judicial waiver pursuant to the Parental Consent for Abortion Act established in CS/SB 404. Specifically, the bill provides that any such information is:

- Confidential and exempt from article I, section 24(a) of the State Constitution, if held by a circuit court or an appellate court; and
- Confidential and exempt from section 119.07(1) and article I, section 24(a) of the State Constitution, if held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission.

The bill provides legislative findings that the public records exemption is a public necessity and provides that the public records exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect on the same date that CS/SB 404 (July 1, 2020) or similar legislation takes effect.

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, section 11.0431, Florida Statutes (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, chapter 119, F.S., provides requirements for public records held by executive agencies.

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 governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

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).

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).

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

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

When creating or expanding a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹² 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.¹³ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁴

Public Records and the Judicial Branch

The Public Records Act does not apply to judicial records.¹⁵ As a coequal branch of government, the judicial branch “is not an ‘agency’ subject to the supervision or control by another coequal branch of government.”¹⁶

However, the judicial branch is required to maintain access to public records and court proceedings pursuant to article 1, section 24 of the Florida Constitution.¹⁷ To meet its

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 FLA. CONST. art. I, s. 24(c).

¹¹ *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).

¹² 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹³ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁴ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁵ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). *See also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). Likewise, the Public Records Act does not apply to the Legislature. Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

¹⁶ *Times Pub. Co. v. Ake*, 645 So. 2d 1003, 1004 (Fla. 2d DCA 1994), *approved*, 660 So. 2d 255 (Fla. 1995). *See also* FLA. CONST., art. II, s. 3 (providing for the separation of powers between the executive, judicial, and legislative branches; stating “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”). *See also* Florida Attorney General, GOVERNMENT-IN-THE-SUNSHINE MANUAL, A REFERENCE FOR COMPLIANCE WITH FLORIDA’S PUBLIC RECORDS AND OPEN MEETINGS LAWS, *Judiciary* at 10-11, (Vol. 39, 2017 Ed.), available at [http://myfloridalegal.com/webfiles.nsf/wf/mnos-akbs9l/\\$file/2017+sunshine+law+manual.pdf](http://myfloridalegal.com/webfiles.nsf/wf/mnos-akbs9l/$file/2017+sunshine+law+manual.pdf).

¹⁷ *See* GOVERNMENT-IN-THE-SUNSHINE MANUAL at 60-65, *supra*. Even before article I, section 24 was passed to require access to public records and meetings by all branches of government, the Florida Supreme Court had recognized that access to court proceedings must be safeguarded as open, “public events.” *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116–19 (Fla. 1988) (“[B]oth civil and criminal court proceedings in Florida are public events and adhere to the

constitutional obligation, the judicial branch adopted Florida Rule of Judicial Administration 2.420 entitled “Public Access to and Protection of Judicial Branch Records.” In pertinent part, Rule 2.420 provides:

(a) Scope and Purpose. Subject to the rulemaking power of the Florida Supreme Court provided by article V, section 2, Florida Constitution, the following rule shall govern public access to and the protection of the records of the judicial branch of government. The public shall have access to all records of the judicial branch of government, except as provided below. . . .

....
(c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:

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- (7) All records made confidential under the Florida and United States Constitutions and Florida and federal law;
 - (8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida, and by the rules of the Judicial Qualifications Commission;

....
(d) Procedures for Determining Confidentiality of Court Records.

- (1) The clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule.

As evidenced by Rule 2.420, the judiciary may adopt, and has adopted, “legislative statements of policy as part of the rules governing matters within the jurisdiction of the judiciary,” including the disclosure or public inspection of court records.¹⁸

well-established common law right of access to court proceedings and records. . . . The reason for openness is basic to our form of government. Public trials are essential to the judicial system’s credibility in a free society.”) (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n. 17 (1980)). See also William A. Buzzett and Deborah K. Kearney, *Commentary to 1992 Addition [of FLA. CONST., art. I, s. 24]*, Fla. Stat. Ann. (Westlaw 1992), noting the following history leading to the passage of article I, section 24:

Florida’s public records and open meetings laws have been a matter of statute since 1967. (Earlier requirements for public records had existed for some time.) Those statutes were not designed to apply to the legislative or judicial branches of state government, but were expressly intended to apply throughout the executive branch and to local governments, including counties, municipalities, and districts. The Supreme Court, the Senate and the House of Representatives each provided some form of access to records and proceedings by rule. In 1978, the Constitution Revision Commission proposed elevating these laws to constitutional status and applying them to records and meetings of the Legislature. That proposal was not adopted.

In *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), the Florida Supreme Court determined that, based on separation of powers requirements, the public records law did not apply to the legislative branch, nor to constitutional officers of the other branches. The decision meant that records of legislators, as well as those of the governor and cabinet officers, at least with respect to the exercise of their constitutional powers, were not subject to the law. The decision caused a stir among the public and particularly the press. Efforts were quickly begun for constitutional change, which concluded with the successful passage of this amendment.

¹⁸ See *Florida Pub. Co. v. State*, 706 So. 2d 54, 56 (Fla. 1st DCA 1998) (citing *Timmons v. Combs*, 608 So.2d 1, 3 (Fla.1992)). See also *Barron*, 531 So. 2d 113, 118 (“closure of court proceedings or records should occur only when

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended¹⁹ public records or open meetings exemptions,²⁰ with specified exceptions.²¹ 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.²²

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 to meet such public purpose.²³ 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;²⁴
- 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;²⁵ or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²⁶

necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f). . . . Further, we note that it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted. However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.”) (holding that while a court has the power to close a proceeding, because a “strong presumption of openness exists for all court proceedings,” the court must consider certain factors before granting a request to close a proceeding).

¹⁹ 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.

²⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

²¹ 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.

²² Section 119.15(3), F.S.

²³ Section 119.15(6)(b), F.S.

²⁴ Section 119.15(6)(b)1., F.S.

²⁵ Section 119.15(6)(b)2., F.S.

²⁶ Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.²⁷ 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.²⁸ 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.²⁹

Office of Criminal Conflict and Civil Regional Counsel

In 2007, the Legislature created the Office of Criminal Conflict and Civil Regional Counsel (Office) to provide adequate representation to persons entitled to court-appointed counsel under the U.S. or Florida Constitution or as authorized by general law. In creating the Office, the Legislature intended to provide adequate representation in a fiscally sound manner, while safeguarding constitutional principles.³⁰ The Office provides counsel only in cases where a judge appoints the office. Counsel may be provided in both criminal and civil cases.³¹

The Justice Administrative Commission

The Justice Administrative Commission (JAC), created in 1965, provides administrative services on behalf of 49 judicial related offices. Currently, the JAC administratively serves 20 Offices of State Attorney, 20 Offices of Public Defender, five Offices of Criminal Conflict and Civil Regional Counsel, three Offices of Capital Collateral Regional Counsel, and the Statewide Guardian ad Litem Program. Services provided are primarily in the areas of accounting, budget, financial services, and human resources. While the JAC administratively serves these offices, the JAC does not supervise, direct, or control the offices it serves.³²

Parental Notice of Abortion Act and Waiver of Notice Requirements

Section 390.01114, F.S., the Parental Notice of Abortion Act, requires a physician to give notice to one parent or to the legal guardian prior to terminating the pregnancy of a minor. Exceptions are provided. Section 390.01114(4), F.S., sets forth the procedure for a minor to seek a judicial waiver of the notice requirement. Under s. 390.01116, F.S., when a minor petitions a circuit

²⁷ 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?

²⁸ See generally s. 119.15, F.S.

²⁹ Section 119.15(7), F.S.

³⁰ Section 27.511, F.S.

³¹ See <https://rc1fl.com/about-us/case-types>, (last visited on November 7, 2019).

³² See <https://www.justiceadmin.org/commissioners/history.aspx>, (last visited on November 7, 2019).

court for a waiver of the notice requirements pertaining to a minor seeking to terminate her pregnancy, any information in documents related to the petition which could be used to identify the minor is confidential and exemption from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. A subsequent amendment to Rule 2.420 was adopted to direct clerks of court to designate and maintain the confidentiality of this information within a court record.³³

III. Effect of Proposed Changes:

Section 1 creates s. 390.01118, F.S., to establish a public records exemption for any information that can be used to identify a minor who is petitioning a circuit court for a judicial waiver pursuant to the Parental Consent for Abortion Act established in CS/SB 404, if CS/SB 404 or a similar bill becomes law. Specifically, the bill provides that any such information is:

- Confidential and exempt from article I, section 24(a) of the State Constitution, if held by a circuit court or an appellate court; and
- Confidential and exempt from section 119.07(1) and article I, section 24(a) of the State Constitution, if held by the Office or the JAC.

Section 2 provides legislative findings of public necessity as follows:

- It is a public necessity to keep confidential and exempt from public disclosure information contained in a court record which could be used to identify a minor who is petitioning the court for a waiver from the statutory requirement that a parent or legal guardian give consent before the minor may obtain an abortion. 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 minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the 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.
- It is a public necessity to keep this identifying information in records held by the court confidential and exempt in order to protect the privacy of the minor. The State Constitution contains an express right of privacy in article I, section 23. Further, the United States Supreme Court has repeatedly required parental-consent laws to contain judicial-bypass procedures and to preserve confidentiality at every level of court proceedings in order to protect the privacy rights of the minor. Without the confidentiality and exemption provided in this act, the disclosure of personal identifying information would violate the right of privacy of the minor and would place the constitutionality of the state's program providing for a judicial waiver of consent in question.

The bill also provides that the public records exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2025, unless reviewed and saved from repeal by the Legislature.

³³ Chapter 2005-52, L.O.F., creating a new parental notice of abortion act, had the following effective date: "This act shall take effect upon the adoption of rules and forms by the Supreme Court, but no later than July 1, 2005." It was approved by the Governor on May 25, 2005. Chapter 2005-104, L.O.F., amending an accompanying public records exemption, had an effective date simultaneous with the underlying parental notice law and was approved by the Governor on June 1, 2005. On June 30, 2005, the Supreme Court issued an opinion adopting rule amendments related to the new laws.

Section 3 provides the bill takes effect on the same date that CS/SB 404 or similar legislation takes effect if such legislation is adopted 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 or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, section 24(c) of the State 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 requirements. This bill enacts a new exemption for information that can be used to identify a minor who is petitioning a circuit court for a judicial waiver pursuant to the Parental Consent for Abortion Act established in CS/SB 404. Thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, section 24(c) of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemptions.

Breadth of Exemption

Article I, section 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of this bill is to protect information that can be used to identify a minor who is petitioning a circuit court for a judicial waiver pursuant to the Parental Consent for Abortion Act established in CS/SB 404. This bill exempts only such information from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the bill.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The public necessity statement in section 2 of the bill provides findings that the State Constitution contains an express right of privacy in article I, section 23. Further, the United States Supreme Court has repeatedly required parental consent laws to contain judicial bypass procedures and to preserve confidentiality at every level of court proceedings in order to protect the privacy rights of the minor. Without the confidentiality and public records exemption provided in this bill, the disclosure of personal identifying information would violate the right of privacy of the minor and would place the constitutionality of the state's process to provide for a judicial waiver of consent in question.

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

None.

B. Private Sector Impact:

The private sector will be subject to the any cost associated with the custodian of records making redactions necessary in response to a public records request.

C. Government Sector Impact:

The custodian of the records made exempt by this bill will incur costs related to the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 390.01118 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 by Health Policy on December 10, 2019:**

The CS revises the contingent effective date so that the bill will take effect on the same date that CS/SB 404 or similar legislation takes effect if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
