

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 Criminal Justice

BILL: CS/SB 1974

INTRODUCER: Criminal Justice Committee and Senator Pizzo

SUBJECT: Public Records/Domestic Violence Injunction

DATE: March 24, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Stokes</u>	<u>Jones</u>	<u>CJ</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1974 is the public records exemption linked to SB 1972. This bill creates a public records exemption for a petition, records, and documents relating to a petition for a domestic violence injunction when the petition was withdrawn, dismissed, or a ruling was issued in favor of the respondent and the court has ordered that those items be sealed upon the petition of the respondent. SB 1972 creates s. 741.301, F.S., permitting a person, who was the respondent to a domestic violence injunction petition, to request that the court seal the injunction petition and all related records and documents, if the petition for the injunction was withdrawn or dismissed or if there was a ruling in favor of the respondent. The petition for sealing may be filed at any time.

The bill further provides that the exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2026, unless it is reviewed and saved from repeal through enactment by the Legislature.

The bill also contains a statement of public necessity as required by s. 24(c), Art. I of the State Constitution. According to the statement, allowing the sealing of those petitions, records, and documents would allow the requestors to continue their lives without facing barriers to employment and other life opportunities including possible discrimination and public criticism.

Because this bill creates a public records exemption, it will require a two-thirds vote of each house in order to pass.

The bill takes effect on the same date that SB 1972, or similar legislation takes effect, if that legislation is adopted 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.

Court Files, Records, and Exemptions

Pursuant to s. 119.0714, F.S., nothing in the public records chapter may be construed to exempt a public record that was made a part of a court file *unless* the record has been specifically closed by court order, or falls into one of eleven enumerated categories. The final exemption, enacted in 2017, provides an exemption for a petition, and its contents for an injunction for protection against domestic violence which is dismissed without a hearing, dismissed at an ex parte hearing due to failure to state a claim or lack of jurisdiction, or dismissed for any reason having to do with the sufficiency of the petition itself *without an injunction being issued*. The exemption applies to records relating to petitions dismissed on or after July 1, 2017.⁵

Court Rules and Confidentiality

The Florida Constitution mandates that the public must have access to court records, subject only to certain enumerated limitations.⁶ Article V, section 2 of the State Constitution grants rulemaking power to the Florida Supreme Court. Subject to that rulemaking power, the Court has adopted rules that “govern public access to and the protection of the records of the judicial branch of government.”⁷ Rule 2.420 of the Florida Rules of Judicial Administration states that the public shall have access to all records of the judicial branch except as provided in the rule. The “judicial branch” is defined to include the clerks of court when acting as an arm of the court.

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2020-2022).

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

⁵ Chapter 2017-14, s. 3, L.O.F.

⁶ Art. I, s. 24, Fla. Const.

⁷ Fla. R. Jud. Admin. 2.420(a).

Another portion of the rule states that the clerk of the court will designate and maintain the confidentiality of information contained within a court record that is described in the rule.⁸

The rules provide that specified records of the judicial branch⁹ must be confidential, including all records made confidential under the Florida and United States Constitution and Florida and federal law.¹⁰ “Confidential,” means that such information is exempt from the public right of access under article I, section 24(a) of the Florida Constitution and may be released only to the persons or organizations designated by law, statute, or court order. As applied to information contained within a court record, the term “exempt” means that such information is confidential.¹¹ The rule further lists a series of records that will be maintained as confidential including, but not limited to, records relating to adoption, HIV test results and the identity of persons tested, birth records and portions of death and fetal death records, information that can be used to identify a minor who petitions for a waiver of parental or guardian notice of consent when seeking to terminate a pregnancy, and clinical records under the Baker Act.¹²

However, the rule does not include the domestic violence injunction petition listed above. According to correspondence from the Florida Court Clerks and Comptrollers, in 2017, the Clerks requested guidance from the Florida Supreme Court to resolve their dilemma after the legislation was passed in 2017. Should the clerks release the confidential information that the Legislature intended to be confidential, or did they need to wait until the Court added the item to Rule 2.420 before keeping the items confidential?¹³

The Court ultimately decided that it would *not* amend the rule to include the domestic violence injunction materials.¹⁴ The Rules of Judicial Administration Committee stated that it did not believe that the statute was an appropriate subject for court rule. The Committee reasoned that the statute did not make the petition and its contents confidential upon filing, but rather upon dismissal for certain reasons and in certain circumstances. Because the clerks would not necessarily be able to glean why the petition was dismissed from the face of the order, there was no feasible way for the clerks to reliably determine in all cases when the provisions of the statute came into play. The Committee concluded and recommended that the burden of ensuring the confidentiality of the injunction petition should be upon the party or the party’s attorney against whom the injunction was sought when the petition was dismissed for the reasons that would trigger the confidentiality protections in statute. They felt that the burden should not be upon the

⁸ Fla. R. Jud. Admin. 2.420(d)(1).

⁹ Fla. R. Jud. Admin. 2.420(b), providing that “records of the judicial branch,” are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity and consists of: (1) “court records,” which are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings; and (2) “administrative records,” which are all other records made or received pursuant to court rule, law, or ordinance, or in connection with the transaction of official business by any judicial branch entity.

¹⁰ *Id.*

¹¹ *Id.*

¹² Fla. R. Jud. Admin. 2.420(c)(1)-(10).

¹³ Correspondence from Marcia M. Johnson, President, Florida Court Clerks & Comptrollers, to the Honorable Jorge Labarga, Chief Justice of the Florida Supreme Court, (July 31, 2017) (on file with the Senate Committee on Judiciary).

¹⁴ Correspondence from John A. Tomasino, Clerk of the Supreme Court of Florida, to Marcia M. Johnson, President, Florida Court Clerks & Comptrollers (Jan. 10, 2018) (on file with the Senate Committee on Judiciary).

clerks by creating a new section in the Rules of Judicial Administration.¹⁵ This remains the current solution.

A court, however, can determine that any court record is confidential by:

- A finding that confidentiality is required to:
 - Prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;
 - Protect trade secrets;
 - Protect a compelling governmental interest;
 - Obtain evidence to determine legal issues in a case;
 - Avoid substantial injury to innocent third parties;
 - 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 proceeding sought to be closed;
 - Comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law.
- A finding that no less restrictive measures are available to protect the interest set forth above.¹⁶

A person may request the court to determine the confidentiality of trial court records in noncriminal cases. Such request must be made in writing in the form of a motion captioned, “Motion to Determine Confidentiality of Court Records.” Such motion must:

- Identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information subject to the confidentiality determination;
- Specify the bases for determining that such court records are confidential without revealing confidential information; and
- Set forth the specific legal authority and any applicable legal standards for determining such court records to be confidential without revealing confidential information.¹⁷

Florida statute and rule provide for the sealing of certain criminal history records. A criminal history record that is ordered sealed by the court is confidential and exempt from public record laws, and only available to specified persons.¹⁸

¹⁵ Correspondence from Judson Lee Cohen, Chair, Rules of Judicial Administration Committee to John A. Tomasino, Clerk of the Supreme Court of Florida (Nov. 21, 2017) (on file with the Senate Committee on Judiciary).

¹⁶ Fla. R. Jud. Admin. 2.420(c).

¹⁷ Fla. R. Jud. Admin. 2.420(e).

¹⁸ Section 943.059(6), F.S., providing that a sealed criminal history record is available to the subject of the record, the subjects attorney, criminal justice agencies for specified purposes, judges in the state court system for specified purposes, and specified entities for licensing access authorization and employment purposes; *see also* Rule 2.420 Fla. R. Gen. Prac. & Jud. Admin.

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁹ (the Act) prescribes a legislative review process for newly created or substantially amended²⁰ public records or open meetings exemptions, 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.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

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

¹⁹ Section 119.15, F.S.

²⁰ 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.

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.

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.

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

Statement of Public Necessity

The State Constitution, in s. 24(c), Art. I, requires that each law establishing a public record exemption provide a statement of public necessity. The public necessity statement must specify the reason for the public necessity exemption and may be no broader than necessary to accomplish the stated purpose of the law. The law must pass each House of the Legislature by a two-thirds vote.

Domestic Violence Injunctions

Temporary Injunctions

If someone believes that she or he is a victim of domestic violence³⁰ or has reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence, that person may petition a circuit court for an injunction for protection against domestic violence.³¹ The clerk's office will take the sworn petition to a judge who rules on the petition, generally within 24 hours.

The judge examines the petition, *ex parte*, meaning that the judge examines only the information submitted by the petitioner. The parties are generally not present, and no additional evidence is submitted. If it appears to the court that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction, pending a full hearing at a later date.³²

Any *ex parte* temporary injunction is effective for a fixed period of time that does not exceed 15 days. A full hearing will be set for a date that is no later than the date when the temporary injunction expires, although the court may grant a continuance for good cause shown, including a continuance to obtain service of process on the respondent. A temporary injunction will be extended if it is necessary to remain in full force and effect during the continuance.³³

Injunctions

Once notice is given, a hearing is held, and the court concludes that the petitioner is a victim of domestic violence or has reasonable cause to believe that she or he is in imminent danger of

²⁹ Section 119.15(7), F.S.

³⁰ "Domestic violence" means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member. Section 741.28(2), F.S.

"Family or household member" means spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit. Section 741.28(3), F.S.

³¹ Section 741.30(1)(a), F.S.

³² Section 741.30(5)(a), F.S.

³³ Section 741.30(5)(c), F.S.

becoming a victim, the court may grant an injunction.³⁴ The injunction remains in effect until it is modified or dissolved. The petitioner or respondent may move at any time for those actions.³⁵

III. Effect of Proposed Changes:

SB 1974 is the public records exemption linked to SB 1972. This bill creates a public records exemption for a petition, records, and documents relating to a petition for a domestic violence injunction when the petition was withdrawn, dismissed, or a ruling was issued in favor of the respondent and the court has ordered that those items be sealed upon the petition of the respondent. SB 1972 creates s. 741.301, F.S., permitting a person, who was the respondent to a domestic violence injunction petition, to request that the court seal the injunction petition and all related records and documents, if the petition for the injunction was withdrawn or dismissed or if there was a ruling in favor of the respondent. The petition for sealing may be filed at any time.

The bill complies with the provisions of the Open Government Sunset Review Act. Section 741.301(2)(b), F.S., states that the new exemption language is subject to the Act and will stand repealed on October 2, 2026, unless reviewed and saved from repeal by reenactment by the Legislature.

The bill also contains a statement of public necessity as required by s. 24(c), Art. I of the State Constitution. The public necessity statement provides that:

The Legislature finds that it is a public necessity that petitions filed under ss. 741.30 and 741.301, Florida Statutes, and all records and documents related to the petitions be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution unless the domestic violence petition was granted. Persons who have been accused of domestic violence face barriers to employment and other life opportunities, and knowledge that they were so accused, although no injunction was granted, would expose them to possible discrimination and public obloquy. It is necessary that these petitions and related documents be made confidential and exempt in order for such petitioners to have the chance to continue their lives without such consequences when no injunction was ever issued.

The bill takes effect on the same date that SB 1972, or similar legislation takes effect, if that legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

³⁴ Section 741.30(6)(a), F.S.

³⁵ Section 741.30(6)(c), F.S.

B. Public Records/Open Meetings Issues:***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 or expanded public records or public meeting exemption. Because this bill creates an exemption for domestic violence injunction records when the injunction was never issued, the bill requires a two-thirds vote.

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 exemption. Because this bill creates an exemption for domestic violence injunction records when the injunction was never issued, the bill provides 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 makes confidential and exempt domestic violence injunction records when the injunction was never issued. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 741.301, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 23, 2021:

The committee substitute is a technical amendment to add a reference to the linked bill, SB 1972.

B. Amendments:

None.