

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 Judiciary

BILL: CS/SB 1846

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Bean

SUBJECT: Public Records/Respondent's Name

DATE: February 4, 2022

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|------------------|
| 1. | <u>Delia</u> | <u>Cox</u> | <u>CF</u> | Fav/CS |
| 2. | <u>Ravelo</u> | <u>Cibula</u> | <u>JU</u> | Favorable |
| 3. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1846 makes the following information, filed with or by the court in proceedings under the Baker Act or Marchman Act, confidential and exempt from public records requirements:

- The respondent's name (at trial and on appeal);
- Petitions for voluntary and involuntary admission for mental health examination;
- Applications for voluntary and involuntary admission for mental health examinations or treatment; and
- All petitions or applications for voluntary and involuntary substance abuse treatment or assessment and stabilization.

The bill, however, clarifies that the clerk of the court may use a respondent's name for the purpose of scheduling and adjudicating cases.

The bill provides a public necessity statement, and extends the scheduled repeal dates of the public record exemptions under the Baker Act by 3 years, and under the Marchman Act by 5 years, to October 2, 2027.

The bill is likely to have an insignificant, negative fiscal impact on courts throughout the state. See Section V. Fiscal Impact Statement.

This bill provides that it takes effect on the same date that SB 1844 or similar legislation takes effect. CS/SB 1844, which is tied to this bill, has an effective date of July 1, 2022.

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 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., known as the Public Records Act, provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

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

Section 119.011(12), F.S., defines “public records” to include:

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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

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

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.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

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.⁹ 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.¹⁰

General exemptions from the public records requirements are contained in the Public Records Act.¹¹ Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹²

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as "confidential and exempt" are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as "exempt" may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act¹⁶ (the Act), prescribe a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ The Act requires the repeal of

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ *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).

¹¹ 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).

¹² 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).

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S.

¹⁷ 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.

¹⁸ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹

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.²⁰ 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;²¹
- 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;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to 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.²⁵ 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁶

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?

²⁵ See *generally* s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

Confidentiality of Records under the Baker and Marchman Acts

Baker Act

Section 394.4615, F.S., in part, provides that clinical records related to procedures under the Baker Act are confidential and exempt²⁷ and may not be disclosed without written consent of the individual, with certain exceptions. Such exceptions include specified disclosure by the individual, a guardian, or a guardian advocate.²⁸

Court records, including all petitions for voluntary and involuntary admission for mental health treatment, court orders, and related records that are filed with or by a court under the Baker Act are also confidential and exempt from disclosure.²⁹ The clerk of the court is authorized to disclose court records to specified entities, including, for example, parties to the proceedings and certain governmental entities.³⁰

Current law does not make confidential and exempt:

- A respondent's name, at trial and on appeal, for Baker Act cases; or
- Information contained in an application, rather than a petition, for voluntary and involuntary admission for mental health examinations under the Baker Act.

Marchman Act

All service provider records related to procedures under the Marchman Act are confidential and exempt and may not be disclosed without written consent of the individual, with certain exceptions.³¹ Additionally, petitions for involuntary assessment and stabilization, court orders, and related records that are filed with the court under the Marchman Act are confidential and exempt from disclosure.³² However, the clerk of the court may disclose such records to specified entities, including, for example, parties to the proceedings and certain governmental entities.³³

Current law does not make confidential and exempt:

- A respondent's name, at trial and on appeal, for Marchman Act cases;
- Information contained in an application, rather than a petition, for involuntary assessment and stabilization under the Marchman Act; or
- Petitions for voluntary assessment and stabilization under the Marchman Act.

III. Effect of Proposed Changes:

The bill amends ss. 394.464 and 397.6760, F.S., expanding existing public records exemptions to include:

- A respondent's name, at trial and on appeal, under both the Baker Act and Marchman Act;

²⁷ Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

²⁸ Section 394.4615(1)-(2), F.S.

²⁹ Section 394.464(1), F.S.

³⁰ Section 394.464(1)-(2), F.S.

³¹ Section 397.501(7), F.S.

³² Section 397.6760(1), F.S.

³³ Section 397.6960(1)-(2), F.S.

- Petitions for voluntary Baker Act examinations;
- Applications for voluntary or involuntary examinations or treatment under the Baker Act;
- Petitions for voluntary and involuntary substance use disorder treatment under the Marchman Act; and
- Applications for voluntary and involuntary assessment and stabilization under the Marchman Act.

The bill applies the exemption to appeals pending or filed under either the Baker Act or Marchman Act on or after July 1, 2022. The bill also adds service providers to the list of individuals to whom the clerk of court may disclose confidential and exempt pleadings and other documents under either the Baker Act or Marchman Act.

The bill continues to prohibit the clerk of court from publishing personal identifying information on a court docket or in a publicly accessible file, as under current law, but creates a narrow exception that allows courts to use a respondent's name to schedule and adjudicate cases. The bill also applies the existing exemption to all court filings for voluntary Marchman Act cases.

The bill extends the current scheduled repeal dates of the public record exemptions provided under the Baker Act by 3 years, and under the Marchman Act by 5 years, to October 2, 2027. The bill maintains the public record exemptions for the disclosure of pleadings and other documents filed with a court involving admission proceedings.

The bill provides a public necessity statement, specifying that the exemption protects sensitive personal information, the release of which could cause unwarranted damage to the reputation of an individual. The statement provides:

Legislature finds that it is a public necessity that applications for voluntary and involuntary mental health examinations and substance abuse treatment which are filed with or by a court and a respondent's name, which is published on a court docket and maintained by the clerk of the court, under part I of chapter 394 and parts IV and V of chapter 397, Florida Statutes, 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 mental health and substance abuse impairments of a person are medical conditions that should be protected from dissemination to the public. A person's health and sensitive personal information regarding his or her mental health or substance abuse impairment are intensely private matters. Making such applications, petitions, orders, records, and identifying information confidential and exempt from disclosure will protect such persons from the release of sensitive, personal information that could damage their and their families' reputations. The publication of personal identifying information on a physical or virtual docket, regardless of whether any other record is published, defeats the purpose of protections otherwise provided. Further, the knowledge that such sensitive, personal information is subject to disclosure could have a chilling effect on a person's willingness to seek out and comply with mental health or substance abuse treatment services.

This bill provides that the act shall take effect on the same date that an unspecified bill or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. CS/SB 1844 has an effective date of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by article VII, section 18 of the State Constitution.

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 bill creating or expanding an exemption to the public records requirements. This bill expands existing exemptions under the Baker and Marchman Acts to include a respondent's name, at trial and on appeal, on applications for voluntary mental health examinations or treatment and substance abuse treatment, and appeals pending or filed on or after July 1, 2022. 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 creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 3 of the bill contains a statement of public necessity for the exemption.

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 the law is to protect personal identifying information of individuals who have been the subject of an involuntary examination under the Baker Act, or who have applied for voluntary substance use disorder treatment under the Marchman Act, at trial and on appeal. This bill exempts only such personal identifying information from the public records requirements. 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 Office of the State Courts Administrator anticipates that CS/SB 1846 will have a minimal, but indeterminate, impact on expenditures of the State Courts System, if any.³⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 394.464 and 397.6760.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

CS by Children and Families on February 1, 2022:

The committee substitute specifies that the bill takes effect on the same date that CS/SB 1844 or similar legislation takes effect.

³⁴ The Office of the State Courts Administrator, *House Bill 1157 Agency Analysis* (January 21, 2022) p. 2. (on file with the Senate Committee on Children, Families, and Elder Affairs).

B. Amendments:

None.

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