

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 197 Pub. Rec./Nonjudicial Arrest Record of a Minor

**SPONSOR(S):** Smith, D. and others

**TIED BILLS:** CS/HB 195 **IDEN./SIM. BILLS:** CS/SB 344

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	17 Y, 0 N	Frost	Hall
2) Government Operations Subcommittee	16 Y, 0 N	Villa	Toliver
3) Judiciary Committee			

**SUMMARY ANALYSIS**

The Department of Law Enforcement (FDLE) must expunge a nonjudicial arrest record of a juvenile who has successfully completed a diversion program for a misdemeanor offense and who otherwise meets the eligibility criteria. Moreover, a juvenile who successfully completes a diversion program for a first-time misdemeanor offense may lawfully deny or fail to acknowledge his or her participation in a diversion program and the expunction of a nonjudicial arrest record, unless the inquiry is made by a criminal justice agency for the purpose of: determining eligibility for other diversion programs; a criminal investigation; or making a prosecutorial decision under s. 985.15, F.S.

CS/HB 195 (2022), to which this bill is linked, requires FDLE to expunge a juvenile’s nonjudicial arrest record following his or her successful completion of a diversion program for any offense that is not a forcible felony or a felony involving the manufacture, sale, purchase, transport, possession, or use of a firearm or weapon, rather than only a misdemeanor. Under CS/HB 195 (2022), a juvenile who is granted an expunction based on successfully completing a diversion program for a qualifying offense, rather than only a first-time misdemeanor, may lawfully deny or fail to acknowledge his or her participation in a diversion program and the expunction of a nonjudicial arrest record, except when the inquiry is made by a criminal justice agency for specified purposes.

This bill, which is linked to the passage of CS/HB 195 (2022), amends s. 943.0582, F.S., to create a public records exemption for the sealed or expunged nonjudicial arrest records of a minor who successfully completes a diversion program for a qualifying offense. Under the bill, such records are confidential and exempt from public disclosure, except that the records must be made available to criminal justice agencies only for the purpose of:

- Determining eligibility for diversion programs;
- A criminal investigation; or
- Making a prosecutorial decision under s. 985.15.

The bill provides for retroactive application of the public record exemption. It also provides for repeal of the public record exemption on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill may have a fiscal impact on agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record.

The bill will become effective on the same date that CS/HB 195 (2022) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

**Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, section 24(a) of the Florida Constitution.<sup>1</sup> The general law must state with specificity the public necessity justifying the exemption<sup>2</sup> and must be no broader than necessary to accomplish its purpose.<sup>3</sup>

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.<sup>5</sup>

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup>

##### Juvenile Diversion Expunction

###### *Diversion Programs*

Diversion is a program designed to divert a juvenile from entering the juvenile justice system by placing him or her on a less restrictive track that affords more opportunities for rehabilitation and restoration.<sup>7</sup> The goal of diversion is to maximize the opportunity for success and minimize the likelihood of recidivism.<sup>8</sup>

A juvenile may have the opportunity to participate in either a prearrest or postarrest diversion program. A prearrest diversion program is an intervention program that holds a juvenile accountable for his or her

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<sup>1</sup> Art. I, s. 24(c), Fla. Const.

<sup>2</sup> This portion of a public record exemption is commonly referred to as a "public necessity statement."

<sup>3</sup> Art. I, s. 24(c), Fla. Const.

<sup>4</sup> S. 119.15, F.S.

<sup>5</sup> S. 119.15(6)(b), F.S.

<sup>6</sup> S. 119.15(3), F.S.

<sup>7</sup> Florida Department of Juvenile Justice, *Glossary*, <http://www.djj.state.fl.us/youth-families/glossary> (last visited Jan. 23, 2022).

<sup>8</sup> Center for Health & Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiatives*, pg. 6, (December 2013),

[https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report\\_web.pdf](https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf) (last visited Jan. 23, 2022).

behavior, while avoiding a court proceeding or formal arrest record.<sup>9</sup> A postarrest diversion program is a similar intervention program, but diverts a juvenile from further court proceedings after an arrest.<sup>10</sup> While prearrest diversion diverts a juvenile before an arrest record is ever created, in postarrest diversion, an arrest record is created and maintained pending the juvenile's participation in and completion of the diversion program. Upon successfully completing a postarrest diversion program, a juvenile's charges are dismissed.

The decision to refer a juvenile to a diversion program is at the discretion of either the law enforcement officer who interacts with the juvenile at the time the offense is committed or the state attorney who is assigned the case. Examples of such programs are Community Arbitration, Juvenile Alternative Services Program, Teen Court, Intensive Delinquency Diversion Services, Civil Citation, Boy and Girl Scouts, Boys and Girls Clubs, mentoring programs, and alternative schools.<sup>11</sup>

### *Expunction*

Generally, expunction is the court-ordered physical destruction or obliteration of a criminal history record or portion of a record by any criminal justice agency having custody of the record.<sup>12</sup> A juvenile who completes one of the following diversion programs may petition for juvenile diversion expunction:<sup>13</sup>

- Civil citation or a similar prearrest diversion program;<sup>14</sup>
- Prearrest or postarrest diversion program;<sup>15</sup>
- Neighborhood restorative justice;<sup>16</sup>
- Community arbitration;<sup>17</sup> or
- A program to which a state attorney refers the juvenile.<sup>18</sup>

FDLE is required to expunge a juvenile's nonjudicial arrest record after he or she successfully completes a diversion program, if the juvenile:

- Submits an application for prearrest or postarrest diversion expunction;
- Participated in a diversion program based on the commission of a misdemeanor;
- Has never been, before filing the application, charged with or found to have committed any other criminal offense or comparable ordinance violation; and
- Submits certification from the state attorney for the county in which the arrest occurred certifying that he or she:
  - Successfully completed that county's diversion program;
  - That his or her participation in the program was based on an arrest for a misdemeanor; and
  - That he or she has not otherwise been charged by the state attorney with, or found to have committed, any criminal offense or comparable ordinance violation.<sup>19</sup>

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<sup>9</sup> Mark A. Greenwald, *Overview of Florida's Pre-Arrest and Post-Arrest Juvenile Diversion Programs and Applicable Laws*, Florida Department of Juvenile Justice (June 7, 2018), <http://www.fdle.state.fl.us/MSDHS/Meetings/June-Meeting-Documents/Presentations/June-7-930AM-DJJ-Greenwald-Diversion-Programs.aspx> (last visited Jan. 23, 2022).

<sup>10</sup> *Id.*

<sup>11</sup> Florida Department of Juvenile Justice, *Probation & Community Intervention*, <http://www.djj.state.fl.us/services/probation> (last visited Jan. 23, 2022).

<sup>12</sup> Criminal history records in FDLE's custody must be retained in all cases for purposes of evaluating subsequent requests by the same person for sealing or expunction or for purposes of recreating the record if a court vacates an order to expunge. S. 943.045(16), F.S.

<sup>13</sup> S. 943.0582, F.S.

<sup>14</sup> The civil citation program offers early intervention, community counseling referrals, and other appropriate community resources to divert juvenile misdemeanor offenders from the Juvenile Justice System. The program works with other community partners in an effort to reduce juvenile crime and to provide services for at-risk youth. Nineteenth Judicial Circuit, *Civil Citation* (2019), <http://www.circuit19.org/programs-services/court-programs/juvenile/civil-citation> (last visited Jan. 23, 2022). S. 985.12, F.S.

<sup>15</sup> S. 985.125, F.S.

<sup>16</sup> In neighborhood restorative justice programs, victims, the offender, and all others impacted by the crime discuss the impact, obligations, and actions needed to repair harm. Florida Restorative Justice Association, *Retributive Justice vs. Restorative Justice* (2014), <https://www.floridarestorativejustice.com/about-rj.html> (last visited Jan. 12, 2022). S. 985.155, F.S.

<sup>17</sup> Community arbitration is a program where a juvenile who has committed a relatively minor offense can have his or her case resolved in an informal manner, and appear before a community arbitrator instead of a judge in juvenile court. Twentieth Judicial Circuit, *Juvenile Arbitration Program* (2014), <https://www.ca.cjis20.org/home/main/juvarb.asp> (last visited Jan. 23, 2022). S. 985.16, F.S.

<sup>18</sup> S. 985.15, F.S. See s. 943.0582(2)(a), F.S.

<sup>19</sup> S. 943.0582(3), F.S.

Juvenile diversion expunction has the same effect as court-ordered expunction of criminal history records under s. 943.0585, F.S., except that:

- FDLE must make an expunged juvenile diversion criminal record available only to criminal justice agencies for the purpose of:
  - Determining eligibility for diversion programs;
  - A criminal investigation; or
  - Making a prosecutorial decision under s. 985.15, F.S.<sup>20, 21</sup>
- Local criminal justice agencies in the county in which an arrest occurred must seal instead of destroy any relevant records.<sup>22</sup>

A juvenile who successfully completes a diversion program for a first-time misdemeanor offense may lawfully deny or fail to acknowledge his or her participation in the program and an expunction of a nonjudicial arrest record, unless the inquiry is made by a criminal justice agency<sup>23</sup> for the purpose of:

- Determining eligibility for diversion programs;
- A criminal investigation; or
- Making a prosecutorial decision under s. 985.15, F.S.<sup>24</sup>

As of January 2021, there were 26,903 minors with 64,343 juvenile felony arrest charges with or without a disposition which may qualify for juvenile diversion expunction.<sup>25</sup> Between January 2018 and September 2021, FDLE's Seal and Expunge section received 566 juvenile diversion expunction applications.<sup>26</sup>

A juvenile who is granted an expunction or sealing of his or her criminal record based on successful completion of a juvenile diversion program is still eligible to petition for court-ordered expunction or sealing of a later criminal history record as provided for in ss. 943.0583, 943.0585, and 943.059, F.S., if the minor is otherwise eligible under those sections.<sup>27</sup> Furthermore, a juvenile who is not eligible for juvenile diversion expunction or sealing may still qualify for court-ordered expunction or sealing of his or her criminal record, if he or she is otherwise eligible for such sealing or expunction.

### Forcible Felonies

Under s. 776.08, F.S., forcible felonies include:

- Treason;
- Murder;
- Manslaughter;
- Sexual battery;
- Carjacking;
- Home-invasion robbery;
- Robbery;
- Burglary;
- Arson;

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<sup>20</sup> S. 943.0582(2)(b)1., F.S.

<sup>21</sup> S. 985.15, F.S., provides that in all juvenile delinquency cases, the state attorney shall determine how to proceed with a case, based on the best interest of the public and the child, including determining whether to charge the child as an adult under s. 985.556, F.S., or to otherwise dispose of the case by: filing a petition for dependency; filing a petition under ch. 984, F.S.; filing a petition for delinquency; filing a petition for delinquency with a motion to transfer and certify the child for prosecution as an adult; filing an information under s. 985.557, F.S.; referring the case to a grand jury; referring the child to a diversionary or other program or to some other treatment or care program if voluntarily accepted by the child or the child's parents or legal guardian; or declining to file.

<sup>22</sup> S. 943.0582(2)(b)2., F.S.

<sup>23</sup> "Criminal justice agency" means a court; FDLE; DJJ; the protective investigations component of the Department of Children and Families, investigating abuse or neglect; and any other governmental agency or subunit thereof that performs the administration of criminal justice pursuant to a statute or rule of court and that allocates a substantial part of its annual budget to the administration of criminal justice. S. 943.045(11), F.S.

<sup>24</sup> Ss. 985.126(5) and 943.0582(2)(b)1.a.-c., F.S.

<sup>25</sup> Florida Department of Law Enforcement, Agency Analysis of 2022 House Bill 195, p. 3 (July 1, 2022), on file with the Criminal Justice & Public Safety Subcommittee.

<sup>26</sup> *Id.* at p. 2.

<sup>27</sup> S. 943.0582(4), F.S.

- Kidnapping;
- Aggravated assault;
- Aggravated battery;
- Aggravated stalking;
- Aircraft piracy;
- Unlawful throwing, placing, or discharging of a destructive device or bomb; and
- Any other felony which involves the use or threat of physical force or violence against any individual.

### Firearm and Weapon Offenses

Section 790.001, F.S., defines “firearm” and “weapon,” as follows:

- “Firearm” means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device;<sup>28</sup> or any machine gun. The term “firearm” does not include an antique firearm<sup>29</sup> unless the antique firearm is used in the commission of a crime.
- “Weapon” means any dirk, knife, metallic knuckles, slungshot,<sup>30</sup> billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife.

According to the Florida Uniform Crime Reports (Florida UCR), in 2018, there were a total of 6,624 arrests for weapons violations<sup>31</sup> reported to the Florida UCR program, and of those arrests, 800 were juvenile arrests.

### CS/HB 195 (2022)

CS/HB 195 (2022), to which this bill is linked, amends s. 943.0582, F.S., to require FDLE to expunge a juvenile’s nonjudicial arrest record following the successful completion of a diversion program for any offense other than a forcible felony or a felony involving the manufacture, sale, purchase, transport, possession, or use of a firearm or weapon, as those terms are defined in s. 790.001, F.S. The bill authorizes a juvenile who has successfully completed a diversion program for a qualifying offense and received an expunction pursuant to s. 943.0582, F.S., to lawfully deny or fail to acknowledge his or her participation in a diversion program and the expunction of a nonjudicial arrest record, except when the inquiry is made by a criminal justice agency for the purpose of: determining eligibility for other diversion programs; a criminal investigation; or making a prosecutorial decision under s. 985.15, F.S.<sup>32</sup>

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<sup>28</sup> “Destructive device” means any bomb, grenade, mine, rocket, missile, pipebomb, or similar device containing an explosive, incendiary, or poison gas and includes any frangible container filled with an explosive, incendiary, explosive gas, or expanding gas, which is designed or so constructed as to explode by such filler and is capable of causing bodily harm or property damage; any combination of parts either designed or intended for use in converting any device into a destructive device and from which a destructive device may be readily assembled; any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms; any type of weapon which will, is designed to, or may readily be converted to expel a projectile by the action of any explosive and which has a barrel with a bore of one-half inch or more in diameter; and ammunition for such destructive devices, but not including shotgun shells or any other ammunition designed for use in a firearm other than a destructive device. “Destructive device” does not include: a device which is not designed, redesigned, used, or intended for use as a weapon; any device, although originally designed as a weapon, which is redesigned so that it may be used solely as a signaling, line-throwing, safety, or similar device; any shotgun other than a short-barreled shotgun; or any nonautomatic rifle (other than a short-barreled rifle) generally recognized or particularly suitable for use for the hunting of big game. S. 790.001(4), F.S.

<sup>29</sup> “Antique firearm” means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, and also any firearm using fixed ammunition manufactured in or before 1918, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. S. 790.001(1), F.S.

<sup>30</sup> “Slungshot” means a small mass of metal, stone, sand, or similar material fixed on a flexible handle, strap, or the like, used as a weapon. S. 790.001(12), F.S.

<sup>31</sup> The Florida UCR program defines weapons violations as violations of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons. Florida Department of Law Enforcement, *Crime Data, Weapons Violations*, <https://www.fdle.state.fl.us/FSAC/Crime-Data/Weapons-Violations> (last visited Jan. 23, 2022).

<sup>32</sup> *Supra*, note 18.

## Effect of Proposed Changes

This bill creates a public records exemption for specified juvenile offender records.

Specifically, the bill provides that the sealed or expunged nonjudicial arrest records of a minor who has successfully completed a diversion program for a qualifying offense are confidential and exempt<sup>33</sup> from public disclosure, except that the records must be made available to criminal justice agencies for specified purposes.

The bill provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution. The public necessity statement provides that the purpose of diversion programs is to redirect youth from the justice system and this purpose will be undermined if the nonjudicial arrest record is not confidential and exempt from public records requirements.

The bill provides for retroactive application of the public record exemption. It also provides for repeal of the public record exemption on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill will become effective on the same date that CS/HB 195 (2022) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 943.0582, F.S., relating to diversion program expunction.

**Section 2:** Provides a public necessity statement as required by the Florida Constitution.

**Section 3:** Provides that the bill is effective on the same date that CS/HB 195 (2022) or similar legislation takes effect.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

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<sup>33</sup> There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Op. Att'y Gen. Fla. 85-62 (August 1, 1985).

2. Expenditures:

The bill could have a minimal fiscal impact on agencies as agency staff responsible for complying with public record requests may require training related to the new public record exemption. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill could have a minimal fiscal impact on local government agencies as agency staff responsible for complying with public record requests may require training related to the new public record exemption. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of those agencies.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to 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.

2. Other:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article 1, section 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public records exemption for the sealed or expunged nonjudicial arrest records of a minor who successfully completes a diversion program for any offense that is not a forcible felony or a felony involving the manufacture, sale, purchase, transport, possession, or use of a firearm or weapon, which does not appear to be broader than necessary to accomplish its purpose.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**