

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7011 PCB GOS 22-03 OGSR/Substance Abuse Impaired Persons

**SPONSOR(S):** Government Operations Subcommittee, Borrero

**TIED BILLS:** IDEN./SIM. **BILLS:** SB 7008

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	13 Y, 0 N	Mwakyanjala	Toliver
1) Children, Families & Seniors Subcommittee	15 Y, 0 N	Morris	Brazzell
2) State Affairs Committee	20 Y, 0 N	Mwakyanjala	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The Marchman Act addresses substance abuse through a system of prevention, detoxification, and treatment services. An individual may receive services under the Marchman Act through either voluntary or involuntary admission. Involuntary admission under the Marchman Act can only occur when there is good faith reason to believe an individual is substance abuse impaired and, because of such impairment, has lost the power of self-control with respect to substance use; and either has inflicted, attempted or threatened to inflict, or unless admitted, is likely to inflict physical harm on himself or herself or another; or the person's judgment has been so impaired because of substance abuse that he or she is incapable of appreciating the need for substance abuse services and of making a rational decision in regard to substance abuse services.

Involuntary assessment and stabilization are short-term court-ordered substance abuse services under the Marchman Act. Current law provides a public record exemption for all petitions for involuntary assessment and stabilization, pleadings, court orders, related records and other documents, and the images of all pleadings and other documents, filed with a court under the Marchman Act. Such information is confidential and exempt from public record requirements but may be disclosed by the clerk of the court under certain circumstances to specific parties and entities.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2021, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The Act 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 is necessary to meet one of the following purposes:<sup>3</sup>

- 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.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

##### Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.<sup>5</sup> Substance use disorders occur when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.<sup>6</sup> Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance use disorder.<sup>7</sup> Brain imaging studies of persons with substance use disorders show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.<sup>8</sup>

According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, a diagnosis of substance use disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.<sup>9</sup> The most common substance use disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.<sup>10</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Art. I, s. 24(c), FLA. CONST.

<sup>5</sup> *World Health Organization, Substance Abuse*, [http://www.who.int/topics/substance\\_abuse/en/](http://www.who.int/topics/substance_abuse/en/) (last visited Jan. 15, 2022).

<sup>6</sup> Substance Abuse and Mental Health Services Administration, *Substance Use Disorders*, <http://www.samhsa.gov/disorders/substance-use> (last visited Jan. 15, 2022).

<sup>7</sup> National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction*,

<https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last visited Jan. 15, 2022).

<sup>8</sup> *Id.*

<sup>9</sup> *Supra*, note 6.

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

## The Marchman Act

In the early 1970s, the federal government furnished grants for states “to develop continuums of care for individuals and families affected by substance abuse.”<sup>11</sup> The grants provided separate funding streams and requirements for alcoholism and drug abuse.<sup>12</sup> In response, the Florida Legislature enacted ch. 396, F.S., (alcohol) and ch. 397, F.S. (drug abuse).<sup>13</sup> In 1993, legislation combined chs. 396 and 397, F.S., into a single law, entitled the Hal S. Marchman Alcohol and Other Drug Services Act (Marchman Act).<sup>14</sup> The Marchman Act supports substance abuse prevention and remediation through a system of prevention, detoxification, and treatment services to assist individuals at risk for or affected by substance abuse.

### *Voluntary and Involuntary Admissions*

An individual may receive services under the Marchman Act through either voluntary<sup>15</sup> or involuntary admission.<sup>16</sup> The Marchman Act establishes a variety of methods under which substance abuse assessment, stabilization, and treatment can be obtained on an involuntary basis.<sup>17</sup> There are five involuntary admission procedures that can be broken down into two categories: non-court involved admissions and court involved admissions. Regardless of the nature of the proceedings, an individual meets the criteria for an involuntary admission under the Marchman Act when there is good faith reason to believe the individual is substance abuse impaired and, because of such impairment, has lost the power of self-control with respect to substance use; and either has inflicted, attempted or threatened to inflict, or unless admitted, is likely to inflict physical harm on himself or herself or another; or the person’s judgment has been so impaired because of substance abuse that he or she is incapable of appreciating the need for substance abuse services and of making a rational decision in regard to substance abuse services.<sup>18</sup>

### *Non-court Involved Involuntary Admissions*

The three types of non-court procedures for involuntary admission for substance abuse treatment under the Marchman Act are:

- **Protective Custody:** This procedure is used by law enforcement officers when an individual is substance-impaired or intoxicated in public and is brought to the attention of the officer.<sup>19</sup>
- **Emergency Admission:** This procedure permits an individual who appears to meet the criteria for involuntary admission to be admitted to a hospital, an addiction receiving facility, or a detoxification facility for emergency assessment and stabilization. Individuals admitted for involuntary assessment and stabilization under this provision must have a physician’s certificate for admission, demonstrating the need for this type of placement and recommending the least restrictive type of service that is appropriate to the needs of the individual.<sup>20</sup>
- **Alternative Involuntary Assessment for Minors:** This procedure provides a way for a parent, legal guardian, or legal custodian to have a minor admitted to an addiction receiving facility to assess the minor’s need for treatment by a qualified professional.<sup>21</sup>

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<sup>11</sup> Darran Duchene & Patrick Lane, *Fundamentals of the Marchman Act*, Risk RX, Vol. 6 No. 2 (Apr. – Jun. 2006) State University System of Florida Self-Insurance Program, available at <http://flbog.sip.ufl.edu/risk-rx-article/fundamentals-of-the-marchman-act/> (last visited Jan. 15, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Chapter 93-39, L.O.F., codified in Chapter 397, F.S. Reverend Hal S. Marchman was an advocate for persons who suffer from alcoholism and drug abuse. *Supra* note 11.

<sup>15</sup> See s. 397.601, F.S.

<sup>16</sup> See ss. 397.675 – 397.6978, F.S.

<sup>17</sup> See ss. 397.675 – 397.6978, F.S.

<sup>18</sup> Section 397.675, F.S.

<sup>19</sup> Sections 397.6771 – 397.6772, F.S. A law enforcement officer may take the individual to his or her residence, to a hospital, a detoxification center, or addiction receiving facility, or in certain circumstances, to jail. Minors, however, cannot be taken to jail.

<sup>20</sup> Section 397.679, F.S.

<sup>21</sup> Section 397.6798, F.S.

### *Court Involved Involuntary Admissions*

The two court-involved Marchman Act procedures are involuntary assessment and stabilization, which provides for short-term court-ordered substance abuse services, and involuntary services,<sup>22</sup> which provides for long-term court-ordered substance abuse treatment.

### *Involuntary Assessment and Stabilization*

Involuntary assessment and stabilization involves filing a petition with the clerk of court.<sup>23</sup> Once the petition is filed with the Clerk of Court, the court issues a summons to the respondent and the court must schedule a hearing to take place within 10 days, or issue an ex parte order immediately.<sup>24</sup> After hearing all relevant testimony, the court determines whether the respondent meets the criteria for involuntary assessment and stabilization and immediately enters an order that either dismisses the petition or authorizes the involuntary assessment and stabilization of the respondent.<sup>25</sup>

If the court determines the respondent meets the criteria, it may order him or her to be admitted for five days<sup>26</sup> to a hospital, licensed detoxification facility, or addictions receiving facility, for involuntary assessment and stabilization.<sup>27</sup> During that time, an assessment is completed on the individual.<sup>28</sup> The written assessment is sent to the court. Once the written assessment is received, the court must either:<sup>29</sup>

- Release the individual and, if appropriate, refer the individual to another treatment facility or service provider, or to community services;
- Allow the individual to remain voluntarily at the licensed provider; or
- Hold the individual if a petition for involuntary services has been initiated.

### *Involuntary Services*

Involuntary services allows the court to require the individual to be admitted for treatment for a longer period only if the individual has previously been involved in at least one of the four other involuntary admissions procedures within a specified period.<sup>30</sup> Similar to a petition for involuntary assessment and stabilization, a petition for involuntary services must contain identifying information for all parties and attorneys and facts necessary to support the petitioner's belief that the respondent is in need of involuntary services.<sup>31</sup>

A hearing on a petition for involuntary services must be held within five days unless a continuance is granted.<sup>32</sup> If the court finds that the conditions for involuntary substance abuse treatment have been

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<sup>22</sup> The term "involuntary services" means "an array of behavioral health services that may be ordered by the court for a person with substance abuse impairment or co-occurring substance abuse impairment and mental health disorders." Section 397.311(22), F.S. SB 12 (2016), ch. 2016-241, Laws of Fla., renamed "involuntary treatment" as "involuntary services" in ss. 397.695 – 397.6987, F.S.; however, some sections of the Marchman Act continue to refer to "involuntary treatment." For consistency, this analysis will use the term "involuntary services."

<sup>23</sup> Section 397.6811, F.S.

<sup>24</sup> Section 397.6815, F.S. Under the ex parte order, the court may order a law enforcement officer or other designated agent of the court to take the respondent into custody and deliver him or her to the nearest appropriate licensed service provider.

<sup>25</sup> Section 397.6818, F.S.

<sup>26</sup> If a licensed service provider is unable to complete the involuntary assessment and, if necessary, stabilization of an individual within 5 days after the court's order, it may, within the original time period, file a request for an extension of time to complete its assessment. The court may grant additional time, not to exceed seven days after the date of the renewal order, for the completion of the involuntary assessment and stabilization of the individual. The original court order authorizing the involuntary assessment and stabilization, or a request for an extension of time to complete the assessment and stabilization that is timely filed, constitutes legal authority to involuntarily hold the individual for a period not to exceed 10 days in the absence of a court order to the contrary. Section 397.6821, F.S.

<sup>27</sup> Section 397.6811, F.S. The individual may also be ordered to a less restrictive component of a licensed service provider for assessment only upon entry of a court order or upon receipt by the licensed service provider of a petition.

<sup>28</sup> Section 397.6819, F.S., The licensed service provider must assess the individual without unnecessary delay using a qualified professional. If an assessment is performed by a qualified professional who is not a physician, the assessment must be reviewed by a physician before the end of the assessment period.

<sup>29</sup> Section 397.6822, F.S. The timely filing of a Petition for Involuntary Services authorizes the service provider to retain physical custody of the individual pending further order of the court.

<sup>30</sup> Section 397.693, F.S.

<sup>31</sup> Section 397.6951, F.S.

<sup>32</sup> Section 397.6955, F.S.

proven, it may order the respondent to receive services for a period not to exceed 90 days.<sup>33</sup> However, substance abuse treatment facilities other than addictions receiving facilities are not locked; therefore, individuals receiving treatment in such unlocked facilities under the Marchman Act may voluntarily leave treatment at any time, and the only legal recourse is for a judge to issue a contempt of court charge and impose brief jail time.<sup>34</sup>

### Department of Children and Families

The Department of Children and Families (DCF) is the single state authority for substance abuse and mental health treatment services in the state of Florida.<sup>35</sup> DCF, through its Office of Substance Abuse and Mental Health (SAMH), develops standards for the prevention, treatment, and recovery services in partnership with other state agencies that also fund behavioral health services.<sup>36</sup> SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services.<sup>37</sup> DCF provides treatment for substance abuse through a community-based provider system.<sup>38</sup>

### Confidentiality of Service Provider Records in Marchman Act Proceedings in Florida

In 2017, the Legislature created a public record exemption for certain information filed with a court under the Marchman Act.<sup>39</sup> Specifically, all petitions for involuntary assessment and stabilization, court orders, and related records that are filed with or by a court under the Marchman Act are confidential and exempt from public record requirements.<sup>40</sup> However, the clerk of court may disclose the pleadings and other documents to:<sup>41</sup>

- The petitioner
- The petitioner's attorney
- The respondent
- The respondent's attorney
- The respondent's guardian or guardian advocate, if applicable
- In the case of a minor respondent, the respondent's parent, guardian, legal custodian, or guardian advocate
- The respondent's treating health care practitioner
- The respondent's health care surrogate or proxy
- DCF, without charge
- The Department of Corrections, if the respondent is committed or is to be returned to the custody of the Department of Corrections from DCF
- A person or entity authorized to view records upon a court order for good cause.

The clerk of court is prohibited from publishing personal identifying information on a court docket or in a publicly accessible file.<sup>42</sup>

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<sup>33</sup> Section 397.697(1), F.S. If the need for services is longer, the court may order the respondent to receive involuntary services for a period not to exceed an additional 90 days.

<sup>34</sup> *Supra*, note 11. If the respondent leaves treatment, the facility will notify the court and a status conference hearing may be set. If the respondent does not appear at this hearing, a show cause hearing may be set. If the respondent does not appear for the show cause hearing, the court may find the respondent in contempt of court.

<sup>35</sup> Department of Children and Families, Multi-Year Review Report SFY 19-20 and 20-21, *available at* <https://www.myflfamilies.com/service-programs/samh/publications/docs/Multi-Year%20Review%20Report%20SFY%2019-20%20and%2020-21%20-%20FINAL.pdf> (last visited Jan. 15, 2022).

<sup>36</sup> *Id.*

<sup>37</sup> Department of Children and Families, Substance Abuse & Mental Health/Adults, *available at* <https://www.myflfamilies.com/service-programs/samh/for-adults.shtml> (last visited Jan. 15, 2022).

<sup>38</sup> Department of Children and Families, Treatment for Substance Abuse, *available at* <https://www.myflfamilies.com/service-programs/samh/substance-abuse.shtml> (last visited Jan. 15, 2022).

<sup>39</sup> Chapter 2017-25, L.O.F., codified as s. 397.6760, F.S.

<sup>40</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. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 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 Attorney General Opinion 85-62 (Aug. 1, 1985).

<sup>41</sup> Section 397.6760(1), F.S.

<sup>42</sup> Section 397.6760(3), F.S.

The 2017 public necessity statement<sup>43</sup> for the exemption provides that the Legislature finds that:

A person's health and sensitive, personal information regarding his or her actual or alleged substance abuse impairment are intensely private matters. The media have obtained, and published information from, such records without the affected person's consent. The content of such records or personal identifying information should not be made public merely because they are filed with or by a court or placed on a docket. Making such petitions, orders, records, and identifying information confidential and exempt from disclosure will protect such persons from the release of sensitive, personal information which 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 substance abuse treatment services.<sup>44</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless reenacted by the Legislature.<sup>45</sup>

During the 2021 interim, subcommittee staff sent questionnaires to county clerks of court throughout the state.<sup>46</sup> In all, 34 questionnaire responses were received. All of the responding clerks that reported collecting or processing petitions for involuntary assessment and stabilization, court orders, and related records recommended reenactment of the public records exemption as is.<sup>47</sup> Five respondents reported their court had received public record requests for the confidential and exempt information. The information was only ever released if the requesting entity was an entity that fell under one of the enumerated statutory exceptions or an entity authorized by court order.<sup>48</sup> The common rationale offered by respondents for maintaining the exemption was the protection of the privacy of those who have sought treatment and care for their substance abuse. No litigation involving the public record exemption was reported by the respondents.<sup>49</sup>

In addition to the questionnaire, subcommittee staff conducted an interview with staff from DCF as part of its review under the Open Government Sunset Review Act. DCF staff stated they had not had any issues interpreting or applying the exemption. DCF staff were unaware of any past or present litigation concerning the public record exemption and had not received a public record requests involving the public record exemption.

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for the disclosure of pleadings and other documents filed with a court involving involuntary admissions proceedings under the Marchman Act.

### **B. SECTION DIRECTORY:**

Section 1 amends s. 397.6760, F.S., relating to court records; confidentiality.

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<sup>43</sup> Art. I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

<sup>44</sup> Chapter 2017-25, L.O.F.

<sup>45</sup> Section 119.071(5)(k)4., F.S.

<sup>46</sup> Open Government Sunset Review Questionnaire, Involuntary Assessment and Stabilization Records, responses on file with the Government Operations Subcommittee.

<sup>47</sup> *Id.* One clerk of court recommended the public record exemption be repealed on the questionnaire, however, the clerk later contacted staff and stated this recommendation was done in error and recommended the public record exemption should be reenacted as is.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Section 2 provides an effective date of October 1, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

### **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 affect county or municipal governments.

2. Other:

None.

### **B. RULE-MAKING AUTHORITY:**

None.

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

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.