



The Florida Senate

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Committee on Judiciary

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 390.01116, F.S., PARENTAL NOTICE OF ABORTION ACT

Issue Description

Adopted by Florida voters in 2004, article X, section 22 of the Florida Constitution authorizes the Legislature to require notification of a parent or guardian before the termination of a minor's pregnancy. The Legislature responded in 2005 by enacting the Parental Notice of Abortion Act (Act), s. 390.01114, F.S. Under the Act, a physician must notify a parent or legal guardian – in person or by telephone – at least 48 hours before performing or inducing the termination of a minor's pregnancy.

The Act, however, authorizes a minor to petition the circuit court for a waiver of the notice requirements (judicial-bypass process). The minor may file the petition using a pseudonym or initials. Proceedings are expedited, and the court generally must rule within 48 hours of the petition filing. If the court finds evidence of child abuse or sexual abuse of the minor by one or both of her parents or her guardian, or that notification is not in the minor's best interests, the court will issue an order authorizing the minor to consent to the abortion without notification to the parent or guardian. An expedited appeal is available for a minor denied a waiver of notice by the circuit court.

At the time it enacted the Parental Notice of Abortion Act, the Legislature also created a public-records exemption related to the judicial-bypass process. Specifically, s. 390.01116, F.S., provides that any information in a record held by a circuit or appellate court which could be used to identify the minor who petitions for a waiver of the notice requirement is confidential and exempt from the statutory and constitutional requirements related to public records. This public-records exemption stands repealed on October 2, 2010, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

Background

Florida Public-Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.²

¹ Sections 1390, 1391 F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24(a).

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.³

The term "public records" is broadly defined to mean:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁴

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency⁵ in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."⁶ Unless made exempt, all such materials are open for public inspection as soon as they become records.⁷

Only the Legislature is authorized to create exemptions to open-government requirements.⁸ Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.⁹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption or substantially amending an existing exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹²

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.¹³ If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁴ If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.¹⁵

Public Access to Court Records

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,¹⁶ the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."¹⁷ Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.¹⁸ This constitutional provision provides for public access to judicial records, except for those

³ Section 119.07, F.S.

⁴ Section 119.011(12), F.S.

⁵ The word "agency" is defined in s. 119.011(2), F.S., to mean "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 Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁸ FLA. CONST. art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.

¹² FLA. CONST. art. I, s. 24(c).

¹³ *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

¹⁴ *Id.*

¹⁵ *Id.* at 54.

¹⁶ *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).

¹⁷ *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).

¹⁸ FLA. CONST. art. I, s. 24.

records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.¹⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act, provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.²⁰ Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.²¹ Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves.²² An identifiable public purpose is served if the exemption meets one of three specified purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.²³

The act also requires consideration of the following:

- 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?²⁴

Parental Notice of Abortion Act

In 1999, the Legislature enacted a law requiring parents of minors to be notified prior to the minor's termination of the pregnancy. This law was constitutionally challenged on grounds that the act violated a person's right to privacy under the Florida Constitution. The Florida Supreme Court concluded that the act violated Florida's constitutional right to privacy because the minor was not afforded a mechanism by which to bypass parental notification if certain exigent circumstances existed.²⁵ In response to the court's decision, the Legislature proposed a constitutional amendment authorizing the Florida Legislature, notwithstanding a minor's right to privacy under the Florida Constitution, to require a physician to notify a minor's parent or guardian prior to

¹⁹ *Id.*

²⁰ Section 119.15(3), F.S.

²¹ Section 119.15(5)(a), F.S.

²² Section 119.15(6)(b), F.S.

²³ *Id.*

²⁴ Section 119.15(6)(a), F.S.

²⁵ *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

termination of the minor's pregnancy, which was subsequently ratified by Florida voters.²⁶ The amendment provides:

The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.²⁷

The Legislature responded to this authorization by enacting the Parental Notice of Abortion Act (Act).²⁸ The Act requires a treating physician to provide actual notice, in person or by telephone, to a parent or other legal guardian of a minor seeking to have an abortion at least 48 hours before the performance of the abortion on the minor.²⁹ Notice under the Act is not required if:

- In the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements;
- Notice is waived in writing by the person who is entitled to notice;
- Notice is waived by a minor who is or has been married or has had the disability of nonage removed under statute;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- A court waives the parental notification process via a bypass proceeding.³⁰

Parental Notification Judicial-Bypass Proceeding

Under the Parental Notice of Abortion Act (Act), a minor may petition any circuit court in a judicial circuit within the jurisdiction of the District Court of Appeal in which she resides for a waiver of the notice requirements under the Act.³¹ To initiate the proceeding, a minor must file a petition with the court under a pseudonym or through the use of initials.³² The court must advise that minor that she is entitled to court-appointed counsel upon her request at no charge.³³

After a petition is filed, the court must rule, and issue written findings of fact and conclusions of law, within 48 hours.³⁴ In order to the grant the petition, the court must:

- Find, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy;
- Find, by a preponderance of the evidence, that there is evidence of child abuse or sexual abuse of the minor by one or both of her parents or her guardian; or
- Find, by a preponderance of the evidence, that the notification of a parent or guardian is not in the best interest of the minor.³⁵

²⁶ See FLA. CONST. art. X, s. 22.

²⁷ *Id.*

²⁸ Laws of Fla. 2005-52, s. 2

²⁹ Section 390.01114(3)(a), F.S. Constructive notice may be provided after a physician has made reasonable efforts to contact the parents. To accomplish legally valid constructive notice, the physician must provide written notice, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After 72 hours, delivery is deemed to have occurred. Section 390.01114(2)(c), F.S.

³⁰ Section 390.01114(3)(b), F.S.

³¹ Section 390.01114(4)(a), F.S.

³² *Id.* No filing fees or court costs are required of any pregnant minor who petitions a court for a waiver of parental notification under the Act. Section 390.01114(4)(g), F.S.

³³ Section 390.01114(4)(a), F.S.

³⁴ Section 390.01114(4)(b), F.S. The 48-hour period may be extended only upon the request of the minor.

³⁵ Section 390.01114(4)(c) and (d), F.S.

If the court fails to issue a ruling within the 48-hour period and an extension of time has not been requested by the minor, the petition is granted, and the notice requirement is waived.³⁶

Court-Records Exemption for Judicial-Bypass Cases

In conjunction with the enactment of the Florida Parental Notice of Abortion Act (Act), the Legislature created an exemption from public access to judicial records related to parental notification bypass proceedings. Under this public-records exemption, any information in a court record which could be used to identify a minor in a proceeding to bypass parental notification under the Act is confidential and exempt from public disclosure.³⁷

In its statement of public necessity accompanying the creation of the exemption, the Legislature recognized that:

The information contained in these records is of a sensitive, personal nature regarding a minor petitioner, release of which could harm the reputation of the minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the minor in instances when child abuse or child sexual abuse against her is present by exposing her to further acts of abuse from an abuser who, without the confidentiality and exemption, could learn of the minor's pregnancy, her plans to terminate the pregnancy, and her petition to the court.³⁸

The Legislature also concluded that the exemption is necessary to protect constitutionally guaranteed rights of the minor as enumerated in the state and federal constitutions. The Legislature reasoned that:

The State Constitution contains an express right of privacy in Section 23 of Article I. Further, the United State Supreme Court has repeatedly required parental-notification laws to contain judicial-bypass procedures and to preserve confidentiality at every level of court proceedings in order to protect the privacy rights of the minor. Without the confidentiality and exemption provided in this act, the disclosure of personal identifying information would violate the right of privacy of the minor. Further, without the confidential and exempt status for this information, the constitutionality of the state's program providing for notification of a minor's termination of pregnancy, and the judicial-bypass procedure in particular, would be in question.³⁹

The public-records exemption will stand repealed on October 2, 2010, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.⁴⁰

Findings and/or Conclusions

Administration of the Public-Records Exemption for Bypass Proceedings

In 2008, 595 parental notification bypass petitions were filed in Florida.⁴¹ The following figure illustrates the final disposition of those judicial-bypass proceedings:

³⁶ Section 390.01114(4)(b), F.S.

³⁷ Section 390.01116, F.S. This exemption is not the first public-records exemption related to juveniles and domestic cases. All dependency court records, including cases related to the termination of parental rights, are closed to the public except to those demonstrating a proper interest. See ss. 39.0132(3) and 39.814(3), F.S.

³⁸ Laws of Fla. 2005-104, s. 3.

³⁹ *Id.*

⁴⁰ Laws of Fla. 2005-104, s. 2.

⁴¹ Florida Office of the State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed By Circuit and County, January through December 2008* (January 28, 2009).

PARENTAL NOTICE OF ABORTION ACT
Petitions Filed and Disposed
January through December 2008⁴²

Petitions Filed	Granted	Dismissed	Granted Without Judicial Order ⁴³	Total Disposed
595	567	27	2	596 ⁴⁴

Senate professional staff interviewed clerks, advocacy organizations, and attorneys representing minors seeking to bypass parental notification and surveyed judges regarding the practical administration of the parental notification bypass process. Although this research revealed that practices may vary slightly from county to county, the public-records exemption is being administered to protect the anonymity of the minor.

Attorney Representation

A minor seeking an abortion may learn of the judicial-bypass process from a physician or clinic, or from a family planning advocacy organization. For example, some advocacy groups have created judicial-bypass guides and published them on the Internet to assist minors in navigating the bypass process. Upon contacting the clerk's office or a family planning advocacy organization to initiate the bypass proceedings, the minor is usually directed to an attorney for assistance with preparing the petition.⁴⁵ The attorney may be a private attorney who has agreed to represent minors in these cases, or an attorney employed by the Office of Criminal Conflict and Civil Regional Counsel (regional counsel), which was created in 2007 to represent criminal defendants in cases where the public defender experiences a conflict of interest, as well as in civil cases where representation is required by law.

Regional counsel attorneys report that upon contact by a minor seeking to bypass parental notification, he or she will create a file and gather pertinent information from the minor. Some of this information may contain identifying information, such as a photocopy of the minor's drivers license. Because regional counsel are subject to the Public-Records Act, and because s. 390.01116, F.S., only exempts disclosure of identifying information contained in trial and appellate court files, the Legislature may wish to clarify that any identifying information retained by regional counsel attorneys is also confidential and exempt from public disclosure.

Identifying information of minors may also be retained by another public agency. The Justice Administrative Commission (JAC) processes requests for payment related to representation of minors by private attorneys in judicial-bypass cases. The JAC reports that, in rare instances, attorneys may mistakenly attach documents to billing requests which may contain identifying information associated with the minor. The Legislature may also wish to consider exempting documents in the possession of the JAC from public disclosure to preserve the anonymity of the minor in those rare instances where this occurs.

Filing of Petition and Case Number Assignment

To preserve anonymity, the petition is prepared using initials or a pseudonym such as "Jane Doe." The petition is filed with the court along with a Sworn Statement of True Name and Pseudonym. This statement is the only document that bears the minor's true name, address, and date of birth. Clerks report that this document is sealed in an envelope and maintained separately from the other documents in the court file. The petition is assigned a case number by the clerk, which in and of itself does not identify the case as a parental notification judicial-bypass proceeding. In most counties, these case numbers are included with other dependency case filings. In some

⁴² *Id.*

⁴³ The petition was granted without judicial order because 48 hours expired without an order being entered by the court.

⁴⁴ The total number of petitions disposed of during 2008 was actually 596 because one petition was filed in calendar year 2007.

⁴⁵ Pursuant to the Parental Notice of Abortion Act, the representation is provided at no charge to the minor. Section 390.01114(4)(a), F.S.

counties, the case number may appear on a public docket communicating scheduled hearings. However, the appearance of the number on the docket is not likely to prompt someone to discover that a judicial-bypass hearing will occur because of the generic number used.⁴⁶ Upon filing of the petition and statement, the minor is provided with a notice that advises, in part:

YOUR CASE NUMBER APPEARS AT THE TOP OF THIS FORM. KEEP IT IN A SAFE PLACE. YOU CANNOT GET INFORMATION FROM THE CLERK WITHOUT YOUR CASE NUMBER.

YOU HAVE BEEN GIVEN A COPY OF THE SWORN STATEMENT YOU SIGNED WITH YOUR TRUE NAME. KEEP IT IN A SAFE PLACE. YOU MAY NEED TO SHOW IT AND THE FINAL JUDGMENT IN YOUR CASE TO YOUR DOCTOR BEFORE TERMINATING YOUR PREGNANCY.⁴⁷

Attorneys report that they usually maintain copies of pleadings and orders in their files in the event a minor misplaces the Statement of True Name and Pseudonym or the final order.

Parental Notification Bypass Hearing

After the filing of the petition, the judicial-bypass court file is then provided to the judge for hearing. It appears that, in most counties, the hearing occurs on the same day of the filing of the petition in order to ensure compliance with the 48-hour time frame for final disposition of the petition. In most cases, the judge accesses the petition and does not review the Sworn Statement of True Name and Pseudonym. Therefore, the judge is not privy to the true identity of the minor in most instances. The hearing may occur in a courtroom or the judge's chamber. The hearing is closed to the public in order to preserve the anonymity of the minor.⁴⁸ Typically, only the minor, the minor's attorney, a clerk employee, the judge, and sometimes a court reporter are present for the hearing. A transcript is taken by manual recording or other electronic or digital means. The electronic transcript is not transcribed unless a petition is denied and the denial is subsequently appealed by the minor.

The duration of the hearings is usually 30 minutes or less, and the judge issues a written order including his or her findings shortly after the hearing. Some judges request that the attorney prepare the order. In some instances, the order may be detailed with references to specific factual information related to the minor, such as where she attends school, involvement in extracurricular and community activities, and other information that, when taken in context with other information, could result in identification of the minor. Conversely, some orders may include very generic findings that contain no references to information that could result in identification of the minor. Upon conclusion of the hearing, the minor is provided with a certified copy of the order. A copy of the order is also placed in the court file.

Sealing of Parental Notification Bypass-Proceeding Files

The judicial-bypass court file contains the petition, the Sworn Statement of True Name and Pseudonym, which is placed in a separate, sealed envelope, possibly a transcript tape of the hearing, and the final order. Although the public-records exemption specifies that the protection extends only to identifying information in the court file, almost every county seals the entire court file, which precludes public disclosure without further order of the court. To ensure the confidentiality of the sensitive information contained in these files and to preserve the anonymity of the minor, the Florida Supreme Court adopted a rule governing these proceedings, which provides

⁴⁶ Judicial-bypass case numbers often contain the designation of a true dependency case.

⁴⁷ Form 8.989, FLA. R. JUV. PRO.

⁴⁸ Rule 8.820(e), FLA. R. JUV. PRO. provides:

Hearings under this part shall be closed to the public and all records thereof shall remain confidential as provided by sections 390.01114(4)(e) and 390.01116, Florida Statutes. Persons other than the petitioner may be permitted to attend the hearing at the request of the petitioner. The court shall advise all persons in attendance that the hearing is confidential.

that “the court file shall be sealed unless otherwise ordered by the court.”⁴⁹ In conjunction with this rule, the Florida Supreme Court also requires that the Sworn Statement of True Name and Pseudonym “be kept under seal at all times and may only be opened at the minor’s request or by court order.”⁵⁰ In order to access any information contained within one of these bypass files, a member of the public would be required to petition the court for an order unsealing the file.⁵¹ The judge would review these requests on a case-by-case basis and determine whether access to the records is warranted based upon a showing of good cause. According to family planning advocacy groups, sealing the entire bypass file is a crucial step in assuring the anonymity of the minor involved in the proceeding.

Appeal of Parental Notification Bypass Denials

Upon denial of a petition to bypass parental notification, a minor is entitled to an expedited appeal to the District Court of Appeal.⁵² The District Court of Appeal must render its decision as expeditiously as possible and no later than 10 days from the filing of the notice of appeal.⁵³ The appellate file also contains the petition, the Sworn Statement of True Identity and Pseudonym, the transcript of the circuit court hearing, and the final order. Some circuit court clerks report that they do not include the Sworn Statement of True Identity and Pseudonym in the record provided to the appellate court. Pursuant to appellate rules, the appellate file also remains sealed unless otherwise ordered by the court.⁵⁴ The appellate court issues a written order that may be published. In some instances, the written order may contain specific factual information regarding the minor, which may lead to the identity of the minor in certain contexts.⁵⁵

Retention of the Parental Notification Bypass-Proceeding Exemption

As the Legislature indicated in the statement of public necessity when it created the exemption, the purpose of the public-records exemption is to protect the confidentiality of sensitive information related to a minor, as well as to protect the minor from potential harm in cases where some form of abuse may prompt a minor to seek the court’s approval to forego notice of the abortion to her parents. Without the protections set forth in the exemption, the minor’s reputation could be severely harmed, or the minor could experience serious physical or emotional harm. Further, the exemption is arguably necessary to preserve the legality of the administration of the Parental Notice of Abortion Act.

Senate professional staff surveyed circuit and appellate judges to gauge their experiences with this exemption. Of those judges responding to the survey, virtually every judge recommended preserving the exemption citing a compelling need for confidentiality. Further, based upon interviews with clerks, judges, family planning advocacy groups, and attorneys representing minors seeking a judicial bypass, many commented that minors would not avail themselves of the judicial-bypass process without the assurance of complete confidentiality, while some observed that confidentiality played only a small role in the minor’s decision to seek court approval of an abortion without parental notification. Some advocacy groups stated that confidentiality and complete anonymity in these proceedings is paramount to the well-being of the minor seeking to terminate a pregnancy without notifying a parent. Unbridled access to court records in these proceedings could result in significant damage to the good name and reputation of the minor. Because no other exemption protects these records from public disclosure, reenactment of the exemption is necessary to avoid unnecessary harm to minors.

⁴⁹ Rule 8.835(b), FLA. R. JUV. PRO; *see also In re Amendments to the Florida Rules of Juvenile Procedure; Forms for Use with Rules of Juvenile Procedure; and the Florida Rules of Appellate Procedure-Judicial Waiver of Parental Notice of Termination of Pregnancy*, 907 So. 2d 1161, 1162 (Fla. 2005).

⁵⁰ Rule 8.805(b), FLA. R. JUV. PRO.

⁵¹ Rule 2.420, FLA. R. JUD. ADMIN., governs requests to unseal court files. When records of court proceedings have been properly sealed, the party seeking to unseal the records has the burden to establish good cause. *Carter v. Conde Nast Publications*, 983 So. 2d 23 (Fla. 5th DCA 2008).

⁵² Section 390.01114(4)(f), F.S.

⁵³ Rule 9.110(n), FLA. R. APP. PRO.

⁵⁴ *Id.*

⁵⁵ *See, e.g., In re Jane Doe*, 924 So. 2d 935, 937-38 (Fla. 1st DCA 2006).

In addition to protecting the minor from the disclosure of information of a sensitive, personal nature, the exemption is arguably necessary to effectively and efficiently administer the Parental Notice of Abortion Act (Act), and it is also critical to the constitutionality of the Act, in its entirety. The exemption at issue in this report ensures that the Act does not violate federal and state constitutional protections afforded to minors. Although the United States Constitution does not expressly contain a right of privacy, the U.S. Supreme Court has held that the First and Fourteenth Amendments embrace a right to privacy, which may be limited when applied to minors.⁵⁶ States cannot enact “a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor.”⁵⁷ As a result, the United States Supreme Court established mandatory criteria for a judicial-bypass process in order to withstand constitutional scrutiny:

- Permitting a bypass where the minor demonstrates that she is sufficiently mature and well-informed to make the abortion decision independent of her parents;
- Permitting a bypass where the minor establishes that the abortion would be in her best interests;
- *Providing for an anonymous hearing*; and
- Requiring that a bypass hearing be expedited.⁵⁸

If these requirements are contained in the bypass proceeding, the process generally passes constitutional muster.⁵⁹ In these bypass proceedings, it is anonymity from the public that is critical, rather than complete anonymity, and the anonymity is tantamount to the concept of confidentiality from public disclosure.⁶⁰ A Montana statute providing the following combination of confidentiality and anonymity measures survived scrutiny by the court:

- Generally stating that bypass proceedings are confidential;
- Requiring the sealing of bypass court records;
- Allowing a minor to file her petition using a pseudonym or her initials; and
- Providing that all documents related to the petition are confidential and protected from disclosure to the public.⁶¹

Akin to the federal requirement of anonymity, the Florida Supreme Court has determined that the right to privacy under the Florida Constitution extends to a minor’s freedom to decide whether to terminate a pregnancy.⁶² The right to privacy under the state constitution has been interpreted more broadly than the right to privacy under the federal constitution.⁶³ Both federal and state law mandate that bypass proceedings preserve confidentiality at every level. Absent the exemption providing that identifying information in these court records are not open to the public, the entire Parental Notice of Abortion Act would be in jeopardy of violating the state and federal constitutions.

Under the Open Government Sunset Review Act, two of the recognized criteria for preserving public-records exemptions are the protection of personal information and safety, as well as the facilitation of the effective administration of the governmental program. Based upon the findings in this report, retention of this exemption is necessary to preserve protection of sensitive personal information and to avoid personal harm to minors availing themselves of the judicial-bypass process, as well as for the constitutionality and administration of the Parental Notice of Abortion Act.

⁵⁶ *Roe v. Wade*, 410 U.S. 113 (1973); *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁵⁷ *Bellotti*, 443 U.S. at 643.

⁵⁸ *Id.* at 643-44 (emphasis added).

⁵⁹ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Association of Kansas City, MO, Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); and *Lambert v. Wicklund*, 520 U.S. 292 (1997).

⁶⁰ 1 AM. JUR. 2D *Abortion and Birth Control* s. 42 (2009).

⁶¹ *Wicklund v. Lambert*, 979 F. Supp. 1285 (D. Mont. 1997).

⁶² *In re: T.W.*, 551 So. 2d 1186 (Fla. 1989); see FLA. CONST. art 1, s. 23.

⁶³ *North Florida Women’s Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003).

Issues Related to Substantive Provisions of the Act

Through the course of the research related to the review of the public-records exemption contained in the Parental Notice of Abortion Act (Act), Senate professional staff also identified the following substantive provisions of the Act and other related issues that the Legislature may wish to study in greater detail:

- The venue provision requiring the minor to file the bypass petition in the judicial circuit within the jurisdiction of the District Court of Appeal in which she resides, to evaluate whether a minor should be permitted to file the petition in any county, when a city in a neighboring district may be in closer proximity to the minor;
- The standards of proof a minor must satisfy under the Act, to determine whether different standards are necessary with regard to maturity and best interests of the minor;
- The provisions relating to the appointment of counsel for the minor, to clarify whether the Office of Criminal Conflict and Civil Regional Counsel may assume representation prior to a formal order by the court; and
- The duty of attorneys and others involved in the bypass process to report abuse of the minor, to clarify how these individuals satisfy the legal obligation to report abuse without, in turn, facilitating, via an abuse investigation, parental notification of the minor's intent to terminate her pregnancy.

Additional study of these provisions will assist the Legislature in determining if changes or modifications of the current statutory framework beyond the scope of this public-records review are necessary to facilitate the administration of the Act.

Options and/or Recommendations

Senate professional staff recommends that the Legislature retain the public-records exemption established in s. 390.01116, F.S., which makes all identifying information contained in court files in parental notification bypass proceedings exempt from public disclosure, because the exemption protects sensitive, personal information and facilitates the administration of the Parental Notice of Abortion Act.

As noted in the Findings section of this report, the Office of Criminal Conflict and Civil Regional Counsel provides representation to minors in bypass proceedings and may retain documents with indentifying information. Similarly, the Justice Administrative Commission may also possess, in rare instances, documents containing identifying information. Therefore, the Legislature may also wish to clarify that, in addition to any documents held by the courts, any documents containing identifying information held by the Office of Criminal Conflict and Civil Regional Counsel attorneys representing a minor or by the Justice Administrative Commission are also exempt from public disclosure.