

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 Judiciary Committee

BILL: SB 1198

INTRODUCER: Judiciary Committee

SUBJECT: Open Government Sunset Review/Parental Notice of Abortion Act

DATE: February 2, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill is the result of the Judiciary Committee’s Open Government Sunset Review of the public-records exemption for any information in a record held by a circuit or appellate court which could be used to identify a minor who petitions for a judicial waiver of the parental notice requirement under the Parental Notice of Abortion Act. This public-records exemption stands repealed on October 2, 2010, unless reenacted by the Legislature.

The bill reenacts the exemption and expands the exemption to also protect from disclosure under the public-records laws any identifying information of a minor under the Parental Notice of Abortion Act if held by the Office of Criminal Conflict and Civil Regional Counsel attorneys or by the Justice Administrative Commission.

This bill substantially amends s. 390.01116, Florida Statutes.

II. Present Situation:

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:

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

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

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

² FLA. CONST. art. I, s. 24(a).

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).

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 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;

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.

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.

- 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 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

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).

²⁶ See FLA. CONST. art. X, s. 22.

²⁷ *Id.*

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

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

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.

³⁶ Section 390.01114(4)(b), F.S.

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

Judiciary Committee's Open Government Sunset Review

Based upon its review of this public-records exemption under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee recommended in September 2009

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.

that the Legislature retain the public-records exemption established in s. 390.01116, F.S., which makes any information in a record held by a circuit or appellate court which could be used to identify a minor who petitions for a judicial waiver of the parental-notice requirement under the Parental Notice of Abortion Act (Act) confidential and exempt from public disclosure.⁴¹ Senate professional staff concluded that, in addition to protecting the minor from the disclosure of information of a sensitive, personal nature, the exemption is necessary to effectively and efficiently administer the Act, and it is also critical to the constitutionality of the Act, in its entirety.

Senate professional staff also recommended that the Legislature consider expanding the exemption to include any documents containing identifying information of a minor if held by the Office of Criminal Conflict and Civil Regional Counsel attorneys or by the Justice Administrative Commission. During representation of minors in judicial-waiver cases under the Act, the Office of Criminal Conflict and Civil Regional Counsel may obtain identifying information from the minors. Similarly, the Justice Administrative Commission may receive identifying information of minors which is related to the processing of attorney billing and payment requests for representation in these cases.

III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemption for any information in a record held by a circuit or appellate court which could be used to identify a minor who petitions for a judicial waiver of the parental notice requirement under the Parental Notice of Abortion Act found in s. 390.01116, F.S. This public-records exemption stands repealed on October 2, 2010, unless reenacted by the Legislature.

The bill reenacts the exemption and expands the exemption to also protect from disclosure under the public-records law any identifying information of a minor under the Parental Notice of Abortion Act if held by the Office of Criminal Conflict and Civil Regional Counsel attorneys or by the Justice Administrative Commission.

A statement of public necessity is included in the bill for the expanded portion of the exemption and s. 2, ch. 2005-104, Laws of Fla., relating to the scheduled repeal of the original public-records exemption contained in s. 390.01116, F.S., is repealed. The bill also provides for the future repeal of the expanded portion of the public-records exemption unless reviewed and reenacted by the Legislature.

The bill provides an effective date of October 1, 2010.

⁴¹ Comm. on Judiciary, *Open Government Sunset Review Of Section 390.01116, F.S., Parental Notice Of Abortion Act* (Interim Report 2010-224) (Sept. 2009), available at http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports /pdf/2010-224ju.pdf.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records exemption, while also expanding the exemption. This bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill expands the exemption, it contains a constitutionally required statement of public necessity for the expansion. Additionally, this bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by article I, section 24 of the Florida Constitution because it expands the public-records exemption.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

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.⁴² States cannot enact “a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor.”⁴³ 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.⁴⁴

If these requirements are contained in the bypass proceeding, the process generally passes constitutional muster.⁴⁵

⁴² *Roe v. Wade*, 410 U.S. 113 (1973); *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁴³ *Bellotti*, 443 U.S. at 643.

⁴⁴ *Id.* at 643-44 (emphasis added).

⁴⁵ 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).

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.⁴⁶ The right to privacy under the state constitution has been interpreted more broadly than the right to privacy under the federal constitution.⁴⁷

Both federal and state law mandate that bypass proceedings preserve confidentiality at every level. Absent the exemption providing that identifying information in these 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

None.

B. Amendments:

None.

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

⁴⁶ *In re: T.W.*, 551 So. 2d 1186 (Fla. 1989); see FLA. CONST. art 1, s. 23.

⁴⁷ *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003).