HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB EEG 24-04 OGSR/Mental Health Treatment and Services
SPONSOR(S): Ethics, Elections & Open Government Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Ethics, Elections & Open Government Subcommittee		Poreda	Toliver

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption 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 Florida Mental Health Act, otherwise known as the Baker Act, provides legal procedures for voluntary and involuntary mental health examination and treatment. A person may be admitted for mental health treatment on a voluntary or involuntary basis. Voluntary admission of persons for psychiatric care may occur when the individual is over the age of 18, deemed to be competent, expresses informed consent, and is suitable for treatment. An involuntary examination is required if there is reason to believe that the person has a mental illness and because of his or her mental illness certain conditions are present, such as a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future.

Current law makes all petitions for voluntary and involuntary admission for mental health treatment, court orders, and related records that are filed with or by a court pursuant to the Baker Act confidential and exempt from public record requirements. The information contained in these court files may only be released to certain entities and individuals. The bill saves from repeal the public record exemption, which will repeal on October 2, 2024, if this bill does not become law.

The bill does not appear to have a fiscal impact on state government 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 (OGSR Act)[1] 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.[2]

The OGSR 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:

- 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.[3]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[4] 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.

Florida Mental Health Act

The Florida Mental Health Act, otherwise known as the Baker Act (Baker Act)was enacted in 1971 to revise the state's mental health commitment laws.[5] It provides legal procedures for mental health examination and treatment. It also protects the rights of all individuals examined or treated for mental illness in Florida.[6] Individuals in acute mental or behavioral health crisis may require emergency treatment to stabilize their condition. Emergency mental health examination and stabilization services may be provided on a voluntary or involuntary basis.[7]

Voluntary Admissions

The Baker Act allows for the voluntary admission of persons for psychiatric care, but only when the individual is over the age of 18, deemed to be competent, expresses informed consent, and is suitable for treatment.[8] Any person age 17 or under may be admitted voluntary if a parent or legal guardians applies for admission and only after a clinical review to verify the minor's willingness to volunteer for treatment under the Baker Act.[9] If any condition for voluntary admission is not met, then that person shall be extended the due process rights assured under the involuntary provisions of the Baker Act.[10]

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[1] Section 119.15, F.S.
[2] Section 119.15(3), F.S.
[3] Section 119.15(6)(b), F.S.
[4] Article I, s. 24(c), FLA. CONST.
[5] Section 394.451, F.S.
[6] Section 394.459, F.S.
[7] Sections 394.4625 and 394.463, F.S.
[8] Section 394.4625(1)(a), F.S.
[9] *Id*.
[10] Section 394.4625, F.S.

Involuntary Examinations

An involuntary examination is required if there is reason to believe that the person has a mental illness and because of his or her mental illness the person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination or is unable to determine for himself or herself whether examination is necessary, and either of the following determinations are made:[11]

- Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; or
- There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.

The involuntary examination may be initiated in one of three ways: [12]

- A court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination, based on sworn testimony. The order of the court shall be made a part of the patient's clinical record.
- A law enforcement officer must take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to an appropriate, or the nearest, receiving facility for examination. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record.
- A physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker may execute a certificate stating that he or she has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination and stating the observations upon which that conclusion is based. The report and certificate shall be made a part of the patient's clinical record.

Involuntary patients must be taken to either a public or private facility that has been designated by the Department of Children and Families (DCF) as a Baker Act receiving facility.[13] A receiving facility has up to 72 hours to examine an involuntary patient.[14] During that 72 hours, the patient must be examined by a physician, a clinical psychologist, or, in certain circumstances, by a psychiatric nurse to determine if the criteria for involuntary services are met.[15] Within that 72-hour examination period one of the following must happen:[16]

- The patient must be released, unless he or she is charged with a crime, in which case law enforcement will assume custody;
- The patient must be released for voluntary outpatient treatment;
- The patient, unless charged with a crime, must give express and informed consent to be placed and admitted as a voluntary patient; or
- A petition for involuntary placement must be filed in circuit court for involuntary outpatient or inpatient treatment.

The receiving facility may not release an involuntary examination patient without the documented approval of a psychiatrist, a clinical psychologist, or in certain circumstances, a psychiatric nurse.[17]

Involuntary Inpatient Placements

A court may order a person into involuntary inpatient treatment if it finds that the person has a mental illness and, because of that mental illness, has refused voluntary inpatient treatment, is incapable of surviving alone or with the help of willing and responsible family or friends and, without treatment, is

[11] Section 394.463(1), F.S.
[12] Section 394.463(2)(a), F.S.
[13] Section 394.461, F.S.
[14] Section 394.463(2)(g), F.S.
[15] Section 394.463(2)(f), F.S.
[16] *Id*.
[17] Section 394.463(2)(f), F.S.

likely to refuse to care for him or herself to the extent that such refusal threatens to cause substantial harm to their well-being, or will inflict serious bodily harm on him or herself or others in the near future based on recent behavior.[18] Additionally, the court must find that all available less restrictive treatment alternatives which would offer an opportunity for improvement of their condition are inappropriate.[19]

Involuntary Outpatient Services

Involuntary outpatient placement, also known as assisted outpatient treatment, is a court-ordered, community-based treatment program for individuals with severe mental illness designed to assist individuals with severe mental illness who have a history of treatment and medication noncompliance but do not require hospitalization.[20] A petition for involuntary outpatient services may be filed with a court by the administrator of either a receiving facility or a treatment facility.[21] There are strict legal requirements for individuals to be ordered into involuntary outpatient placement and only circuit judges have the authority to issue such an order.[22]

Public Record Exemption under Review

In 2019, the Legislature made all petitions for voluntary and involuntary admission for mental health treatment, court orders, and related records that are filed with or by a court pursuant to the Baker Act confidential and exempt[23] from public record requirements.[24] The records may only be released to:[25]

- 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 legal custodian, or guardian advocate.
- The respondent's treating health care practitioner.
- The respondent's health care surrogate or proxy.
- The Department of Children and Families, without charge.
- The Department of Corrections, without charge, if the respondent is committed or is to be returned to the custody of the Department of Corrections from the Department of Children and Families.
- A person or entity authorized to view records upon a court order for good cause.[26]

The Clerk of the Court is prohibited from publishing any personal identifying information on a court docket or in a publicly accessible file. However, the Clerk of the Court is not prohibited from submitting the protected information to the Department of Law Enforcement for purposes of a criminal history record check relating to the sale of firearms.[27]

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[18] Section 394.467(1), F.S.
[19] *Id*.
[20] Section 394.4655, F.S.
[21] Section 394.4655(4), F.S.
[22] Section 394.4655(2), F.S.
[23] There is a difference between records the Legislature designates *exempt* from public record requirements and those the Legislature designates *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); *State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018); 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. 04- 09 (2004).
[24] Section 394.464, F.S.
[25] Section 394.464(1), F.S.
[26] In determining if good cause exists, the court must weigh the person or entity's need for the information against the potential harm to the respondent of disclosure. Section 3943464(1)(k), F.S.
[27] Section 394.464(2), F.S.

In 2019, the public necessity statement[28] stated that:

> The mental health of a person, including a minor, is a medical condition, which should be protected from dissemination to the public. A person's mental health is also an intensely private matter. The public stigma associated with a mental health condition may cause persons in need of treatment to avoid seeking treatment and related services if the record of such condition is accessible to the public. Without treatment, a person's condition may worsen, the person may harm himself or herself or others, and the person may become a financial burden on the state. 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.[29]

Pursuant to the OGSR Act, the exemption will repeal on October 2, 2024, unless reenacted by the Legislature.

During the 2023 interim, House and Senate staff sent a questionnaire to the Clerks of Court as part of its review under the OGSR Act. In total, staff received 42 responses from Clerks offices.[30] Respondents indicated they had not had any issues interpreting or applying the exemption and that they were unaware of the existence of any litigation concerning the exemption. Clerk staff noted that the Florida Supreme Court had incorporated the public record exemption into Rule 2.420 of the Rules of General Practice and Judicial Administration.[31] All respondents recommended the exemption be reenacted as is.

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for all petitions for voluntary and involuntary admission for mental health treatment, court orders, and related records that are filed with or by a court pursuant to the Baker Act.

B. SECTION DIRECTORY:

Section 1 amends s. 394.464, F.S., relating to court records; confidentiality.

Section 2 provides an effective date of October 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[28] Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."
[29] Chapter 2019-51, L.O.F.
[30] Open Government Sunset Review Questionnaire, Public Records Related to The Baker responses on file with the Ethics, Elections & Open Government Subcommittee.
[31] *See* Rule 2.420(d)(1)(B)(viii), Fla. R. Gen. Prac. & Jud. Admin (2021).

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. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties and municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Not applicable.