

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 95 Pub. Rec./Nonjudicial Arrest Record of a Minor

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

**TIED BILLS:** HB 93 **IDEN./SIM. BILLS:** CS/SB 166

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

### SUMMARY ANALYSIS

The Department of Law Enforcement (FDLE) must expunge a nonjudicial arrest record of a juvenile who has successfully completed a diversion program for a misdemeanor offense. Moreover, a juvenile who successfully completes a diversion program for a first-time misdemeanor offense may lawfully deny or fail to acknowledge his or her participation in a diversion program and the expunction of a nonjudicial arrest record, unless the inquiry is made by a criminal justice agency for specified purposes.

HB 93 (2021), to which this bill is linked, authorizes FDLE to expunge a juvenile's nonjudicial arrest record following the successful completion of a diversion program for any offense, rather than only a misdemeanor. A juvenile who successfully completes a diversion program for any offense, rather than only a first-time misdemeanor, may lawfully deny or fail to acknowledge his or her participation in a diversion program and the expunction of a nonjudicial arrest record, except when the inquiry is made by a criminal justice agency for specified purposes.

This bill, which is linked to the passage of HB 93 (2021), expands the public records exemption for the nonjudicial arrest records of a minor who has successfully completed a diversion program for any offense. Under the bill, such records are confidential and exempt from public disclosure, except that the record must be made available to criminal justice agencies only for the purpose of:

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

The bill provides for retroactive application of the public record exemption. It also provides for repeal of the public record exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

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

The bill will become effective on the same date that HB 93 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Public Records

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

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

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

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

##### Juvenile Diversion Expunction

###### *Diversion Programs*

Diversion is a program designed to divert a juvenile from entering the juvenile justice system by placing him or her on a less restrictive track that affords more opportunities for rehabilitation and restoration.<sup>7</sup> The goal of diversion is to maximize the opportunity for success and minimize the likelihood of recidivism.<sup>8</sup> The decision to refer a juvenile to a diversion program is at the discretion of either the law enforcement officer who interacts with the juvenile at the time of the offense or the state attorney who is referred the case. Examples of such programs are Community Arbitration, Juvenile Alternative Services Program, Teen Court, Intensive Delinquency Diversion Services, Civil Citation, Boy and Girl Scouts, Boys and Girls Clubs, mentoring programs, and alternative schools.<sup>9</sup>

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<sup>1</sup> Art. I, s. 24(c), FLA. CONST.

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

<sup>3</sup> Art. I, s. 24(c), FLA. CONST.

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

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

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

<sup>7</sup> Florida Department of Juvenile Justice, *Glossary*, <http://www.djj.state.fl.us/youth-families/glossary> (last visited Feb. 10, 2021).

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

(December 2013),

[http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report\\_web.pdf](http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf) (last visited Feb. 10, 2021).

<sup>9</sup> Florida Department of Juvenile Justice, *Probation & Community Intervention*, <http://www.djj.state.fl.us/services/probation> (last visited Feb. 10, 2021).

A juvenile may have the opportunity to participate in either a prearrest or postarrest diversion program. A prearrest diversion program is an intervention program that holds a juvenile accountable for their behavior, while diverting them from any court proceeding or formal arrest record.<sup>10</sup> A postarrest diversion program is a similar intervention program, but diverts the juvenile from further court proceedings after an arrest.<sup>11</sup> While prearrest diversion diverts a juvenile before an arrest record is ever created, under postarrest diversion, an arrest record is created and maintained pending the juvenile's participation in and completion of the diversion program. Upon successful completion of a postarrest diversion program, the juvenile's charges are dismissed.

### *Expunction*

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

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

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

- Submits an application for prearrest or postarrest diversion expunction;
- Participated in a diversion program based on the commission of a misdemeanor;
- Has not committed any other criminal offense or comparable ordinance violation;
- Participated in a diversion program that expressly allows for such expunction; and
- Submits certification from the state attorney that the juvenile meets the expunction qualifications.<sup>19</sup>

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

- FDLE may make an expunged juvenile diversion criminal record available to:
  - Criminal justice agencies for the purpose of determining eligibility for diversion programs;
  - When the record is sought as part of a criminal investigation; or
  - When making a prosecutorial decision;<sup>20</sup> and

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<sup>10</sup> Mark A. Greenwald, Overview of Florida's Pre-Arrest and Post-Arrest Juvenile Diversion Programs and Applicable Laws, Florida Department of Juvenile Justice (June 7, 2018), <http://www.fdle.state.fl.us/MSDHS/Meetings/June-Meeting-Documents/Presentations/June-7-930AM-DJJ-Greenwald-Diversion-Programs.aspx> (last visited Feb. 10, 2021).

<sup>11</sup> *Id.*

<sup>12</sup> Criminal history records in the custody of FDLE must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction. S. 943.045(16), F.S.

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

<sup>14</sup> The civil citation program offers early intervention, community counseling referrals, and other appropriate community resources to divert juvenile misdemeanor offenders from the juvenile justice system. The program works with other community partners in an effort to reduce juvenile crime and to provide services for at-risk youth. Nineteenth Judicial Circuit, *Civil Citation* (2019), <http://www.circuit19.org/programs-services/court-programs/juvenile/civil-citation> (last visited Feb. 10, 2021). S. 985.12, F.S.

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

<sup>16</sup> In neighborhood restorative justice programs, victims, the offender, and all others impacted by the crime discuss the impact, obligations, and actions needed to repair harm. Florida Restorative Justice Association, *Retributive Justice vs. Restorative Justice* (2014), <https://www.floridarestorativejustice.com/about-rj.html> (last visited Feb. 10, 2021). S. 985.155, F.S.

<sup>17</sup> Community arbitration is a program where a juvenile who has committed a relatively minor offense can have his or her case resolved in an informal manner, and appear before a community arbitrator instead of a judge in juvenile court. Twentieth Judicial Circuit, *Juvenile Arbitration Program* (2014), <https://www.ca.cjis20.org/home/main/juvarb.asp> (last visited Feb. 10, 2021). S. 985.16, F.S.

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

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

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

- Local criminal justice agencies in the county in which an arrest occurred must seal instead of destroy any relevant records.<sup>21</sup>

A juvenile who successfully completes a diversion program for a first-time misdemeanor offense may lawfully deny or fail to acknowledge his or her participation in a program and the expunction of a nonjudicial arrest record, unless the inquiry is made by a criminal justice agency<sup>22</sup> for the purpose of:

- Determining eligibility for diversion programs;
- A criminal investigation; or
- Making a prosecutorial decision.<sup>23</sup>

## HB 93 (2021)

HB 93 (2021), to which this bill is linked, requires FDLE to expunge a juvenile's nonjudicial arrest record following the successful completion of a diversion program for any offense, rather than only a misdemeanor. The bill authorizes a juvenile who has successfully completed a diversion program for any offense, rather than only a first-time misdemeanor, to lawfully deny or fail to acknowledge his or her participation in a program and the expunction of a nonjudicial arrest record, except when the inquiry is made by a criminal justice agency for specified purposes.<sup>24</sup>

### **Effect of Proposed Changes**

This bill, which is linked to the passage of HB 93 (2021), expands the public records exemption for juvenile offender records. Specifically, the bill provides that the nonjudicial arrest records of a minor who has successfully completed a diversion program are confidential and exempt<sup>25</sup> from public disclosure, except that the record must be made available to criminal justice agencies for specified purposes.

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

The bill provides for retroactive application of the public record exemption. It also provides for repeal of the public record exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill will become effective on the same date that HB 93 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

## **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 943.0582, F.S., expanding a public record exemption to include the nonjudicial arrest records of a minor who has successfully completed a diversion program.

<sup>21</sup> S. 943.0582(2)(b)2., F.S.

<sup>22</sup> "Criminal justice agency" means a court; FDLE; DJJ; the protective investigations component of the Department of Children and Families, investigating abuse or neglect; and any other governmental agency or subunit thereof that performs the administration of criminal justice pursuant to a statute or rule of court and that allocates a substantial part of its annual budget to the administration of criminal justice. S. 943.045(11), F.S.

<sup>23</sup> Ss. 985.126(5) and 943.0582(2)(b)1.a.-c., F.S.

<sup>24</sup> *Supra*, note 18.

<sup>25</sup> There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. *See Op. Att'y Gen. Fla.* (1985).

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

**Section 3:** Provides an effective date of the same date that HB 93 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

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

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

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

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

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

### Public Necessity Statement

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

### Breadth of Exemption

Article 1, section 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands the public records exemption for the nonjudicial arrest records of a minor who has successfully completed a diversion program for a felony or subsequent misdemeanor, which does not appear to be broader than necessary to accomplish its purpose.

#### B. RULE-MAKING AUTHORITY:

None.

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

None

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

None.