

Overview of Florida Privacy Laws Affecting Information Sharing

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Constitutional Framework — Right to Privacy

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

- FLA. CONST. Art. I, § 23

Constitutional Framework — Access to Public Records

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.

- FLA. CONST. Art. I, § 24(a)

Statutory Framework — Chapter 119

Public Records are:

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.

- Fla. Stat. § 119.011(12)

Public Records — Definition

- *all materials*
- *made or received*
- *by an agency*
- *in connection with official business*
- *which are used*
 - *to perpetuate,*
 - *communicate or*
 - *formalize*
- *knowledge*

- Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980)

Public Records — Confidentiality

- A record or information that is **confidential** is not subject to inspection by the public
- An agency can release confidential information only to specifically authorized persons and entities
 - WFTV, Inc. v. School Bd. of Seminole County, 874 So. 2d 48, 53 (Fla. 5th DCA 2004)

Public Records — Exemptions

- An **exempt** record or information “is not subject to the access requirements” of the Public Records Act
- But the agency is not prohibited from disclosing the documents or information
 - Fla. Stat. § 119.011(8)
 - Williams v. City of Minneola, 575 So. 2d 683, 687 (Fla. 5th DCA)

Confidentialities and Exemptions

Include:

- Hospital and medical records
- Mental health treatment records
- Child abuse investigations
- Law enforcement investigations and intelligence information
- Criminal history information
- School-based behavioral threat / risk assessment teams

Hospital Records

Patient records are confidential and must not be disclosed without the consent of the patient or his or her legal representative

- Fla. Stat. § 395.3025(4)

Hospital Records

But, “appropriate disclosure may be made without such consent” to certain people and entities, including

- Other health care professionals treating the patient
 - In response to a subpoena
 - Department of Children and Families, “for the purpose of investigations of or services for cases of abuse, neglect, or exploitation of children or vulnerable adults.”
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- Fla. Stat. § 395.3025(4)(a) – (l)

Medical Records

[R]ecords may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient.

- Fla. Stat. § 456.057(7)(a)

Medical Records

Records **may** be furnished without written authorization:

- In response to a subpoena
 - Statistical and scientific research
 - Poison control centers
 - Department of Children and Families, “for the purpose of investigations of or services for cases of abuse, neglect, or exploitation of children or vulnerable adults.”
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- Fla. Stat. § 456.057(7)(a)1 – (a)6

Mental Health Treatment

Clinical records are confidential and exempt

- Fla. Stat. § 394.4615(1)

Clinical records “include[] all medical records, progress notes, charts, and admission and discharge data, and all other information recorded by facility staff which pertains to the patient’s hospitalization or treatment.”

- Fla. Stat. § 394.455(6)

Mental Health Treatment

Clinical records **shall** be released:

- Authorization from patient or guardian
 - Authorization from patient's attorney needed "for adequate representation"
 - Court order
 - The Department of Corrections, if the patient is committed to, or is to be returned to, the Department of Corrections from the Department of Children and Families
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- Fla. Stat. § 394.4615(2)(a) - (d)

Mental Health Treatment

Clinical records **may** be released:

- When a patient has declared an intention to harm other persons
- “may authorize . . . sufficient information to provide adequate warning to the person threatened with harm by the patient”
- Fla. Stat. § 394.4615(3)(a)

Mental Health Treatment

Clinical records **may** be released:

- *When the administrator of the facility or secretary of the department deems release to a qualified researcher as defined in administrative rule, an aftercare treatment provider, or an employee or agent of the department is necessary for treatment of the patient, maintenance of adequate records, compilation of treatment data, aftercare planning, or evaluation of programs.*
- Fla. Stat. § 394.4615(3)(b)

Mental Health Treatment — Baker Act

A law enforcement officer who takes a person into custody who appears to meet the statutory criteria for involuntary examination must “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.”

- Fla. Stat. § 394.463(2)(a)2

This record (e.g., the BA 52) is confidential

- Fla. Stat. § 394.4615(1)

Mental Health Treatment — Baker Act

However, a **separate incident report** made and kept by the law enforcement agency as a record of that event and that is not made a part of the patient's clinical record is **not** confidential

- AGO 93-51

Mental Health Treatment

Communications between a patient and a psychiatrist . . . shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative.

- Fla. Stat. § 456.059

Mental Health Treatment

Disclosure **may** occur when

- A patient is engaged in a treatment relationship with a psychiatrist;
 - The patient has made an actual threat to physically harm an identifiable victim or victims; and
 - The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat
- Fla. Stat. § 456.059

Mental Health Treatment

[T]he psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency.

- Fla. Stat. § 456.059

Child Abandonment, Abuse, & Neglect

[T]o protect the rights of the child and the child's parents . . . all records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, shall be confidential and exempt . . . and shall not be disclosed except as specifically authorized by this chapter

- Fla. Stat. § 39.202(1)

Child Abandonment, Abuse, & Neglect

Access “shall be granted only to the following persons, officials, and agencies” responsible for

- Child or adult protective investigations
- Ongoing child or adult protective services
- Early intervention and prevention services
- Healthy Start services
- Licensure
- Certain employment screening
- Domestic violence services
- Fla. Stat. § 39.202(2)(a)(1) – (7)

Child Abandonment, Abuse, & Neglect

Access “shall be granted”

- 19 separately enumerated entities
- Fla. Stat. § 39.202(2)(b) - (t)

Law Enforcement Records

Arrest and crime reports are generally not confidential or exempt

- active criminal intelligence information and active criminal investigative information **is** exempt
- Fla. Stat. § 119.071(2)(c)1

Criminal History Records

Florida law enforcement agencies are authorized by statute to release exempt criminal history information about a criminal offender, unless it is confidential by law. Under Florida public records law, exempt information may be withheld. Confidential information must be withheld.

Examples of this are often seen when law enforcement asks for citizens to come forward with information about a crime or a suspect's whereabouts.

Juvenile Criminal History Records

Criminal history information relating to juveniles is generally confidential and exempt

information obtained . . . in the discharge of official duty by any judge, any employee of the court, any authorized agent of the DJJ, the Florida Commission on Offender Review, the Department of Corrections, the juvenile justice circuit boards, any law enforcement agent, or any licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile is confidential and exempt

- Fla. Stat. § 985.04(1)(a)

Juvenile Criminal History Records

There are exceptions to the confidentiality of juvenile criminal history information, if the juvenile was

- arrested for, charged with, or found to have committed a crime that, if committed by an adult, would be a felony
 - transferred to adult court
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- Fla. Stat. § 985.556, *et seq.*

Juvenile Criminal History Records

Can only be disclosed to:

- Court personnel
- DJJ and its designees
- Department of Corrections
- Florida Commission on Offender Review
- Law enforcement agents
- School superintendents and their designees
- Licensed professional or licensed community agency representative for assessment or treatment
- Court order
- Fla. Stat. § 985.04(1)(b)

Juvenile Criminal History Records

Confidential juvenile criminal history information is also available to

- criminal justice agencies for criminal justice purposes
 - the juvenile and the juvenile's attorney, parents, and guardians
 - certain agencies and entities for employment or licensing purposes (e.g., DCF, The Florida Bar, etc.)
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- Fla. Stat. § 943.053(3)(c)1

Juvenile Criminal History Records

Mandatory school notification

- When a juvenile is arrested for or charged with an offense that would be a felony if committed by an adult, or a crime of violence, the law enforcement agency or state attorney must notify the superintendent that the child is alleged to have committed the delinquent act
- Fla. Stat. § 985.04(4)(a) & (b)

Threat Assessment Teams

School-based behavioral threat / risk assessment teams
— e.g., Threat Assessment Team (TAT)

- Fla. Stat. § 1006.07(7) (S.B. 7026, ln. 1948, *et seq.*)

Threat Assessment Teams

Access to criminal history record information is permitted on a preliminary determination by the TAT that

- a student poses a threat of violence to himself or herself or others or
 - exhibits significantly disruptive behavior or need for assistance
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- Fla. Stat. § 1006.07(7) (S.B. 7026, ln. 1948, *et seq.*)

Threat Assessment Teams

[S]tate and local agencies and programs that provide services to students experiencing or at risk of an emotional disturbance or a mental illness, including the school districts, school personnel, state and local law enforcement agencies, the [DJJ], the [DCF], the [DOH], the [AHCA], the Agency for Persons with Disabilities, the [DOE], the Statewide Guardian Ad Litem Office, and any service or support provider contracting with such agencies . . .

Threat Assessment Teams

... may share with each other records or information that are confidential or exempt from disclosure ...

- *if the records or information are reasonably necessary to ensure access to appropriate services for the student or*
- *to ensure the safety of the student or others.*
- Fla. Stat. § 1006.07(7)(d) (S.B. 7026, ln. 1983)

Threat Assessment Teams

All such state and local agencies and programs shall communicate, collaborate, and coordinate efforts to serve such students.

- Fla. Stat. § 1006.07(7)(d) (S.B. 7026, ln. 1983)

Sealing and Expunction

Sealing: Placing the record under restricted access

Expunction: Removing and destroying the record

- *Expunction is the literal, physical destruction of records*
- AGO 75-29

Sealing Criminal History Records

Prerequisites and requirements for obtaining

Effect of sealing a record

- The record becomes confidential and exempt
- Subject of a sealed criminal history record can lawfully deny and fail to acknowledge the arrests covered by the sealed record (exceptions for criminal justice employment, licensing boards, school employment, etc.; see Fla. Stat. § 943.059(4)(a)(1) – (a)(10))
- Fla. Stat. § 943.059

Expunction of Criminal History Records

Prerequisites and requirements for obtaining

Effect of expunging a record

- Destruction of the record
- Subject of an expunged record can lawfully deny and fail to acknowledge the arrests covered by the expunged record (see exceptions in Fla. Stat. § 943.0585(4)(a)(1) – (a)(8))
- Fla. Stat. § 943.0585

Expunction of Juvenile Records

Diversion program expunction.

A person who has completed a juvenile diversion program for a misdemeanor may apply for a juvenile diversion expungement of that misdemeanor from the juvenile record.

- Fla. Stat. § 943.0582(1)

Expunction of Juvenile Records

General rule: Per statute, FDLE “auto expunges” juvenile records when the person reaches age 21.

- Fla. Stat. § 943.0515(1)(b)1

Exceptions that postpone “auto expunge” to age 26:

- Serious or habitual
- Committed to juvenile correctional facility or juvenile prison
- Fla. Stat. § 943.0515(1)(a)

Exceptions to “auto expunge”, and instead keep the juvenile record and merge it with the adult record:

- After age 18, charged or convicted of a forcible felony
- While still a juvenile, adjudicated *as an adult* for a forcible felony
- Adjudicated delinquent after 2007 for an offense that would require registration as a sex offender.

Forcible felony:

“Forcible felony” means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

- Fla. Stat. § 943.0515

Expunction of Juvenile Records

Early expunction is available for juvenile who are **not a serious or habitual offenders**

- must be 18 or older and less than 21
- not charged with or found to have committed any crime in the prior 5 years
- only applies to offenses committed before the juvenile reached age 18
- requires approval of the state attorney for each circuit in which an offense occurred
- Fla. Stat. § 943.0515(1)(b)2

Questions?