

**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.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: SB 6-A

INTRODUCER: Senators Bradley and Young

SUBJECT: Public Records/Medical Marijuana Use Registry/Physician Certification for Marijuana and Dispensing/Department of Health

DATE: June 8, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stovall</u>	<u>Stovall</u>	<u>HP</u>	<u>Favorable</u>
2.	<u>Loe</u>	<u>Hansen</u>	<u>AP</u>	<u>Favorable</u>

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**I. Summary:**

SB 6-A expands the public records exemption for the medical marijuana use registry (registry), formerly the compassionate use registry, to conform its provisions to changes being made to section 381.986, Florida Statutes, regarding the medical use of marijuana by SB 8-A. The bill also protects certain personal identifying information that is held by the Department of Health (DOH) outside of the registry.

Specifically, the bill makes a qualifying patient's and a caregiver's personal identifying information and all personal identifying information pertaining to the physician certification for marijuana held by the department confidential and exempt from public records laws; restricts access to a patient's diagnosis when a law enforcement agency or medical marijuana treatment center accesses the registry to verify a qualifying patient's or caregiver's authorization under s. 381.986, F.S., to use or possess marijuana; and expands access to this confidential information to:

- Practitioners licensed to prescribe prescription drugs for purposes of patient care;
- Department employees for approval of exceptions to marijuana daily dosage limits; and
- The Coalition for Medical Marijuana Research and Education established in s. 1004.4351, F.S.

The bill also extends the open government sunset review date to October 2, 2022, includes the constitutionally required public necessity statement, and makes other conforming changes to provisions amended by SB 8-A.

The bill requires a two-thirds vote from each chamber for passage.

The bill has no impact on state revenues or expenditures.

The bill takes effect on the same date as SB 8-A, or other similar legislation, becomes a law, provided both are adopted in the same legislative session.

## II. Present Situation:

### Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that:

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S.

Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” to mean as “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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> *Id.*

broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption that does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>13</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>14</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>15</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>16</sup>

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>17</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>18</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>19</sup> or
- It protects trade or business secrets.<sup>20</sup>

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

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

<sup>13</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>14</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(b), F.S.

<sup>18</sup> Section 119.15(6)(b)1., F.S.

<sup>19</sup> Section 119.15(6)(b)2., F.S.

<sup>20</sup> Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.<sup>21</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>22</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>23</sup>

### Medical Marijuana in Florida

The Compassionate Medical Cannabis Act of 2014<sup>24</sup> (act) legalized a low tetrahydrocannabinol (THC) and high cannabidiol (CBD) form of cannabis (low-THC cannabis)<sup>25</sup> for medical use<sup>26</sup> by patients suffering from cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms.

Chapter 2016-123, Laws of Florida, amended the act to expand the regulatory structure relating to dispensing low-THC cannabis and authorized approved dispensing organizations to cultivate and dispense medical cannabis to eligible patients as defined under the Right to Try Act (RTTA).<sup>27</sup> In conjunction with s. 381.986, F.S., the RTTA allows physicians to treat eligible patients with terminal conditions with medical cannabis by including medical cannabis<sup>28</sup> within the definition of an investigational drug, biological product, or device. Physicians must order the use of medical cannabis for those patients pursuant to the provisions of s. 381.986, F.S.

In November 2016, Florida voters approved Amendment 2 that added s. 29, Art. X to the State Constitution. This new constitutional provision approved the medical use of marijuana by certain

<sup>21</sup> Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>22</sup> FLA. CONST. art. I, s. 24(c).

<sup>23</sup> Section 119.15(7), F.S.

<sup>24</sup> Chapter 2014-157, Laws of Fla., codified in s. 381.986, F.S.

<sup>25</sup> Section 381.986(b), F.S., defines “low-THC cannabis,” as the dried flowers of the plant *Cannabis* which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight, or the seeds, resin, or any compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.

<sup>26</sup> Section 381.986(1)(c), F.S., defines “medical use” as administration of the ordered amount of low-THC cannabis; and the term does not include the possession, use, or administration by smoking, or the transfer of low-THC cannabis to a person other than the qualified patient for whom it was ordered or the qualified patient’s legal representative. Section 381.986(1)(e), F.S., defines “smoking” as burning or igniting a substance and inhaling the smoke; smoking does not include the use of a vaporizer.

<sup>27</sup> Section 499.0295, F.S.

<sup>28</sup> “Medical cannabis” means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, sale, derivative, mixture, or preparation of the plant or its seeds or resin that is dispensed only from a DO for medical use by an eligible patient as defined in the Right to Try Act.

patients with debilitating medical conditions pursuant to a physician's certification. SB 8-A is proposed legislation that amends Florida's current low-THC and medical cannabis law to implement the provisions of s. 29, Art. X of the State Constitution. Along with other requirements, s. 29(d)(4), Art. X of the State Constitution requires that the DOH protect the confidentiality of all qualifying patients and makes all records containing the identity of qualifying patients confidential except for valid medical or law enforcement purposes.

For more details on current medical marijuana laws in Florida and other states, including details on Amendment 2, and s. 29, Art. X of the State Constitution, please see the analysis for SB 8-A.

### ***Compassionate Use Registry and Identification Cards***

Section 381.986, F.S., requires the DOH to create a secure, electronic, and online registry, for the registration of physicians and patients and for the verification of patient orders by dispensing organizations (DOs) that is accessible to law enforcement.<sup>29</sup> The registry must allow DOs to record the dispensing of low-THC cannabis, and must prevent an active registration of a patient by multiple physicians. Physicians must register qualified patients with the registry and DOs are required to verify that the patient has an active registration in the registry, that the order presented matches the order contents as recorded in the registry, and that the order has not already been filled before dispensing any low-THC cannabis. The DOs are also required to record in the registry the date, time, quantity, and form of low-THC cannabis dispensed.<sup>30</sup> The registry became operational on July 11, 2016.<sup>31</sup> As of June 1, 2017, there were 15,878 patients registered with the registry.<sup>32</sup>

On February 19, 2017, the DOH adopted Rule 64-4.011, F.A.C., which governs the issuance and renewal of registry identification cards (ID card). The rule requires patients and legal representatives to obtain ID cards to obtain low-THC cannabis, medical cannabis, or a cannabis delivery device. In order to obtain an ID card, a patient or legal representative must submit an application form<sup>33</sup> created by the DOH. The form requires the patient or legal representative to submit personal identifying information to the DOH including his or her name, address, social security number, telephone number, date of birth, a passport style photo, and proof of residency including a driver's license, utility bill, or voter registration card.

### ***Public Records Exemption for the Compassionate Use Registry***

Section 381.987, F.S., enacted in 2014, provides an exemption from the public records law for a patient's personal identifying information and all information pertaining to the physician's order held by the DOH in the compassionate use registry. An exemption is also established for a physician's identifying information held by the department in the compassionate use registry.

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<sup>29</sup> Section 381.986(5)(a), F.S.

<sup>30</sup> Section 381.986(6), F.S.

<sup>31</sup> Office of Compassionate Use, *Implementation Timeline* (October 2016) available at <http://www.floridahealth.gov/programs-and-services/office-of-compassionate-use/documents/ocu-timeline.pdf>, (last visited June 6, 2017).

<sup>32</sup> Email from the Legislative Affairs Director, Department of Health (June 1, 2017) (on file with the Senate Committee on Health Policy).

<sup>33</sup> For patients form DH8009-OCU-10/2016, available at <https://www.flrules.org/Gateway/reference.asp?No=Ref-07855>, (last visited on June 6, 2017) and for legal representatives form DH8010-OCU-10/2016 available at <https://www.flrules.org/Gateway/reference.asp?No=Ref-07856>, (last visited June 6, 2017).

Access to the registry, including the confidential and exempt information is authorized to:

- A law enforcement agency that is investigating a violation of law regarding cannabis in which the subject of the investigation claims an exception established under s. 381.986, F.S.
- A DO which is attempting to verify information prior to filling a patient's order issued pursuant to s. 381.986, F.S.
- A physician for the purpose of monitoring his or her patient's use of cannabis or before issuing an order to ensure another physician has not ordered cannabis for that patient.
- An employee of the department to maintain the registry and for period reporting.
- The department's regulatory boards if investigating a specific physician for a violation of s. 381.986, F.S.
- A person engaged in bona fide research if the person agrees to certain safeguards relating to the confidential information.

A person who willfully and knowingly violates these provisions commits a felony of the third degree.

### ***Medical Marijuana Use Registry and Identification Cards***

SB 8-A amends the section of law governing both the registry and issuing of ID cards<sup>34</sup> to conform terms to definitions provided in s. 29, Art. X of the State Constitution (such as changing the term "legal representative" to "caregiver") and to provide more statutory detail on qualifications for an ID card what is required to be on an ID card. SB 8-A requires that all patient and caregiver ID cards include, at a minimum:

- The name, address, and date of birth of the patient or caregiver, as appropriate;
- A full-face, passport-type, color photograph of the patient or caregiver, as appropriate, taken within 90 days immediately preceding registration or the Florida driver license or Florida identification care photograph of the qualified patient or caregiver obtained directly from the Department of Highway Safety and Motor Vehicles;
- A designation of the cardholder as a patient or caregiver;
- A unique numeric identifier for the patient or caregiver that is matched to the identifier used for such person in the DOH's registry. A caregiver's identification number and file in the registry must be linked to the file of the patient or patients the caregiver is assisting; and
- The expiration date, which shall be one year after issuance or the date treatment ends as provided in the patient's physician certification, whichever occurs first.

Additionally, SB 8-A requires the submission to the DOH of proof that an individual is a resident of this state for purposes of registration of qualified patients and caregivers in the registry. This includes various forms of information for adult residents, adult seasonal residents,<sup>35</sup> and minors.

An adult resident must provide the DOH with a copy of his or her valid Florida driver license or valid Florida identification card. An adult seasonal resident, who cannot provide either of these

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<sup>34</sup> Section 381.986, F.S.

<sup>35</sup> A "seasonal resident" is defined in SB 8-A as a person who temporarily resides in this state for at least 31 consecutive days in each calendar year; maintains a temporary residence in this state; returns to the state or jurisdiction of his or her residence at least one time during each calendar year; and is registered to vote or pays income tax in another state or jurisdiction.

forms of proof may provide the DOH with a copy of two of the following that show proof of residential address:

- A deed, mortgage, monthly mortgage statement, mortgage payment booklet or residential rental or lease agreement.
- One proof of residential address from the seasonal resident's parent, step-parent, legal guardian or other person with whom the seasonal resident resides and a statement from the person with whom the seasonal resident resides stating that the seasonal resident does reside with him or her.
- A utility hookup or work order dated within 60 days before registration in the medical use registry.
- A utility bill, not more than 2 months old.
- Mail from a financial institution, including checking, savings, or investment account statements, not more than 2 months old.
- Mail from a federal, state, county, or municipal government agency, not more than 2 months old.
- Any other documentation that provides proof of residential address as determined by department rule.

Specific information required for a patient who is a minor includes a copy of a birth certificate or a current record of registration from a Florida K-12 school.

#### ***Qualified Patient Medical Information Submitted to the DOH***

SB 8-A requires qualified physicians to submit specified medical documentation pertaining to certain patients to the DOH. Upon receipt, the DOH is required to submit this documentation to the Coalition for Medical Marijuana Research and Education that is established in s. 1004.4351, F.S. in SB 8-A.

If a qualified physician issues a physician certification for a qualified patient diagnosed with a qualifying medical condition that is of the same kind or class as or comparable to those enumerated in s. 29, Art. X of the State Constitution,<sup>36</sup> the physician must submit the following to the applicable board (medicine or osteopathic medicine) within 14 days after issuing the physician certification:

- Documentation supporting the qualified physician's opinion that the medical condition is of the same kind or class as the conditions enumerated in the State Constitution.
- Documentation that establishes the efficacy of marijuana as treatment for the condition.
- Documentation supporting the qualified physician's opinion that the benefits of medical use of marijuana would likely outweigh the potential health risks for the patient.
- Any other documentation as required by board rule.

Upon patient re-evaluation before issuing a new certification to a qualified patient, the physician must determine whether the patient experienced an adverse drug interaction with any prescription or nonprescription medication or a reduction in the use of, or dependence on, other types of controlled substances related to the medical use of marijuana.

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<sup>36</sup> The qualifying medical conditions enumerated in the State Constitution include: cancer, epilepsy, glaucoma, HIV, AIDS, post-traumatic stress disorder, ALS, Crohn's disease, Parkinson's disease, and multiple sclerosis.

### III. Effect of Proposed Changes:

The bill amends s. 381.987, F.S., to conform its provisions to changes made to s. 381.986, F.S., by SB 8-A. The bill renames the registry the medical marijuana use registry. This public records exemption bill protects personal identifying information relating to the medical use of marijuana that is held by the department, either in the medical marijuana use registry or outside of the registry.

#### Section 1 of the bill:

- Makes the following information confidential and exempt from public records laws:
  - A qualifying patient's or caregiver's personal identifying information, including the addition of a patient's or caregiver's date of birth, photograph, and personal identifying information collected for the purpose of issuing the registration ID card.
  - A qualified physician's Drug Enforcement Administration number, residential address, and government issued identification card.
  - All personal identifying information pertaining to the physician certification for marijuana and the dispensing thereof, including but not limited to information related to the patient's diagnosis, information submitted by a physician in support of a request for a qualified patient's exception to the daily dose amount limit, and information submitted about a qualified patient's experience with marijuana after a re-evaluation examination of a qualified patient for a new certification for marijuana.
- Restricts access to information in the registry related to a patient's diagnosis by:
  - A law enforcement agency when accessing the registry to investigate a violation of law relating to marijuana in which the subject claims an exception established under s. 381.986, F.S., or
  - A medical marijuana treatment center when verifying a physician certification prior to dispensing marijuana or a marijuana delivery device.
- Expands access to confidential information in the registry to:
  - Practitioner's licensed to prescribe prescription drugs to ensure proper care for patients before medications that may interact with the medical use of marijuana are prescribed,
  - An employee of the department to monitor qualified physician practices in issuing certifications for the medical use of marijuana, and
- Authorizes access to confidential information held by the DOH either in the registry or outside the registry to:
  - An employee of the department for the purpose of approving or disapproving a request for an exception to the daily dose amount limit for a qualified patient.
  - The Coalition for Medical Marijuana Research and Education established in s. 1004.4351, F.S.

The bill provides that the information released from the registry or the department pursuant to this act remains confidential and exempt when received by a person granted access to that information. A person who willfully and knowingly violates this law commits a felony of the third degree.

The bill also extends the open government sunset review date to October 2, 2022, and makes other conforming and technical changes.

**Section 2** of the bill provides legislative findings. The bill states that the Legislature finds it is a public necessity to protect identifying information of qualifying patients, caregivers, and physicians in the registry, including all personal identifying information pertaining to the physician's certification of marijuana for the patient, in order to protect their privacy. The Legislature finds that the public availability of registry information could make the public aware of a patient's medical diseases or conditions and may also expose patients and caregivers to embarrassment, humiliation, harassment, or discrimination for their use, or assisting with the use, of marijuana.

**Section 3** provides that the bill takes effect on the same date that SB 8-A, or similar legislation, becomes a law, provided both are adopted in the same legislative session.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

###### **Voting Requirement**

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

###### **Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. The bill creates a new public records exemption and includes a public necessity statement.

###### **Breadth of Exemption**

Article I, s. 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts certain identifying information of caregivers that is held by the DOH within the registry. The public necessity for the exemption provides that it is necessary to protect patient and caregiver information from disclosure to protect their privacy and to protect them from potential discrimination. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

C. Trust Funds Restrictions:

None.

**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. Statutes Affected:**

This bill substantially amends section 381.987 of the Florida Statutes.

This bill creates one undesignated section of law.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.