

**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 Governmental Oversight and Accountability Committee

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BILL: SB 584

INTRODUCER: Senator Richter

SUBJECT: Public Records/Dental Workforce Surveys

DATE: January 24, 2012

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davlantes</u>	<u>Stovall</u>	<u>HR</u>	<b>Favorable</b>
2.	<u>Jenkins</u>	<u>Roberts</u>	<u>GO</u>	<b>Favorable</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

The bill makes confidential and exempt from public records requirements all personal identifying information contained in records provided by dentists or dental hygienists in response to dental workforce surveys and held by the Department of Health (DOH). The bill specifies circumstances under which the confidential and exempt information may be released.

The bill provides for review and repeal of the exemption pursuant to the Open Government Sunset Review Act and provides a statement of the public necessity for the exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill will take effect upon becoming a law.

This bill creates two undesignated sections of law.

**II. Present Situation:**

**Public Records<sup>1</sup>**

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.<sup>2</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of

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<sup>1</sup> Art I, s. 24(c), State Constitution.

<sup>2</sup> Section 1390, 1391 F.S. (Rev. 1892).

access to public records to a constitutional level.<sup>3</sup> Article I, s. 24, of the State Constitution, provides that:

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.

In addition to the State Constitution, the Public Records Act,<sup>4</sup> which predates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>5</sup> Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" 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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> Exemptions must be created by general law, and such law must specifically state the public

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<sup>3</sup> Art I, s. 24, State Constitution

<sup>4</sup> Ch. 119, F.S.

<sup>5</sup> 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution. See *supra* fn. 3.

<sup>6</sup> Section 119.011(12), F.S.

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

<sup>8</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>9</sup> *Supra* fn. 1.

necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>13</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>14</sup>

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

The Open Government Sunset Review Act (Act)<sup>15</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>16</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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, whose administration would be significantly impaired without the exemption;
- 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 their safety; 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 that 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.<sup>17</sup>

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?

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<sup>10</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> *Supra* fn. 1.

<sup>13</sup> Florida Attorney General Opinion 85-62.

<sup>14</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5<sup>th</sup> DCA 1991), review denied, 589 So. 2d 289 (Fla. 1991).

<sup>15</sup> Section 119.15, F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> *Id.*

- 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>18</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

Notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Workforce Surveys**

The DOH currently administers an optional workforce survey which dentists and dental hygienists may complete as part of their licensure renewal. For the 2009-2010 licensing cycle, the first time that this survey was offered, 89 percent of dentists with active licenses responded.<sup>19</sup> The survey was expanded to include dental hygienists for the 2010-2011 licensing cycle, and 87.9 percent responded.<sup>20</sup>

Physicians are required to respond to physician workforce surveys as a condition of license renewal.<sup>21</sup> All personal identifying information contained in records provided by physicians in response to these workforce surveys is confidential and exempt under s. 458.3193, F.S., concerning allopathic physicians, and s. 459.0083, F.S., concerning osteopathic physicians.

### **III. Effect of Proposed Changes:**

**Section 1** creates an undesignated section of law to require that personal identifying information contained in records provided by dentists or dental hygienists in response to dental workforce surveys held by the DOH be confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I

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<sup>18</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

<sup>19</sup> DOH, *Report on the 2009-2010 Workforce Survey of Dentists*, available at: [http://doh.state.fl.us/Family/dental/OralHealthcareWorkforce/2009\\_2010\\_Workforce\\_Survey\\_Dentists\\_Report.pdf](http://doh.state.fl.us/Family/dental/OralHealthcareWorkforce/2009_2010_Workforce_Survey_Dentists_Report.pdf) (Last visited on December 19, 2011).

<sup>20</sup> DOH, *2012 Bill Analysis, Economic Statement, and Fiscal Note for SB 584*. A copy is on file with the Senate Governmental Oversight and Accountability Committee.

<sup>21</sup> Section 381.4018, F.S. Language requiring the submission of physician workforce surveys for license renewal can be found in s. 458.3191, F.S., for allopathic physicians and s. 459.0081, F.S., for osteopathic physicians.

of the State Constitution. The bill authorizes disclosure of such information with the written consent of the individual to whom the information pertains or the individual's legally authorized representative, by court order upon a showing of good cause, or to a research entity fulfilling certain conditions.

Access to public records is a substantive right and, therefore, a statute affecting that right is presumptively prospective in its application. There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.<sup>22</sup> Accordingly, this bill may only make confidential and exempt personal identifying information that is received after the effective date of the act.

The bill provides that the public records exemption created in this act is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** creates an undesignated section of law providing justification of public necessity for the exemption. Candid and honest responses to the workforce survey will ensure that timely and accurate information is available to the DOH. The failure to maintain the confidentiality of the personal identifying information would prevent the resolution of important state interests to ensure the availability of dentists or dental hygienists in this state.

**Section 3** provides that this public records exemption takes effect upon becoming a law.

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

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

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

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

###### **Vote Requirement**

Section 24(c), Art. I, of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

###### **Subject Requirement**

Section 24(c), Art. I, of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

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<sup>22</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).

**Public Necessity Statement**

Section 24(c), Art. I, of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill will protect personal identifying information of dentists and dental hygienists who respond to the voluntary dental workforce survey.

**C. Government Sector Impact:**

None.<sup>23</sup>

**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.

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

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<sup>23</sup> *Supra* fn. 20.