

**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.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 452

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Joshua Abbott Organ and Tissue Registry/Donor Information

DATE: March 13, 2013      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall		<b>hp SPB 7004 as introduced</b>
2.	Naf	McVaney	GO	<b>Pre-meeting</b>
3.			RC	
4.				
5.				
6.				

**I. Summary:**

SB 452 is the result of an Open Government Sunset Review by the Health Policy Committee.

Current law provides a public records exemption for personal identifying information held in the Joshua Abbott Organ and Tissue Registry, which is an interactive web-based organ and tissue donor registry that allows for online organ donor registration. Specifically, information that identifies a donor is confidential and exempt from public records requirements. Such information may be disclosed under specified circumstances.

The public records exemption is subject to review under the Open Government Sunset Review Act and will sunset on October 2, 2013, unless saved from repeal through reenactment by the Legislature. This bill reenacts the exemption.

This bill does not expand the scope of the public records exemption and therefore does not require a two-thirds vote of the members present and voting in each house of the Legislature for passage.

This bill amends section 765.51551 of the Florida Statutes.

**II. Present Situation:**

**Public Records Laws**

The Florida Constitution provides every person 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 of persons acting on their behalf.<sup>1</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>2</sup>

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act<sup>3</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>4</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>5</sup>

Only the Legislature may create an exemption to public records requirements.<sup>6</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>7</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>8</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>9</sup>

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

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>10</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>11</sup>

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

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

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> Section 119.011(12), F.S., defines "public records" 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 "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

<sup>5</sup> Section 119.07(1)(a), F.S.

<sup>6</sup> FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records 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. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 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 the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

<sup>7</sup> FLA. CONST., art. I, s. 24(c).

<sup>8</sup> The bill may, however, contain multiple exemptions that relate to one subject.

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

<sup>10</sup> Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

<sup>11</sup> Section 119.15(3), F.S.

The Act 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 to meet such public purpose.<sup>12</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 governmental program, which administration would be significantly impaired without the exemption;
- It protects 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; or
- It protects trade or business secrets.<sup>13</sup>

The Act also requires specified questions to be considered during the review process.<sup>14</sup>

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is expanded.<sup>15</sup> A public necessity statement and a two-thirds vote for passage are not required 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<sup>16</sup> to the exemption is created.<sup>17</sup>

### **Organ Donations in Florida**

Over 3,500 people in Florida are registered and waiting for organ transplants, and thousands more wait for tissue donations.<sup>18</sup> The most common types of organ transplants include the kidneys, liver, heart, lungs and pancreas, but many other organs and tissues can be transplanted or used for various other medical procedures.<sup>19</sup> Nationwide, nearly 6,000 people die each year waiting for an organ donation.<sup>20</sup>

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<sup>12</sup> Section 119.15(6)(b), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> Section 119.15(6)(a), F.S. The specified questions are:

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

<sup>15</sup> An exemption is expanded when it is amended to include more records, information, or meetings or to include meetings as well as records, or records as well as meetings.

<sup>16</sup> An example of an exception to a public records exemption would be allowing an additional agency access to confidential and exempt records.

<sup>17</sup> *See State of Florida v. Ronald Knight*, 661 So.2d 344 (Fla. 4th DCA 1995) (holding that nothing in s. 24, art. I of the Florida Constitution requires exceptions to a public records exemption to contain a public necessity statement).

<sup>18</sup> *FAQs About Donation*, Donate Life Florida, 2009, available at:

[http://www.donateliflorida.org/content/about/facts/faq/#faq\\_22](http://www.donateliflorida.org/content/about/facts/faq/#faq_22), (last visited Jan. 16, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Four major organ and tissue procurement agencies operate in Florida to facilitate the process of organ donation. These agencies are certified by the U.S. Centers for Medicare and Medicaid Services (CMS) and operate in Florida to increase the number of registered donors and coordinate the donation process when organs become available.<sup>21</sup> Each agency serves a different region of the state.<sup>22</sup> In addition to federal certification of organ procurement organizations, the Agency for Healthcare Administration (AHCA) also certifies these organ procurement organizations and other eye and tissue organizations.<sup>23</sup>

### **The Joshua Abbott Organ and Tissue Donor Registry<sup>24</sup> (Donor Registry)**

In 2008,<sup>25</sup> Florida's Legislature found that a shortage of organ and tissue donors existed in Florida, and that there was a need for a statewide donor registry with online donor registration capability and enhanced donor education to increase the number of organ and tissue donors. This online registry would afford more persons who are awaiting organ or tissue transplants the opportunity for a full and productive life.<sup>26</sup> As directed by the legislature, the AHCA and the Department of Highway Safety and Motor Vehicles (DHSMV) jointly contracted for the operation of Florida's interactive web-based donor registry that, through electronic means, allows for online donor registration and the recording of organ and tissue donation records submitted through the driver's license identification program or through other sources. The AHCA and the DHSMV selected Donate Life Florida, which is a coalition of Florida's organ, tissue, and eye donor programs, to run the donor registry and maintain donor records.

Floridians who are age 18 or older can join the donor registry either online,<sup>27</sup> at the DHSMV (or their local drivers license office), or by contacting Donate Life Florida for a paper application. Children ages 13 to 17 may join the registry, but the final decision on any organ donation of a minor rests with the parent or guardian. The registry collects personal information from each donor including, but not limited to, his or her name, address, date and place of birth, race, ethnicity, and driver's license number.

Since 2007, the number of donors registered in the donor registry has increased by over 1,500,000.<sup>28</sup> As of January 16, 2013, there were 6,938,301 people registered in the donor registry.<sup>29</sup> Its large number of registered donors ranks the Joshua Abbott Organ and Tissue Donor Registry as the second largest donor registry in the United States in terms of enrollment.<sup>30</sup>

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<sup>21</sup> Organ Procurement Organizations, [Organdonor.gov](http://organdonor.gov), available at <http://organdonor.gov/materialsresources/materialsopolist.html>, (last visited Jan. 16, 2013).

<sup>22</sup> Id.; LifeLink of Florida serves west Florida, LifeQuest Organ Recovery Services serves north Florida, TransLife Organ and Tissue Donation Services serves east Florida, and LifeAlliance Organ Recovery Services serves south Florida.

<sup>23</sup> AHCA's authority for certifying organ, eye, and tissue banks can be found in s. 765.542, F.S., and a list of organ, eye and tissue banks is available on FloridaHealthFinder at [www.floridahealthfinder.gov](http://www.floridahealthfinder.gov), (last visited on Jan. 16, 2013.)

<sup>24</sup> Section 765.5155(5), F.S., designates the donor registry as the Joshua Abbott Organ and Tissue Registry, however it is currently referred to as the Joshua Abbott Organ and Tissue Donor Registry.

<sup>25</sup> Chapter 2008-223, L.O.F.

<sup>26</sup> Section 765.5155(1), F.S.

<sup>27</sup> At <https://www.donatelifeflorida.org/> (last visited on Jan. 16, 2013)

<sup>28</sup> There were 5,215,437 registered donors reported in the DHSMV's annual report for 2007-2008, which is available at: <http://www.flhsmv.gov/html/AgencyAnnualReport2008.pdf>, (last visited Sept. 27, 2012).

<sup>29</sup> [http://www.donatelifeflorida.org/content/about/facts/faq/#faq\\_22](http://www.donatelifeflorida.org/content/about/facts/faq/#faq_22), (last visited Jan. 16, 2013).

<sup>30</sup> From Donate Life Florida's annual report to AHCA for 2011. This report is on file with the Senate Health Policy Committee.

### **Organ Donor Registration at the DHSMV**

Section 765.521, F.S., which predates the establishment of the donor registry, requires that the AHCA and the DHSMV implement a system to encourage potential donors to make anatomical gifts through the process of issuing and renewing driver's licenses. Though the DHSMV no longer maintains an organ donor database, it still gives out organ donor cards in its offices around the state. The DHSMV will collect those cards if they are returned to its offices, but donors are encouraged to register with the donor registry electronically or to mail their organ donation cards directly to Donate Life Florida. Any donor cards collected by the DHSMV are mailed directly to Donate Life Florida for entry into the donor registry without copies of the information being made. The DHSMV maintains in its driver's license database a flag marking the person as a donor.<sup>31</sup>

### **Donor Registry Public Records Law Exemption**

Section 765.51551, F.S., enacted in 2008,<sup>32</sup> makes all personal identifying information in the donor registry confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24 of the State Constitution.

However, the statute authorizes the protected information to be made available to:

- Organ, tissue and eye procurement organizations that have been certified by the AHCA for purposes of ascertaining or effectuating the existence of a gift; and
- Persons engaged in bona fide research who agree to:
  - Submit a research plan to the AHCA that specifies the exact nature of the requested information and the intended use of such information;
  - Maintain the confidentiality of the records or information made available;
  - Destroy any confidential records or information once the research is concluded; and
  - Not directly or indirectly contact, for any purpose, any donor or donee.<sup>33</sup>

In enacting the public records exemption for the donor registry, the Florida Legislature found that it was a public necessity to make confidential and exempt from disclosure all information held in the donor registry which would identify a donor because:

- Making such information publicly available could open up donors in the registry to invasion of their personal privacy;
- The disclosure of such information could hinder the effective and efficient administration of the organ and tissue donor program;
- Opening such information up to the public could reduce donations and the availability of potentially life-saving organs and tissues; and

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<sup>31</sup> Email memo from Deborah Todd, program manager for Division of Motorist Services at the DHSMV, on file with the Senate Health Regulation Committee.

<sup>32</sup> Chapter 2008-222, L.O.F.

<sup>33</sup> Section 765.51551(2), F.S.

- Access to such information could be used to stalk, harass, solicit, or intimidate organ and tissue donors.<sup>34</sup>

Section 765.51551, F.S., does not exempt any information which is collected by the DHSMV before it is sent to Donate Life Florida for entry into the donor registry. However, personal identifying information<sup>35</sup> pertaining to a motor vehicle record collected by the DHSMV is protected from disclosure by the federal Driver Privacy Protection Act<sup>36</sup> and other Florida Statutes.<sup>37</sup>

### **Open Government Sunset Review for Section 765.51551, F.S.**

Senate professional staff of the Health Policy Committee conducted a review of the public records exemption in s. 765.51551, F.S., as required by the Open Government Sunset Review Act.<sup>38</sup> This review included gathering information on the past and current status of the Joshua Abbott Organ and Tissue Donor Registry and the public records exemption in s. 765.51551, F.S. Senate professional staff distributed a questionnaire to various interested parties, including the AHCA, the DHSMV, Donate Life Florida, and multiple organ and tissue procurement agencies, in order to determine the necessity of maintaining the public records exemption.<sup>39</sup> All organizations responding to the questionnaire supported the reenactment of this public records exemption.

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

The bill saves from repeal the public records exemption for information that identifies a donor and that is held in the donor registry.

The bill's effective date is October 1, 2013.

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

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

Not applicable. This bill does not appear to affect county or municipal government.

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

This bill saves from repeal the existing public records exemption in s. 765.51551, F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of the members present and voting in each house of the Legislature for passage.

<sup>34</sup> Chapter 2008-222, L.O.F.

<sup>35</sup> Including a driver's social security number, driver's license number, name, address, telephone number, and medical and disability information.

<sup>36</sup> 18 U.S.C. 2721-2725

<sup>37</sup> Section 322.142(4), F.S., protects the driver's photograph; s. 322.126, F.S., protects the driver's medical and disability information; and see generally s. 119.0712(2), F.S.

<sup>38</sup> Section 119.15, F.S.

<sup>39</sup> These completed questionnaires are on file with the Senate Health Policy Committee.

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. 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.