

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 Health Policy

BILL: SPB 7004

INTRODUCER: For consideration by Health Policy Committee

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

DATE: January 16, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall		Submitted as Committee Bill
2.				
3.				
4.				
5.				
6.				

I. Summary:

This proposed committee bill reenacts the public records exemption for personal identifying information held in the Joshua Abbott Organ and Tissue Donor Registry. This exemption will sunset on October 2, 2013, unless saved from repeal by reenactment by the Legislature. This proposed committee bill is the result of a review under the Open Government Sunset Review Act.

This proposed committee bill amends section 765.51551 of the Florida Statutes.

II. Present Situation:

Public Records

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 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² 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

¹ Section 1390, 1391 Florida Statutes. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

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,³ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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 agency⁴ 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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

³ Chapter 119, F.S.

⁴ 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.”

⁵ Section 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. 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. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which 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.¹⁵

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?
- 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?

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(6)(b), F.S.

- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the 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.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

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

... notwithstanding s. 778.28 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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Organ Donations in Florida

Over 3,500 people in Florida are registered and waiting for organ transplants and thousands more wait for tissue donations.¹⁷ 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.¹⁸ Nationwide, nearly 6,000 people die each year waiting for an organ donation.¹⁹

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.²⁰ Each agency serves a different region of the state.²¹ 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.²²

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ *FAQs About Donation*, Donate Life Florida, 2009, available at: http://www.donateliflorida.org/content/about/facts/faq/#faq_22, (last visited Jan. 16, 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Organ Procurement Organizations, [Organdonor.gov](http://organdonor.gov), available at <http://organdonor.gov/materialsresources/materialsopolist.html>, (last visited Jan. 16, 2013).

²¹ *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.

²² 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, (last visited on Jan. 16, 2013.)

The Joshua Abbott Organ and Tissue Donor Registry²³ (Donor Registry)

In 2008,²⁴ Florida's Legislature found a shortage of organ and tissue donors in Florida and 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.²⁵ 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,²⁶ 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, their 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 1,500,000.²⁷ As of January 16, 2013, there were 6,938,301 people registered in the donor registry.²⁸ 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.²⁹

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 their 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

²³ 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.

²⁴ Chapter 2008-223, L.O.F.

²⁵ Section 765.5155(1), F.S.

²⁶ At <https://www.donatelifeflorida.org/> (last visited on Jan. 16, 2013)

²⁷ 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).

²⁸ http://www.donatelifeflorida.org/content/about/facts/faq/#faq_22, (last visited Jan. 16, 2013).

²⁹ From Donate Life Florida's annual report to AHCA for 2011. This report is on file with the Senate Health Policy Committee.

information being made. The DHSMV maintains in its driver's license database a flag marking the person as a donor.³⁰

Donor Registry Public Records Law Exemption

Section 765.51551, F.S., enacted in 2008,³¹ 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 exempt 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.³²

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,
- Access to such information could be used to stalk, harass, solicit or intimidate organ and tissue donors.³³

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, personally identifying information³⁴ pertaining to a motor vehicle record collected by the DHSMV is protected from disclosure by the federal Driver Privacy Protection Act³⁵ and other Florida Statutes.³⁶

³⁰ Email memo from Deborah Todd, program manager for Division of Motorist Services at the DHSMV, on file with the Senate Health Regulation Committee.

³¹ Chapter 2008-222, L.O.F.

³² Section 765.51551(2), F.S.

³³ Chapter 2008-222, L.O.F.

³⁴ Including a driver's social security number, driver's license number, name, address, telephone number, and medical and disability information.

³⁵ 18 U.S.C. 2721-2725

³⁶ Section 322.142(4), F.S., protects the driver's photograph; s. 322.126, F.S., protects the driver's medical and disability

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.³⁷ 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.³⁸ All organizations responding to the questionnaire supported the reenactment of this public records exemption.

III. Effect of Proposed Changes:

Personal identifying information contained in the Joshua Abbott Organ and Tissue Donor Registry will remain confidential and exempt from the public records laws.

Section 1 amends s. 765.51551, F.S., to remove its scheduled repeal on October 2, 2013, thereby reenacting the exemption for personal identifying information in the Joshua Abbott Organ and Tissue Donor Registry.

Section 2 provides an effective date of October 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill reenacts and amends an existing public records exemption specified 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 each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

information; and see generally s. 119.0712(2), F.S.

³⁷ Section 119.15, F.S.

³⁸ These completed questionnaires are on file with the Senate Health Policy Committee.

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.