

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 939 Pub. Rec./Florida Prepaid College Board/Florida ABLE, Inc./Florida ABLE Program

SPONSOR(S): Health & Human Services Committee; Government Operations Subcommittee; Rodrigues and others

TIED BILLS: HB 935 **IDEN./SIM. BILLS:** CS/SB 646

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	12 Y, 0 N	Tuszynski	Brazzell
2) Government Operations Subcommittee	12 Y, 0 N, As CS	Williamson	Williamson
3) Health & Human Services Committee	17 Y, 0 N, As CS	Tuszynski	Calamas

SUMMARY ANALYSIS

The federal ABLE Act of 2014 (ABLE Act) authorized states to establish ABLE programs or contract with other states to administer such programs if certain conditions are met. ABLE programs would provide a tax-advantaged approach for certain individuals with disabilities to build financial resources for disability-related expenses without losing state or federal benefit eligibility, similar to 529 college savings plans.

CS/CS/HB 935 establishes the Florida ABLE Program. HB 939, which is tied to the passage of HB 935, creates a public records exemption for personal financial and health information of a consumer, or any information that would identify a consumer, which is held by the Florida Prepaid College Board, Florida ABLE, Inc., or Florida ABLE.

The bill authorizes the release of such information in certain instances. It also provides that the exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the State Constitution.

The bill appears to have no fiscal impact on the state or local government.

The bill provides that CS/CS/HB 939 becomes effective on the same date that HB 935 or similar legislation takes effect.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Public Records

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person the right to inspect and copy any state, county, or municipal record.

Open Government Sunset Review Act¹

The Open Government Sunset Review Act (act) prescribes a legislative review process for newly created or substantially amended public records exemptions.² The act 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.³

The act provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.⁴ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;⁵
- 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;⁶ or
- It protects trade or business secrets.⁷

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.⁸

Federal ABLE Act

The federal Achieving a Better Life Experience Act of 2014 (ABLE Act) became law on December 19, 2014.⁹ The purposes of the federal ABLE Act are to encourage and assist individuals and families in saving to support individuals with disabilities in maintaining health, independence, and quality of life, and provide secure funding for disability-related expenses that will supplement, but not supplant, other

¹ See s. 119.15, F.S.

² Section 119.15, F.S. Section 119.15(4)(b), F.S. provides that an exemption is considered substantially amended if it is expanded to include more information or to include meetings. The act 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.

³ Section 119.15(3), F.S.

⁴ Section 119.15(6)(b), F.S.

⁵ Section 119.15(6)(b)1., F.S.

⁶ Section 119.15(6)(b)2., F.S.

⁷ Section 119.15(6)(b)3., F.S.

⁸ Section 119.15(6)(b), F.S.

⁹ H.R. 5771, Division B, Title I, Public Law 113-295.

sources.¹⁰ The ABLE Act permits a state to implement a qualified ABLE program and establish ABLE accounts for individuals with disabilities that meet certain criteria.

Florida ABLE Program

CS/CS/HB 939 is tied to and helps implement CS/HB 935, which requires the Florida Prepaid College Board to create the Florida ABLE, Inc., as a direct support organization that is organized as a not-for-profit corporation. Florida ABLE, Inc., would establish and administer the Florida ABLE Program. HB 935 provides that the Florida ABLE, Inc., would operate under a contract with the Florida Prepaid College Board. The Florida College Savings Program is a tax-advantaged account that allows the tax-free accumulation and distribution of cash assets for qualified educational expenses under s. 529 of the Internal Revenue Code. These plans are very similar to the tax advantaged disability savings plans envisioned by the federal ABLE Act under s. 529A of the Internal Revenue Code.

Under the Florida ABLE Program, eligible individuals¹¹ with disabilities, family members and others would be able to contribute funds to an ABLE account without affecting the individual's eligibility for state and federal benefits, such as Supplemental Security Income and Medicaid. The bill provides that those funds could be used for qualified disability expenses relating to the individual's blindness or disability. These expenses would include education, housing, transportation, employment support, health, prevention, wellness, financial, and legal expenses, and other expenses authorized through federal regulations. Funds placed in the ABLE program would supplement rather than supplant benefits provided through state and federal programs, earnings, and other sources.

Effect of Proposed Changes

The bill creates a public records exemption for personal financial and health information of a consumer held by the Florida Prepaid College Board, Florida ABLE, Inc., Florida ABLE program, or an agent or service provider of one of these entities relating to an ABLE account or a participation agreement, or any information that could identify a consumer. The information is made confidential and exempt¹² from s. 119.07(1), F.S., and s. 24(a), Art. I, of the State Constitution.

For purposes of the bill, the term "consumer" means a party to a participation agreement of the Florida ABLE program. The bill defines the term "personal financial and health information" to mean:

- A consumer's personal health condition, disease, injury, or medical diagnosis or treatment;
- The existence, nature, source, or amount of a consumer's personal income or expenses;
- Records of or relating to a consumer's personal financial transactions of any kind; or
- The existence, identification, nature, or value of a consumer's assets, liabilities, or net worth.

The bill authorizes Florida Prepaid College Board or Florida ABLE, Inc., to disclose information made confidential and exempt to another state or federal government entity if disclosure is necessary for the receiving entity to perform its duties or responsibilities or to verify the eligibility of an eligible individual or authorize the use of an ABLE account.

¹⁰ Id.

¹¹ An individual is an eligible individual for establishing an ABLE account for a taxable year if during such taxable year:

- The individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26; or
- A disability certification with respect to such individual is filed with the Secretary of the Department of Treasury for such taxable year. See H.R. 5771, Division B, Title I. Public Law 113-295.

¹² There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems 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, 53 (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 1994); *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 statute. See Attorney General Opinion 85-62 (August 1, 1985).

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity for the public records exemption. The Legislature finds that it is a public necessity to protect a consumer's:

- Personal identifying information in order to encourage participation in the program, thus ensuring the effective and efficient administration of the program;
- Personal financial information due to the possibility of jeopardizing the individual's financial security through identity theft, fraud, or other illegal activity; and
- Health information due to the possibility of detrimental effects on the consumer's personal and business relationships and finances.

The bill will take effect on the same date as HB 935 or similar legislation if such legislation is adopted in the same legislative session, or an extension of the same session, and becomes law. The effective date of CS/HB 935 is October 1, 2015.

B. SECTION DIRECTORY:

Section 1: Creates s.1009.987, F.S., relating to public record exemption for health information.

Section 2: Provides a public necessity statement.

Section 3: Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

This bill creates a public-records exemption. It complies with the requirements of s. 24(c), Art. I of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill creates an exemption, it contains a statement of public necessity and is subject to a two-thirds vote of each house of the Legislature for passage as required by s. 24(c), Art. I of the Florida Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 24, 2015, the Government Operations Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment conforms the public necessity statement to the public record exemption.

On April 1, 2015, the Health & Human Services Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment defined the term "consumer" to mean a party to a participation agreement with the Florida ABLE program.

This analysis is drafted to the committee substitute as approved by the Health & Human Services Committee.