

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: CS/SB 1008

INTRODUCER: Banking and Insurance Committee and Senators Perry and Bradley

SUBJECT: Public Records/Injured or Deceased Employee/Department of Financial Services

DATE: April 14, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1008 creates a public records exemption for personal identifying information of an injured or deceased worker contained in reports, notices, records, or supporting documentation held by the Department of Financial Services (DFS) pursuant to s. 440.1851, F.S. "Personal identifying information," means the injured or deceased employee's name, date of birth, home, mailing, or e-mail address, or telephone number. The bill authorizes the DFS to disclose personal identifying information made confidential and exempt only:

- To the injured employee, to the spouse or a dependent of the deceased employee, to the spouse or a dependent of the injured employee if authorized by the injured employee, or to the legal representative of the deceased employee's estate;
- To a party litigant, or his or her authorized representative, in matters pending before the Office of the Judges of Compensation Claims;
- To a carrier or an employer for the purpose of investigating the compensability of a claim or for the purpose of administering its anti-fraud investigative unit established pursuant to s. 626.9891, F.S.;
- In an aggregate reporting format that does not reveal the personal identifying information of any employee;
- Pursuant to a court order or subpoena;
- To an agency for administering its anti-fraud investigative function or in furtherance of the agency's official duties and responsibilities; or
- To a federal governmental entity in the furtherance of the entity's official duties and responsibilities.

The bill provides that a person who willfully and knowingly discloses personal identifying information made confidential and exempt by this bill commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

The public records exemption created by this bill is subject to the Open Government Sunset Review and will stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill requires a two-thirds vote from each chamber for passage because the bill creates a public records exemptions.

The bill takes effect October 1, 2017.

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.¹ 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.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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.”

agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷ 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;¹⁸

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

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Id.*

¹² *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).

¹³ 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).

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

¹⁵ 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.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

- 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;¹⁹ or
- It protects trade or business secrets.²⁰

The OGSR also requires specified questions to be considered during the review process.²¹ 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.²² 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.²³

Department of Financial Services

The Chief Financial Officer is the head of the DFS.²⁴ The DFS is responsible for various administrative and law enforcement functions. The scope of the DFS's jurisdiction includes many divisions, such as the Division of Investigative and Forensic Services, the Division of Risk Management, and the Division of Workers' Compensation.

The Bureau of Insurance Fraud of the Division of Investigative and Forensic Services investigates alleged acts of insurance fraud not categorized under workers' compensation fraud, including; licensee, healthcare, application, vehicle, homeowners, commercial, disability, arson, and life insurance fraud. Within these categories are: organized schemes to defraud the public and insurers, insolvency of insurance companies due to internal fraud, criminal activity.²⁵

The Bureau of State Employee Workers' Compensation Claims within the Division of Risk Management is responsible for the administration of all workers' compensations claims filed by state employees and volunteers who are injured on the job. The bureau is primarily responsible for ensuring that covered individuals receive timely benefits, while safeguarding the State from instances of fraud, waste, and abuse.²⁶

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ 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?

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ Section 20.121(1), F.S.

²⁵ Section 626.989, F.S.

²⁶ See Bureau of State Employee Workers' Compensation Claims within the Division of Risk Management, available at <http://www.fldfs.com/Division/Risk/WorkersCompensation/Default.htm> (last viewed Apr. 5, 2017).

The Division of Workers' Compensation is responsible for administering many of the provisions of ch. 440, F.S.²⁷ In addition, the Agency for Health Care Administration and the Office of Judges of Compensation Claims within the Division of Administrative Hearings are also responsible for administering provisions of ch. 440, F.S., the Workers' Compensation Law.²⁸

Section 440.185, F.S., establishes reporting requirements for employers and carriers relating to injured employees. In addition to the First Report of Injury (DWC-1), employers and carriers are required to file subsequent reports with the DFS relating to an injured worker that also contain information that would identify an injured worker. These reports or forms include, but are not limited to the: Wage Statement, Request for Wage Loss/Temporary Partial Benefits, Notice of Action/Change, Notice of Denial, and Claim Cost Report. Generally, these reports or forms²⁹ require the submission of the following information to the DFS:

- The name and address of the employer;
- The name, social security number, mailing address, telephone number, and occupation of the injured worker;
- The cause and nature of the injury or death;
- The year, month, day, and hour when, and the particular locality where the injury or death occurred; and
- Such other information the DFS may require.³⁰

Carriers and employers are required to report to the DFS every injury that results in payment of lost wages. Further, additional reports about the condition of the employee, including copies of medical reports,³¹ funeral expenses, and wage statements, must be filed with the DFS.³²

Public Records Exemptions Relating to Florida's Workers' Compensation Law

Currently, ch. 440, F.S., provides two public records exemptions directly related to injured or deceased injured workers. The first exemption, s. 440.102(8), F.S., protects all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced because of a drug-testing program. The second exemption, s. 440.125, F.S., provides that medical records and medical reports identifying an injured worker, which are filed with the DFS pursuant to s. 440.13, F.S., are confidential and exempt.

In addition, s. 624.23, F.S., of the Florida Insurance Code provides a public record exemption for personal information submitted by a consumer seeking assistance from the DFS. The term, "consumer," is defined to include an employee seeking assistance from the Employee Assistance

²⁷ Effective July 1, 2002, the Department of Labor and Employment Security was abolished and the majority of the functions and programs that were within the Division of Workers' Compensation of this department were transferred to the Department of Insurance. [ch. 2002-194, Laws of Fla.] Effective January 7, 2003, the Division of Workers' Compensation will be transferred to the Department of Financial Services. [ch. 2002-404, Laws of Fla.]

²⁸ Section 440.01, F.S.

²⁹ Section 440.185(2), F.S.

³⁰ Rule 69L-3.025, F.A.C., incorporating DFS-F2-DWC-1 by reference.

³¹ Information in the medical reports include the name and address of the injured worker, date of accident, and procedure and diagnosis code describing the treatment and nature of the injury. Section 440.13(4)(b), F.S., and Rules 69L-7.710-7.750, F.A.C.

³² Section 440.185(4), F.S.

and Ombudsman Office under s. 440.191, F.S. Section 624.23, F.S., provides that a consumer's personal and financial information means:

- Personal health condition, disease, or injury;
- A history of a consumer's personal 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;
- The existence, identification, nature, or value of a consumer's assets, liabilities, or net worth;
- The existence or content of, or any individual coverage or status under a consumer's beneficial interest in, any insurance policy or annuity contract; or
- The existence, identification, nature, or value of a consumer's interest in any insurance policy, annuity contract, or trust.

Personal financial and health information held by the DFS or Office of Insurance Regulation relating to a consumer's complaint or inquiry regarding a matter or activity regulated under the Florida Insurance Code or Employee Assistance and Ombudsman Office, are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Further, the section provides that such confidential and exempt information may be disclosed to:

- Another governmental entity, if disclosure is necessary for the receiving entity to perform its duties and responsibilities.
- The National Association of Insurance Commissioners.
- The consumer or the legally authorized representative of the consumer.

In 1998, the Legislature enacted a public records exemption for information, pertaining to injured or deceased workers, contained in the report of injury or death submitted to the division. This exemption provided that any information contained in a report of injury or illness that was filed pursuant to s. 440.185, F.S., that would identify an ill or injured employee was confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. This exemption was not reenacted in 2003, and was repealed as a result of a 2002 Open Government Sunset Review of the public record exemption. The Senate committee staff interim report, did not recommend³³ reenacting the exemption since the statutory exemption, as implemented, did not maintain the confidentiality of an injured worker and failed to meet all of the OGSR standards necessary to be recommended for reenactment.³⁴

According to Division of Workers' Compensation (DWC), about 90 requests per month are received for requests of the names and contact information of injured workers that were reported by employers/carriers in the previous month. Pursuant to these requests, the names and contact information for approximately 4,750 injured or deceased workers are released in response to

³³ See Senate Committee on Banking and Insurance, *Open Government Sunset Review of the Public Records Exemption for Notices of Injury or Death Received by the Division of Workers' Compensation* (Nov. 2002) (on file with Senate Committee on Banking and Insurance).

³⁴ For example, interested parties could obtain records concerning an injured worker by providing the division with the name and social security number of the injured worker. In response, the division would provide the requestor with any applicable records of the injured worker with the name and social security number redacted. The exempt information concerning an injured workers' was also available to carriers and other parties, which subscribed to claims' databases provided by third parties, such as the Division of Workers' Compensation. This confidential information was readily available on other forms submitted to the division, pursuant to s. 440.185, F.S., and would not be protected by the exemption.

these monthly requests. The majority of the requesting parties are law firms.³⁵ The DWC also has an online claims database that allows users to search for claims of injured or deceased employees based on their name and social security number.³⁶

III. Effect of Proposed Changes:

Section 1 creates a public records exemption for personal identifying information of an injured or deceased worker contained in reports, notices, records, or supporting documentation held by the DFS pursuant to newly created s. 440.1851, F.S. “Personal identifying information,” means the injured or deceased employee’s name, date of birth, home mailing, or e-mail address, or telephone number.

The bill authorizes the DFS to disclose information made confidential and exempt only:

- To the injured employee, to the spouse or a dependent of the deceased employee, to the spouse or a dependent of the injured employee if authorized by the injured employee, or to the legal representative of the deceased employee’s estate;
- To a party litigant, or his or her authorized representative, in matters pending before the Office of the Judges of Compensation Claims;
- To a carrier or an employer for the purpose of investigating the compensability of a claim or for the purpose of administering its anti-fraud investigative unit established pursuant to s. 626.9891;
- In an aggregate reporting format that does not reveal the personal identifying information of any employee;
- Pursuant to a court order or subpoena;
- To an agency for administering its anti-fraud investigative function or in furtherance of the agency’s official duties and responsibilities; or
- To a federal governmental entity in the furtherance of the entity’s official duties and responsibilities.

Any carrier, employer, agency, or governmental entity receiving such information must maintain the confidentiality of the information as long as it would otherwise be confidential. The exemption applies to personally identifying information held by the DFS before, on, or after the effective date of the exemption.

The bill provides that a person who willfully and knowingly discloses personal identifying information made confidential and exempt by this bill commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

The public records exemption created by this bill is subject to the Open Government Sunset Review and will stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

³⁵ Section 440.192, F.S.

³⁶ See Division of Workers’ Compensation Claims Database available at <https://apps.fldfs.com/claimsweb/logon.aspx> (last viewed Apr. 5, 2017).

Section 2 provides a public necessity statement for making personal identifying information of an injured worker or employee held by the DFS pursuant to s. 440.1851, F.S., confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Such information is of a sensitive, personal nature. Disclosure of such sensitive, personal information about an injured or deceased employee is an invasion of that employee's privacy or the privacy of a deceased employee's family. Further, the release of such information could lead to discrimination against the employee by coworkers, potential employers, and others. The harm caused to such an employee or his or her family by the release of this information outweighs any public benefit derived from its release.

Section 3 provides the bill takes effect October 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

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 or expanded public record or public meeting exemption. CS/SB 1244 creates a public record and public meeting exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record and public meeting exemption and therefore includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

The bill will protect personal identifying information of injured or deceased employees held by the Department of Financial Services. Since attorneys will no longer have access to the names and contact information of injured or deceased workers, the bill may reduce attorney involvement in workers' compensation disputes.

C. Government Sector Impact:

Insignificant. The DFS estimated a nonrecurring fiscal impact of \$400 for the fiscal year 2017-2018.

VI. Technical Deficiencies:

The criminal penalty provision appears to be ambiguous and may need to be modified to state that unauthorized disclosure is a misdemeanor.

The bill appears to be limited to workers' compensation claims filed under s. 440.185, F.S. An expressed reference to this section may be appropriate for context.

VII. Related Issues:

The public records exemption in s. 624.23, F.S., does not exempt personal identifying information of consumers, which includes employees seeking assistance from the Employee Assistance and Ombudsman Office under s. 440.191, F.S.

VIII. Statutes Affected:

This bill creates section 440.1851 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Banking and Insurance on April 3, 2017:**

- Revises the definition of the term, “personal identifying information.”
- Expands the circumstances in which the Department of Financial Services may disclose personal identifying information.
- Creates a criminal penalty for a person who willfully and knowingly discloses information made confidential and exempt.

- Provides that the exemption applies to personal identifying information held by the DFS before, on, or after the effective date of the exemption.
- Revises the effective date of the bill.

B. Amendments:

None.

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