

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 103 Public Records/Nonviable Birth Records

SPONSOR(S): Health & Human Services Committee; Cortes

TIED BILLS: CS/HB 101 **IDEN./SIM. BILLS:** SB 674

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---------------------|---------|--|
| 1) Health Quality Subcommittee | 13 Y, 0 N | Siples | McElroy |
| 2) Oversight, Transparency & Administration Subcommittee | 11 Y, 0 N | Moore | Harrington |
| 3) Health & Human Services Committee | 15 Y, 0 N, As CS | Siples | Calamas |

SUMMARY ANALYSIS

CS/CS/HB 101 authorizes the Department of Health (DOH) to issue a certificate of nonviable birth upon the request of an authorized parent. A nonviable birth is a pregnancy that unintentionally and spontaneously results in a fetal demise before a gestation period of 20 completed weeks, more commonly known as a miscarriage.

CS/HB 103, which is linked with CS/CS/HB 101, creates a public record exemption for certain information that may be collected when issuing a certificate of nonviable birth. Specifically, the bill provides that the cause of death, parentage, marital status, and medical information included in nonviable birth records are confidential and exempt from public disclosure. The bill authorizes the release of a certified copy of the nonviable birth certificate that includes the confidential and exempt information to the fetus' parent, certain governmental agencies for official purposes, and upon the order of a court.

The bill provides for repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a public necessity statement as required by the State Constitution.

The bill may have an indeterminate negative fiscal impact on DOH.

The bill will become effective on the same date that CS/HB 101 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 and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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.¹ The public also has a right to have notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.³

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.⁷

The Legislature, however, may create an exemption to public record or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰ There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act and also confidential.

Exempt Records

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public record" as 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" 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. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁸ FLA. CONST., art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.¹¹

Confidential Records

The term "confidential" is not defined in the Public Records Act; however, it is used in Article I, s. 24 of the Florida Constitution, which provides that every person has the right to inspect or copy any public record, except with respect to records exempted or specifically made confidential by the Constitution. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.¹²

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public record or open meetings exemptions.¹³ 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.¹⁴

The OGSR provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁵ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;
- It protects sensitive personal information, the release of which 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; or
- It protects trade or business secrets.¹⁶

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.¹⁷

The OGSR also requires specific questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR asks the Legislature to 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.¹⁹ If the exemption is reenacted without

¹¹ See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." *Id.* at 686.

¹² *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), rev. denied, 892 So. 2d 1015 (Fla. 2004). See also, 04-09 Fla Op. Att'y Gen. (2004) and 86-97 Fla Op. Att'y Gen. (1986).

¹³ 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. Section 119.15(2), F.S.

¹⁴ Section 119.15(3), F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Section 119.15(6)(a), F.S. The questions are: What specific records or meetings are affected by the exemption? Whom does the exemption uniquely affect, as opposed to the 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?

¹⁹ FLA. CONST., art. I, s. 24(c).

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 retain their exempt status unless provided for by law.²⁰

Vital Records

The Bureau of Vital Records (bureau), which is housed within the Department of Health (DOH), is statutorily required to develop and maintain a uniform and efficient system of registering, compiling, storing, and preserving all vital records²¹ in this state.²² Under current law, the following records compiled by the bureau are confidential and exempt from public inspection:

- All birth records, except for those over 100 years old that are not sealed pursuant to a court order;²³
- Information relating to cause of death in all death and fetal death records;²⁴ and
- The parentage, marital status, and medical information of fetal death records.²⁵

Although these records are exempt from public inspection, the records may be made available for health research purposes, as approved by DOH.

Certificates of Nonviable Birth

CS/CS/HB 101 authorizes the bureau to issue a certificate of nonviable birth upon the request of a parent who experiences an unintentional, spontaneous fetal demise before a gestation period of 20 completed weeks, more commonly known as a miscarriage.

Effect of Proposed Changes

The bill creates a public record exemption for certain information that may be collected to issue a certificate of nonviable birth. Specifically, the bill exempts and makes confidential information collected regarding the cause of death and parentage of the fetus, marital status of the parents, and any medical information. As with a death certificate and fetal death certificate, a certificate of nonviable birth that includes the exempt and confidential information may be released to:

- The fetus' parent;
- Any local, state, or federal agency for official purposes upon the approval of the department;²⁶ or
- Upon the order of any court of competent jurisdiction.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2022, unless saved from repeal through reenactment by the Legislature.

²⁰ Section 119.15(7), F.S.

²¹ A vital record is defined as certificates or reports of birth, death, fetal death, marriage, dissolution of marriage, certain name changes, and data related thereto. Section 382.002(17), F.S.

²² Section 382.003, F.S.

²³ Section 382.025(1), F.S. See *also*, ss. 382.013 and 382.017, F.S., which involve specific situations in which a new birth certificate may be issued and the original birth certificate remains confidential and exempt from public inspection.

²⁴ Section 382.008(6), F.S. However, pursuant to s. 382.025(2)(b), F.S., all portions of a death certificate cease to be exempt from the provisions of s.119.07(1), F.S., 50 years after the date of death.

²⁵ *Id.*

²⁶ According to the Bureau of Vital Statistics, the information obtained from the issuance of vital statistics will not be made available to any governmental registry because under the bill prohibits the use of the certificate of nonviable birth in the calculation of vital statistics. (E-mail from Department of Health staff dated March 23, 2017, on file with the Health and Human Services Committee). Therefore, the exception to the public records exemption is unneeded.

The bill provides a public necessity statement as required by the State Constitution, which states that the exemption is necessary to protect the privacy rights of a parent who experiences a nonviable birth and such exemptions currently exist for death and fetal death records. Medical information is sensitive and personal in nature and disclosure of such information may lead to an invasion of privacy of the parent. Additionally, disclosure of the marital status of the parents or the parentage of the nonviable birth may discourage an individual from seeking a certificate of nonviable birth due to real or perceived stigma regarding such information.

The bill takes effect on the same date that CS/CS/HB 101 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

B. SECTION DIRECTORY:

Section 1: Amends s. 382.008, relating to death and fetal death registration.

Section 2: Provides a public necessity statement.

Section 3: Provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may create an insignificant, negative impact on DOH for costs associated with training staff on a new public record exemption. The costs, however, would be absorbed, as part of the day-to-day responsibilities of DOH.

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:

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 public record or public meeting exemption. The bill creates new exemptions; 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 new public record exemption; thus, it 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 bill creates a public record exemption for certain information contained in and related to nonviable birth records, which does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2017, the Health and Human Services Committee adopted an amendment that allowed certain individuals and entities to receive unredacted copies of the certificate of nonviable birth and more narrowly defined the basis of the privacy concerns for the public records exemption.

The bill was reported favorably as a committee substitute. This analysis is drafted to the committee substitute as reported by the Health and Human Services Committee.