

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/HB 103	<b>FINAL HOUSE FLOOR ACTION:</b>		
<b>SUBJECT/SHORT TITLE</b>	Pub. Rec./Nonviable Birth Records	114	Y's 0	N's
<b>SPONSOR(S):</b>	Health & Human Services Committee; Cortes, B. and others	<b>GOVERNOR'S ACTION:</b>	Approved	
<b>COMPANION BILLS:</b>	CS/CS/SB 674			

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**SUMMARY ANALYSIS**

CS/HB 103 passed the House on April 5, 2017, and subsequently passed the Senate on April 27, 2017.

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 an unintentional, spontaneous fetal demise occurring after the 9th week of gestation but before the completion of the 20th week of gestation of a pregnancy that has been verified by a health care practitioner.

The bill, which is linked to 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 was approved by the Governor on May 31, 2017, ch. 2017-39, L.O.F., and will become effective on the same date that CS/CS/HB 101 or similar legislation takes effect, which is July 1, 2017.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Current Situation

#### Public Records Requirements

The Florida Constitution provides that the public has the right to access government records. 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.<sup>1</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which the public must be granted access to government records. The Public Records Act<sup>2</sup> guarantees every person's right to inspect and copy any state or local government public record.<sup>3</sup>

The Legislature, however, may create an exemption to the public record requirements.<sup>4</sup> An exemption must specifically state the public necessity justifying the exemption<sup>5</sup> and must be tailored to accomplish the stated purpose of the law.<sup>6</sup> 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 prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.<sup>7</sup>

#### *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.<sup>8</sup>

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

<sup>2</sup> Chapter 119, F.S.

<sup>3</sup> 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.

<sup>4</sup> FLA. CONST., art. I, s. 24(c).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 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.

<sup>8</sup> *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).

## 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

The OGSR also requires specific questions to be considered during the review process.<sup>14</sup> 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.<sup>15</sup> 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 retain their exempt status unless provided for by law.<sup>16</sup>

### 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 records<sup>17</sup> in this state.<sup>18</sup> Under current law, the following records compiled by the bureau are confidential and exempt from public inspection:

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<sup>9</sup> 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.

<sup>10</sup> Section 119.15(3), F.S.

<sup>11</sup> Section 119.15(6)(b), F.S.

<sup>12</sup> *Id.*

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

<sup>14</sup> 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?

<sup>15</sup> FLA. CONST., art. I, s. 24(c).

<sup>16</sup> Section 119.15(7), F.S.

<sup>17</sup> 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.

<sup>18</sup> Section 382.003, F.S.

- All birth records, except for those over 100 years old that are not sealed pursuant to a court order;<sup>19</sup>
- Information relating to cause of death in all death and fetal death records;<sup>20</sup> and
- The parentage, marital status, and medical information of fetal death records.<sup>21</sup>

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 under current law, 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;<sup>22</sup> 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.

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.

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<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> *Id.*

<sup>22</sup> 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 Quality Subcommittee). Therefore, the exception to the public records exemption is unneeded.

## 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.