

**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.)

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Prepared By: The Professional Staff of the Health Policy Committee

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BILL: SPB 7000

INTRODUCER: For Consideration by the Health Policy Committee

SUBJECT: OGSR/Public Records/Dental Workforce Surveys

DATE: January 4, 2019

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Brown	HP	<b>Pre-meeting</b>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

SPB 7000 amends s. 466.051, F.S., to save from repeal the public records exemption for personal identifying information contained in records provided by dentists or dental hygienists licensed under ch. 466, F.S., in response to Department of Health (DOH) dental workforce surveys. The exemption will automatically be repealed under the provisions of the Open Government Sunset Review Act (OGSR) on October 2, 2019.

The bill takes effect October 1, 2019.

**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.<sup>1</sup> 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.<sup>2</sup> In addition to the Florida Constitution, the Florida Statutes provide that the public may access

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

<sup>2</sup> *Id.*

legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

[i]t 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.<sup>5</sup>

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.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements by passing a general law by a two-thirds vote of each of the House and the Senate.<sup>9</sup> The exemption must explicitly lay out the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>10</sup> A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.<sup>11</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>12</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.

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<sup>3</sup> 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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> 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” 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.”

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

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

<sup>9</sup> FLA. CONST. art. I, s. 24(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a public records statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>12</sup> 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).

Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>13</sup>

### **Open Government Sunset Review Act**

The OGSR prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>14</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 or repeal the sunset date.<sup>15</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.<sup>16</sup> 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;<sup>17</sup>
- 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;<sup>18</sup> or
- It protects trade or business secrets.<sup>19</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>20</sup> 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 or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</sup> If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>14</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 records or 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 s. 119.15(2), F.S.

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> Section 119.15(6)(b)1., F.S.

<sup>18</sup> Section 119.15(6)(b)2., F.S.

<sup>19</sup> Section 119.15(6)(b)3., F.S.

<sup>20</sup> Section 119.15(6)(a), F.S. The specified questions are:

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

<sup>21</sup> FLA. CONST. art. I, s. 24(c).

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.<sup>22</sup>

**Workforce Surveys**

The DOH currently administers two dental workforce surveys—one for dentists and one for dental hygienists—which may be completed as part of licensure renewal. Participation in the surveys is optional, and practitioners are not required to respond.

The DOH first offered the survey to dentists and dental hygienists in 2010<sup>23</sup> and has had the following percentage participation rates (among those with active licenses) by year and population as follows:<sup>24</sup>

<b>Population</b>	<b>2009-2010</b>	<b>2011-2012</b>	<b>2013-2014</b>	<b>2015-2016</b>
Dentist	89%	87%	85%	65%
Dental Hygienist	93%	89%	78%	89%

The Public Health Dental Program is housed within the DOH Division of Community Health Promotion.<sup>25</sup> The program leads the DOH's efforts to improve and maintain the oral health of all persons in Florida. The program has four primary functions:

- Providing a statewide direction for policy related to oral health issues;
- Promoting and administering oral health education and preventive dental programs;
- Collecting and analyzing data on oral health; and
- Supporting the provision of direct dental care services through the county health departments (CHD) and other public and private organizations.<sup>26</sup>

The Public Health Dental Program works with the DOH Office of Information Technology and the DOH Division of Medical Quality Assurance (MQA) every two years to administer the survey. The program develops the survey questions with the assistance of CHD's which are approved by DOH leadership. Then MQA dental staff administers the survey. The DOH then links demographic information from the MQA licensure date base via unique identifiers so that results can be stratified by age, gender, and race/ethnicity. The data files are stored on the DOH

<sup>22</sup> Section 119.15(7), F.S.

<sup>23</sup> Florida Department of Health, *Response to Open Government Sunset Review Questionnaire* (Aug. 1, 2018), at p. 2 (on file with the Senate Committee on Health Policy).

<sup>24</sup> *Id.* The Public Health Dental Program recently received the data from the 2017-2018 reporting period and plans to disseminate these results by the end of the calendar year. This bill won't be heard until January 2019. Need to figure out a better wording for this footnote.

<sup>25</sup> Section 381.0052, F.S.

<sup>26</sup> The Department of Health, *Dental Health, Division of Community Health Promotion, Public Health Dental Program*, Available at <http://www.floridahealth.gov/programs-and-services/community-health/dental-health/index.html> (last visited Dec. 14, 2018).

secure network drives for data analysis. The reports, published on the DOH website,<sup>27</sup> contain only summary (aggregate) information.

In 2018, the Public Health Dental Program used the 2015-2016 survey information in a federal grant application to support programs to address Florida's dental workforce needs, particularly in health professional shortage areas.<sup>28</sup>

While reporting that no personal information gathered in the surveys has yet been requested, the DOH recommends reenacting the public records exemption to encourage dentists and dental hygienists to voluntarily participate in the survey to better measure public health needs and resources relating to the dentistry workforce.<sup>29</sup> Unlike dentists and dental hygienists, medical and osteopathic physicians are *required* to respond to a workforce survey as a condition of license renewal,<sup>30</sup> and all personal identifying information contained in records provided by physicians in response to the survey is confidential and exempt.<sup>31</sup>

Section 466.051, F.S., created a public records exemption for dental workforce surveys similar to the one for physicians. The exemption for physician workforce surveys made disclosure of the information to research entities mandatory when the research entity has complied with specified conditions.<sup>32</sup> Under the public records exemption for dental workforce surveys, however, the DOH is authorized, but not required, to disclose such information to research entities under certain parameters. Research entities to which dental workforce survey information has been disclosed are prohibited from releasing identifying information and are limited to the use of the records or data for approved research protocols only.

### **Information Protected from Disclosure**

Section 466.051, F.S., specifically provides that all personal identifying information contained in records provided by dentists or dental hygienists licensed under ch. 466, F.S., in response to a dental workforce survey and held by the DOH, are confidential and exempt<sup>33</sup> from public records requirements. However, the DOH must disclose the information under the following circumstances:

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<sup>27</sup> The Department of Health, Programs and Services, Community Health, Reports, *Work Force Reports – Dentist and Hygienist*, available at <http://www.floridahealth.gov/programs-and-services/community-health/dental-health/reports/index.html> (last visited Dec. 14, 2018).

<sup>28</sup> See note 23.

<sup>29</sup> Florida Department of Health, *Response to Open Government Sunset Review Questionnaire* (Aug. 1, 2018), at p. 4 (on file with the Senate Committee on Health Policy). The first dental workforce survey was administered in 2010 to be reflective of the dental workforce in Florida for the preceding 2 years (2009 and 2010).

<sup>30</sup> See ss. 458.3191 and 459.0081, F.S.

<sup>31</sup> See ss. 458.3193 and 459.0083, F.S.

<sup>32</sup> Section 458.3193(3), F.S.

<sup>33</sup> FLA. CONST. art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates 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 (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 2004); and *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 the statutory exemption (see Attorney General Opinion 85-62, August 1, 1985).

- With the express written consent of the person who is identified or the person's legally authorized representative; or
- By court order upon a showing of good cause.

In addition, the DOH may disclose the information to a research entity, if the entity:

- Seeks the record or data pursuant to a research protocol approved by the DOH;
- Maintains the records in accordance with the protocol; and
- Enters into a purchase and data-use agreement with DOH. The agreement must restrict the release of information that would identify individuals, limit the use of records or data to the approved research protocol, and prohibit any other use of the records or data.

Section 466.051, F.S., authorizes the DOH to deny a research entity's request if the protocol provides for intrusive follow-back contacts, does not plan for the destruction of confidential records after the research has concluded, is administratively burdensome, or does not have scientific merit.

Section 466.051, F.S., provides for repeal of the exemption pursuant to the OGSR on October 2, 2019, unless reviewed and saved from repeal by the Legislature. The statute also provides a statement of public necessity as required by the Florida Constitution.<sup>34</sup> The statement finds that preserving the confidentiality of the information will result in more participation and candid responses to the surveys, which, in turn, are important to addressing the availability and areas of need for the dental workforce in Florida.<sup>35</sup>

### III. Effect of Proposed Changes:

SPB 7000 saves from repeal the public records exemption in s. 466.051, F.S., which makes confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the State Constitution, personal identifying information held by the DOH that is contained in records provided by a licensed dentist or dental hygienist in response to a dental workforce survey.

The effective date of the bill is October 1, 2019.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

<sup>34</sup> FLA CONST. art 1, s. 24(c).

<sup>35</sup> Chapter 2014-78, s. 2, Laws of Fla.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 461.051(2) of the Florida Statutes.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.