

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: SB 7004
INTRODUCER: Health Policy Committee
SUBJECT: OGSR/Department of Health Personnel
DATE: February 11, 2019 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------------------|----------------|-----------|---------------------------------------|
| | Rossitto-Van Winkle | Brown | | HP Submitted as Committee Bill |
| 1. | Ponder | McVaney | GO | Pre-meeting |
| 2. | | | RC | |

I. Summary:

SB 7004 amends s. 119.071(4)(d)2.o., F.S., to save from repeal a public records exemption for certain personal identification and location information of certain Department of Health (DOH) personnel, their spouses, and children. The exemption applies to records of DOH personnel whose duties include, or result in, the determination or adjudication of eligibility for social security disability benefits, the investigation or prosecution of complaints against health care practitioners, or the inspection of health care practitioners or health care facilities.

The exemption is subject to the Open Government Sunset Review Act (OGSR) and will stand repealed on October 2, 2019, unless saved from repeal by the Legislature.

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.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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

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

[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.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 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 by passing a general law by a two-thirds vote of each of the House and the Senate.⁹ 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.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

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

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). See also *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.

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” 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.”

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 *Halifax Hosp. Medical Center v. News-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.

¹² 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.¹³

Open Government Sunset Review Act

The OGSR prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵ 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.¹⁶ 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;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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

¹⁴ 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ 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?

Public Records Exemptions for Agency Personnel Identification and Location Information

Current law provides public records exemptions for identification and location information of certain current or former government personnel and their spouses and children.²¹ Categories of personnel covered by these exemptions include:

- Law enforcement, including correctional, and specified investigatory personnel;
- Firefighters;
- Justices and judges;
- Local and statewide prosecuting attorneys;
- Magistrates, administrative law judges, and child support hearing officers;²²
- Local government agency and water management district human resources administrators;
- Code enforcement officers;
- Guardians ad litem;²³
- Specified Department of Juvenile Justice personnel;
- Public defenders and criminal conflict and civil regional counsel;
- Investigators or inspectors of the Department of Business and Professional Regulation; and
- County tax collectors.

Although the types of exempt information vary, the following information is exempt²⁴ from public records requirements for all personnel listed above:

- Home addresses and telephone numbers²⁵ of the named personnel;
- Home addresses, telephone numbers, and places of employment of the spouses and their children; and
- Names and locations of schools and day care facilities attended by their children.

If exempt information is held by an agency²⁶ that is not the employer of the protected person, he or she must submit a written request to that agency to maintain the public records exemption.²⁷

²¹ See s. 119.071(4)(d), F.S.

²² See s. 119.071(4)(d)2.e., F.S. This exemption applies only if the magistrate, administrative law judge, or child support hearing officer provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public.

²³ See s. 119.071(4)(d)2.h., F.S. This exemption applies only if the guardian ad litem provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public. A guardian ad litem may be a public employee, volunteer, or contract or appointed attorney. See s. 39.820(1), F.S.

²⁴ See *supra* note 6.

²⁵ The term “telephone numbers” includes home, personal cellular, and personal pager telephone numbers, and telephone numbers associated with personal communications devices. See s. 119.071(4)(d)1., F.S.

²⁶ Section 119.011(2), F.S., defines “agency” to mean 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.

²⁷ Section 119.071(4)(d)3., F.S.

Department of Health

Regulation of Professions

The DOH is responsible for licensing and regulating health care practitioners in order to preserve the health, safety, and welfare of the public.²⁸ Practitioner regulation is conducted by the Division of Medical Quality Assurance (MQA) and includes the following professions:

- Emergency Medical Technicians and Paramedics (part III of ch. 401, F.S.);
- Acupuncture (ch. 457, F.S.);
- Allopathic Medicine, (ch. 458, F.S.);
- Osteopathic Medicine, (ch. 459, F.S.);
- Chiropractic Medicine, (ch. 460, F.S.);
- Podiatric Medicine (ch. 461, F.S.);
- Naturopathy (ch. 462, F.S.);
- Optometry (ch. 463, F.S.);
- Nursing, including Certified Nursing Assistants (ch. 464, F.S.);
- Pharmacy (ch. 465, F.S.);
- Dentistry (ch. 466, F.S.);
- Midwifery (ch. 467, F.S.);
- Speech-Language Pathology and Audiology (part I of ch. 468, F.S.);
- Nursing Home Administration (part II of ch. 468, F.S.);
- Occupational Therapy (part III of ch. 468, F.S.);
- Radiology (part IV of ch. 468, F.S.);
- Respiratory Therapy (part V of ch. 468, F.S.);
- Dietetics and Nutrition (part X of ch. 468, F.S.);
- Athletic Training (part XIII of ch. 468, F.S.);
- Orthotics, Prosthetics, and Pedorthics (part XIV of ch. 468, F.S.);
- Electrolysis (ch. 478, F.S.);
- Massage Therapy, (ch. 480, F.S.);
- Clinical Laboratory Personnel (part III of ch. 483, F.S.);
- Medical Physicists (part IV of ch. 483, F.S.);
- Opticianry (part I of ch. 484, F.S.);
- Hearing Aid Specialists (part II of ch. 484, F.S.);
- Physical Therapy Practice (ch. 486, F.S.);
- Psychology (ch. 490, F.S.); and
- Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (ch. 491, F.S.).

The following facilities are also regulated or inspected by MQA:²⁹

- Body Piercing Establishments (s. 381.0075, F.S.);
- Brain and Spinal Cord Injury Programs (ss. 381.739 - 381.79, F.S.);
- Counterfeit-proof Prescription Vendors (s. 456.42(2), F.S.);

²⁸ Section 20.43(1)(g), F.S.

²⁹ Other entities regulated by the DOH, although not the MQA, include tanning facilities, X-ray sites, and radioactive materials users, among others.

- Dental Laboratories (ch. 466, F.S.);
- Electrology Facilities (ch. 478, F.S.);
- Electrolysis Training Programs (ch. 478, F.S.);
- EMS Education Programs (ch. 401, F.S.);
- EMS Vehicle Permittees (ch. 401, F.S.);
- Environmental Testing Laboratories (s. 403.0625, F.S.);
- Massage Establishments (ch. 480, F.S.);
- Massage Schools (ch. 480, F.S.);
- Nursing Education Programs (ch. 464, F.S.);
- Office Surgery Sites (ch. 458 and ch. 459, F.S.);
- Optical Establishments (part I of ch. 484, F.S.);
- Pain Management Clinics (ch. 458 and ch. 459, F.S.);
- Pharmacies (ch. 465, F.S.); and
- Trauma Centers (part II of ch. 395, F.S.).

As part of its enforcement responsibilities, the DOH investigates complaints against health care practitioners. It must investigate any complaint that is written, signed by the complainant,³⁰ and legally sufficient,³¹ and may initiate an investigation if it believes a violation of law or rule has occurred. Such an investigation may result in an administrative case against the health care practitioner's license.³² The DOH also has a duty to notify the proper prosecuting authority when there is a criminal violation of any statute related to the practice of a profession regulated by the DOH.³³

The Consumer Services Unit (CSU) within MQA is the central intake for all complaints. The CSU includes investigators and analysts assigned to specific professions. Staff reviews each complaint for possible violations of laws and rules and forwards only those complaints that are legally sufficient for investigation.³⁴

The Investigative Services Unit (ISU) is the investigative arm of MQA. Generally, an investigation includes the following steps:

- Obtaining medical records, documentation, and evidence related to the complaint;
- Locating and interviewing the complainant, the patient, the subject, and any witnesses;

³⁰ The DOH may investigate an anonymous complaint or a complaint by a confidential informant if the alleged violation of law or rule is substantial and the DOH has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true. *See* s. 456.073(1), F.S.

³¹ A complaint is legally sufficient if it contains ultimate facts that show a violation of ch. 456, F.S., of any of the practice acts relating to the professions regulated by the DOH, or of any rule adopted by the DOH or one of its regulatory boards has occurred. *See* s. 456.073(1), F.S.

³² Upon completion of an investigation, the DOH must submit a report to the probable cause panel of the appropriate regulatory board. *See* s. 456.073(2), F.S. If the probable cause panel finds that probable cause exists, it must direct the DOH to file a formal administrative complaint against the licensee. If the DOH declines to prosecute the complaint because it finds that probable cause has been improvidently found by the panel, the regulatory board may still pursue and prosecute an administrative complaint. *See* s. 456.073(4), F.S.

³³ Section 456.066, F.S.

³⁴ Florida Department of Health, *Consumer Services*, (last modified May 25, 2017), available at <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/consumer-services.html> (last visited Dec. 12, 2018).

- Drafting and serving subpoenas for necessary information; and
- Drafting the investigative report.

The ISU also conducts the required initial health care facility inspections before a facility begins operation and re-inspects on a periodic basis.³⁵

Disability Determinations

The Division of Disability Determinations (DDD) within DOH is responsible for making the determination of medical eligibility for disability benefits under the federal Social Security Administration (SSA) disability programs (Social Security Disability-Title II and Supplemental Security Income-Title XVI). The DDD is also responsible for the periodic Continuing Disability Review of all SSA disability beneficiaries to determine if they continue to meet medical eligibility criteria.

Applications for Social Security disability benefits are filed at the claimant's local SSA field office or online. The application is forwarded to the DDD for development, assessment, and determination of medical eligibility in accordance with Social Security regulations. All relevant medical evidence is procured from the claimant's medical sources.

If the medical evidence is insufficient for a determination, the DDD will arrange for a consultative examination targeted to the claimant's alleged disability. The claimant is also contacted for detailed information on activities of daily living, clarification of symptoms, work history, and other pertinent information.

After the claim file is documented and a determination of medical eligibility is made, the DDD prepares and releases notification of denial to the claimant, or the claim file is returned to the SSA for a final determination of technical (non-medical) eligibility and processing for any benefits due to the claimant.³⁶

Personal Identification and Location Information of DOH Personnel

Section 119.071(4)(d)2.o., F. S., created a public records exemption for identification and location information of certain current and former personnel of the DOH, their spouses, and their children. The exemption applies to records of those personnel whose duties include, or result in, the determination or adjudication of eligibility for social security disability benefits, the investigation or prosecution of complaints against health care practitioners, or the inspection of health care practitioners or health care facilities. The information that is exempt includes:

- The home addresses, telephone numbers, dates of birth, and photographs of the DOH personnel;
- The names, home addresses, telephone numbers, dates of birth, and places of employment of their spouses and children; and

³⁵ Florida Department of Health, *Investigative Services Unit Brochure*, (updated March 18, 2015) available at http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/_documents/isu-brochure.pdf (last visited Dec. 12, 2018).

³⁶ Social Security Disability Resource Center, *Applying for Disability in Florida*, available at: <https://www.ssdrc.com/state-florida-fl-getting-started.html> (last visited Dec. 17, 2018).

- The names and locations of schools and day care facilities attended by the children of the DOH personnel.

The DOH reports that it currently has 2,711 personnel that meet the criteria of s. 119.071(4)(d)2.o., F.S., and has received 210 public record requests for information about those personnel via phone, email, written, online, and in person since the statute's enactment. Exempt information has been released pursuant only to subpoena or court order, or if authorized by the individual with written consent and/or a signed disclosure form.

The DOH also indicates that the exemptions should continue for all listed personnel to ensure their safety in the workplace and prevent injury violence or harassment from disgruntled regulated individuals at home. The DOH further suggests an additional exemption for the same information for parents of listed personnel but does not cite any specific basis or need for the additional information exemption.³⁷

Section 119.071(4)(d)2.o., F.S., is subject to the OGSR and will stand repealed on October 2, 2019, unless saved from repeal by the Legislature.

III. Effect of Proposed Changes:

The bill saves from repeal the public records exemptions in s. 119.071(4)(d)2.o., F.S., which makes confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I of the State Constitution, the following agency personnel's information:

- The home addresses, telephone numbers, dates of birth, and photographs;
- The names, home addresses, telephone numbers, dates of birth, and places of employment of their spouses and children; and
- The names and locations of schools and day care facilities attended by the children of the DOH personnel.

The bill takes effect October 1, 2019.

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 bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption

³⁷ The Department of Health, *Response to Open Government Sunset Review Questionnaire* (Aug. 13, 2018) (on file with the Senate Committee on Health Policy).

beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of this law to protect certain personal identifying and location information of current or former DOH personnel whose duties include, or result in, the determination or adjudication of eligibility for social security disability benefits, the investigation or prosecution of complaints against health care practitioners, or the inspection of health care practitioners or health care facilities. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost, to the extent imposed, associated with an agency making redactions in response to the public records request.

C. Government Sector Impact:

Governmental entities will continue to incur costs related to the redaction of records in response to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.071(4)(d)2.o., 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.