

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 7080

INTRODUCER: Governmental Oversight and Accountability Committee and Health Policy Committee

SUBJECT: Public Records and Meetings/Interstate Medical Licensure Compact

DATE: April 2, 2019

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------------------|-----------------------------|-----------|---------------------------------------|
| | <u>Lloyd</u> | <u>Brown</u> | | HP Submitted as Committee Bill |
| 1. | <u>Ponder</u> | <u>McVaney</u> | <u>GO</u> | Fav/CS |
| 2. | <u> </u> | <u> </u> | <u>AP</u> | <u> </u> |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 7080 exempts from public record inspection and copying requirements the personal identifying information of a physician, other than the physician's name, licensure status, or licensure number, obtained from the coordinated information system under the Interstate Medical Licensure Compact, as defined in s. 456.4501, F.S.,¹ and held by the Department of Health or the board (the Board of Medicine or the Board of Osteopathic Medicine).² This information is not exempt from public records requirements if the state originally reporting the information to the coordinated information system authorizes disclosure of such information by law.

The bill exempts from public meeting requirements a meeting or a portion of the meeting of the Interstate Medical Licensure Commission established under the Interstate Medical Licensure Compact. The exemption applies when matters are specifically exempted from disclosure by state or federal law are discussed. The recordings, minutes, and records generated from those meetings are also exempt from requirements to disclose such public records.

The bill takes effect on the same date that SB 7078 or similar legislation takes effect. SB 7078, the substantive bill authorizing Florida's participation in the Interstate Medical Licensure Compact, is effective on July 1, 2019.

¹ Section 456.4501, F.S., is created in SPB 7078 and establishes the state's participation in the Interstate Medical Licensure Compact and the coordinated information system.

² Section 456.001, F.S.

The bill provides for the repeal of the exemption on October 2, 2024, unless reviewed and reenacted by the Legislature. It also provides statements of public necessity for the public records and public meetings exemptions as required by the State Constitution.

Because the bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for final passage.

II. Present Situation:

Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.³

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.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 the duty of each agency.⁵

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁶ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁷ 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.”⁸

³ FLA. CONST. art. 1, s. 24(a).

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Chapter 119.01(1), F.S.

⁶ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁷ 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.”

⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person's right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁹ A violation of the Public Records Act may result in civil or criminal liability.¹⁰

Only the Legislature may create an exemption to public records requirements.¹¹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹² Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹³ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁴

When creating or expanding a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'¹⁵ Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.¹⁶

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁷ with specified exceptions.¹⁸ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁹ The Act 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 to meet such public purpose.²⁰

⁹ Section 119.07(1)(a), F.S.

¹⁰ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Id.*

¹³ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁴ FLA. CONST., art. I, s. 24(c)

¹⁵ 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁶ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁷ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁸ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

Open Meetings Law

The State Constitution provides that the public has a right to access governmental meetings.²¹ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.²² This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts or special districts.²³

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”²⁴ or the “Sunshine Law,”²⁵ 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 open to the public.²⁶ The board or commission must provide the public reasonable notice of such meetings.²⁷ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public’s access to the facility.²⁸ Minutes of a public meeting must be promptly recorded and open to public inspection.²⁹ Failure to abide by public meetings requirements will invalidate any resolution, rule or formal action adopted at a meeting.³⁰ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.³¹

The Legislature may create an exemption to public meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.³² 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.³³ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.³⁴

²¹ FLA CONST., art. I, s. 24(b).

²² *Id.*

²³ FLA CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all 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 formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

²⁴ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

²⁵ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

²⁶ Section 286.011(1)-(2), F.S.

²⁷ *Id.*

²⁸ Section 286.011(6), F.S.

²⁹ Section 286.011(2), F.S.

³⁰ Section 286.011(1), F.S.

³¹ Section 286.011(3), F.S.

³² FLA CONST., art. I, s. 24(c).

³³ *Id.*

³⁴ *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 following are general exemptions from the requirement that all meetings of any state agency or authority be open to the public:

- That portion of a meeting that would reveal a security or fire safety system plan; and
- Any portion of a team meeting at which negotiation strategies are discussed.³⁵

Practitioner Profiles

Pursuant to s. 456.041, F.S., the Department of Health (DOH) operates a database of Florida's health care practitioners, which includes physicians. The practitioner profile database is online and searchable.³⁶ The profile may include information that is public record and relates to the practitioner's profession.³⁷ Practitioners and the DOH are required to update profiles.³⁸ Information exempt from public disclosure and submitted by another governmental entity that the DOH uses for practitioner profiles continues to maintain its exempt status.³⁹

Interstate Medical Licensure Compact and Commission

Interstate Medical Licensure Compact

The Interstate Medical Licensure Compact (Compact) provides an expedited pathway for medical and osteopathic physicians to qualify to practice medicine across state lines within a licensure compact. Currently, 24 states and one territory which cover 31 medical and osteopathic boards participate in the Compact, and, as of February 2019, six other states have active legislation to join the Compact.^{40, 41}

Approximately 80 percent of physicians meet the eligibility guidelines for licensure through the Compact.⁴² The providers' applications are expedited by using the information previously submitted in their state of principal licensure (SPL). The physician can then seek expedited licensure in member states after a fresh background check is completed.

Interstate Medical Licensure Compact Commission

The Interstate Medical Licensure Compact Commission (Commission) is created in Section 11 of the Compact and serves as the administrative arm of the Compact and the member states. Each member state has two voting representatives on the Commission and, if the state has separate regulatory boards for allopathic and osteopathic, then the representation is split between the two boards.⁴³

The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

³⁵ Section 286.0113, F.S.

³⁶ Section 456.041(8), F.S.; Department of Health Practitioner Profile Search, <https://apps.mqa.doh.state.fl.us/MQASearchServices/HealthCareProviders/PractitionerProfileSearch> (last visited Mar. 12, 2019).

³⁷ Section 456.041(7), F.S.

³⁸ Section 456.042, F.S.

³⁹ Section 456.046, F.S.

⁴⁰ Interstate Medical Licensure Compact, *The IMLC*, <https://imlcc.org/> (last visited Mar. 8, 2019).

⁴¹ Interstate Medical Licensure Compact, Draft Executive Committee Meeting Minutes (February 5, 2019), <https://imlcc.org/wp-content/uploads/2019/02/2019-IMLC-Executive-Committee-Minutes-February-5-2019-DRAFT.pdf> (last visited Mar. 8, 2019).

⁴² Interstate Medical Licensure Compact, *The IMLC*, <https://imlcc.org/> (last visited Mar. 7, 2019).

⁴³ Interstate Medical Licensure Compact, Section 11, (d), p. 11, <https://imlcc.org/wp-content/uploads/2018/04/IMLC-Compact-Law.pdf> (last visited Mar. 8, 2019).

The Commission meets at least once per calendar year in a publicly noticed meeting. The Compact also creates an Executive Committee which may act on behalf of the Commission, with the exception of rulemaking. Information, rules, and minutes of the Commission and the Executive Committee, with the exception of those areas that may be closed to the public, are available to the public for inspection.⁴⁴

All or a portion of a Commission meeting may be closed to the public if a topic is likely to involve certain matters, based on a two-thirds vote of those Commission members present at the meeting. The areas covered by a closed meeting are:

- Personnel matters;
- Matters specifically exempted from disclosure by federal law;
- Trade secrets, commercial, or financial information that is privileged or confidential;
- Information that involves accusing a person of a crime or that formally censures a person;
- Information of a personal nature where disclosure would clearly constitute an unwarranted invasion of personal privacy;
- Investigative records compiled for law enforcement purposes; or
- Information that specifically relates to the Commission's participation in a civil action or other legal proceeding.⁴⁵

III. Effect of Proposed Changes:

Section 1 creates s. 456.4502, F.S., to make a physician's personal identifying information, other than the physician's name, licensure status, or licensure number, obtained from the IMLC's coordinated information system, as defined in s. 456.4501, F.S., and held by the DOH or the boards exempt from public disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The personal identifying information is exempt from public disclosure unless the state that originally reported the information to the coordinated information system authorizes the disclosure of such information. Under such circumstances, the information may only be disclosed to the extent permitted by the reporting state's law.

The bill also creates an exemption from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution for a meeting or any portion of a meeting of the Commission may be closed if it has determined by a two-thirds vote of the Commission members present that an open meeting would likely:

- Relate solely to the internal personnel practices and procedures of the commission;
- Discuss matters exempted from disclosure by federal statute;
- Discuss trade secrets, commercial, or financial information that is privileged or confidential;
- Involve accusing a person of a crime or that formally censures a person;
- Discuss information of a personal nature where disclosure would clearly constitute an unwarranted invasion of personal privacy;
- Discuss investigative records compiled for law enforcement purposes; or
- Relate specifically to participation in a civil action or other legal proceeding.

⁴⁴ Interstate Medical Licensure Compact, Section 11(d), pg. 13, <https://imlcc.org/wp-content/uploads/2018/04/IMLC-Compact-Law.pdf> (last visited Mar. 8, 2019).

⁴⁵ See *Interstate Medical Licensure Compact*, Section 11(h), pp. 12-13, <https://imlcc.org/wp-content/uploads/2018/04/IMLC-Compact-Law.pdf> (last visited Mar. 8, 2019).

Recordings, minutes, and records generated during an exempt meeting are exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

These exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides, as required by the State Constitution, a statement of public necessity which provides that protection of the specified information is required under the Compact which the state must adopt in order to become a member state and a party to the Compact. Without the public records exemption, the state would be unable to effectively and efficiently function as a member of the Compact.

Additionally, the bill provides a statement of public necessity, as required by the Florida Constitution, for protecting any meeting or portion of a meeting of the Commission at which matters specifically exempted from disclosure by federal or state statute are discussed. These meetings or portions of meetings would be exempted from s. 286.011, F.S., and s. 24(b), Art. I. of the State Constitution. Without the public meeting exemption, the state will be prohibited from becoming a party to the Compact.

The bill includes a statement of public necessity by the Legislature that the recordings, minutes, and records generated during an exempt meeting of the Commission are exempt pursuant to s. 464.0096, F.S., and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Release of such information would negate the public meeting exemption.

Section 3 provides that the bill takes effect on the same date as SB 7078 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 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 records or public meeting exemption. This bill creates a public records exemption and a public meeting exemption, therefore, it requires a two-thirds vote.

Public Necessity Statement

Article I, Section 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public records or public meeting exemption. This bill creates a new public records exemption and a new public meeting exemption. Section 2 includes a public necessity statement that supports the exemptions.

Breadth of the Exemption

Article I, s. 24(c) of the State Constitution requires exemptions to the public records and public meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. It is not clear if the public records exemption is broader than necessary to accomplish the purposes outlined in the public necessity statement. The exemption covers a physician's personal identifying information (excluding a physician's name, licensure status and license number) that is otherwise exempt in the physician's home state. In the context of the compact, it is not clear what information would be considered "personal identifying information" for purposes of this exemption. Personal identifying information is used throughout Florida statutes and is not defined. It is not clear if a state would consider a physician's business address, certifications, or level of education to be personal identifying information. State laws are also subject to change, so it is not clear if this exemption is limited to state laws as currently enacted or in the future. Therefore, the breadth of the exemption is subject to change depending on when or how the DOH and the boards interpret the laws of the physician's home state.

It is also unclear if the public meetings exemption is broader than necessary to accomplish the purposes outlined in the public necessity statement. The bill provides instances during which a public meeting may be closed. Some of those matters are already exempted under Florida's public meetings exemptions.⁴⁶ In addition, the bill provides that the Commission has the authority to vote on when it will close a meeting, so it is not clear exactly which meetings or portions of meetings will be closed. The bill provides the Commission with authority to close a meeting or a portion of a meeting by a two-thirds vote. This could be considered an overly broad exemption. Additionally, one of the seven reasons enumerated upon which the Commission may vote to close a meeting is when the meeting would likely involve a discussion of personal information that would constitute a clearly unwarranted invasion of personal privacy. This may conflict with Article 1, section 23, of the State Constitution which provides:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

⁴⁶ Meetings with attorneys on pending litigation are exempt under s. 286.011(8), F.S. Competitive solicitations team meetings and some negotiations are exempt under s. 286.0113(2), F.S. Meetings to determine if there is probable cause to find that a practitioner is subject to discipline are closed until 10 days after probable cause has been found pursuant to s. 456.073(4), F.S. These exemptions are provided as examples and not an exhaustive list of relevant public meetings exemptions.

Courts will look to the Legislature to balance these competing interests.⁴⁷

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

The bill may have an indeterminate fiscal impact on DOH and the boards involved with the administration of the Compact as it relates to training and redaction of exempt information. However, these costs are likely to be minimal.

VI. Technical Deficiencies:

None.

VII. Related Issues:

VIII. None. Statutes Affected:

This bill creates section 456.4502 of the Florida Statutes.

⁴⁷ See *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 402-403 (Fla. 5th DCA 2002) (“Thus our function here has not been to weigh these two constitutional rights with respect to autopsy photographs and determine whether the right that helps ensure an open government freely accessible by every citizen is more significant or profound than the right that preserves individual liberty and privacy. Rather, our function has been to determine whether the Legislature has declared that the latter prevails over the former in a manner that is consistent with the constitutional provisions that bestow upon it the power to do so.”); see also *Wallace v. Guzman*, 687 So. 2d 1351, 1354 (Fla. 3d DCA 1997) (noting “[t]he [L]egislature has balanced the private/public rights by creating the various exemptions from public disclosure contained in section 119.07, Florida Statutes (1995).”).

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 Governmental Oversight and Accountability on April 2, 2019:

The Committee Substitute clarifies that the exemption applies to the *personal* identifying information of a physician and fixes a number of scrivener errors to make the bill more readable.

- B. **Amendments:**

None.

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