

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 Health Policy

BILL: SPB 7080

INTRODUCER: For consideration by Health Policy Committee

SUBJECT: Public Records and Meetings/Interstate Medical Licensure Compact

DATE: March 15, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Lloyd	Brown		Pre-meeting

I. Summary:

SPB 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 (IMLC), as defined in s. 456.4501, F.S.,¹ and held by the Department of Health (DOH) or the Board of Medicine or Board of Osteopathic Medicine (boards). 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 IMLC. 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 IMLC, is effective on July 1, 2019.

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.

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.

II. Present Situation:

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any record made or received in connection with the official business of any public body, officer, or employee received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.² The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.³ The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.⁴

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., the "Public Records Act" constitutes the main body of public records laws, and states that:

It 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

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 A violation of the Public Records Act may result in civil or criminal liability.⁷

Section 286.011, F.S., the "Sunshine Law,"⁸ requires all meetings of any board or commission or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁹

² FLA. CONST. art. 1, s. 24(a).

³ FLA. CONST. art. 1, s. 24(b).

⁴ FLA. CONST. art. 1, s. 24(b).

⁵ Chapter 119, 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 their 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" to mean 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 purpose 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). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are penalties for violations of those laws.

⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

⁹ 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, s. 4(e) of the Florida Constitution provides the 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 reasonable open to the public.

The Legislature may, by two-thirds votes of the House and the Senate¹⁰ create an exemption to public records or open meetings requirements.¹¹ An exemption must explicitly state the public necessity of the exemption¹² and must be tailored to accomplish the stated purpose of the law.¹³ A statutory exemption which does not meet these two criteria may be found unconstitutional, and efforts may not be made by the court to preserve the exemption.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR Act).

The OGSR Act prescribes a legislative review process for newly created or substantially amended public records exemptions.¹⁵ The OGSR Act 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.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR Act, the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁷

- What specific records or meetings are affected by the exemption?
- Who 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?

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ 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 as *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). 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).

¹² FLA. CONST. art. I, s. 24(c).

¹³ FLA. CONST. art. I, s. 24(c).

¹⁴ *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. 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 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.

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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 pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed; however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one Legislature cannot bind a future Legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(a), F.S.

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

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁸ 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 remain exempt unless otherwise provided for by law.¹⁹

Practitioner Profiles

Pursuant to s. 456.041, F.S., the DOH operates a database of Florida's health care practitioners, which includes physicians. The practitioner profile database is online and searchable.²⁰ The profile may include information that is public record and relates to the practitioner's profession.²¹ Practitioners and the DOH are required to update profiles.²² Information exempt from public disclosure and submitted by another governmental entity that the DOH uses for practitioner profiles continues to maintain its exempt status.²³

Interstate Medical Licensure Compact and Commission

The Interstate Medical Licensure Compact (IMLC) 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 IMLC, and, as of February 2019, six other states have active legislation to join the IMLC.^{24, 25}

Approximately 80 percent of physicians meet the eligibility guidelines for licensure through the Compact.²⁶ 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 Commission

The Interstate Commission is created in Section 11 of the IMLC and serves as the administrative arm of the IMLC 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.²⁷

¹⁸ FLA. CONST. art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

²⁰ 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).

²¹ Section 456.041(7), F.S.

²² Section 456.042, F.S.

²³ Section 456.046, F.S.

²⁴ Interstate Medical Licensure Compact, *The IMLC*, <https://imlcc.org/> (last visited Mar. 8, 2019).

²⁵ 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).

²⁶ Interstate Medical Licensure Compact, *The IMLC*, <https://imlcc.org/> (last visited Mar. 7, 2019).

²⁷ 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 Committee, with the exception of those areas that may be closed to the public, are available to the public for inspection.²⁸

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.²⁹

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 IMLC Commission during which any matters specifically exempted from disclosure by federal or state statute are discussed. Discussion of the following additional matters may result in a closed meeting on a two-thirds vote of the Commission members present at the meeting:

- Personnel matters;
- 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.

²⁸ 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).

²⁹ 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 states that protection of the specified information is required under the IMLC which the state must adopt in order to become a member state to the IMLC. 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 State 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 shall take 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:

None.

B. Public Records/Open Meetings Issues:

Public Records

SPB 7080 provides that personal identifying information obtained from the coordinated information system of the physician's home state may only be disclosed to the extent permitted by the home state's laws.

Public Meetings

Under the compact, SPB 7080 provides that Commission meetings must be open to the public, and the public provided at least 10 days' notice of such meeting. For proposed

rules, notice of rulemaking should follow the model state administrative procedure act of 2010 and the public should have access to a copy of the proposed draft rule and notice of the hearing at least prior 30 days prior to each public hearing.³⁰ The public must also be provided a reasonable opportunity for public comment, orally or in writing, for proposed rules.

The Commission is required to keep minutes of these closed sessions that fully describe all matters discussed. The Commission is not required to provide an accurate summary of actions taken or to provide any type of report once litigation has concluded. All minutes and documents of a closed meeting shall remain under seal according to the IMLC's provisions.

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 for information obtained from the coordinated information system, and held by the DOH or the boards; 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 includes a public necessity statement that supports the exemption. The exemption is no broader than necessary to accomplish the stated purpose.

Breadth of the Exemption

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 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, but it may have a different meaning in other states. For example, 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.

³⁰ Interstate Medical Licensure Compact Commission, *Rule on Rulemaking*, (adopted June 24, 2016) <https://imlcc.org/wp-content/uploads/2018/02/IMLCC-Rule-Chapter-1-Rule-on-Rulemaking-Adopted-June-24-2016.pdf> (last visited Mar. 12, 2019).

It is also unclear if the public meetings exemption is broader than necessary to accomplish the purposes outlined in the public necessity statement. SPB 7078 provides instances during which a public meeting may be closed. Some of those matters are already exempted under Florida's public meetings exemptions.³¹ In addition, SPB 7078 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. It is unclear if giving the Commission the authority to vote on when it will close its meetings would be considered an overly broad exemption. Finally, one reason the Commission may close a meeting is to protect someone's personal privacy. This may conflict with Article 1, section 23, of the Florida 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.

Courts will look to the Legislature to balance these competing interests.³²

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.

³¹ 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.

³² 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).”).

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 456.4502 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.