

**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 Committee on Rules

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BILL: SB 830

INTRODUCER: Senator Benacquisto

SUBJECT: OGSR/Certain Personal Financial and Health Information

DATE: February 10, 2020

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorable</b>
2.	<u>Ponder</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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**I. Summary:**

SB 830 amends s. 1009.987, F.S., to save from repeal the public records exemption relating to personal financial and health information of a consumer that is held by the Florida Prepaid College Board, the Florida ABLE, Inc., the Florida ABLE program, or an agent or service provider of one of these entities relating to an ABLE account, or a participation agreement or any information that would identify a consumer. This information will continue to be confidential and exempt from public disclosure beyond October 2, 2020.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2020.

**II. Present Situation:**

**Access to Public Records – Generally**

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> The right to inspect or copy 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>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the

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

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

rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

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

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

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

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

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

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<sup>12</sup> See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>18</sup> 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.

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

<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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 provided for by law.<sup>26</sup>

### **Federal ABLE Act**

The federal ABLE Act (Achieving a Better Life Experience Act of 2014) became law on December 19, 2014.<sup>27</sup> The purpose of the ABLE Act is to encourage individuals and families to save money to support individuals with disabilities.<sup>28</sup> The ABLE Act permits a state to implement a qualified ABLE program and establish ABLE accounts for eligible individuals with disabilities that meet certain criteria.<sup>29</sup> A designated beneficiary of an ABLE account is an eligible individual who establishes an ABLE account and is the owner of such of an account.<sup>30</sup> An agent or parent may also establish an account on behalf of the eligible individual.<sup>31</sup>

### **Florida ABLE Program**

An individual is an eligible individual for a taxable year if during such taxable year:<sup>32</sup>

- The individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26; or
- A disability certification with respect to such individual is filed with the Secretary of the Department of Treasury for such taxable year.

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<sup>24</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>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Pub. L. No. 113-295, 128 Stat. 4056 (Dec. 19, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> 26 U.S.C. s. 529A(e)(1).

<sup>30</sup> *Id.* at (e)(3). A designated beneficiary may also be a brother, sister, stepbrother, or stepsister of a former designated beneficiary of the ABLE account, provided such new designated beneficiary is also an eligible individual. *Id.* at (e)(4).

<sup>31</sup> Rule 19B-18.003, F.A.C., *Participation Agreement, Final ABLE Terms and Conditions*, Form No. FPCB 2018-08, available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-09690>.

<sup>32</sup> *Id.*; s. 1009.986(2)(d), F.S.

Under the Florida ABLE Program, eligible individuals with disabilities, family members, and others may contribute funds to an ABLE account, which supplements, rather than supplants, any federal benefits received by the beneficiary.<sup>33</sup> Those funds may be used for qualified disability expenses relating to the individual's blindness or disability. These expenses may include education, housing, transportation, employment support, health, prevention, wellness, financial, and legal expenses, and other expenses authorized through federal regulations.<sup>34</sup>

A consumer's personal financial and health information held by the Florida Prepaid College Board, the Florida ABLE, Inc., the Florida ABLE program, or an agent or service provider of one of these entities relating to an ABLE account, or a participation agreement or any information that would identify a consumer is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, of the State Constitution.<sup>35</sup>

A "consumer" means a party to a participation agreement of the Florida ABLE program.<sup>36</sup> The law provides that "personal financial and health information" means:<sup>37</sup>

- A consumer's personal health condition, disease, injury, or medical diagnosis or treatment;
- The existence, nature, source, or amount of a consumer's personal income or expenses;
- Records of or relating to a consumer's personal financial transactions of any kind; or
- The existence, identification, nature, or value of a consumer's assets, liabilities, or net worth.

The Florida Prepaid College Board and Florida ABLE, Inc., may disclose information made confidential and exempt to another state or federal government entity if disclosure is necessary for the receiving entity to perform its duties or responsibilities or to verify the eligibility of an eligible individual or authorize the use of an ABLE account.<sup>38</sup>

Section 1009.987, F.S., provides for future review and repeal of the public records exemption on October 2, 2020.

Chapter 2015-58, L.O.F., which established the exemption from public record disclosure requirements for consumer information held under the Florida ABLE program, included a public necessity statement that provided rationale for the exemption. This rationale recognized that the disclosure of sensitive financial information regarding a consumer under the Florida ABLE program could create the opportunity for theft, identity theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the consumer and placing him or her at risk for substantial financial harm. Furthermore, the disclosure of personal health information relating to

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<sup>33</sup> Pub. L. 113-295, Div. B, Title I, §§ 101(2) and 103 (Dec. 19, 2014). Any amount in an ABLE account will be disregarded, except for the purpose of determining supplemental security income, any amount in excess of \$100,000 may cause a suspension in benefits. *Id.*; see also Letter from Brian Neale, U.S. Dep't of Health and Human Servs., *Implications of the ABLE Act for State Medicaid Programs* (Sept. 7, 2017), available at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf>.

<sup>34</sup> 26 U.S.C. s. 529A(e)(5).

<sup>35</sup> Section 1009.987, F.S.

<sup>36</sup> Section 1009.987(1)(a), F.S.

<sup>37</sup> Section 1009.987(1)(b), F.S.

<sup>38</sup> Section 1009.987(3), F.S.

a consumer under the Florida ABLÉ program could negatively affect an individual's business and personal relationships and cause detrimental financial consequences.<sup>39</sup>

### **Open Government Sunset Review Findings and Recommendations**

In June 2019, the Senate Education Committee and the House Oversight, Transparency & Public Management Subcommittee sent an Open Government Sunset Review Questionnaire to the Florida Prepaid College Board regarding the need to maintain the exemption related to personal financial and health information of a consumer that is held by the Florida Prepaid College Board, the Florida ABLÉ, Inc., the Florida ABLÉ program, or an agent or service provider of one of these entities relating to an ABLÉ account, or a participation agreement or any information that would identify a consumer.

The Florida Prepaid College Board responded to the questionnaire and recommended that the exemption remain in effect to protect the personal, financial, and health information for individuals associated with ABLÉ accounts in the Florida ABLÉ program.

### **III. Effect of Proposed Changes:**

SB 830 saves from repeal the current public records exemption relating to personal financial and health information of a consumer that is held by the Florida Prepaid College Board, the Florida ABLÉ, Inc., the Florida ABLÉ program, or an agent or service provider of one of these entities relating to an ABLÉ account, or a participation agreement or any information that would identify a consumer. The information will continue to be confidential and exempt from public disclosure beyond October 2, 2020.

The bill takes effect October 1, 2020.

### **IV. Constitutional Issues:**

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

Not applicable. The bill does not require counties or municipalities to take an 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, 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 beyond its current date of repeal. The bill does not create or expand an exemption. Thus, the bill does not require an extraordinary vote for enactment.

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<sup>39</sup> Ch. 2015-58, L.O.F.

***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 the law is to protect personal identifying information of those who are employed by, under contract with, volunteering or engaged in activities related to animal research. This bill exempts only personal identifying information from the public records requirements. 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 identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

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

**C. Government Sector Impact:**

Governmental agencies will continue to incur costs related to the redaction of records in responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 1009.987 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.

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

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