

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: SB 7002

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Trade Secrets/Department of Health

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Smith</u>	<u>Brown</u>		HP Submitted as Committee Bill
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7002 saves from repeal the public record exemption for trade secrets contained in records, reports, or information submitted to the Department of Health (DOH) under ch. 381, F.S. People or entities may be required to submit trade secrets to the DOH under ch. 381, F.S., to obtain a license or permit, such as with Medical Marijuana Treatment Centers, or to provide the DOH with the person's or entity's qualifications as the DOH seeks to procure services or commodities.

The public records exemption stands repealed on October 2, 2021, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. This bill removes the scheduled repeal of the exemption to continue the confidential and exempt status of the information.

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

The bill takes effect October 1, 2021.

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.¹ 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.²

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, 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 rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 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.⁵

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 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.”⁷

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.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

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.¹⁰ 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.¹¹

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2010-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2020-2022).

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

⁵ 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.”

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.”

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

⁸ Section 119.07(1)(a), F.S.

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

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *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

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

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.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, 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.²⁰ 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:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program and such administration would be significantly impaired without the exemption;²¹
- The exemption 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;²² or

(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).

¹² 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).

¹³ 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).

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

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

¹⁶ Section 119.15, F.S.

¹⁷ 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.

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 Courts 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.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to question carefully 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.²⁵ 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, then records created before the sunset date may not be made public unless otherwise provided by law.²⁶

Trade Secrets

For the purpose of s. 381.83, F.S., the term “trade secrets” is defined in s. 812.081(1)(c), F.S. In short, when the owner of the information in question takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes, a trade secret is considered to be secret, of value, for use or in use by the business, and of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

The First District Court of Appeal held that the names and related information of a Medical Marijuana Treatment Center’s (“MMTC’s”) individual investors and partners are not trade secrets under s. 812.081(c), F.S. (2015), but that the names and related information of an MMTC’s consultants may be protected as trade secrets.²⁷

In 2016, the definition of “trade secret” in section 812.081, F.S., was expanded to include financial information.²⁸ As a result, this public record exemption was amended to include the new definition of “trade secret” and is subject to the Open Government Sunset Review Act.²⁹

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ *Surterra Florida, LLC. v. Florida Department of Health*, 233 So.2d 376, 640 (Fla. 1st DCA 2017).

²⁸ Ch. 5, s. 1, Laws of Fla. (2016).

²⁹ Ch. 6, s. 6, Laws of Fla. (2016).

Chapter 381 - Public Health: General Provisions

Chapter 381, F.S. encompasses a wide variety of health services and licensing provisions under the DOH regulation. This includes patients submitting medical records to apply for various programs, physicians providing reports and records on research and testing, permitting of MMTCs, licensing systems for medical marijuana patients and caregivers, permitting of migrant labor camps, and any other programs or service listed under the statute.

Licenses and permits that are issued by the DOH under ch. 381, F.S., and the number of active licenses or permits in the state for each type:³⁰

- MMTCs – 22
- Certified Medical Marijuana Testing Labs - 5
- Medical Marijuana Patients and Caregivers – 435,105
- Tattoo Artist Licensure: Tattoo Artist–11,865
- Tattoo Artist Licensure: Guest Tattoo Artist– 89
- Radon Program Certification: Radon Measurement Professional -379
- Radon Program Certification: Radon Mitigation Professional -46
- Certified Environmental Health Professional: Food Protection Only – 209
- Certified Environmental Health Professional: OSTDS Only - 249
- Certified Environmental Health Professional: Food Protection & OSTDS - 349
- Septic Tank Contractor Registration – 650
- Biomedical Waste Permits (46,648):
- Generator – 45,767
- Needle Collection – 356
- Storage – 217
- Transporter – 288
- Treatment - 20
- Body Piercing Establishments (481):
- Salon – 479
- Temporary - 2
- Food Hygiene Permits (14,747):
- Adult Day Care – 381
- Afterschool Meal Program – 334
- Assisted Living Facility – 1,490
- Bar/Lounge – 2,540
- CCFP-Religious Exempt – 26
- Civic Organization – 440
- Crisis Stabilization Unit – 33
- Detention Facility – 737
- Domestic Violence Shelter – 38
- Fraternal Organization – 921
- Homes for Special Services – 18

³⁰ Department of Health, *Open Government Sunset Review Questionnaire relating to Trade Secrets contained in records, reports, or information submitted to the Department of Health under chapter 381, F.S.*, (prepared on Oct. 26, 2020) (on file with the Senate Committee on Health Policy).

- Hospice – 56
- Intermediate Care Facility for the Developmentally Disabled – 52
- Migrant Labor – 8
- Movie Theater – 56
- Prescribed Pediatric Extended Care Center – 114
- Recreational Camp – 94
- Residential Treatment Facility (AHCA) – 154
- School (9 months or less) – 2,831
- School (more than 9 months) – 4,245
- Short-Term Residential Treatment Center (DCF) – 164
- Transitional Living Facility - 15
- Limited Use Water Permits (11,270):
- Limited Use Commercial – 2,953
- Limited Use Community – 3,887
- Multifamily – 90
- Registered Limited Use Commercial – 4,340
- Migrant Labor Camp Permit (1,150):
- H2A Migrant Camp – 438
- HUD Housing – 3
- MHP/RV/Migrant Housing – 3
- Migrant Labor Camp – 526
- Non-permitted – 45
- Other – 5
- Residential Migrant Housing - 130
- Mobile Home Parks Permits (5,399):
- Lodging Park – 173
- MHP/RV/Migrant Housing – 28
- Mobile Home Park – 3,800
- Recreational Camp – 147
- Recreational Vehicle Park -1,225
- Temporary Event - 26
- Onsite Sewage Treatment & Disposal System (OSTDS) Operating Permits (22,192):
- Aerobic – 11,165
- Commercial – 3,105
- Industrial or manufacturing – 5,781
- Performance Based – 2,141
- OSTDS Service Permits – 1,220
- OSTDS Construction Permits – 56,716
- OSTDS Septic Tank Business Authorizations – 576
- Public Swimming Pools (42,119):
- Exempt Pools < 32 Units – 1,813
- Exempt Pools > 32 Units – 1,304
- Exempt Pool Therapy – 33
- Fountains – 51

- Natural Bathing Place – 29
- Other – 141
- Public Pool <= 25,000 Gallons – 8,788
- Public Pool > 25,000 Gallons – 20,963
- River Ride – 16
- Spa-Type Pools - 7,245
- Special Purpose Pool – 148
- Wading Pool – 839
- Water Activity – 485
- Water Attractions – 193
- Water Slide Plunge Pool – 24
- Zero Depth Entry Pool - 47
- Radon Measurement Business – 45
- Radon Mitigation Business - 26
- Tanning Establishments – 718
- Tattoo Establishments – 4,188

Trade Secrets Submitted to the DOH under Chapter 381

The information included in the records that may pertain to trade secrets include financial and proprietary information from applicants and licensees, financial and proprietary information from those requesting permits, and any data software, programs, and/or information submitted or created pursuant to this section for any of the programs overseen by the DOH.

Individuals and entities may be required to submit information that meets the definition of trade secret to the DOH to obtain a license or a permit. For example, s. 381.986, F.S., provides licensing requirements for MMTCs. Under this section, an MMTC provides detailed business plans to prove its ability to safely and efficiently provide medical marijuana to patients. Most of these business plans contain trade secret information. Such information is necessary for the DOH to weigh qualifications and determine the best candidates to receive licensure. However, the disclosure of this information could provide an unfair advantage to competitors and render the competitive application process meaningless.

Records and information may also be submitted to the DOH under ch. 381, F.S., as the DOH seeks to procure services or commodities. A potential vendor may include specific product specifications, financial records, or financial projections as part of its submission and may claim that the information and records are trade secrets.

Financial information that would fall under a trade secret may include calculations for pricing of certain products as the calculations may provide an advantage to a competitor on how to outbid by offering a lower price point. It could also include proprietary information on pricing from the entity's vendors, or wage and/or tax information that may give a competitor knowledge it did not previously possess, as well as bank notes and information regarding financial statuses of private investors. As part of the procurement process, it may be necessary to receive information from the potential vendors such as net worth, business plans, profit and loss statements, balance sheets, cash on hand, and other information which would support their ability to perform the

services. If this information is not protected from disclosure, there is a risk that the DOH may not receive the information it needs to make an informed decision.

Submitting Trade Secrets to the DOH

Each person or entity seeking a trade-secret exemption is required to provide documentation asserting the trade secret when the information is submitted. If necessary, the DOH may request both a redacted and unredacted copy of the information to be maintained on file in the case of a public records request. If a public records request is made, the DOH then makes a determination as to whether the information fits the statutory definition of “trade secret,” as that term is defined in s. 812.081(1)(c), F.S.³¹

If the information is not determined to be a trade secret, the DOH allows the person or entity to provide additional information.³² The person or entity is also put on notice that they can challenge that determination through a court proceeding.

If the information is determined to be a trade secret, the DOH will review the unredacted copy to ensure that only exempted trade secret information has been redacted. If the information should not have been redacted, the person or entity is notified and given the opportunity to correct the redactions or provide additional information prior to its release.³³

Staff Survey Regarding Exemption under Review

Legislative staff received a response from the DOH to a joint survey of the House Oversight, Transparency & Public Management Subcommittee and the Senate Committee on Health Policy regarding the public record exemption for trade secrets contained in records, reports, or information submitted to the DOH under ch. 381, F.S. The DOH recommends retaining the exemption in its current form.³⁴

III. Effect of Proposed Changes:

The bill saves from repeal the public records exemption in s. 381.83, F.S., for trade secrets contained in records, reports, or information submitted to the DOH under ch. 381, F.S. The information will continue to be confidential and exempt from public disclosure beyond October 2, 2021.

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

³¹ Section 381.83(1), F.S.

³² *Id.* at 31.

³³ *Id.* at 31.

³⁴ *Id.* at 31.

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:

Voting 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 newly created or expanded public record exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Therefore, a two-thirds vote of the members present and voting for final passage of the bill is not required.

Public Necessity Statement

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. The bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Thus, the bill does not require a public necessity statement.

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 bill exempts trade secret information “upon a showing satisfactory to the Department”³⁵ that the information meets the statutory definition in s. 812.081(1)(c), F.S. Whether information constitutes a trade secret is subject to interpretation by the Department. Specific applications of the exemption could be challenged. However, “exemptions from disclosure are to be narrowly construed,”³⁶ and the agency having custody of the records “bears the burden of proving its right to the claimed exemption.”³⁷

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

³⁵ Section 381.83(1), F.S.

³⁶ *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004) (citations omitted), *rev. den.*, 892 So.2d 1015 (Fla. 2004).

³⁷ *Id.*

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 the DOH making redactions and/or making copies in response to public records requests.

C. Government Sector Impact:

The DOH will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 381.83 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.