

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 3B Pub. Rec./COVID-19 Vaccination Policies and Practices

**SPONSOR(S):** Commerce Committee, Massullo, Grall and others

**TIED BILLS:** HB 1B **IDEN./SIM. BILLS:** SB 4-B

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**FINAL HOUSE FLOOR ACTION:** 85 Y's

31 N's

**GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

HB 3B passed the House on November 17, 2021, and subsequently passed the Senate on November 17, 2021.

The Attorney General is the head of the Department of Legal Affairs (DLA), which provides certain legal services, including defending the state in civil litigation cases; representing the people of Florida in criminal appeals in state and federal courts; protecting the rights of children, consumers, and victims through its various protection programs; and investigating and litigating against businesses that seek to limit competition and defraud taxpayers.

HB 1B (2021 B), with which this bill is linked, prohibits a private employer from imposing a COVID-19 vaccination mandate for any employee without providing certain exemptions that allow an employee to opt out of such mandate. HB 1B allows an employee to file a complaint with DLA alleging that an exemption was not offered or was improperly applied or denied, and authorizes DLA to investigate such complaint. In addition, the bill allows a terminated employee to file a complaint with DLA alleging that an exemption was not offered or was improperly applied or denied, resulting in the employee's termination, which DLA must investigate.

This bill creates a public record exemption for an employee complaint alleging a private employer's violation of state law regarding employer COVID-19 vaccination policies or practices, and all information relating to an investigation of such complaint, held by DLA until the investigation is completed or ceases to be active. After an investigation is completed or ceases to be active, information relating to the investigation remains confidential and exempt from public records requirements if disclosure of that information would jeopardize the integrity of another active investigation, reveal medical information about an employee, or reveal information regarding an employee's religious beliefs.

Information made confidential and exempt may be released to another governmental entity in the furtherance of that entity's lawful duties and responsibilities. Additionally, the bill provides that it does not prohibit the disclosure of information in an aggregated format.

The bill provides a public necessity statement as required by the Florida Constitution. It also provides that the public record exemption is repealed on October 2, 2023.

The bill may have an insignificant negative fiscal impact on the state.

The bill was approved by the Governor on November 18, 2021, ch. 2021-273, L.O.F., and became effective on that date.

**Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### Public Records

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of art. I, s. 24(a) of the Florida Constitution.<sup>1</sup> The general law must state with specificity the public necessity justifying the exemption<sup>2</sup> and must be no broader than necessary to accomplish its purpose.<sup>3</sup>

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.<sup>5</sup>

#### Florida Attorney General and the Department of Legal Affairs

The Attorney General is an elected constitutional officer who serves as the chief state legal officer and as a member of the cabinet.<sup>6</sup> The Attorney General must perform the duties prescribed by the Florida Constitution and any other duties appropriate to his or her office as may from time to time be required of the Attorney General by law or by resolution of the Legislature.<sup>7</sup>

The Attorney General is the head of the Department of Legal Affairs (DLA),<sup>8</sup> which is responsible for providing all legal services required by any department, unless otherwise provided by law,<sup>9</sup> including defending the state in civil litigation cases; representing the people of Florida in criminal appeals in state and federal courts; protecting the rights of children, consumers, and victims through its various protection programs; and investigating and litigating against businesses that seek to limit competition and defraud taxpayers.<sup>10</sup>

#### House Bill 1B (2021 B)

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<sup>1</sup> Article I, s. 24(c), FLA. CONST.

<sup>2</sup> This portion of a public record exemption is commonly referred to as a "public necessity statement."

<sup>3</sup> Article I, s. 24(c), FLA. CONST.

<sup>4</sup> S. 119.15, F.S.

<sup>5</sup> S. 119.15(6)(b), F.S.

<sup>6</sup> Art. IV, s. 4, FLA. CONST.

<sup>7</sup> See s. 16.01(2), F.S.

<sup>8</sup> S. 20.11, F.S.

<sup>9</sup> S. 16.015, F.S.

<sup>10</sup> OPPAGA, *Office of the Attorney General (Department of Legal Affairs)*, <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=1026> (last visited Nov. 8, 2021).

HB 1B (2021 B), to which this bill is linked, creates s. 381.00317, F.S., which prohibits a private employer from imposing a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing exemptions that allow an employee to opt out of such mandate. At a minimum, a private employer must allow an employee to opt out of a COVID-19 vaccination mandate based on medical reasons, religious reasons, COVID-19 immunity, periodic testing, and the use of employer-provided personal protective equipment.

HB 1B allows an employee to file a complaint with DLA alleging that an exemption was not offered or was improperly applied or denied, and authorizes DLA to investigate such complaint. In addition, the bill allows a terminated employee to file a complaint with DLA alleging that an exemption was not offered or was improperly applied or denied, resulting in the employee's termination, which DLA must investigate.

HB 1B provides that the investigation must determine whether the private employer imposed a COVID-19 vaccination mandate, whether the employee submitted a proper exemption statement and complied with any specified condition, and whether the employee was terminated as a result of the COVID-19 vaccination mandate. The bill requires the Attorney General to impose an administrative fine if the Attorney General finds that the employee was terminated improperly. However, the Attorney General may not impose a fine on a private employer that reinstates, prior to issuance of a final order, a terminated employee with back pay to the date that the complaint was received by DLA.

### **Effect of the Bill**

This bill, which is linked to the passage of HB 1B (2021 B), creates a public record exemption for an employee complaint alleging a private employer's violation of s. 381.00317, F.S., regarding a private employer's COVID-19 vaccination policies or practices, and all information relating to an investigation of such complaint, held by DLA. The complaint and investigative information are confidential and exempt<sup>11</sup> from public records requirements until the investigation is completed or ceases to be active. For purposes of the public record exemption, an investigation is considered "active" while such investigation is being conducted by DLA with a reasonable good faith belief that it may lead to a determination of whether there was a violation of s. 381.00317, F.S. An investigation does not cease to be active if DLA is proceeding with reasonable dispatch and there is a good faith belief that action may be initiated by DLA.

After an investigation is completed or ceases to be active, information relating to the investigation remains confidential and exempt from public records requirements if disclosure of that information would jeopardize the integrity of another active investigation, reveal medical information about an employee, or reveal information regarding an employee's religious beliefs.

Information made confidential and exempt may be released to another governmental entity in the furtherance of that entity's lawful duties and responsibilities. In addition, the bill provides that it does not prohibit the disclosure of information in an aggregated format.

The bill also provides a public necessity statement as required by art. I, s. 24(c) of the Florida Constitution. In part, the public necessity statement provides that the public disclosure of the complaint or investigative information ...

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<sup>11</sup> There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Op. Att'y Gen. Fla. 04-09 (2004).

[C]ould discourage an employee from filing a complaint if he or she knows that his or her personal medical information or religious beliefs will be made available pursuant to a public records request...if a complainant's information is made publicly available while an investigation is active, that complainant could become the subject of intimidation tactics and threats, thus hindering the effective and efficient administration of the investigation...

Lastly, the bill provides for repeal of the public record exemption on October 2, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill could have an insignificant negative fiscal impact on the DLA because DLA staff responsible for complying with public records requests may require training related to the newly created public record exemption. These costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the DLA.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.