

**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 Health Policy

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BILL: SB 1350

INTRODUCER: Senator Diaz

SUBJECT: Public Records and Meetings/In-hospital Medical Staff Committees

DATE: February 9, 2022

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	<b>Pre-meeting</b>
2.			GO	
3.			RC	

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## I. Summary:

SB 1350 makes confidential and exempt from public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, certain specified records held by in-hospital medical staff committees of a public hospital. The bill also makes exempt any portion of an in-hospital medical staff committee meeting during which the above information is discussed and the recordings and transcripts of the exempt portions of the meeting.

The bill provides for an automatic repeal date of October 2, 2027, pursuant to the Open Government Sunset Review Act, and provides a public necessity statement as required by Article I, s. 24(c) of the State Constitution.

The bill provides an effective date of October 1, 2022.

## 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, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in

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

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

s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the 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, 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.<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*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

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

### Hospital Committees

The types and roles of hospital committees vary from hospital to hospital. Committees generally serve as a governance tool that a hospital can use for various reasons including, but not limited to, making key decisions on the operations of the hospital or reviewing hospital practices for quality or risk management. As an example of the types of committees that may exist, one public hospital system in Florida, Broward Health, has a number of standing committees, including the:

- Audit committee, which provides a structured and systematic oversight of the hospital district's governance, risk management, and internal control practices.<sup>27</sup>
- Building committee, which considers all matters concerning the hospital district's and its subsidiaries' buildings, facilities and land, to attend to all matters relating to new construction, renovation, acquisition, and leasing of real property in and for the district and its subsidiaries.
- Compliance committee, which is responsible for the review and oversight of the hospital district's Compliance and Ethics Program, including, but not limited to, matters related to compliance with federal and state health care program requirements; the district's compliance-related policies and procedures; and the performance of the Chief Compliance and Privacy Officer.
- Finance committee, which reviews short, intermediate, and long-range financial plans of the hospital district and attends to all financial interests of the district as prescribed by the Charter.
- Governance committee, which reviews and makes recommendations to the hospital district's board of directors about the hospital district's governance structure and participating in the development of training and orientation materials for new commissioners.

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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> North Broward Hospital District, Regular Board Meeting, April 28, 2021, Minutes, Exhibit A, on file with Senate Health Policy Committee staff.

- Human resource committee, which conducts annual reviews and/or performance evaluations, establishes performance standards, reviews executive leadership structure and positions, and reviews employee benefits and incentive plans.
- Joint conference committee, serves as a forum for discussion, collaboration, and conflict resolution relating to matters of the hospital district's staff, the district, and the policies and practices of the district's hospitals.
- Legal affairs and governmental relations committee, which reviews the legal affairs of the hospital districts; the district's state and federal legislative efforts; and the district's contracts for physician services, major employment contracts, and other major contractual commitments.
- Pension and investment committee, which monitors the hospital district's investment management services for the general operating funds, bond funds, self-insurance funds, employee pension plans, and other retirement plans.
- Quality assessment and oversight committee, which, among other things, evaluates the needs and expectations of the individuals served by the hospital district to determine how the district might improve its overall efforts.
- Risk-management/claims review committee, which assesses matters that relate solely to the evaluation of claims for which the hospital district is, or may be, liable under the statutory waiver of sovereign immunity in s. 768.28, F.S., and which are filed with the district's risk management program or relate solely to offers of compromise of claims filed with the risk management program.

### **Public Hospitals**

In Florida there are currently 42 hospitals that are either government owned or that have been granted sovereign immunity by Legislative act. Several of these hospitals are owned under the same health care system.<sup>28,29</sup> Some examples of public hospital systems in Florida include: Halifax Health, Lee Health, Memorial Healthcare System, Sarasota Memorial Health Care System, and Broward Health.<sup>30</sup>

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

SB 1350 creates s. 395.3027, F.S., to make confidential and exempt from public records requirements in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, the records held by in-hospital medical staff committees of a public hospital, including, but not limited to, any medical executive committee or credentialing committee, or its agent, if the records contain:

- Individually identifiable health information protected under HIPPA, or its implementing regulations.
- Personal identifying information of hospital personnel.
- Information relating to:
  - Pending legal matters, including, but not limited to, litigation strategy.

<sup>28</sup> Financial Data Dashboard – Operations – government controlled, Florida Health Finder, available at [https://bi.ahca.myflorida.com/t/ABICC/views/FinancialDataDashboard/FinancialDataDashboard?embed=y&:showShareOptions=true&:display\\_count=no&:showVizHome=no](https://bi.ahca.myflorida.com/t/ABICC/views/FinancialDataDashboard/FinancialDataDashboard?embed=y&:showShareOptions=true&:display_count=no&:showVizHome=no) (last visited Feb. 8, 2022).

<sup>29</sup> A list of such hospitals is on file with Senate Health Policy Committee staff.

<sup>30</sup> Public Hospitals, Safety Net Hospital Alliance of Florida, available at <http://safetynetsflorida.org/public> (last visited Feb. 8, 2022).

- Contract negotiations.
- Personnel matters.
- Peer review procedures.
- Trade secrets as defined in s. 688.002, F.S.

The bill also makes exempt any portion of an in-hospital medical staff committee meeting during which the above information is discussed. The bill specifies that a complete recording and transcript must be made of any portion of a meeting which is closed pursuant to this subsection, and any closed portion of such meeting may not be held off the record, but also makes the recordings and transcripts exempt.

The bill provides for the automatic repeal of the statute on October 2, 2027, pursuant to the Open Government Sunset Review Act.

**Section 2** of the bill provides that the Legislature finds that it is a public necessity that records held by in-hospital medical staff committees, as described above, be made confidential and exempt because subjecting the records of these in-hospital medical staff committees to the public records requirements could cause unnecessary harm to individuals whose personal identifying information and confidential health information are revealed and would impair public hospitals from effectively competing in the marketplace against private hospitals whose records are not required to be open to the public.

Additionally the bill provides that the Legislature finds that it is a public necessity that any portion of meetings held by in-hospital medical staff committees, as described above, be made exempt and that the recordings and transcripts of such meetings be made exempt, because:

- Such meetings are designed to encourage the free discussion and exchange of ideas between health care practitioners and other hospital personnel, which could be blunted if such confidential and sensitive information were subject to disclosure;
- Subjecting the in-hospital medical staff committees to the public meetings requirements is duplicative since the final decisions made by medical staff committees are subsequently presented to a public body at publicly noticed meetings; and
- The failure to exempt the recordings and transcripts of such meetings would defeat the purpose of the public meetings exemption.

The bill provides an effective date of October 1, 2022.

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

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

None.

##### **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 newly created or expanded public records or public meeting exemption. The bill creates a public record exemption for certain records and transcripts of in-hospital committees of public hospitals and creates a public meetings exemption for meetings of those committees in which the confidential and exempt records are discussed.

### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public exemption. The bill a public record exemption for certain records and transcripts of in-hospital committees of public hospitals and creates a public meetings exemption for meetings of those committees in which the confidential and exempt records are discussed. Section 2 of the bill provides a public necessity statement.

### **Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill makes confidential and exempt certain records of in-hospital committees of public hospitals and makes exempt meetings of those committees in which the confidential and exempt records are discussed and the transcripts of those meetings. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

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.

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 395.3027 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.