

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 Rules

BILL: SB 7000

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Nonviable Birth Certificates

DATE: January 11, 2022

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|----------------|-----------|---------------------------------------|
| 1. | <u>Smith</u> | <u>Brown</u> | <u>RC</u> | HP Submitted as Comm. Bill/Fav |
| | <u>Smith</u> | <u>Phelps</u> | | Favorable |

I. Summary:

SB 7000 amends s. 382.008(8), F.S., to save from repeal the public record exemption for certain information that may be collected by the Department of Health when issuing a nonviable birth certificate. Specifically, the cause of death and parentage of the fetus, marital status of the parents, and any medical information included in nonviable birth records are confidential and exempt from public disclosure.

The public records exemption stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.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 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.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

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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

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 1, (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 (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.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
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

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.

²³ Section 119.15(6)(b)3., F.S.

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

Vital Statistics

The Office of Vital Statistics,²⁷ housed within the Department of Health (DOH), is responsible for compiling, storing, and preserving the vital records of the state.²⁸ Vital records are the official certificates or reports of birth, death, fetal death, marriage, dissolution of marriage, certain name changes, and data related to these records.²⁹

Florida officially began collecting birth and death records in 1917. Two years later, in 1919, the state became a nationally recognized death registration jurisdiction. In 1924, the state became a nationally recognized birth registration jurisdiction. Since 1927, marriage and dissolution records have been filed with the Office of Vital Statistics.³⁰ In addition to the state office, which operates under the direction of the state registrar, district offices operate under the direction of local registrars.

Birth Registration

A certificate for each live birth that occurs in this state must be filed within five days after the birth. The certificate may be filed with the local registrar of the district where the birth occurred or submitted electronically to the state registrar. Responsibility for filing the certificate is assigned to various persons depending upon where the birth occurs. For example, if the birth

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 The statutes consistently refer to the “Office” of Vital Statistics and not the “Bureau” of Vital Statistics. For example, see s. 382.003, F.S. While the statutes refer to an Office of Vital Statistics, the DOH has established this responsibility at the bureau level. See the DOH’s organizational chart available at: <http://www.floridahealth.gov/about/documents/orgchart.pdf> (last visited Oct. 26, 2021).

²⁸ Section 382.003, F.S.

²⁹ Section 382.002(18), F.S.

³⁰ Department of Health, Florida Vital Statistics Annual Report, August 2016, Page *vii*, <http://www.flpublichealth.com/VSBOOK/pdf/2015/Intro.pdf> (last visited Oct. 21, 2021).

occurs in a hospital, birth center, or other health care facility, or in route thereto, the person in charge of the facility is responsible for filing the certificate. The health care practitioner in attendance is responsible for providing the facility with the information required by the birth certificate. If the birth occurs outside a facility and a physician, certified nurse midwife, midwife, or a public health nurse was in attendance, then that person must file the certificate.³¹

Death and Fetal Death Registration

A certificate for each death or fetal death³² that occurs in this state must be filed within five days after the death. The certificate may be filed with the local registrar of the district in which the death or fetal death occurred or submitted electronically to the state registrar.³³

Katherine's Law - Certificate of Birth Resulting in Stillbirth

In 2006, Governor Jeb Bush signed into law legislation that allows for the creation and issuance of a certificate of birth resulting in stillbirth.³⁴ This law is known as Katherine's Law.³⁵

The certificate of birth resulting in stillbirth is not proof of live birth³⁶ and may not be used to establish identity.³⁷ Gestation must be 20 weeks or more,³⁸ and there must be a fetal death certificate on file with the Office of Vital Statistics in order for a certificate to be prepared. The information included on the certificate comes from the fetal death certificate.

Miscarriage

Miscarriage is often described as the spontaneous loss of a pregnancy that occurs before the 20th week of gestation. Approximately 10 to 20 percent of all known pregnancies end in miscarriage. The number of miscarriages might actually be higher because some occur before a woman is aware that she is pregnant.³⁹

Stephanie Saboor Grieving Parents Act

In 2003, the Legislature enacted the Stephanie Saboor Grieving Parents Act.⁴⁰ This law applies to a physician, physician assistant, nurse, or midwife⁴¹ or a hospital, ambulatory surgical center,

³¹ Section 382.013, F.S.

³² Section 382.002(8), F.S., defines "fetal death" as death prior to the complete expulsion or extraction of a product of human conception from its mother if the 20th week of gestation has been reached and the death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

³³ Section 382.008(1), F.S.

³⁴ Section 382.002(17), F.S., defines "stillbirth" as an unintended, intrauterine fetal death after a gestational age of not less than 20 completed weeks.

³⁵ Chapter 2006-118, L.O.F.

³⁶ Section 382.0085(4)(e), F.S.

³⁷ See <http://www.floridahealth.gov/certificates/certificates/birth/Stillbirth/index.html> (last visited March 16, 2017).

³⁸ Section 382.002(17), F.S.

³⁹ See for example, The Mayo Clinic, Miscarriage website at: <http://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/home/ovc-20213664>, (last visited on Oct. 25, 2021).

⁴⁰ Chapter 2003-52, L.O.F., codified at s. 383.33625, F.S.

⁴¹ See s. 383.33625(2), F.S., which requires a health care practitioner licensed pursuant to chapter 458, 459, 464, or 467, F.S., to provide the notification.

or birth center⁴² with custody of fetal remains following a spontaneous fetal demise that occurs after a gestation period of less than 20 completed weeks. Those persons or facilities are required to notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law.^{43,44}

Grieving Families Act

In 2017, the Legislature enacted the Grieving Families Act, which enables a parent to obtain, in certain situations, a certificate of nonviable birth following a miscarriage.⁴⁵ The Grieving Families Act defines “nonviable birth” as “an unintentional, spontaneous fetal demise occurring after the completion of the 9th week of gestation but prior to the 20th week of gestation of a pregnancy that has been verified by a health care practitioner.”⁴⁶

A health care practitioner who attends or diagnoses a nonviable birth, or a facility at which the nonviable birth occurs, must advise a parent of a nonviable birth that they may request the preparation of a certificate of nonviable birth.⁴⁷ Upon the request of a parent of a nonviable birth, such practitioner or facility, must electronically file a registration of nonviable birth on the DOH’s electronic death registration system or on a certain form with the DOH or the local registrar within 30 days after receiving the parent’s request.⁴⁸ The practitioner or facility must also advise a parent how to contact the Office of Vital Statistics to request a certificate of nonviable birth.⁴⁹ After the health care practitioner has filed the nonviable birth registration, the parents may request the Office to issue a certificate of nonviable birth. The Office must issue a certificate of nonviable birth within 60 days after receiving a parent’s request.⁵⁰

A certificate of nonviable birth must contain:

- The date of the nonviable birth.
- The county in which the nonviable birth occurred.
- The name of the fetus, as provided on the registration of nonviable birth. If a name does not appear on the original or amended registration of nonviable birth and the requesting parent does not wish to provide a name, the Office of Vital Statistics must fill in the certificate of nonviable birth with the name “baby boy” or “baby girl” and the last name of the parent. If the sex of the child is unknown, the Office must fill in the certificate of nonviable birth with the name “baby” and the last name of the parent.
- The statement: “This certificate is not proof of a live birth.”⁵¹

⁴² Section 383.33625(4), F.S., requires a facility licensed pursuant to chapter 383 or chapter 395, F.S., to provide the notification.

⁴³ Section 383.33625(4), F.S.

⁴⁴ Fetal remains of less than 20 completed weeks of gestation would be considered biomedical waste, which is governed by s. 381.0098, F.S.

⁴⁵ Chapter 2017-38, L.O.F.

⁴⁶ Section 382.002(14), F.S.

⁴⁷ Section 382.0086(2)(a), F.S.

⁴⁸ Section 382.008(7), F.S.

⁴⁹ Section 382.0086(2), F.S.

⁵⁰ Section 382.0086(1), F.S.

⁵¹ Section 382.0086(4)-(5), F.S.

The Office of Vital Statistics may not use a certificate of nonviable birth to calculate live birth statistics.⁵² Because not all parents of nonviable births would seek to obtain a certificate, there would be limited value in collecting or analyzing nonviable birth certificate data for research purposes.

| Nonviable Birth Registrations Filed by Year ⁵³ | |
|---|------------|
| 2017 | 93 |
| 2018 | 156 |
| 2019 | 145 |
| 2020 | 121 |
| 2021 (Jan. 1 - Sept. 21) | 86 to date |

Exemption under Review

According to the statement of public necessity included in the original public records exemption,⁵⁴ medical information, including the cause of death of a nonviable fetus, and any medical information pertaining thereto, is sensitive and personal in nature and disclosure of such information may lead to an invasion of privacy of a parent experiencing a nonviable birth. Disclosure of information regarding the parentage of a nonviable fetus and the marital status of such fetus' parent may discourage an individual who would otherwise request a nonviable birth certificate from doing so due to real or perceived stigma regarding the nonviability of the fetus, the fetus' parentage, or the marital status of the fetus' parent.

All information relating to the cause of death and parentage of a nonviable fetus, the marital status of such fetus' parent, and any medical information included in nonviable birth records held by a state agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, but may be released for health research purposes as approved by the DOH.⁵⁵ There have been no such health research requests and no request has been denied by the DOH.⁵⁶

The DOH may issue a certified copy of an original nonviable birth certificate which includes the confidential and exempt information: to the fetus' parent; to any local, state, or federal agency for official purposes upon approval by the DOH; or upon the order of any court of competent jurisdiction.⁵⁷ Parents who do not provide identification may be issued a nonviable birth certificate as a public document, with confidential and exempt information redacted. To date, no entity other than a parent has requested a certified copy of a nonviable birth registration.⁵⁸

⁵² Section 382.0086(8), F.S.

⁵³ Email from Legislative Affairs Director, Department of Health, to Government Operations Subcommittee, Florida House of Representatives (Sept. 21, 2021) (on file with the Senate Committee on Health Policy).

⁵⁴ Chapter 2017-39, L.O.F.

⁵⁵ Section 382.008(8)(b), F.S.

⁵⁶ *Id.* at 53.

⁵⁷ Section 382.008(8)(a), F.S.

⁵⁸ *Id.* at 53.

The public records exemption stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. The DOH recommends retaining the exemption in its current form.⁵⁹

III. Effect of Proposed Changes:

The bill saves from repeal a public record exemption in s. 382.008(8), F.S., for certain information that may be collected when issuing a nonviable birth certificate. Specifically, the cause of death and parentage of the fetus, marital status of the parents, and any medical information included in nonviable birth records will continue to be confidential and exempt from public disclosure beyond October 2, 2022.

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:

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 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 continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. It does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

⁵⁹ Conversation with Ken Jones, State Registrar and Bureau Chief, Bureau of Vital Statistics, Department of Health (Aug. 31, 2021).

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 substantially amends section 382.008 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.