

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 Health Policy

BILL: SPB 7002

INTRODUCER: For consideration by the Health Policy Committee

SUBJECT: OGSR/Information Relating to Medical Marijuana Held by the Department of Health

DATE: October 25, 2021 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Looke</u>	<u>Brown</u>		Pre-meeting

I. Summary:

SPB 7002 amends s. 381.987, F.S., to save from repeal the public records exemption for certain personal identifying information of patients, caregivers, and physicians held by the Department of Health (DOH) and relating to Florida’s medical marijuana program. Specifically, the section makes confidential and exempt from public records requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- A patient’s or caregiver’s personal identifying information held in the DOH’s medical marijuana use registry (MMUR);
- All personal identifying information collected for the purpose of issuing MMUR identification cards;
- All personal identifying information pertaining to a physician certification for medical marijuana; and
- A qualified physician’s Drug Enforcement Administration (DEA) number, residential address, and government-issued identification card.

The section requires the DOH to allow access to confidential and exempt information under specified circumstances and specifies that any information released by the DOH remains confidential and exempt and that the person who receives the information must maintain the information’s confidential and exempt status.

The public records exemption stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.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 proposed bill removes the scheduled repeal of the exemption to continue the confidential and exempt status of the information.

The proposed 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 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

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

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).

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

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

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).

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.

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

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

Public Records Exemption for Personal Identifying Information Relating to Medical Marijuana Held by the DOH

Section 381.987, F.S., establishes that the following information is confidential and exempt from public records:

- A patient's or caregiver's personal identifying information held by the DOH in the MMUR established under s. 381.986, F.S., including, but not limited to, the patient's or caregiver's name, address, date of birth, photograph, and telephone number.
- All personal identifying information collected for the purpose of issuing a patient's or caregiver's MMUR identification card described in s. 381.986, 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.

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.

- All personal identifying information pertaining to the physician certification for marijuana and the dispensing thereof held by the DOH, including, but not limited to, information related to the patient's diagnosis, exception requests to the daily dose amount limit, and the qualified patient's experience related to the medical use of marijuana.
- A qualified physician's DEA number, residential address, and government-issued identification card.

The section allows the release of confidential and exempt information to specified persons or entities and also specifies that all information released remains confidential and exempt and that the person who receives the information must maintain such status. Any person who willfully and knowingly violates this provision, or any other provision in the section, commits a felony of the third degree. The section requires the DOH to allow access to the confidential and exempt information the following persons or entities:

- A law enforcement agency that is investigating a violation of law regarding marijuana in which the subject of the investigation claims an exception established under s. 381.986, F.S., except for information related to the patient's diagnosis.
- A medical marijuana treatment center approved by the DOH pursuant to s. 381.986, F.S., which is attempting to verify the authenticity of a physician certification for marijuana, including whether the certification had been previously filled and whether the certification was issued for the person attempting to have it filled, except for information related to the patient's diagnosis.
- A physician who has issued a certification for marijuana for the purpose of monitoring the patient's use of such marijuana or for the purpose of determining, before issuing a certification for marijuana, whether another physician has issued a certification for the patient's use of marijuana. The physician may access the confidential and exempt information only for the patient for whom he or she has issued a certification or is determining whether to issue a certification for the use of marijuana pursuant to s. 381.986, F.S.
- A practitioner licensed to prescribe prescription medications to ensure proper care of a patient before prescribing medication to that patient which may interact with marijuana.
- An employee of the DOH for the purposes of maintaining the MMUR and periodic reporting or disclosure of information that has been redacted to exclude personal identifying information.
- An employee of the DOH for the purposes of reviewing physician registration and the issuance of physician certifications to monitor practices that could facilitate unlawful diversion or the misuse of marijuana or a marijuana delivery device.
- The DOH's relevant health care regulatory boards responsible for the licensure, regulation, or discipline of a physician if he or she is involved in a specific investigation of a violation of s. 381.986, F.S. If a health care regulatory board's investigation reveals potential criminal activity, the board may provide any relevant information to the appropriate law enforcement agency.
- The Consortium for Medical Marijuana Clinical Outcomes Research established in s. 1004.4351(4), F.S.
- A person engaged in bona fide research if the person agrees:
 - To submit a research plan to the DOH which specifies the exact nature of the information requested and the intended use of the information;

- To maintain the confidentiality of the records or information if personal identifying information is made available to the researcher;
- To destroy any confidential and exempt records or information obtained after the research is concluded; and
- Not to contact, directly or indirectly, for any purpose, a patient or physician whose information is in the MMUR.

According to the statement of public necessity included in SB 6-A (2017), which established the public records exemption, the Legislature found that it was necessary to protect the personal identifying information of patients, caregivers, and physicians as such information could make the public aware of the patient's medical conditions, as well as be used to embarrass, humiliate, harass, or discriminate against the patient, caregiver, or physician over his or her decision to use, assist with the use of, or certify a patient for medical marijuana. As of October 22, 2021, there were 628,277 active, qualified patients in the MMUR and 2,765 physicians who qualify to issue certifications for medical marijuana.²⁷

The public records exemption stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. In a phone interview that Senate Health Policy Committee staff conducted with the DOH on August 31, 2021, the DOH recommended that the public records exemption be reenacted as is.²⁸

III. Effect of Proposed Changes:

SPB 7002 amends s. 381.987, F.S., to save from repeal the public records exemption for certain personal identifying information of patients, caregivers, and physicians held by the DOH and relating to Florida's medical marijuana program. For specific information on the public records exemption please see Section II of this analysis.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

²⁷ See Office of Medical Marijuana Use (OMMU) information sheet, October 22, 2021, available at https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2021/102221-OMMU-Update.pdf (last visited Nov. 28, 2021). Note: the number of caregivers is not listed on the OMMUs webpage, nor is it specified on OMMU's annual report for 2020, which can be found at <https://knowthefactsmmj.com/wp-content/uploads/2020/02/2020-Annual-Report.pdf> (last visited Nov. 28, 2021).

²⁸ Conversation with Ken Jones, State Registrar and Bureau Chief, Bureau of Vital Statistics, Department of Health (Aug. 31, 2021).

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 proposed 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 proposed bill continues the current public records exemption under sunset review; it does not expand this exemption or create a new one. Thus, the proposed 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 proposed 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.

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 381.987 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.