

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 7018

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Injured or Deceased Employee/Department of Financial Services

DATE: January 11, 2022

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
<u>Schrader</u>	<u>Knudson</u>		BI Submitted as Comm. Bill/Fav
1. <u>Schrader</u>	<u>Phelps</u>	<u>RC</u>	Favorable

I. Summary:

SB 7018 amends s. 440.1851, Florida Statutes (F.S.), to save from repeal a public records exemption relating to the personal identifying information of an injured or deceased worker contained in reports, notices, records, or supporting documentation held by the Department of Financial Services (DFS) pursuant to Florida’s Workers’ Compensation Law (ch. 440, F.S.). “Personal identifying information,” means the injured or deceased employee’s name, date of birth, home or mailing address, e-mail address, or telephone number. Section 440.1851, F.S., makes this information confidential and exempt and authorizes the DFS to disclose it only under certain specified conditions. The section also provides for criminal penalties for the willful and knowing unlawful disclosure of such information.

The bill takes effect October 1, 2022.

II. Present Situation:

Public Records Law

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 This 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

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that:

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

Section 119.011(12), F.S., defines “public records” to include:

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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

Only the Legislature may create an exemption to public records requirements.⁹ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32, 34 (Fla. 1992); *see also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c)

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act (the Act), prescribe a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ The Act requires the repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption or repeal the sunset date.¹⁸ In practice, many exemptions are continued by repealing the sunset date, rather than reenacting the exemption.

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.¹⁹ 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 subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁰
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²¹ or
- It protects trade or business secrets.²²

The Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.

¹⁷ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

²³ 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?

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁴ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁵

Department of Financial Services

The Chief Financial Officer is the head of the DFS.²⁶ Within the DFS's many divisions are the Division of Investigative and Forensic Services, the Division of Risk Management, and the Division of Workers' Compensation.

The Bureau of Insurance Fraud of the Division of Investigative and Forensic Services investigates alleged acts of insurance fraud not categorized under workers' compensation fraud, including: licensee, healthcare, application, vehicle, homeowners, commercial, disability, arson, and life insurance fraud. Within these categories are: organized schemes to defraud the public and insurers, insolvency of insurance companies due to internal fraud, criminal activity by unauthorized entities illegally doing business in Florida, and viatical related fraud.²⁷

The Bureau of State Employee Workers' Compensation Claims, within the Division of Risk Management, is responsible for the administration of all workers' compensations claims filed by state employees and volunteers who are injured on the job. It typically receives approximately 12,000 new claims each year and is primarily responsible for ensuring that covered individuals receive timely benefits, while safeguarding the State from instances of fraud, waste, and abuse.²⁸

The Division of Workers' Compensation is responsible for administering many of the provisions of ch. 440, F.S. In addition, the Agency for Health Care Administration and the Office of Judges of Compensation Claims within the Division of Administrative Hearings are also responsible for administering provisions of ch. 440, F.S., the Workers' Compensation Law.²⁹

Section 440.185, F.S., establishes reporting requirements for employees, employers, and carriers relating to said employee suffering an injury arising out of and in the course of their employment. In particular, s. 440.185(2), F.S., requires that employers report such injury to its

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- 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?

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ Section 119.15(7), F.S.

²⁶ Section 20.121(1), F.S.

²⁷ Bureau of Insurance Fraud within the Division Investigative and Forensic Services, available at <https://www.myfloridacfo.com/division/difs/insurance-fraud> (last viewed Nov. 24, 2021).

²⁸ Bureau of State Employee Workers' Compensation Claims within the Division of Risk Management, available at <https://www.myfloridacfo.com/division/risk/workers-compensation> (last viewed Nov. 24, 2021).

²⁹ Sections 440.015, 440.135, 440.44, and 440.45, F.S.

workers' compensation insurance carrier, in a format prescribed by the department, and shall provide a copy of such report to the employee or the employee's estate.

- The name and address of the employer;
- The name, social security number, mailing address, telephone number, and occupation of the injured worker;
- The cause and nature of the injury or death;
- The year, month, day, and hour when, and the particular locality where the injury or death occurred; and
- Such other information the DFS may require.

Further, additional reports about the condition of the employee, including copies of medical reports and bills,³⁰ funeral expenses, and wage statements, must also be filed with the DFS.³¹

In addition to the First Report of Injury (form DFS-F2-DWC-1 as established by DFS), employers and carriers are also required to file subsequent reports with the DFS relating to an injured worker that contain information that would identify said worker.³² These reports or forms include, but are not limited to, the following reports: Wage Statement, Request for Wage Loss/Temporary Partial Benefits, Notice of Action/Change, Notice of Denial, Claim Cost Report, Request for Social Security Disability Benefit Information, and Employee Earnings Report.³³

Public Records Exemptions Relating to Florida's Workers' Compensation Law

Section 624.23, F.S., of the Florida Insurance Code provides a public record exemption for personal financial and health information³⁴ submitted by a consumer seeking assistance from the DFS. The term "consumer," as used in the section, means 1) a prospective purchaser, purchaser, or beneficiary of, or applicant for, any product or service regulated under the Florida Insurance Code, and a family member or dependent of said consumer, or 2) an employee seeking assistance from the Employee Assistance and Ombudsman Office under s. 440.191, F.S. This personal financial and health information held by the DFS or Office of Insurance Regulation, is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

³⁰ Information in the medical reports may include the name and address of the injured worker, date of accident, and procedure and diagnosis code describing the treatment and nature of the injury. Section 440.13(4)(b), F.S., and Rules 69L-7.710-7.750, F.A.C.

³¹ Section 440.185(4), F.S.

³² See Division of Worker's Compensation Forms, available at <https://www.myfloridacfo.com/division/wc/publicationsformsmanualsreports/forms/default.htm> (last viewed Nov. 24, 2021).

³³ *Id.*

³⁴ Section 624.23, F.S., provides that a consumer's personal financial and health information means: Personal health condition, disease, or injury; a history of a consumer's personal medical diagnosis or treatment; the existence, nature, source, or amount of a consumer's personal income or expenses; records of or relating to a consumer's personal financial transactions of any kind; the existence, identification, nature, or value of a consumer's assets, liabilities, or net worth; the existence or content of, or any individual coverage or status under a consumer's beneficial interest in, any insurance policy or annuity contract; or the existence, identification, nature, or value of a consumer's interest in any insurance policy, annuity contract, or trust.

Further, s. 624.23(3), F.S., provides that this personal financial and health information may be disclosed to specified parties.³⁵

Currently, ch. 440, F.S., provides three public records exemptions directly related to injured or deceased injured workers. The first exemption, s. 440.102(8), F.S., protects all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced because of a drug-testing program. The second exemption, s. 440.125, F.S., provides that medical records and medical reports identifying an injured worker, which are filed with the DFS pursuant to s. 440.13, F.S., are confidential and exempt.

The third exemption, s. 440.1851, F.S., is the subject of this open government sunset review. The exemption provides that personal identifying information of an injured or deceased worker contained in reports, notices, records, or supporting documentation held by the DFS pursuant to ch. 440, F.S. are confidential and exempt from public records requirements. As used in, s. 440.1851, F.S., “personal identifying information,” means the injured or deceased employee’s name, date of birth, home mailing, or e-mail address, or telephone number. Section 440.1851, F.S., provides that the DFS may only disclose such information:

- To the injured employee, to the spouse or a dependent of the deceased employee, to the spouse or a dependent of the injured employee if authorized by the injured employee, or to the legal representative of the deceased employee’s estate;
- To a party litigant, or his or her authorized representative, in matters pending before the Office of the Judges of Compensation Claims;
- To a carrier or an employer for the purpose of investigating the compensability of a claim or for the purpose of administering its anti-fraud investigative unit established pursuant to s. 626.9891;
- In an aggregate reporting format that does not reveal the personal identifying information of any employee;
- Pursuant to a court order or subpoena;
- To an agency for administering its anti-fraud investigative function or in the furtherance of the agency’s official duties and responsibilities; or
- To a federal governmental entity in the furtherance of the entity’s official duties and responsibilities.

Section 440.1851, F.S., also provides for criminal penalties for the unlawful disclosure of the personal identifying information protected under the statute. Specifically, s. 440.1851(2), F.S., provides that a person willingly and knowingly disclosing such information commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

Section 440.1851, F.S., was originally passed and signed into law in 2017. Pursuant to the Act, the section is set to stand repealed on October 2, 2022, unless saved from repeal through reenactment.

³⁵ The parties to whom disclosure may be made are: Another governmental entity, if disclosure is necessary for the receiving entity to perform its duties and responsibilities; the National Association of Insurance Commissioners; or the consumer or the legally authorized representative of the consumer.

Senate Banking and Insurance Committee staff surveyed the DFS to ascertain whether the public records exemption in s. 440.1851, F.S., remains necessary. Staff reviewed the DFS's responses to the questions to be considered by the Legislature in accordance with s. 119.115(6)(a), F.S. The DFS recommends that the Legislature reenact this public records exemption without revision. The DFS stated that, prior to the enactment of this exemption, the Division of Workers' Compensation received approximately 90 public records requests per month for the names and contact information of injured workers that were reported to the Division in the previous month. On average, about 4,750 injured workers' names were released each time one of these requests were fulfilled by the Division. According to the DFS, the majority of the requesting parties were law firms seeking to market their services to injured workers. The Division would regularly receive communications from injured workers complaining about the solicitations they were receiving and to ascertain how these firms acquired said workers' personal information. In addition, according to the DFS, background check companies would utilize this information provide their clients with knowledge on whether prospective new hires had sustained a workers' compensation injury and those clients subsequently potentially using such information to make determinations on employment.³⁶

In addition, the DFS stated that it believes that s. 440.1851, F.S., mitigates unnecessary litigation between injured workers and carriers on claim disputes. The DFS admits that "it is impossible to definitively quantify the results," but cites as evidence of the mitigating effect that the number of Petitions for Benefits (PFB) filed with the Office of the Judges of Compensations (OJCC) have only slightly increased since 2017, while, the actual number of "new cases" with PFBs have stayed the same, despite Florida experience significant job growth during this time.³⁷ Though the evidence cited by the DFS may be indicative of said mitigating effect, it is also possible that this outcome was driven, at least in part, by other factors.

III. Effect of Proposed Changes:

Section 1 amends s. 440.1851, F.S., to delete the scheduled repeal of the current public records exemption of personal identifying information of an injured or deceased employee which is contained in reports, notices, records, or supporting documentation held by the DFS pursuant to the Workers' Compensation Law (ch. 440, F.S.). "Personal identifying information," means the injured or deceased employee's name, date of birth, home mailing, or e-mail address, or telephone number. This information will continue to be confidential and exempt from public disclosure, subject to the disclosures permitted pursuant to s. 440.1851(1)(b), F.S.

Because the bill does not expand the public records exemption or the open meetings exemption, the bill does not require a two-thirds vote of each house in order to pass.

Section 2 provides that the bill takes effect October 1, 2022.

³⁶ Correspondence from the DFS (Sep. 24, 2021), on file with Senate Banking and Insurance Committee.

³⁷ *Id.*

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 bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion.

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 purpose of the law is to protect personal identifying information of injured or deceased employees held by the DFS. Specifically, the section seek to protect this information to protect such persons from unwanted solicitation relating to workers compensation claims and protect such workers from potential discrimination or social stigma relating to their injury or disability. This bill exempts only an injured or deceased person's name, date of birth, home address or mailing address, e-mail address, and telephone number from the public records requirements. Since these any of these pieces may potentially be used to "personally identify" an injured or deceased person, the exemption does not appear to be broader than necessary to accomplish the purpose of the law.

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 s. 440.185 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.