

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/SB 1552 Public Records/Pharmacy Benefit Managers

**SPONSOR(S):** Health Policy, Brodeur

**TIED BILLS:** CS/CS/SB 1550 **IDEN./SIM. BILLS:**

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**FINAL HOUSE FLOOR ACTION:** 40 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/SB 1552 passed the House on May 2, 2023.

The bill extends the current public records exemptions applicable to administrators under the Florida Insurance Code (FIC) found in ss. 624.319 and 626.884, F.S., to pharmacy benefit managers (PBMs), which will be a new class of administrators if CS/CS/SB 1550, or similar legislation, is enacted. Additional examination and investigation authority specific to PBMs is provided in CS/CS/SB 1550, and statutory reference to those reports and related work papers is also included in the exemptions provided in CS/SB 1552.

The exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2028, unless reviewed and reenacted by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

The bill was approved by the Governor on May 3, 2023, ch. 2023-30, L.O.F., and will become effective on the same date that SB 1550 takes effect which is July 1, 2023.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

##### 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 s. 11.0431(2)-(3), F.S., and 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., known as the Public Records Act, provides requirements for public records held by executive agencies.

##### Executive Agency Records – The Public Records Act

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>

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 that are used to “perpetuate, communicate, or formalize knowledge of some type.”<sup>6</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>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

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

<sup>2</sup> Id.

<sup>3</sup> Rule 1.48, *Rules and Manual of the Florida Senate*, (2022-2024) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2022-2024)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> S. 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> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> S. 119.07(1)(a), F.S.

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

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>9</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>10</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>11</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>12</sup>

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*.<sup>13</sup> 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.<sup>14</sup> Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>15</sup>

### **Open Government Sunset Review Act**

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act<sup>16</sup> (the Act), prescribe 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> The Act requires the 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

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<sup>9</sup> FLA. CONST. art. I, s. 24(c).

<sup>10</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).

<sup>11</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>12</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>13</sup> *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5<sup>th</sup> DCA 2004).

<sup>14</sup> *Id.*

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

<sup>16</sup> S. 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 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.

<sup>19</sup> S. 119.15(3), F.S.

<sup>20</sup> S. 119.15(6)(b), F.S.

<sup>21</sup> S. 119.15(6)(b)1., F.S.

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>

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 question the purpose and necessity of reenacting the exemption.

### Public Necessity Statement and Two-thirds Vote Requirement

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 expire, the previously exempt records will remain exempt unless otherwise provided by law.<sup>26</sup>

### Pharmacy Benefit Managers as Administrators

Pharmacy benefit managers (PBMs) are companies that manage prescription drug benefits on behalf of pharmacy benefit plans or programs (health insurers, Medicare Part D drug plans, large employers, state health plans, and other payers).<sup>27</sup> Key PBM functions may include administration and management of prescription drug benefits; developing and maintaining formularies; negotiating discounts and rebates between payers and pharmaceutical manufacturers; providing access to a contracted pharmacy network; real-time pharmacy claims processing; and performing utilization management, retroactive claims review, prior authorization and other medication management programs.<sup>28</sup>

Pharmacy benefit managers that contract to administer prescription drug benefits on behalf of a health insurer or health maintenance organization to residents of Florida have been required to register with the Office of Insurance Regulation (OIR) pursuant to s. 624.490, F.S., since 2019. A \$5 fee is paid at the time of registration and no specific regulation of PBM practices is addressed under Florida law.

CS/SB 1550, if enacted, will regulate all PBMs as administrators under the FIC.

### **Effect of Proposed Changes**

CS/SB 1552 provides the same public records exemptions to PBMs that currently exist for administrators under the FIC by amending and reenacting two statutes in which the exemptions are found. SB 1550, or similar legislation, if enacted, will require PBMs to become administrators. In addition, because additional examination and investigation provisions relating to PBMs are created in

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<sup>22</sup> S. 119.15(6)(b)2., F.S.

<sup>23</sup> S. 119.15(6)(b)3., F.S.

<sup>24</sup> S. 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> S. 119.15, F.S.

<sup>26</sup> S. 119.15(7), F.S.

<sup>27</sup> The Commonwealth Fund, *Pharmacy Benefit Managers and Their Role in Drug Spending*, (April 22, 2019) available at: [https://www.commonwealthfund.org/sites/default/files/2019-04/Explainer\\_PBMs\\_1.pdf](https://www.commonwealthfund.org/sites/default/files/2019-04/Explainer_PBMs_1.pdf) (last visited Mar 21, 2023).

<sup>28</sup> U.S. Pharmacist, *State PBM Regulations Protecting Community Pharmacies*, (August 16, 2022) *US Pharm.* 2022;47(8):21-25 available at: <https://www.uspharmacist.com/article/state-pbm-regulations-protecting-community-pharmacies> (last visited Mar. 21, 2023).

SB 1550, the bill extends the confidentiality and public records exemptions to these new provisions, unless otherwise provided in statute.<sup>29</sup>

The records that are made confidential and exempt in s. 624.319, F.S., are examination reports, until filed; investigation reports, until the investigation is completed or ceases to be active; and the related work papers. Portions of these documents may remain confidential and exempt if disclosure would:

- Jeopardize the integrity of another active examination or investigation;
- Impair the safety or financial soundness of the licensee, affiliated party, or insured;
- Reveal person financial, medical, or health information;
- Reveal the identity of a confidential source;
- Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual;
- Reveal examination techniques or procedures; or
- Reveal information received from another governmental entity of the National Association of Insurance Commissioners, which is confidential or exempt when held by that entity.

The records that are made confidential and exempt in s. 626.884, F.S., are books and records of all transactions among the administrator, insurers, and insured persons maintained by an administrator that are made available to the OIR for examination, audit, and inspection. This section of law is reenacted to include PBMs as a new class of administrator.

The bill includes technical updates to the two statutory sections to reference s. 24(a), Art. I of the State Constitution. The provisions making certain information confidential and exempt from the public records law were in the FIC prior to adoption of s. 24(a), Art. I of the State Constitution in 1992. The adopted Constitutional language includes a grandfather provision, “All laws that are in effect on July 1, 1993 that limit public access to records ... shall remain in force ... until they are repealed.”

The bill provides for review and repeal of both ss. 624.319 and 624.884, F.S., which provide the new exemptions, unless saved from repeal through reenactment by the Legislature by October 2, 2028, in accordance with the Open Government Sunset Review Act.

The bill contains statements of public necessity explaining why the documents need to be made confidential and exempt.

The first statement provides that as a new class of administrator, PBMs need to be subject to the exemptions that currently exist for administrators, unless otherwise provided in statute, to protect their confidential information and business and professional good name or reputation in a like manner. Also, both the Department of Financial Services and the OIR have responsibility for examining and investigating administrators under the FIC, and the exemptions are needed to ensure that disclosure of certain information relating to examinations and investigations of PBMs would not jeopardize the integrity of investigations or reveal information that is received from another regulatory entity which is confidential or exempt when held by that entity.

The bill also contains a statement of public necessity for making the trade secret information contained in the books and records of PBMs confidential and exempt. This statement provides that the Legislature recognizes that the release of trade secret information of a PBM, as with any administrator, could destroy the value of a business’s proprietary information and cause financial loss to the business by giving its competitors an unfair advantage and weakening its position in the marketplace.

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<sup>29</sup> Section 12 of SB 1550 creates s. 626.8828, Florida Statutes. Section 626.8828(2)(d), provides that documents obtained pursuant to an expanded examination or investigation predicated upon a pattern or practice of knowing and willful violations of s. 626.8825 or s. 626.8827, are public records and are not trade secrets or otherwise exempt from s. 119.07(1), F.S.

The bill provides an effective date as the same date that SB 1550 or similar legislation takes effect, if adopted, and becomes a law. SB 1550 provides an effective date of July 1, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

None.

### D. FISCAL COMMENTS:

None.