

**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 Governmental Oversight and Accountability Committee

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**BILL:** CS/SB 830

**INTRODUCER:** Governmental Oversight and Accountability Committee and Health Regulation Committee

**SUBJECT:** OGSR/Physician Workforce Surveys/Department of Health

**DATE:** February 7, 2012      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davlantes</u>	<u>Stovall</u>	<u>HR</u>	<b>Favorable</b>
2.	<u>Seay</u>	<u>Roberts</u>	<u>GO</u>	<b>Fav/CS</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill is the result of the Health Regulation Committee’s Open Government Sunset Review of the public records exemptions for all personal identifying information contained in records provided by allopathic and osteopathic physicians in response to the Department of Health’s physician workforce survey. The exemptions will expire on October 2, 2012, unless saved from repeal through reenactment by the Legislature. This bill reenacts the public records exemptions.

This bill substantially amends sections 458.3193 and 459.0083 of the Florida Statutes.

**II. Present Situation:**

**Public Records Law**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

- (a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined 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>5</sup>

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.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law and such law must specifically state the public

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<sup>2</sup> Article I, s. 24, Fla. Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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.” The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

<sup>5</sup> Section 119.011(11), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>8</sup> Article I, s. 24(c), Fla. Constitution.

necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

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

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.<sup>15</sup>

The Act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- Protects information of a sensitive, personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>16</sup>

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<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24(c), Fla. Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(5)(a), F.S.

<sup>16</sup> Section 119.15(4)(b), F.S.

The Act also requires consideration of the following:

- 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?

### **Physician Licensure**

Prior to engaging in the practice of medicine in Florida, an allopathic physician must be licensed under Chapter 458, F.S. Osteopathic physicians must be licensed under Chapter 459, F.S. before practicing in Florida. A license issued under either act must be renewed biennially.<sup>17</sup>

The 2007 Legislature enacted the requirements for physician workforce surveys for allopathic physicians and osteopathic physicians in sections 458.3191 and 459.0081, F.S., respectively. Both sections of statute require each Florida-licensed allopathic or osteopathic physician, in conjunction with the renewal of his or her license, to furnish specified information to the Department of Health (DOH) in a physician workforce survey.

Completed surveys submitted to DOH under sections 458.3191 and 459.0081, F.S., include:

- Licensee information, including but not limited to:
  - Frequency and geographic location of practice within the state;
  - Practice setting;
  - Percentage of time spent in direct patient care;
  - Anticipated changes to license or practice status; and
  - Areas of specialty or certification.
- Availability and trends relating to critically needed services, including but not limited to:
  - Obstetric care and services, including incidents of deliveries;
  - Radiological services, particularly performance of mammograms and breast-imaging services;
  - Physician services for hospital emergency departments and trauma centers, including on-call hours; and
  - Other critically needed specialty areas as determined by DOH.

Each physician survey must include a statement that the information provided is true and accurate to the best of the licensee's knowledge and that the submission does not contain any knowingly false information.<sup>18</sup> DOH issues a non-disciplinary citation to a licensee who fails to complete the survey within 90 days after the renewal of his or her license to practice as a physician. The citation notifies the physician that his or her medical license will not be renewed for any subsequent licensing period unless he or she completes the survey.<sup>19</sup>

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<sup>17</sup> Section 458.319, F.S.; section 459.008, F.S.

<sup>18</sup> Section 458.3191(2), F.S.; section 459.0081(2), F.S.

<sup>19</sup> Section 458.3191, F.S.; section 459.0081(3), F.S.

Annually, DOH is required to analyze the results of the physician workforce survey<sup>20</sup> to determine by geographic area and specialty the number of physicians who:

- Perform deliveries of children in Florida.
- Read mammograms and perform breast-imaging-guided procedures in Florida.
- Perform emergency care on an on-call basis for a hospital emergency department.
- Plan to reduce or increase emergency on-call hours in a hospital emergency department.
- Plan to relocate outside the state.
- Practice medicine in Florida.
- Plan to reduce or modify the scope of their practices.

DOH is required to report its findings to the Governor, the President of the Senate, and the Speaker of the House of Representatives by November 1 of each year. Additionally, the annual report must include findings, recommendations, and strategic planning activities as provided in s. 381.4018, F.S., relating to physician workforce assessment and development. DOH may also include other information requested by the Physician Workforce Advisory Council.<sup>21</sup>

### **Public Records Exemptions Under Review**

Sections 458.3193 and 459.0083, F.S., provide that all personal identifying information contained in records provided by physicians in response to the physician workforce surveys required as a condition of license renewal are exempt from the public records requirements in s. 119.07(1), F.S. and Article I, section 24(a) of the State Constitution, with certain exceptions.

Information made confidential and exempt shall be disclosed:

- With the express written consent of the individual to whom the information pertains or the individual's legally authorized representative.
- By a court order upon a showing of good cause.
- To a research entity, if the entity:
  - Seeks the records or data pursuant to a research protocol approved by DOH;
  - Maintains the records or data in accordance with the approved protocol; or
  - Enters into a purchase and data-use agreement with the department.

DOH may deny a request for records or data if the protocol provides for intrusive follow-back contacts, does not plan for the destruction of confidential records after the research is concluded, is administratively burdensome, or does not have scientific merit. The agreement between DOH and the research entity must restrict the release of information that would identify individuals, limit the use of records or data to the approved research protocol, and prohibit any other use of the records or data.

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<sup>20</sup> ss. 458.3192 and 459.0082, F.S.

<sup>21</sup> *Id.* The Physician Workforce Advisory Council is created in s. 29, ch. 2010-161, L.O.F., to advise and assist the State Surgeon General and the DOH on matters concerning current and future physician workforce needs in this state.

### **Committee on Health Regulation's Open Government Sunset Review**

Based on an Open Government Sunset Review of these exemptions, Senate professional staff of the Health Regulation Committee recommended that the Legislature retain the public records exemptions established in sections 458.3193 and 459.0083, F.S., which makes personal identifying information obtained by DOH through physician workforce surveys confidential and exempt from public disclosure.

This recommendation was made in light of the information gathered for the Open Government Sunset Review, which indicated that a public necessity continues to exist in maintaining the confidential nature of personal identifying information gathered by DOH through completed physician workforce surveys. The exemptions continue to serve an identifiable public purpose by allowing the state to effectively and efficiently administer and plan for an adequate and appropriate supply of well-trained physicians as the general and elderly population of the state increase. Meaningful and reliable analysis can only occur if physicians respond honestly and fully disclose relevant information concerning their current and planned future activities related to their medical practice. Maintaining the confidentiality of the responses will help ensure the state receives honest and complete responses.

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

**Section 1** reenacts and saves from repeal the public records exemption allowing personal identifying information contained in physician workforce surveys from allopathic physicians to remain confidential and exempt from public disclosure, removing redundant language.

**Section 2** reenacts and saves from repeal the public records exemption allowing personal identifying information contained in physician workforce surveys from osteopathic physicians to remain confidential and exempt from public disclosure, removing redundant language.

**Section 3** provides an effective date of October 1, 2012.

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

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

None.

#### **B. Public Records/Open Meetings Issues:**

This bill retains already-existing public records exemptions and thus is not subject to the requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The bill complies with the requirement of Article I, section 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

#### **C. Trust Funds Restrictions:**

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. Additional Information:**

## A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability – February 7, 2012:**

The CS amended the bill to remove redundant language found in the exemptions and changed the effective date to October 1, 2012.

## B. Amendments:

None.