

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: CS/SB 662

INTRODUCER: Health Policy Committee and Senator Brandes

SUBJECT: Public Records/Clearinghouse for Compassionate and Palliative Care Plans/AHCA

DATE: February 1, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	Fav/CS
2.			GO	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 662 creates an exemption from the public record requirements for compassionate and palliative care plans held by the Agency for Health Care Administration (AHCA) or its designee. The bill permits disclosure of such information only after verification of the request and the requestor's identity. Disclosure is permitted to a physician or health care facility for treatment purposes and to the patient or his or her representative.

The bill takes effect on July 1, 2016, contingent upon SB 664 or similar language taking effect.

The bill provides for the repeal of the exemption on October 2, 2021, unless reviewed and reenacted by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

Because the bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for final passage.

II. Present Situation:

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any record made or received in connection with the official business of any public body, officer, or employee received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their

behalf.¹ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.³

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, Florida Statutes, the "Public Records Act" constitutes the main body of public records laws, and states that:

It 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 the duty of each agency.⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ A violation of the Public Records Act may result in civil or criminal liability.⁶

Section 286.011, Florida Statutes, the "Sunshine Law,"⁷ requires all meetings of any board or commission or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

The Legislature may, by two-thirds votes of the House and the Senate⁹ create an exemption to public records or open meetings requirements.¹⁰ An exemption must explicitly state the public

¹ FLA. CONST., art. 1, s. 24(a).

² FLA. CONST., art. 1, s. 24(b).

³ FLA. CONST., art. 1, s. 24 (b).

⁴ Chapter 119, F.S.

⁵ 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 their 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." Section 119.011(2), F.S., defines "agency" to mean 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 purpose 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 Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are penalties for violations of those laws.

⁷ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

⁸ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution, Article III, s. 4(e) of the Florida Constitution provides the legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonable open to the public.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons

necessity of the exemption¹¹ and must be tailored to accomplish the stated purpose of the law.¹² A statutory exemption which does not meet these two criteria may be found unconstitutional, and efforts may not be made by the court to preserve the exemption.¹³

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁴ The OGSR provides that an exemption automatically repeals 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.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁶

- 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁷ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are

or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹¹ FLA. CONST., art. I, s.24(c).

¹² FLA. CONST., art. I, s. 24(c).

¹³ *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found 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. In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional.

¹⁴ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed; however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(a), F.S.

¹⁷ FLA. CONST., art. I, s. 24(c).

not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.¹⁸

Clearinghouse for Compassionate and Palliative Care Plans

Through a linked bill, CS/SB 664, the Agency for Health Care Administration (AHCA) or its designee is responsible for establishing and maintaining a reliable and secure database that will allow Florida residents to electronically submit their individual plans for compassionate and palliative care. The database must be accessible to health care providers who are treating the resident.

The AHCA is directed to seek input on the clearinghouse from state residents, compassionate and palliative care providers, and health care facilities for its development and implementation. The AHCA may also subscribe to or participate in a national or private clearinghouse that will accomplish the same goals in lieu of establishing an independent clearinghouse. Once clearinghouse information is available, the AHCA is required to publish and disseminate information regarding the availability of the clearinghouse to Floridians. The AHCA must also provide training to health care providers and health care facilities on how to access plans.

The POLST form, along with other health care advance directive forms, that will be submitted to the Clearinghouse will contain personal identifying information of patients, identifying information of patient family members, health care status information, proposed treatment plans, and end-of-life plans.

III. Effect of Proposed Changes:

Section 1 creates section 408.0641, F.S., to make information held in the clearinghouse for compassionate and palliative care plans held at the AHCA or its designee confidential and exempt from public disclosure under s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution.

The AHCA or its designee is permitted to disclose confidential and exempt information to the following persons after using a verification process to ensure the legitimacy of the request and the requestor's identity for individuals who have a plan in the clearinghouse:

- A physician who certifies that the information is necessary to provide medical treatment to a patient with a terminal illness;
- A patient or the legal guardian or designated health care surrogate of a patient with a terminal illness; or
- A health care facility that certifies that the information is necessary to provide medical treatment to a patient with a terminal illness.

The bill provides, as required by the State Constitution, a statement of public necessity which states that disclosure of the specified information:

- Could invade the personal privacy of the patient or his or her family;

¹⁸ Section 119.15(7), F.S.

- Could hinder the effective and efficient administration of the clearinghouse for compassionate and palliative care plans;
- Could reduce participation and minimize the effectiveness of compassionate and palliative care plans to meet the needs of individuals; and
- Could be used to solicit, harass, stalk, or intimidate clearinghouse participants or terminally ill patients or their families.

The bill further states that information held in the clearinghouse which would identify patients or which contains or reflects a patient's medical information should be confidential and exempt from public records requirements.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill takes effect on the same date that SB 664¹⁹ or similar legislation takes effect if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

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 newly created or expanded public records or public meeting exemption. This bill creates a public records exemption for information held by the Agency for Health Care Administration or its designee in the Clearinghouse for Compassionate and Palliative Care Plans; thus it requires a two-thirds vote.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public records or public meeting exemption. This bill creates a new public records exemption and includes a public necessity statement that supports the exemption. The exemption is no broader than necessary to accomplish the stated purpose.

C. Trust Funds Restrictions:

None.

¹⁹ Senate Bill 664 has an effective date of July 1, 2016.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Private sector providers may experience administrative expenses in accessing the clearinghouse for information on patients.

C. Government Sector Impact:

The Agency for Health Care Administration (AHCA) estimates the costs for the Clearinghouse for Compassionate and Palliative Care Plans to be \$350,000 for the first year of implementation and \$140,000 per year for maintenance costs to participate in a national or private clearinghouse.²⁰

VI. Technical Deficiencies:

None

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 408.0641 of the Florida Statutes:

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Health Policy on February 1, 2016:

The CS extends the public records exemption to the AHCA's designee as well to the AHCA in the event the AHCA elects to subscribe to or participate in a database operated by a public or private clearinghouse as authorized in the substantive bill (SB 664).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁰ Agency for Health Care Administration, *Senate Bill 1052 Analysis* (Feb. 20, 2015), p. 4, (on file with Senate Committee on Health Policy).