



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government** – This bill decreases access to certain public records.

#### B. EFFECT OF PROPOSED CHANGES:

##### HB 1485

The bill authorizes the Agency for Health Care Administration (“AHCA”) and the Department of Highway Safety and Motor Vehicles (“DHSMV”) to, pursuant to chapter 287, jointly contract for the operation of an organ and tissue donor registry and education program. The bill provides for specified priorities the agencies shall give in awarding the contract and requires the contractor to: (1) develop, implement, and maintain an interactive, web-based organ and tissue donation registry, which shall be designated the “Joshua Abbott Organ and Tissue Registry,” and that allows for online organ donor registration and the recording of organ and tissue donation records submitted through the driver’s license identification program or other sources; (2) provide education programs the laws of the state regarding, and the need for, anatomical gifts; and (3) submit an report to AHCA by December 31 of each year containing statistical information about the donors, including an analysis of Florida’s registry compared with those of other states, and general information about the types of educational programs implemented during the year.

The bill additionally provides that costs of the program are paid by AHCA from the Health Care Trust Fund pursuant to ss. 320.8047 and 322.08, F.S., that are designated for maintaining the organ and tissue donor registry and education program, or from funds that the use of voluntary contributions that may be received and used to help support the registry and provide education.

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

- (a) 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 predates 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:

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

<sup>2</sup> Article I, s. 24 of the Florida Constitution.

<sup>3</sup> Ch. 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

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 Supreme Court of Florida 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 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 persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2<sup>nd</sup> of the 5<sup>th</sup> 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.

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

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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> S. 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) of the Florida Constitution.

<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> Article I, s. 24(c) of the Florida 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> S. 119.15, F.S.

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:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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>15</sup>

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>16</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4)(e), F.S., makes explicit the fact that:

...notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Additionally, any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year, and a fine not exceeding \$1,000.

### **Effect of Proposed Changes**

The bill is the public records exemption companion to HB 1485, which creates s. 765.5155, F.S., and permits the AHCA and DHSMV to contract with an entity to establish an organ and tissue donation

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<sup>15</sup> *Id.*

<sup>16</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

registry. The public records exemption in this bill is created in s. 765.51551, F.S. The bill makes confidential and exempt, from s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution, information that identifies a donor.

The bill creates an exception to the public records exemption for organ, tissue, and eye procurement organizations that have been certified by AHCA for the purpose of ascertaining or effectuating the existence of a gift under s. 765.522., and for persons engaged in bona fide research if the person agrees to:

- Submit a research plan to AHCA that specifies the exact nature of the information requested and the intended use of the information;
- Maintain the confidentiality of the records or information if personal identifying information is made available to the researcher;
- Destroy any confidential records or information obtained after the research is concluded; and
- Not directly or indirectly contact, for any purpose, any donor or donee.

The bill specifies this exemption as subject to the Open Government and Sunset Review Act in accordance with s. 119.15, F.S., and provides that such exemption will stand repealed on October 2, 2013, unless reviewed and saved from repeal through reenactment by the Legislature. Current law requires that public records exemptions be reviewed on October 2 of the fifth year following enactment, which would be October 2, 2013 for this bill.

The bill provides a statement of public necessity for the exemption.

The bill creates a new public records exemption and, as a result, is subject to Article I, s. 24(a) of the Florida Constitution, which requires that two-thirds of the members present and voting in each house shall pass the bill.

The bill provides that the bill is effective on the same date that HB 1485, or similar legislation, takes effect if such legislation is adopted in the same legislative session or an extension thereof.

#### C. SECTION DIRECTORY:

**Section 1.** Creates s. 765.5155; relating to the organ and tissue donation registry; public records exemption.

**Section 2.** Provides a statement of public necessity for the exemption.

**Section 3.** Provides that the act is effective on the same date that HB 1485, or similar legislation takes effect and becomes law, if such legislation is adopted in the same legislative session or an extension thereof.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill likely could create a minimal fiscal impact because staff responsible for complying with public records requests could require training related to the public record exemption. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agency.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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

None.

**D. FISCAL COMMENTS:**

None.

### **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This legislation does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**D. STATEMENT OF THE SPONSOR**

No statement provided.

### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On April 17, 2008, the Health Care Council adopted three amendments to the bill. The amendments provide the following:

- The first amendment amends the statutory section in which the public records exemption is created in the bill from s. 765.5155 to s. 765.51551 in order to prevent conflict with CS/HB 1485.
- The second amendment adds a public records exemption for persons engaged in bona fide research meeting specified requirements.
- The third amendment amends the expiration date of the public records exemption provided in the bill from October 1, 2013 to October 2, 2013 in order to comply with chapter 119, F.S.

The bill, as amended, was reported favorably as a Council Substitute. This analysis reflects the Council Substitute.