

**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 Committee on Health Policy

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BILL: SB 144

INTRODUCER: Senator Bean

SUBJECT: Public Records/Impaired Practitioner Consultants/Department of Health

DATE: December 30, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peterson	Stovall	HP	<b>Pre-meeting</b>
2.			GO	
3.			FP	

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**I. Summary:**

SB 144 proposes to enhance the safety of impaired practitioner consultants and their employees, and the spouses and children of both, by creating a public records exemption for certain of their personal identification and location information. The impaired practitioner program assists the Department of Health and the Department of Business and Professional Regulation in determining whether licensees who have experienced a substance abuse or mental or physical health impairment are safe to practice. Currently, there are two impaired practitioner consultants that are retained by the Department of Health and the Department of Business and Professional Regulation to provide services.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and reenacted by the Legislature.

The bill contains a public necessity statement as required by the Florida Constitution.

Because this 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 passage.

**II. Present Situation:**

**Public Records Laws**

The Florida Constitution provides every person 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 of persons acting on their behalf.<sup>1</sup> The records of the legislative, executive, and judicial branches are specifically included.<sup>2</sup>

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

<sup>2</sup> *Id.*

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act<sup>3</sup> guarantees every person's right to inspect and copy any state or local government public record<sup>4</sup> at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>5</sup>

Only the Legislature may create an exemption to public records requirements.<sup>6</sup> Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>7</sup> 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 provisions<sup>8</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>9</sup>

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly-created or substantially-amended public records or open meetings exemptions.<sup>10</sup> It requires the automatic repeal of such exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>11</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 to meet such public purpose.<sup>12</sup>

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

<sup>4</sup> Section 119.011(12), F.S., defines "public records" 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." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)). *But see* s. 11.0431, F.S. (Providing public access to records of the Senate and the House of Representatives, subject to specified exemptions.)

<sup>5</sup> Section 119.07(1)(a), F.S.

<sup>6</sup> 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 *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, the record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see* Attorney General Opinion 85-62, August 1, 1985).

<sup>7</sup> FLA. CONST. art. I, s. 24(c).

<sup>8</sup> The bill may, however, contain multiple exemptions that relate to one subject.

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

<sup>10</sup> Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

<sup>11</sup> Section 119.15(3), F.S.

<sup>12</sup> Section 119.15(6)(b), F.S.

## Public Records Exemptions for Agency Personnel Identification and Location Information

Current law provides public records exemptions for identification and location information of certain current or former agency personnel and their spouses and children.<sup>13</sup> Categories of personnel covered by these exemptions include:

- Law enforcement, including correctional, and specified investigatory personnel;<sup>14</sup>
- Firefighters;<sup>15</sup>
- Justices and judges;<sup>16</sup>
- Local and statewide prosecuting attorneys;<sup>17</sup>
- Magistrates, administrative law judges, and child support hearing officers;<sup>18</sup>
- Local government agency and water management district human resources administrators;<sup>19</sup>
- Code enforcement officers;<sup>20</sup>
- Guardians ad litem;<sup>21</sup>
- Specified Department of Juvenile Justice personnel;<sup>22</sup>
- Public defenders and criminal conflict and civil regional counsel;<sup>23</sup>
- Investigators or inspectors of the Department of Business and Professional Regulation;<sup>24</sup>
- County tax collectors;<sup>25</sup> and,
- Specified personnel of the Department of Health.<sup>26</sup>

Although the types of exempt information vary, the following information is exempt<sup>27</sup> from public records requirements for all personnel listed above:

- Home addresses and telephone numbers<sup>28</sup> of the named personnel;
- Home addresses, telephone numbers, and places of employment of the spouses and their children; and,
- Names and locations of schools and day care facilities attended by their children.

<sup>13</sup> See s. 119.071(4)(d), F.S.

<sup>14</sup> See s. 119.071(4)(d)2.a., F.S.

<sup>15</sup> See s. 119.071(4)(d)2.b., F.S.

<sup>16</sup> See s. 119.071(4)(d)2.c., F.S.

<sup>17</sup> See s. 119.071(4)(d)2.d., F.S.

<sup>18</sup> See s. 119.071(4)(d)2.e., F.S. This exemption applies only if the magistrate, administrative law judge, or child support hearing officer provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public.

<sup>19</sup> See s. 119.071(4)(d)2.f., F.S.

<sup>20</sup> See s. 119.071(4)(d)2.g., F.S.

<sup>21</sup> See s. 119.071(4)(d)2.h., F.S. This exemption applies only if the guardian ad litem provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public. A guardian ad litem may be a public employee, volunteer, or contract or appointed attorney. See s. 39.820(1), F.S.

<sup>22</sup> See s. 119.071(4)(d)2.i., F.S.

<sup>23</sup> See s. 119.071(4)(d)2.j., F.S.

<sup>24</sup> See s. 119.071(4)(d)2.k., F.S.

<sup>25</sup> See s. 119.071(4)(d)2.l., F.S.

<sup>26</sup> See s. 119.071(4)(d)2.m., F.S. This exemption applies only if the person claiming the exemption provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public.

<sup>27</sup> See *supra* note 6.

<sup>28</sup> The term “telephone numbers” includes home, personal cellular, and personal pager telephone numbers, and telephone numbers associated with personal communications devices. See s. 119.071(4)(d)1., F.S.

If exempt information is held by an agency<sup>29</sup> that is not the employer of the protected person, he or she must submit a written request to that agency to maintain the public records exemption.<sup>30</sup>

### **Regulation of Health Professions**

The DOH is responsible for licensing and regulating health care practitioners in order to preserve the health, safety, and welfare of the public.<sup>31</sup> Practitioner regulation is conducted by the Division of Medical Quality Assurance and includes the following professions:

- Emergency Medical Technicians and Paramedics (part III of ch. 401, F.S.)
- Acupuncture (ch. 457, F.S.)
- Allopathic Medicine, (ch. 458, F.S.)
- Osteopathic Medicine, (ch. 459, F.S.)
- Chiropractic Medicine, (ch. 460, F.S.)
- Podiatric Medicine (ch. 461, F.S.)
- Naturopathy (ch. 462, F.S.)
- Optometry (ch. 463, F.S.)
- Nursing, including Certified Nursing Assistants (ch. 464, F.S.)
- Pharmacy (ch. 465, F.S.)
- Dentistry (ch. 466, F.S.)
- Midwifery (ch. 467, F.S.)
- Speech-Language Pathology and Audiology (part I of ch. 468, F.S.)
- Nursing Home Administration (part II of ch. 468, F.S.)
- Occupational Therapy (part III of ch. 468, F.S.)
- Radiology (part IV of ch. 468, F.S.)
- Respiratory Therapy (part V of ch. 468, F.S.)
- Dietetics and Nutrition (part X of ch. 468, F.S.)
- Athletic Training (part XIII of ch. 468, F.S.)
- Orthotics, Prosthetics, and Pedorthics (part XIV of ch. 468, F.S.)
- Electrolysis (ch. 478, F.S.)
- Massage Therapy, (ch. 480, F.S.)
- Clinical Laboratory Personnel (part III of ch. 483, F.S.)
- Medical Physicists (part IV of ch. 483, F.S.)
- Opticianry (part I of ch. 484, F.S.)
- Hearing Aid Specialists (part II of ch. 484, F.S.)
- Physical Therapy Practice (ch. 486, F.S.)
- Psychology (ch. 490, F.S.)
- Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (ch. 491, F.S.)

<sup>29</sup> Section 119.011(2), F.S., defines “agency” 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.

<sup>30</sup> Section 119.071(4)(d)3., F.S.

<sup>31</sup> Section 20.43(1)(g), F.S.

As part of its enforcement responsibilities, the DOH investigates complaints against health care practitioners. It must investigate any complaint that is written, signed by the complainant,<sup>32</sup> and legally sufficient,<sup>33</sup> and may initiate an investigation if it believes a violation of law or rule has occurred. Such an investigation may result in an administrative case against the health care practitioner's license.<sup>34</sup>

## **Treatment Programs for Impaired Practitioners**

### ***Department of Health***

The DOH administers the impaired practitioner treatment program to ensure that licensed health care practitioners, applicants for licensure, and students enrolled in prelicensure education programs who are impaired and may pose a threat to the public if allowed to obtain or retain a license are evaluated and referred for treatment. Impairment can result from the use or misuse of drugs or alcohol, or both, or due to a mental or physical condition that could affect the person's ability to practice with skill and safety.<sup>35</sup> By entering and successfully completing the impaired practitioner treatment program, a practitioner may avoid formal disciplinary action, if the only violation of the licensing statute under which the practitioner is regulated is the impairment. Participation is voluntary, but requires the licensee either to withdraw from practice or limit the scope of his or her practice until he or she successfully completes the treatment required by the program.<sup>36</sup>

Section 456.076, F.S., authorizes the DOH to contract with one or more impaired practitioner consultants who manage and coordinate services. The consultant, who must be a licensed physician, a licensed nurse, or an entity with a licensed physician or nurse as its medical director, assists the DOH in determining if the practitioner is actually impaired, connects the practitioner to appropriate resources for treatment of the impairment, and monitors his or her progress. The consultant does not provide medical treatment or render decisions relating to licensure of a particular practitioner. However, the consultant is required to make recommendations to the probable cause panel, or the DOH when there is no board, regarding a practitioner's ability to practice safely.

There are two impaired practitioner consultants currently retained by the DOH: the Intervention Project for Nurses (IPN) and the Professionals Resource Network (PRN) for other health care

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<sup>32</sup> The DOH may investigate an anonymous complaint or a complaint by a confidential informant if the alleged violation of law or rule is substantial and the DOH has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true. *See* s. 456.073(1), F.S.

<sup>33</sup> A complaint is legally sufficient if it contains ultimate facts that show a violation of ch. 456, F.S., of any of the practice acts relating to the professions regulated by the DOH, or of any rule adopted by the DOH or one of its regulatory boards has occurred. *See* s. 456.073(1), F.S.

<sup>34</sup> Upon completion of an investigation, the DOH must submit a report to the probable cause panel of the appropriate regulatory board. *See* s. 456.073(2), F.S. If the probable cause panel finds that probable cause exists, it must direct the DOH to file a formal administrative complaint against the licensee. If the DOH declines to prosecute the complaint because it finds that probable cause has been improvidently found by the panel, the regulatory board may still pursue and prosecute an administrative complaint. *See* s. 456.073(4), F.S.

<sup>35</sup> *Id.* *See also* ss. 456.073(3) & (4), F.S.

<sup>36</sup> Section 456.076(4), F.S.

professions. According to the DOH, there are approximately 2,449 participants enrolled in the programs: 1,461 in the IPN and 988 in the PRN.<sup>37</sup>

### *Department of Business and Professional Regulation*

The Board of Veterinary Medicine and the Board of Pilot Commissioners, within the Department of Business and Professional Regulation (DBPR), provide impaired practitioner treatment programs for their licensees.<sup>38</sup> The DBPR has implemented these programs by contract with the Professionals Resource Network. According to the DBPR, there are currently 21 licensees in the programs: all veterinarians.<sup>39</sup>

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

The bill expands the current public records exemptions for identification and location information of certain agency personnel to include impaired practitioner consultants and their employees who are retained by the DOH or other agency pursuant to s. 456.076, and the spouses and children of both. Currently, the contracted consultants are corporate entities. Thus, the immediate effect of the bill is to exempt the personal identifying information of their 41 employees and that of their families.

The bill makes the following information exempt from public records requirements:

- The home addresses and telephone numbers of the consultants and their employees;
- The names, home addresses, telephone numbers, and places of employment of their spouses and children; and
- The names and locations of schools and day care facilities attended by the children of the consultants and their employees.

The bill provides that the exemption may be maintained only if the consultant or employee has made reasonable efforts to protect such information from being accessible through other means available to the public.

The exemption is subject to an existing general requirement that if exempt information is held by an agency that is not the employer of the protected agency personnel, then the protected agency personnel must submit to that agency a written request to maintain the public records exemption.

The bill provides for repeal of the exemption pursuant to the Open Government Sunset Review Act on October 2, 2020, unless reviewed and reenacted by the Legislature.

The bill provides a public necessity statement, which is required by the Florida Constitution. Specifically, the statement indicates that the exemption is needed to protect the consultants and their employees from the risk of physical or emotional harm or of being stalked by a practitioner who is angered by a recommendation or conclusion of a consultant or a consultant's employee.

The bill takes effect upon becoming a law.

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<sup>37</sup> E-mail from Paul Runk, Fla. Dept. of Health, (Dec. 23, 2014) (on file with the Senate Committee on Health Policy).

<sup>38</sup> See ss. 474.221 and 310.102, F.S.

<sup>39</sup> Conversation with David Mica, Fla. Dept. of Business and Professional Regulation, (Dec. 23, 2014).

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:****Vote Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

**Public Necessity Statement**

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly-created or expanded public records or public meetings exemption. This bill creates a new public records exemption; therefore, it includes a public necessity statement.

**Scope**

Article I, s. 24(c) of the Florida Constitution requires that an exemption to the public records laws be no broader than necessary to accomplish the stated purpose of the law creating the exemption. SB 144 states as its purpose to prevent harm to a consultant or the consultant's employees that might be perpetrated by a health care practitioner "who has a hostile reaction to a recommendation, report, or conclusion provided by the consultant or the consultant's employees ...." The term "employee," as used in the bill, would include staff who serve an exclusively administrative role without responsibility for making or communicating opinions regarding the safety of a person to practice a licensed profession. Similar exemptions cover only the employee whose specific job function involves the activity deemed to have created the risk, e.g. sworn law enforcement personnel, judges, public defenders. For this reason, a court might find SB 144 overly broad.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

SB 144 may create a minimal fiscal impact on agencies for costs associated with training staff on the new public records exemption, and administrative costs to comply with the new public records exemption.

**VI. Technical Deficiencies:**

The phrase “consultants and employees” should be revised to the disjunctive “consultants or employees” since the bill creates an exemption for two distinct categories of people.

On lines 233 and 234, the term “consultants or employees” should be revised to “consultant or employee” to clarify that the exemption does not create an “all or nothing” condition that requires all consultants and employees to have made efforts to maintain the confidentiality of their identifying information in order for an individual consultant or employee to assert the exemption.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 119.071 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.