

**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 Governmental Oversight and Accountability

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**BILL:** CS/SB 646

**INTRODUCER:** Banking and Insurance Committee and Senator Benacquisto

**SUBJECT:** Public Records/Information Held by the Florida Prepaid College Board, Florida ABLE, Inc., and the Florida ABLE program

**DATE:** March 4, 2015      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>AP</u>	_____

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

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 646 creates a public records exemption for specified personal financial and health information of a consumer relating to an ABLE account or a participation agreement or any information that would identify a consumer held by the Florida Prepaid College Board, Florida ABLE Inc., Florida ABLE program, or an agent or service provider of these entities. The bill defines a consumer as a party to a participation agreement, which would be under the Florida ABLE Program.

A related bill, SB 642, requires the Florida Prepaid College Board to create Florida ABLE, Inc., as a direct support organization, to administer the Florida ABLE program. The Florida ABLE program, pursuant to federal law,<sup>1</sup> allows individuals with disabilities to save money without losing their eligibility for state and federal benefits and use such funds for qualified disability expenses.

Because this bill creates a public-records exemption, it contains a public necessity statement and requires a two-thirds vote of each house of the Legislature for passage.

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<sup>1</sup> H.R. 5771, Division B, Title I. Public Law 113-295.

## II. Present Situation:

### Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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>2</sup> 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.<sup>3</sup> The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.<sup>4</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>5</sup> guarantees every person's right to inspect and copy any state or local government public record.<sup>6</sup> The Sunshine Law<sup>7</sup> requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.<sup>8</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>9</sup> An exemption must specifically state the public necessity justifying the exemption<sup>10</sup> and must be tailored to accomplish the stated purpose of the law.<sup>11</sup>

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<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> FLA. CONST., art. I, s. 24(b).

<sup>4</sup> FLA. CONST., art. I, s. 24(b).

<sup>5</sup> Chapter 119, F.S.

<sup>6</sup> 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 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." 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 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 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.

<sup>7</sup> Section 286.011, F.S.

<sup>8</sup> 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, section 4(e) of the Florida Constitution provides that 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 reasonably open to the public.

<sup>9</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. *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 or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

## Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>12</sup> 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.<sup>13</sup>

The OGSR 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 necessary.<sup>14</sup> An exemption serves an identifiable purpose if it meets one of the following purposes and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>15</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>16</sup> or
- It protects trade or business secrets.<sup>17</sup>

In addition, the Legislature must find that the purpose of the exemption overrides the Florida’s public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.<sup>18</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>19</sup> 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 *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>20</sup>

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<sup>12</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 section 119.15(2), F.S.

<sup>13</sup> Section 119.15(3), F.S.

<sup>14</sup> Section 119.15(6)(b), F.S.

<sup>15</sup> Section 119.15(6)(b)1., F.S.

<sup>16</sup> Section 119.15(6)(b)2., F.S.

<sup>17</sup> Section 119.15(6)(b)3., F.S.

<sup>18</sup> Section 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>19</sup> FLA. CONST., art. I, s. 24(c).

<sup>20</sup> Section 119.15(7), F.S.

## **Federal ABLE Act**

The federal ABLE Act (Achieving a Better Life Experience Act of 2014) became law on December 19, 2014. The purpose of the ABLE Act is to encourage individuals and families to save money to support individuals with disabilities. The ABLE Act permits a state to implement a qualified ABLE program and establish ABLE accounts for individuals with disabilities that meet certain criteria and are deemed “eligible individuals.” A designated beneficiary of an ABLE account is an eligible individual who establishes an ABLE account and is the owner of such of an account.<sup>21</sup> The provisions of the ABLE Act are effective for taxable years beginning after December 31, 2014.

## **Florida ABLE Program**

This bill is the public records exemption relating to the Florida ABLE program created in SB 642. SB 642 requires the Florida Prepaid College Board to create the Florida ABLE, Inc., as a direct support organization that is organized as a not-for-profit corporation. Florida ABLE, Inc., will establish and administer the Florida ABLE Program. Florida ABLE, Inc., will operate under a contract with the Florida Prepaid College Board.

Individuals who participate in the Florida ABLE Program must meet certain requirements. Under the provisions of SB 642, a designated beneficiary means the eligible individual who established an ABLE account or the eligible individual to whom an ABLE account was transferred. A designated beneficiary in the Florida ABLE program would be subject to the terms and conditions of the participation agreement.

An individual is an eligible individual for establishing an ABLE account for a taxable year if during such taxable year:

- The individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26; or
- A disability certification with respect to such individual is filed with the Secretary of the Department of Treasury for such taxable year.

Under the Florida ABLE Program, eligible individuals with disabilities, family members and others can contribute funds to an ABLE account without affecting the individual’s eligibility for state and federal benefits, such as SSI and Medicaid. Those funds can be used for qualified disability expenses relating to the individual’s blindness or disability. These expenses would include education, housing, transportation, employment support, health, prevention, wellness, financial, and legal expenses, and other expenses authorized through federal regulations. Funds placed in the ABLE program would supplement rather than supplant benefits provided through state and federal programs, earnings, and other sources.

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<sup>21</sup> A designated beneficiary may also be a brother, sister, stepbrother, or stepsister of a former designated beneficiary of the ABLE account, provided such new designated beneficiary is also an eligible individual.

### III. Effect of Proposed Changes:

The bill provides that personal financial and health information of a consumer that is held by the Florida Prepaid College Board, the Florida ABLE, Inc., the Florida ABLE program, or an agent or service provider of one of these entities relating to an ABLE account, or a participation agreement or any information that would identify a consumer is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I, of the State Constitution.

For purposes of the bill, a “consumer” means a party to a participation agreement of the Florida ABLE program. The bill provides that “personal financial and health information” means:

- A consumer’s personal health condition, disease, injury, or medical diagnosis or treatment;
- The existence, nature, source, or amount of a consumer’s personal income or expenses;
- Records of or relating to a consumer’s personal financial transactions of any kind; or
- The existence, identification, nature, or value of a consumer’s assets, liabilities, or net worth.

The bill authorizes Florida Prepaid College Board or Florida ABLE, Inc., to disclose information made confidential and exempt to another state or federal government entity if disclosure is necessary for the receiving entity to perform its duties or responsibilities or to verify the eligibility of an eligible individual or authorize the use of an ABLE account. The bill does not include a penalty for releasing confidential and exempt records for any other purpose.

The bill provides that this public records exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity for this public records exemption. The public necessity statement provides that the Legislature finds that it is a public necessity to protect a consumer’s personal financial and health information. Disclosure of sensitive financial information held for a consumer under the Florida ABLE program would create the opportunity for theft, identity theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the consumer and placing him or her at risk for substantial financial harm. Further, each person has a reasonable expectation of and a right to privacy in all matters concerning personal financial interests.

In addition, the statement provides that the Legislature finds that it is a public necessity to protect a consumer’s personal health information because such information is traditionally a private and confidential matter between the patient and health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors, and public disclosure of such personal health information held for a consumer under the Florida ABLE program could negatively affect a person’s business and personal relationships and cause detrimental financial consequences.

The bill takes effect on the same date that SB 642 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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

None.

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

This bill creates a public-records exemption. It complies with the requirements of s. 24(c), Art. I of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

Because the bill creates an exemption, it contains a statement of public necessity and is subject to a two-thirds vote of each house of the Legislature for passage as required by s. 24(c), Art. I of the Florida Constitution.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

The bill is intended to prevent the disclosure of specified personal financial and health information of a consumer that is held by the Florida Prepaid College Board, Florida ABLE Inc., Florida ABLE program, or an agent or service provider of these entities relating to an ABLE account or a participation agreement or any information held that could identify a consumer. The bill provides a limited exception for the release of such confidential and exempt information to governmental entities in furtherance of their duties.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 1009.987 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.)

**CS by Banking and Insurance on February 17, 2015:**

The CS replaces the word, “board” with the term, “Florida Prepaid College Board.”

**B. Amendments:**

None.