

**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 1844

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Bradley

SUBJECT: Public Records/Compassionate Use Registry

DATE: April 18, 2017

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

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Ferrin  | Ferrin         | GO        | Fav/CS |
| 2. |         |                | AP        |        |

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1844 expands the public records exemption for the Compassionate Use Registry (registry) to conform its provisions to changes being made to s. 381.986, F.S., regarding the compassionate use of low-THC and medical cannabis by CS/SB 406 (2017). Specifically, the bill makes a qualifying patient's and a caregiver's personal identifying information held in the registry confidential and exempt from public records laws; clarifies that law enforcement access to the registry is for the purpose of verifying the authorization of a qualifying patient or caregiver to possess marijuana; and expands access to information within the registry to:

- Allopathic and osteopathic physician's licensed under chs. 458 and 459, F.S., (respectively);
- Practitioners licensed to prescribe prescription drugs to ensure proper care for patients before prescribing medications that may interact with marijuana; and
- Employees of the Department of Health (DOH) for the purpose of monitoring physician registration in the registry and monitoring physician certifications for practices that could facilitate diversion or misuse of marijuana.

The bill also extends the open government sunset review date to October 2, 2022, includes the constitutionally required public necessity statement, and makes other conforming changes to provisions amended by CS/SB 406 (2017).

The bill requires a two-thirds vote from each chamber for passage.

The bill's provisions take effect on the same date as CS/SB 406 (2017) or other similar legislation takes effect.

## II. Present Situation:

### Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act 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 a duty of each agency.<sup>5</sup>

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.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory

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

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

<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), 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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

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

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>13</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>14</sup>

### **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>15</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>16</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 is necessary.<sup>17</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy 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>18</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>19</sup> or
- It protects trade or business secrets.<sup>20</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>21</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

<sup>13</sup> 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>14</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</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>16</sup> Section 119.15(3), F.S.

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

<sup>18</sup> Section 119.15(6)(b)1., F.S.

<sup>19</sup> Section 119.15(6)(b)2., F.S.

<sup>20</sup> Section 119.15(6)(b)3., F.S.

<sup>21</sup> Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>22</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>23</sup>

### **Medical Marijuana in Florida**

The Compassionate Medical Cannabis Act of 2014<sup>24</sup> (act) legalized a low tetrahydrocannabinol (THC) and high cannabidiol (CBD) form of cannabis (low-THC cannabis)<sup>25</sup> for medical use<sup>26</sup> by patients suffering from cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms.

In 2016, Florida voters approved Amendment 2 that added s. 29, Art. X to the State Constitution. This new constitutional provision approved the medical use of marijuana by certain patients with debilitating medical conditions pursuant to a physician's certification. CS/SB 406 (2017) is proposed legislation that amends Florida's current low-THC and medical cannabis law to implement the provisions of s. 29, Art. X of the State Constitution. Along with other requirements, s. 29(d)(4), Art. X of the State Constitution requires that the DOH protect the confidentiality of all qualifying patients and makes all records containing the identity of qualifying patients confidential except for valid medical or law enforcement purposes.

For more details on current medical marijuana laws in Florida and other states including details on Amendment 2 and s. 29, Art. X of the State Constitution, please see the analysis for CS/SB 406 (2017).

### ***Compassionate Use Registry and Identification Cards***

Section 381.986, F.S., requires the DOH to create a secure, electronic, and online registry for the registration of physicians and patients and for the verification of patient orders by dispensing organizations (DOs), which is accessible to law enforcement.<sup>27</sup> The registry must allow DOs to

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?

<sup>22</sup> FLA. CONST. art. I, s. 24(c).

<sup>23</sup> Section 119.15(7), F.S.

<sup>24</sup> Chapter 2014-157, Laws of Fla., codified in s. 381.986, F.S.

<sup>25</sup> Section 381.986(b), F.S., defines "low-THC cannabis," as the dried flowers of the plant *Cannabis* which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight, or the seeds, resin, or any compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.

<sup>26</sup> Section 381.986(1)(c), F.S., defines "medical use" as administration of the ordered amount of low-THC cannabis; and the term does not include the possession, use, or administration by smoking, or the transfer of low-THC cannabis to a person other than the qualified patient for whom it was ordered or the qualified patient's legal representative. Section 381.986(1)(e), F.S., defines "smoking" as burning or igniting a substance and inhaling the smoke; smoking does not include the use of a vaporizer.

<sup>27</sup> Section 381.986(5)(a), F.S.

record the dispensing of low-THC cannabis, and must prevent an active registration of a patient by multiple physicians. Physicians must register qualified patients with the registry and DOs are required to verify that the patient has an active registration in the registry, that the order presented matches the order contents as recorded in the registry, and that the order has not already been filled before dispensing any low-THC cannabis. The DOs are also required to record in the registry the date, time, quantity, and form of low-THC cannabis dispensed.<sup>28</sup> The registry became operational on July 11, 2016.<sup>29</sup> As of the end of February, 2017, there were 4,079 patients registered with the registry.<sup>30</sup>

On February 19, 2017, the DOH adopted Rule 64-4.011, F.A.C., that governs the issuance and renewal of registry identification cards (ID card). The rule requires patients and legal representatives to obtain ID cards to obtain low-THC cannabis, medical cannabis, or a cannabis delivery device. In order to obtain an ID card a patient or legal representative must submit an application form<sup>31</sup> created by the DOH. The form requires the patient or legal representative to submit personal identifying information to the DOH including his or her name, address, social security number, telephone number, date of birth, a passport style photo, and proof of residency including a driver's license, utility bill, or voter registration card.

CS/SB 406 (2017) amends the section of law governing both the registry and issuing of ID cards<sup>32</sup> to conform terms to definitions provided in s. 29, Art. X of the State Constitution (such as changing the term "legal representative" to "caregiver") and to provide more statutory detail on what is required to be on an ID card. CS/SB 406 (2017) requires that all patient and caregiver ID cards include, at a minimum:

- The name, address, and date of birth of the patient or caregiver, as appropriate;
- A full-face, passport-type, color photograph of the patient or caregiver, as appropriate, taken within the 90 days immediately preceding registration;
- Designation of the cardholder as a patient or caregiver;
- A unique numeric identifier for the patient or caregiver which is matched to the identifier used for such person in the department's compassionate use registry. A caregiver's identification number and file in the compassionate use registry must be linked to the file of the patient or patients the caregiver is assisting so that the caregiver's status may be verified for each patient individually;
- The expiration date, which shall be one year after issuance or the date treatment ends as provided in the patient's physician certification, whichever occurs first; and
- For caregivers who are assisting three or fewer qualifying patients, the names and unique numeric identifiers of the qualifying patient or patients that the caregiver is assisting.

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<sup>28</sup> Section 381.986(6), F.S.

<sup>29</sup> Office of Compassionate Use, *Implementation Timeline* (October 2016) available at <http://www.floridahealth.gov/programs-and-services/office-of-compassionate-use/documents/ocu-timeline.pdf>, (last visited Mar. 21, 2017).

<sup>30</sup> Revenue Estimating Conference, *Use of Marijuana for Debilitating Medical Conditions* (March 2, 2017), p. 3, (on file with the Senate Committee on Health Policy).

<sup>31</sup> For patients form DH8009-OCU-10/2016, available at <https://www.flrules.org/Gateway/reference.asp?No=Ref-07855>, (last visited on April 12, 2017) and for legal representatives form DH8010-OCU-10/2016 available at <https://www.flrules.org/Gateway/reference.asp?No=Ref-07856>, (last visited on April 12, 2017).

<sup>32</sup> Section 381.986, F.S.

Additionally, CS/SB 406 (2017)<sup>33</sup> allows non-Florida residents to receive ID cards if they qualify for an ID card in Florida and if the DOH confirms that they are able to legally receive marijuana in their state of residency. This confirmation will likely require the submission of some additional personal identifying information to the DOH but which is not detailed in the bill.

### III. Effect of Proposed Changes:

The bill amends s. 381.987, F.S., to conform its provisions to changes made to s. 381.986, F.S., by CS/SB 406 (2017).

#### Section 1 of the bill:

- Makes a qualifying patient's or caregiver's personal identifying information that is held in the Compassionate Use Registry (registry) confidential and exempt from public records laws. Protected information includes, but is not limited to:
  - The patient's name, address, date of birth, photograph, telephone number, and government-issued identification number;
  - All information collected for the purpose of issuing a qualifying patient's or caregiver's registry identification card;<sup>34</sup> and
  - All information pertaining to a physician certification for marijuana;
- Clarifies that law enforcement access to the registry is for the purpose of verifying the authorization of a qualifying patient or caregiver to possess marijuana; and
- Expands access to information within the registry to:
  - Allopathic and osteopathic physician's licensed under chs. 458 and 459, F.S., (respectively);
  - Practitioner's licensed to prescribe prescription drugs to ensure proper care for patients before prescribing medications that may interact with marijuana; and
  - Employees of the Department of Health (DOH) for the purpose of monitoring physician registration in the compassionate use registry and monitoring physician certifications for practices that could facilitating diversion or misuse of marijuana.

The bill also extends the open government sunset review date to October 2, 2022 and makes other conforming and technical changes.

**Section 2** of the bill provides legislative findings. The bill states that the Legislature finds it is a public necessity to protect the information of qualifying patients' and caregivers' information in the registry, including all information pertaining to the physician's certification of marijuana for the patient, in order to protect their privacy. The Legislature finds that the public availability of registry information could make the public aware of a patient's medical diseases or conditions and may also expose patients and caregivers to discrimination for their use, or assisting with the use, of marijuana.

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<sup>33</sup> As originally filed, SB 406 (2017) restricted ID cards to Florida residents, however as amended by the Health Policy Committee on April 3, 2017, CS/SB 406 (2017) allows non-Florida residents to receive ID cards.

<sup>34</sup> This information includes the caregiver's name, address, date of birth, photograph, and registry ID card number.

**Section 3** of the bill provides that the bill's provisions take effect on the same date that CS/SB 406 (2017) or similar legislation takes effect, provided both are adopted in the same legislative session.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

**Voting Requirement**

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public records or public meetings exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final 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. The bill creates a new public records exemption and includes a public necessity statement.

**Breadth of Exemption**

Article I, s. 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts certain identifying information of caregiver's which is held by the DOH within the registry. The public necessity for the exemption provides that it is necessary to protect patient and caregiver information from disclosure to protect their privacy and to protect them from potential discrimination. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

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. Statutes Affected:**

This bill substantially amends section 381.987 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 Governmental Oversight and Accountability on April 17, 2017:**

The following changes were made to align the public records exemption in SB 1844 with provisions in CS/SB 406 (2017), its linked substantive bill:

- Including the “date of birth” and “photograph” on an ID card to the specified information exempted from public disclosure; and
- Clarifying that all information collected for the purpose of issuing an ID card is exempt, rather than just the information on the ID card.

**B. Amendments:**

None.