

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 Governmental Oversight and Accountability

BILL: CS/SB 674

INTRODUCER: Health Policy Committee and Senator Bean

SUBJECT: Public Records/Nonviable Birth Records

DATE: March 24, 2017 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HP	Fav/CS
2.	Kim	Ferrin	GO	Pre-meeting
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 674 creates a public records exemption for information relating to cause of death and the parentage, marital status, and medical information in all nonviable birth records.

The bill includes a constitutionally required public necessity statement. The exemption will stand repealed on October 2, 2022, pursuant to the Open Government Sunset Review Act unless it is reenacted.

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

The bill has no fiscal impact.

The bill takes effect on July 1, 2017, contingent upon SB 672 or similar legislation becoming a law.

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.¹ This applies to the official business

¹ FLA. CONST., art. I, s. 24(a).

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.²

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

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ 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.¹¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

² *Id.*

³ 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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.”

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

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Id.*

¹² *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).

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷ 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;¹⁸
- 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;¹⁹ or
- It protects trade or business secrets.²⁰

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

¹³ 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).

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

¹⁵ 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.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ 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?
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?

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

Death and Fetal Death Certificates

Section 382.008, F.S., requires that a death certificate and fetal death certificate must be filed with the department or local registrar. Such a certificate must include specified information, such as the decedent's social security number, name, place of death and cause of death. In addition, the original death certificate or fetal death certificate "shall contain all information required by the department for legal, social and health research purposes," pursuant to s. 382.008(6), F.S.

Copies of Death and Fetal Death Certificates and Public Records Exemptions

Certified copies of death records and fetal death certificate are subject to public records exemptions. The department may issue certified copies of death and fetal death certificates, which exclude confidential and exempt information, to anyone who requests a certified copy and pays the appropriate fee.²⁴ Information related to the cause of death is confidential and exempt from for all death and fetal death records.²⁵ In addition, parentage, marital status, and medical information are confidential and exempt in fetal death records.²⁶

The department may issue certified copies of certificates of death or fetal death which include confidential and exempt information to certain family members and government agencies.²⁷ All of the information on a death certificate become public after 50 years.²⁸

The department may provide confidential and exempt information, vital records or data to government agencies for specified purposes, such as statistical analysis, or to a research entity, if the department reviews the research protocols. Records or data submitted to government agencies or research entities are exempt from public disclosure.²⁹

Nonviable Birth Records

SB 672 (2017) creates the "Grieving Families Act" which enables a parent to obtain, in certain situations, a certificate of nonviable birth following a miscarriage. The bill defines a "nonviable birth" as an unintentional, spontaneous fetal demise occurring after the completion of the 9th

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ Section 382.025(2)(a), F.S.

²⁵ Section 382.008(6), F.S.

²⁶ *Id.*

²⁷ Section 382.025(2)(a), F.S.

²⁸ Section 382.025(2)(b), F.S.

²⁹ Section 382.025(3), F.S.

week of gestation but prior to the 20th week of gestation of a pregnancy that has been verified by a health care practitioner.

In response to a parent's request, certain health care practitioners and facilities must submit information, as determined by rule by the Department of Health, Bureau of Vital Statistics (BVS), to the BVS in order to register a nonviable birth. This information will be used to issue a certificate of nonviable birth upon the parent's request. Only a parent named on the nonviable birth registration may request the BVS to issue a certificate of nonviable birth. However, once the certificate has been issued, any person may request a copy of that certificate pursuant to a public records request.

The certificate of nonviable birth must contain:

- The date of the nonviable birth.
- The county in which the nonviable birth occurred.
- The name of the fetus, as indicated on the registration of nonviable birth. If a name was not provided on the original or amended registration and the parent chooses not to provide a name, the certificate will use "baby boy," "baby girl," or "baby" if the sex is unknown, and the last name of the parents.
- A statement on the front of the certificate: "This certificate is not proof of a live birth."

III. Effect of Proposed Changes:

The bill creates a public records exemption for information relating to cause of death and the parentage, marital status, and medical information in all nonviable birth records. This is similar to an existing exemption relating to the information in fetal death records, which is republished in this bill.

The underlying substantive bill, SB 672, makes available pursuant to a public records request, a copy of a previously issued certificate of nonviable birth. A certificate of nonviable birth includes the last name of the parents. Pursuant to this bill, that parentage information will need to be redacted from a copy of a certificate.

The exemption will stand repealed on October 2, 2022, pursuant to the Open Government Sunset Review Act unless it is reenacted.

The bill includes a constitutionally required public necessity statement. The public necessity statement provides that the exemption is needed to protect the privacy rights of a woman who experiences a nonviable birth. Furthermore, the public disclosure of such information may discourage a woman from seeking medical care from a licensed health care practitioner or health care facility.

The bill takes effect on July 1, 2017, contingent upon SB 672 or similar legislation becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for public records exemptions to pass.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that the exemption is needed to protect the privacy rights of a woman who experiences a nonviable birth. Furthermore, the public disclosure of such information may discourage a woman from seeking medical care from a licensed health care practitioner or health care facility.

Breadth of Exemption

Article I, Section 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 the parentage, marital status, and medical information included in nonviable birth records. The public necessity statement references the privacy rights of women who experience a nonviable birth as well as the chilling effect that publication of the certificate would have on a woman seeking healthcare. The nexus between a woman’s privacy and the public records exemption is not clear. Since the certificate of nonviable birth is created by request only, a woman could maintain her privacy by not requesting that a certificate be created. To be more narrowly tailored, the bill could be revised to exempt only the woman’s personal identifying information.

This bill appears to be 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.³⁰

C. Government Sector Impact:

None.³¹

VI. Technical Deficiencies:

This bill does not appear to distinguish between an original certificate of nonviable birth (which “shall contain all information required by the department for legal, social and health research purposes,” pursuant to s. 382.008(6), F.S., and copy of a certificate of nonviable birth in the same way that current statutes distinguish between an original certificate and a copy. Original certificates of death and fetal death contain information that is confidential and exempt; copies issued, however, do not always contain information that is confidential and exempt. The substantive bill, SB 672, provides that a parent may request that a (presumably original) certificate of nonviable birth, however CS/SB 674 does not state that the department may release an unredacted, original certificate to a parent.

SB 672 provides that the following information be recorded on the (presumably original) certificate: date of nonviable birth, county where the nonviable birth occurred and the name of the fetus. The public records bill (CS/SB 674), however, contemplates information that is not in the substantive bill: parent’s marital status, cause of death, and medical information.

CS/SB 674 provides that information is confidential and exempt from s. 119.07(1), F.S., and Article I, section 24 of the State Constitution, but SB 672 includes references to ch. 119 only. The substantive bill and the linked bill establishing the public records exemption should be consistent.

CS/SB 674 permits information to be released pursuant to s. 382.025, F.S., however, as drafted, it is not clear if the release of information would be limited to health research purposes (per line 31) and may not be released for other research purposes (per s. 382.025(3), F.S.). SB 672 does not amend s. 382.025, F.S., to include a reference to nonviable birth records.

VII. Related Issues:

This bill provides that the parentage in all nonviable birth records is confidential and exempt from the public records laws. However, the underlying substantive bill, SB 672, provides for the issuance of a certificate of nonviable birth pursuant to a parent’s request. Under SB 672, a certificate of nonviable birth is required to include the last name of the parents. As drafted, CS/SB 674 would require the department to redact parentage in the original certificate of nonviable birth. It might be appropriate to include an exception in this bill for the certificate of

³⁰ 2017 Agency Legislative Bill Analysis, Department of Health, HB 103, December 16, 2017. Available on ABARS.

³¹ *Id.*

nonviable birth issued to the parents to include the parentage to give full effect to the intent in SB 672.

VIII. Statutes Affected:

This bill substantially amends section 382.008 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 Health Policy on March 14, 2017:

The bill number of the linked substantive bill was inserted into the effective date.

- B. **Amendments:**

None.