HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	HB 7A	**FINAL HOUSE FLOOR ACTION:**		
SUBJECT/SHORT TITLE	Public Records	109 **Y's**	3 **N's**	
SPONSOR(S):	Plasencia	**GOVERNOR'S ACTION:**	Approved	
COMPANION BILLS:	SB 6-A			

SUMMARY ANALYSIS

HB 7A passed the House on June 9, 2017, as SB 6-A.

The Compassionate Medical Cannabis Act (CMCA) legalized a low-THC and high-CBD form of cannabis for medical use by patients suffering from certain medical conditions and legalized medical cannabis without any THC limit or CBD mandate for the terminally ill. The CMCA also allows the use of cannabis delivery devices by patients.

The CMCA required the Department of Health (DOH) to approve dispensing organizations to cultivate, process and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices and provided regulatory standards for those activities. The CMCA also required DOH to create an online registry, the Compassionate Use Registry, to be used by physicians and dispensing organizations for the ordering and dispensing of low-THC cannabis, medical cannabis and cannabis delivery devices.

Current law makes the personal identifying information of physicians and patients contained within the Compassionate Use Registry confidential and exempt from public record requirements. This information is available to certain individuals and entities, including law enforcement investigating a cannabis-related violation and dispensing organizations for the purposes of verifying a patient order when dispensing low-THC cannabis, medical cannabis, and cannabis delivery devices.

On November 8, 2016, Florida voters approved an amendment to the Florida Constitution that allows the medical use of marijuana without any THC limit by patients certified by physicians as having a specified debilitating medical condition. The amendment authorizes Medical Marijuana Treatment Centers (MMTCs) to be marijuana providers.

HB 5A (2017), which is linked to this bill, implements the constitutional amendment by amending the CMCA. The bill renames the Compassionate Use Registry as the Medical Marijuana Use Registry and changes the requirements for its use.

The bill amends the current public record exemption related to information in the registry related to the personal identifying information of physicians, patients and caregivers contained within the registry or held by DOH to comply with the requirements established by HB 5A. It makes confidential and exempt any personal identifying information in the registry of patients that obtain marijuana for medical use and caregivers that assists patients in the medical use of marijuana. The bill makes confidential and exempt certain personal identifying information of the physicians that certify patients for medical use of marijuana.

The bill amends the current public record exemption to allow access by MMTCs, healthcare practitioners licensed to prescribe prescription medications, certain DOH employees and the Coalition for Medical Marijuana Research and Education created by HB 5A for treatment, dispensing, monitoring and research purposes.

The bill may have a minimal fiscal impact on the state and local governments. *See* Fiscal Comments section.

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

The bill was approved by the Governor on June 23, 2017, ch. 2017-231, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

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.[1] The public also has a right to notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.[2] The Legislature's meetings must also be open and noticed to the public, unless there is a specific exemption provided by law.[3]

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[4] guarantees every person's right to inspect and copy any state or local government public record.[5] The Sunshine Law[6] requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.[7]

The Legislature may create an exemption to public records or open meetings requirements.[8] An exemption must specifically state the public necessity justifying the exemption[9] and must be tailored to accomplish the stated purpose of the law.[10] There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act and also confidential.

Exempt Records

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not

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[1] FLA. CONST., art. I, s. 24(a).
[2] FLA. CONST., art. I, s. 24(b).
[3] FLA. CONST., art. I, s. 24(b).
[4] Chapter 119, F.S.
[5] Section 119.011(12), F.S., defines "public record" as 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" 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), however, the Legislature's records are public pursuant to section 11.0431, F.S.
[6] Section 286.011, F.S.
[7] 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 provide 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.
[8] FLA. CONST., art. I, s. 24(c).
[9] FLA. CONST., art. I, s. 24(c).
[10] FLA. CONST., art. I, s. 24(c).

prohibit the showing of such information, but simply exempts the records from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.[11]

Confidential Records

The term "confidential" is not defined in the Public Records Act; however, it is used in article I, section 24 of the Florida Constitution, which provides that every person has the right to inspect or copy any public record, except with respect to records exempted pursuant to the Constitution or specifically made confidential by the Constitution. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in statute.[12]

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public record or open meeting exemptions.[13] 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.[14]

The OGSR provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to accomplish its purpose.[15] An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;
- 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; or
- It protects trade or business secrets.[16]

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.[17]

Compassionate Medical Cannabis Act

The Compassionate Medical Cannabis Act (CMCA) was enacted in 2014 and amended in 2016.[18] The CMCA legalized a high-CBD form of low-THC cannabis[19] for medical use[20] by patients suffering from

[11] See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S, [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." Id. at 686.
[12] *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), rev. denied, 892 So. 2d 1015 (Fla. 2004). See also, 04-09 Fla Op. Att'y Gen. (2004) and 86-97 Fla Op. Att'y Gen. (1986).
[13] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 s. 119.15(2), F.S.
[14] Section 119.15(3), F.S.
[15] Section 119.15(6)(b), F.S.
[16] *Id.*
[17] *Id.*
[18] *See* ch. 2014-157, L.O.F., ch. 2016-123, L.O.F. and s. 381.986, F.S.
[19] The act 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. *See* s. 381.986(1)(b), F.S.
[20] Section 381.986(1)(c), F.S., defines "medical use" as "administration of the ordered amount of low-THC cannabis. The term does not include the possession, use, or administration by smoking. The term also does not include the transfer of low-THC cannabis to a person

cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms. In 2016, the Legislature also amended the Right to Try Act (RTTA) to allow eligible patients with a terminal condition to receive a form of cannabis with no THC limit or CBD mandate referred to as medical cannabis.[21]

Under the CMCA, a physician who is authorized to order low-THC or medical cannabis must register as the patient's physician and enter the patient and the contents of the patient's order for low-THC cannabis, medical cannabis, or a cannabis delivery device into the Compassionate Use Registry.

Under the CMCA, entities known as dispensing organizations are authorized to cultivate, process, transport and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices. Dispensing organizations are required to verify the patient's order before dispensing low-THC cannabis, medical cannabis, or a cannabis delivery device. Dispensing organizations must also enter into the registry the date, time, quantity, and form dispensed and type of cannabis delivery device dispensed to the patient.

CMCA Public Record Exemption

Section 381.987, F.S., makes the personal identifying information of physicians and patients contained within the Compassionate Use Registry confidential and exempt from public record requirements. Specifically, information relating to the patient's name, address, telephone number, government issued identification number, and all information pertaining to the physician's order for low-THC cannabis and the dispensing thereof is confidential and exempt. In addition, the physician's name, address, telephone number, government issued identification number, and Drug Enforcement Administration number are confidential and exempt.

This information is available to certain individuals and entities, including law enforcement investigating a cannabis-related violation; dispensing organizations for the purposes of verifying a patient order when dispensing low-THC cannabis, medical cannabis, and cannabis delivery devices; physicians for the purposes of ordering low-THC cannabis, medical cannabis, or cannabis delivery devices; a Department of Health (DOH) employee for purposes of maintaining the registry; DOH's relevant health care regulatory boards for purposes of investigating a possible violation of the CMCA by a physician; and a person engaged in bona fide research under certain conditions.

All information released from the registry remains confidential and exempt, and a person who receives access to such information must maintain its confidential and exempt status.

Amendment 2: Use of Marijuana for Debilitating Medical Conditions

On November 8, 2016, Florida voters approved an amendment to the Florida Constitution (Fla. Const. art. X, s. 29), which allows the medical use of marijuana without any THC limit by patients who are certified by physicians to have a specified debilitating medical condition. The amendment authorizes entities known as Medical Marijuana Treatment Centers (MMTCs) to be marijuana providers.

House Bill 5A (2017)

HB 5A which is linked with this bill, implements Fla. Const. art. X, s. 29 by amending the CMCA. HB 5A renames the Compassionate Use Registry as the Medical Marijuana Use Registry and changes the requirements for its use. The Medical Marijuana Use Registry will be used by physicians to certify patients and by MMTCs to dispense marijuana under Fla. Const. art. X s.29. Physicians must enter the contents of the patient's certification for marijuana into the registry, including the patient's debilitating

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other than the qualified patient for whom it was ordered or the qualified patient's legal representative on behalf of the qualified patient." 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."
[21] Section 499.0295, F.S.

medical condition. MMTCs must use the registry to verify the patient's certification before dispensing marijuana to the patient and must enter certain information regarding the dispensing of the marijuana to the patient.

The bill also requires physicians to submit documentation related to the certification of qualified patients for the medical use of marijuana to the Board of Medicine, Board of Osteopathic Medicine and DOH that is not submitted through the registry. The bill requires a physician who issues a certification for qualifying medical condition that is of the same kind or class as the conditions enumerated in in Fla. Const. art. X s. 29 to provide documentation to the applicable board supporting the physician's determination that a qualified patient suffers from a debilitating medical condition that is of the same kind or class as the conditions listed within 14 days after issuing the certification. The bill requires DOH to submit the documentation to the Coalition for Medical Marijuana Research and Education created by the bill.

The bill requires the physician at each recertification to document whether the patient experience an adverse drug reaction or reduction in the use of opioids and submit such documentation to DOH, which must submit the findings to the Coalition for Medical Marijuana Research and Education created by the bill.

Pursuant to Fla. Const. art. X s. 29(d)(1)d, the bill allows a qualified physician to request an exception from DOH from the daily dose amount limit. The bill requires the qualified physician to submit documentation regarding the patient's medical condition and treatment to DOH in order to receive an exception.

The bill creates the Coalition for Medical Research and Education at the H. Lee Moffitt Cancer Center and Research Institute, Inc. for the purpose of conducting research and providing education regarding the medical use of marijuana. The Coalition must annually adopt a plan for medical marijuana research and must issue a report by February 15th of each year to the Governor, President of the Senate, and Speaker of the House on research projects, community outreach initiatives, and future plans for the coalition. Beginning January 15, 2018, DOH must submit to the Coalition a data set that includes, for each patient in the registry, the patient's qualifying medical condition, the daily dose amount and forms of marijuana certified for the patient.

Effect of Proposed Changes

The bill amends the current public record exemption in s. 381.987, F.S., to reflect the changes made to the registry and the additional information required to be submitted by HB 5A. It makes confidential and exempt any personal identifying information held by DOH of patients that obtain marijuana for medical use and the caregivers that assist patients in the medical use of marijuana. It also makes the DEA number, residential address, and government issued identification number of qualified physicians confidential and exempt.

The bill also amends the current public record exemption to allow access to the registry by MMTCs to verify patients' certifications when dispensing marijuana or marijuana delivery devices, by practitioners licensed to prescribe prescription medications to ensure proper care of patients before prescribing medications that may have a negative interaction with marijuana, an employee of DOH for the purpose of monitoring physician registration in the registry and the issuance of physician certifications for practices that could facilitate unlawful diversion or misuse of marijuana or a marijuana delivery device, and by the Coalition for Medical Marijuana and Research established by the bill for research purposes.

The bill also prohibits MMTCs and law enforcement from seeing the patient's diagnosis.

The bill also amends the current public record exemption to allow access to the confidential and exempt information held by DOH outside of the registry to an employee of DOH for the purpose of approving or disapproving a request for an exception to the daily dose amount limit for a qualified

patient and the Coalition for Medical Marijuana and Research established by the bill for research purposes.

The bill provides a public necessity statement as required by the State Constitution, which states that the exemption is necessary to protect the privacy rights of physicians and patients, including protecting patients' personal health information.

The bill takes effect on the same date that HB 5A or similar legislation takes effect.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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