

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 Appropriations

BILL: SB 4-B

INTRODUCER: Senator Burgess

SUBJECT: Public Records/Employer COVID-19 Vaccination Policies

DATE: November 15, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ponder</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Hrdlicka</u>	<u>Sadberry</u>	<u>AP</u>	Favorable

I. Summary:

SB 4-B, which is linked to the passage of SB 2-B, makes confidential and exempt from public copying and inspection requirements an employee complaint alleging a private employer's violation of state law regarding such employer's COVID-19 vaccination policy or practices, and all information relating to an investigation of such complaint, held by the Department of Legal Affairs.

After the investigation is completed or ceases to be active, information in records relating to the investigation remain confidential and exempt from public copying and inspection requirements if disclosure of that information:

- Jeopardizes the integrity of another active investigation.
- Reveals medical information about an employee.
- Reveals information regarding the employee's religious beliefs.

The bill permits release of the confidential and exempt information to another governmental entity in the furtherance of that entity's lawful duties and responsibilities. Additionally, the bill permits disclosure of information in an aggregated format.

The bill takes effect on the same date that SB 2-B or similar legislation takes effect, if such legislation is adopted in the same legislative session and becomes law. The public records exemption expires on October 2, 2023.

Article I, section 24(c) of the Florida 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.

II. Present Situation:

Access to Public Records - Generally

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 The right to inspect or copy 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.²

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person and that providing access to public records is a duty of each agency.⁵

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 the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2 (2018-2020).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. 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.”

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.”

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

custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature designates as “exempt” from public records requirements and those the Legislature designates as “confidential and exempt.” A record classified as “exempt” from public disclosure may be disclosed under certain circumstances.¹⁴ If the Legislature designates a record as “confidential and exempt” from public disclosure, such 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.¹⁵

SB 2-B – COVID-19 Mandates

SB 2-B, to which this bill is linked, prohibits a private employer from adopting a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement. An employee may opt out of such a COVID-19 vaccination mandate on the basis of:

- Medical reasons;
- Religious reasons;
- COVID-19 immunity;
- Periodic testing; and
- Use of employer-provided personal protective equipment.

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ *Id.* See, e.g., *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc., v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ See Op. Att’y Gen. Fla 85-62 (August 1, 1985).

If an employer fails to comply with the exemption provisions, an employee may file a complaint with the Department of Legal Affairs (DLA) alleging that an exemption has been improperly denied or applied or has not been offered. If the DLA investigates and finds that the exemption was improperly denied or applied, or not offered, it must notify the employer of its determination and allow the employer time to cure the noncompliance.

SB 2-B makes it a violation for an employer to fail to comply with the exemption provisions and to terminate an employee based on a COVID-19 vaccination mandate. The terminated employee may file a complaint with DLA alleging that the exemption has been improperly denied or not offered, resulting in the employee's termination. The DLA must conduct an investigation of the complaint and if the Attorney General determines that a violation has occurred, the Attorney General shall impose an administrative fine, unless the employer rehires the terminated employee and pays the person back pay.¹⁶ The decision of the Attorney General constitutes agency action for purposes of chapter 120, F.S.

III. Effect of Proposed Changes:

Section 1 creates section 381.00318, F.S., to make an employee complaint alleging a private employer's violation of state law regarding such employer's COVID-19 vaccination policy or practices, and all information relating to an investigation of such complaint, held by the DLA confidential and exempt from public copying and inspection requirements until such time as the investigation is completed or ceases to be active.

The exemption applies to records held by the DLA pursuant to an investigation into whether a private employer failed to comply with state law and terminated an employee based on a COVID-19 vaccination mandate.

The bill provides that an investigation is considered "active" while such investigation is being conducted by the DLA with a reasonable good faith belief that it may lead to a determination of whether there was a violation of state law. An investigation does not cease to be active if the DLA is proceeding with reasonable dispatch and there is a good faith belief that action may be initiated by the DLA.

The bill provides that upon completion of the investigation or at such time it ceases to be active, information in records relating to the investigation remain confidential and exempt from public copying and inspection requirements if disclosure of that information would:

- Jeopardize the integrity of another active investigation.
- Reveal medical information about an employee.
- Reveal information regarding the employee's religious beliefs.

The bill permits release of the confidential and exempt information to another governmental entity in the furtherance of that entity's lawful duties and responsibilities. Additionally, the bill permits disclosure of information in aggregated format.

¹⁶ Fines may not exceed \$10,000 per violation for employers having fewer than 100 employees; and up to \$50,000 for employers having 100 or more employees.

The bill provides for the expiration of this section on October 2, 2023.

Section 2 provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution. The statement provides that it is a public necessity that an employee complaint alleging a private employer's violation of state law regarding such employer's COVID-19 vaccination policy or practices, and all information relating to an investigation, held by the DLA be made confidential and exempt from public copying and inspection requirements, until the investigation is completed or ceases to be active.

The statement provides that it is a public necessity that an employee's medical information or religious information remain confidential and exempt regardless of the status of the investigation as disclosure of such information:

- Would allow the public to gain knowledge of sensitive, personal information that could be used to harass, embarrass, or humiliate a person based on his or her medical or religious information;
- Could enable other persons to gain knowledge of the employee's vulnerabilities and such knowledge could result in the employee becoming a target of an act of violence or other crimes; and
- Could discourage an employee from filing a complaint if he or she knows his or her personal, medical, or religious information will be made available.

Further, the public necessity statement provides that if a complainant's information is made publicly available while an investigation is active, that complainant could become the subject of intimidation tactics and threats; thus, hindering the effective and efficient administration of the investigation by the DLA.

Section 3 provides that the bill takes effect on the same date that SB 2-B or similar legislation takes effect, if such legislation is adopted in the same legislative session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill creates a new public records exemption. Thus, the bill requires a two-thirds vote for enactment.

Public Necessity Statement

Article 1, section 24(c) of the Florida Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill creates a new public records exemption. Thus, the bill includes a public necessity statement.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of this law is to protect the complaint of an employee alleging a private employer's violation of state law regarding such employer's COVID-19 vaccination policy or practices, and all information relating to an investigation of such complaint, held by the Department of Legal Affairs. The bill also provides for an employee's medical information and religious information to remain confidential and exempt regardless of the status of the investigation. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

SB 4-B may have an indeterminate negative fiscal impact on the Department of Legal Affairs, as it requires the DLA to maintain the confidential and exempt status of the designated information in the daily course of business and in response to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 381.00318 of the Florida Statutes.

The bill creates an undesignated section of Florida law.

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.