

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7005 PCB GOS-22-01 OGSR/Information Relating to the Medical Use of Marijuana/Department of Health

**SPONSOR(S):** Government Operations Subcommittee, Rizo

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 7002

| REFERENCE                                       | ACTION    | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|-----------|---------|---------------------------------------|
| Orig. Comm.: Government Operations Subcommittee | 13 Y, 0 N | Roth    | Toliver                               |
| 1) Professions & Public Health Subcommittee     | 17 Y, 0 N | Rahming | McElroy                               |
| 2) State Affairs Committee                      | 22 Y, 0 N | Roth    | Williamson                            |

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The Department of Health Office of Medical Marijuana Use (OMMU) has been tasked with creating and maintaining a secure, electronic, and online medical marijuana use registry for physicians, patients, and caregivers. Additionally, OMMU must issue medical marijuana use registry identification cards for qualified patients and caregivers.

Current law provides a public record exemption for certain information relating to medical marijuana held by the Department of Health. The public record exemption protects the following information from public disclosure:

- A patient's or caregiver's personal identifying information held in the medical marijuana use registry including, but not limited to, the patient's or caregiver's name, address, date of birth, photograph, and telephone number.
- Personal identifying information collected for the purpose of issuing a patient's or caregiver's medical marijuana use registry identification card.
- Personal identifying information pertaining to the physician certification for marijuana and the dispensing thereof, including but not limited to, information related to the patient's diagnosis, exception requests to the daily dose amount limit, and the qualified patient's experience related to the medical use of marijuana.
- Personal identifying information contained in a qualified physician's Drug Enforcement Administration number, residential address, and government-issued identification card.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2022, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

##### Department of Health (DOH)

The purpose of DOH is to protect and promote the health of all residents and visitors in Florida.<sup>5</sup> Under current law, DOH must:

- Identify, diagnose, and conduct surveillance of diseases and health conditions in the state and accumulate the health statistics necessary to establish trends.
- Implement interventions that prevent or limit the impact or spread of diseases and health conditions.
- Collect, manage, and analyze vital statistics and other health data to inform the public and formulate public health policy and planning.
- Maintain and coordinate preparedness for and responses to public health emergencies in the state.
- Provide or ensure the provision of quality health care and related services to identified populations in the state.
- Regulate environmental activities that have a direct impact on public health in the state.
- Regulate health practitioners for the preservation of the health, safety, and welfare of the public.<sup>6</sup>

##### Office of Medical Marijuana Use

The Department of Health Office of Medical Marijuana Use (OMMU) is responsible for the statewide implementation and oversight of medical marijuana. This includes the development and implementation

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Art. I, s. 24(c), Fla. Const.

<sup>5</sup> Section 20.43(1), F.S.

<sup>6</sup> Section 20.43(1)(a)-(g), F.S.

of DOH's rules for medical marijuana, oversight of the database of ordering physicians and qualified patients (Medical Marijuana Use Registry), patient and caregiver identification cards and licensure of businesses authorized to provide low-THC cannabis and medical marijuana to qualified patients.

### Medical Marijuana Use Registry

OMMU has been tasked with creating and maintaining a secure, electronic, and online medical marijuana use registry for physicians, patients, and caregivers.<sup>7</sup> The medical marijuana use registry must be accessible to law enforcement agencies, qualified physicians, and medical marijuana treatment centers (MMTC) to verify the authorization of a qualified patient<sup>8</sup> or a caregiver<sup>9</sup> to possess marijuana or a marijuana delivery device and to record the marijuana or marijuana delivery device dispensed.<sup>10</sup> The medical marijuana use registry must also be accessible to practitioners licensed to prescribe prescription drugs to ensure proper care for patients before medications that may interact with the medical use of marijuana are prescribed.<sup>11</sup> OMMU must determine whether an individual is a resident of Florida for the purpose of registration of qualified patients and caregivers in the medical marijuana use registry.<sup>12</sup>

OMMU may suspend or revoke the registration of a qualified patient or caregiver if the qualified patient or caregiver:

- Provides misleading, incorrect, false, or fraudulent information to OMMU;
- Obtains a supply of marijuana in an amount greater than the amount authorized by the physician certification;
- Falsifies, alters, or otherwise modifies an identification card;
- Fails to timely notify OMMU of any changes to his or her qualified patient status; or
- Violates the requirements of Florida statute or rule regarding the use of medical marijuana.<sup>13</sup>

Additionally, OMMU:

- Must immediately suspend the registration of a qualified patient or caregiver charged with a violation of the Florida Comprehensive Drug Abuse Prevention and Control Act<sup>14</sup> until final disposition of any alleged offense.<sup>15</sup>
- May revoke the registration of a qualified patient or caregiver who cultivates marijuana or who acquires, possesses, or delivers marijuana from any person or entity other than a MMTC.<sup>16</sup>
- Must revoke the registration of a qualified patient, and the patient's associated caregiver, upon notification that the patient no longer meets the criteria of a qualified patient.<sup>17</sup>

### Use Registry Identification Cards

OMMU must issue medical marijuana use registry identification cards for qualified patients and caregivers who are residents of Florida. Identification cards must be renewed annually and must include, at a minimum:

- The name, address, and date of birth of the qualified patient or caregiver.
- A full-face, passport-type, color photograph of the qualified patient or caregiver.
- Identification as a qualified patient or a caregiver.
- The unique numeric identifier used for the qualified patient in the medical marijuana use registry.

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<sup>7</sup> Section 381.986(5)(a), F.S.

<sup>8</sup> The term "qualified patient" means a resident of this state who has been added to the medical marijuana use registry by a qualified physician to receive marijuana or a marijuana delivery device for a medical use and who has a qualified patient identification card. Section 381.986(1)(l), F.S.

<sup>9</sup> The term "caregiver" means a resident of this state who has agreed to assist with a qualified patient's medical use of marijuana, has a caregiver identification card, and meets the requirements of s. 381.986(6), F.S. Section 381.986(1)(a), F.S.

<sup>10</sup> Section 381.986(5)(a), F.S.

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

<sup>12</sup> Section 381.986(5)(b), F.S.

<sup>13</sup> Section 381.986(5)(c), F.S.

<sup>14</sup> Chapter 893, F.S.

<sup>15</sup> Section 381.986(5)(d)-(e), F.S.

<sup>16</sup> Section 381.986(5)(f), F.S.

<sup>17</sup> Section 381.986(5)(g), F.S.

- For a caregiver, the name and unique numeric identifier of the caregiver and the qualified patient or patients that the caregiver is assisting.
- The expiration date of the identification card.<sup>18</sup>

Applications for identification cards must be submitted on a form prescribed by OMMU, and OMMU may charge a reasonable fee associated with the issuance, replacement, and renewal of identification cards.<sup>19</sup> A qualified patient or caregiver must return his or her identification card to OMMU within five business days after revocation.<sup>20</sup>

### Physician Certification

A qualified physician<sup>21</sup> may issue a physician certification only if the qualified physician:

- Conducted a physical examination while physically present in the same room as the patient and a full assessment of the medical history of the patient.
- Diagnosed the patient with at least one qualifying medical condition.<sup>22</sup>
- Determined that the medical use of marijuana would likely outweigh the potential health risks for the patient.
- Determined whether the patient is pregnant.
- Reviewed the patient's controlled drug prescription history in the prescription drug monitoring program database.<sup>23</sup>
- Reviewed the medical marijuana use registry and confirmed that the patient does not have an active physician certification from another qualified physician.
- Registered as the issuer of the physician certification for the named qualified patient on the medical marijuana use registry in an electronic manner.
- Obtains the voluntary and informed written consent of the patient for medical use of marijuana each time the qualified physician issues a physician certification for the patient.<sup>24</sup>

### Public Record Exemption under Review

In 2017, the Legislature expanded a public record exemption that protected certain personal identifying information relating to medical marijuana held by DOH. The information is confidential and exempt<sup>25</sup> from public disclosure. The public record exemption protects the following information from disclosure:

- A patient's or caregiver's personal identifying information held in the medical marijuana use registry including, but not limited to, the patient's or caregiver's name, address, date of birth, photograph, and telephone number.
- Personal identifying information collected for the purpose of issuing a patient's or caregiver's medical marijuana use registry identification card.
- Personal identifying information pertaining to the physician certification for marijuana and the dispensing thereof, including but not limited to, information related to the patient's diagnosis, exception requests to the daily dose amount limit, and the qualified patient's experience related to the medical use of marijuana.
- A qualified physician's Drug Enforcement Administration number, residential address, and government-issued identification card.

<sup>18</sup> Section 381.986(7)(a)1.-6., F.S.

<sup>19</sup> Section 381.986(7)(d), F.S.

<sup>20</sup> Section 381.986(7)(e), F.S.

<sup>21</sup> The term "qualified physician" means a person who holds an active, unrestricted license as an allopathic physician under chapter 458, F.S., or as an osteopathic physician under chapter 459, F.S., and is in compliance with the physician education requirements of s. 381.986(3), F.S. Section 381.986(1)(m), F.S.

<sup>22</sup> A list of qualifying medical conditions is found in s. 381.986(2), F.S.

<sup>23</sup> The prescription drug monitoring program database was established pursuant to s. 893.055, F.S.

<sup>24</sup> Section 381.986(4)(a), F.S.

<sup>25</sup> There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991). 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 statute. *See* Attorney General Opinion 85-62 (Aug. 1, 1985).

DOH must allow the following entities to access the confidential and exempt information in the medical marijuana use registry:<sup>26</sup>

- A law enforcement agency that is investigating a violation of law regarding marijuana in which the subject of the investigation claims an exception.<sup>27</sup>
- A MMTC approved by DOH, which is attempting to verify the authenticity of a physician certification for marijuana, including whether the certification had been previously filled and whether the certification was issued for the person attempting to have it filled.<sup>28</sup>
- A physician who has issued a certification for marijuana for the purpose of monitoring the patient's use of such marijuana or for the purpose of determining, before issuing a certification for marijuana, whether another physician has issued a certification for the patient's use of marijuana.<sup>29</sup>
- A practitioner licensed to prescribe prescription medications to ensure proper care of a patient before prescribing medication to that patient which may interact with marijuana.
- An employee of DOH for the purposes of maintaining the registry and periodic reporting or disclosure of information that has been redacted to exclude personal identifying information.
- An employee of DOH for the purposes of reviewing physician registration and the issuance of physician certifications to monitor practices that could facilitate unlawful diversion or the misuse of marijuana or a marijuana delivery device.
- The DOH's relevant health care regulatory boards responsible for the licensure, regulation, or discipline of a physician if he or she is involved in a specific investigation of a violation of medical use of marijuana.<sup>30</sup>
- The Consortium for Medical Marijuana Clinical Outcomes Research.<sup>31</sup>
- A person engaged in bona fide research.<sup>32</sup>

DOH must also allow access to the confidential and exempt information pertaining to the physician certification for marijuana and the dispensing thereof, whether in the registry or otherwise held by DOH, to a DOH employee for the purpose of approving or disapproving a request for an exception to the daily dose amount limit for a qualified patient, and to the Consortium for Medical Marijuana Clinical Outcomes Research for the purpose of conducting research regarding the medical use of marijuana.<sup>33</sup>

All confidential and exempt information released by DOH remains confidential and exempt, and a person who receives access to such information must maintain the confidential and exempt status of the information received.<sup>34</sup> A person who willfully and knowingly violates the public records exemption commits a felony of the third degree.<sup>35</sup>

The 2017 public necessity statement<sup>36</sup> for the exemption states the following:

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<sup>26</sup> Section 381.987(2), F.S.

<sup>27</sup> A law enforcement agency cannot access information related to a patient's diagnosis.

<sup>28</sup> A MMTC cannot access information related to a patient's diagnosis.

<sup>29</sup> The physician may access the confidential and exempt information only for the patient for whom he or she has issued a certification or is determining whether to issue a certification for the use of marijuana.

<sup>30</sup> See s. 381.986, F.S.

<sup>31</sup> The Consortium for Medical Marijuana Clinical Outcomes Research is established in s. 1004.4351(4), F.S.

<sup>32</sup> In order to engage in bona fide research, the person must agree:

- To submit a research plan to DOH which specifies the exact nature of the information requested and the intended use of the information;
- To maintain the confidentiality of the records or information if personal identifying information is made available to the researcher;
- To destroy any confidential and exempt records or information obtained after the research is concluded; and
- Not to contact, directly or indirectly, for any purpose, a patient or physician whose information is in the registry.

<sup>33</sup> Section 381.987(3), F.S.

<sup>34</sup> Section 381.987(4), F.S.

<sup>35</sup> Section 381.987(5), F.S. A third-degree felony is punishable by up to 5 years imprisonment or a fine up to \$5,000.

<sup>36</sup> Art. I, s. 24(c), Fla. Const., requires each public record exemption "state with specificity the public necessity justifying the exemption."

The choice made by a physician to certify, and by his or her patient to use, marijuana to treat the patient's medical condition or symptoms and the choice made by a caregiver to assist a qualifying patient with the medical use of marijuana is a personal and private matter between such parties. The availability of such information could make the public aware of both the patient's use of marijuana and the patient's diseases or other medical conditions for which the patient is using marijuana. The knowledge of the patient's use of marijuana, the knowledge that the physician certified the use of marijuana, the knowledge of the patient's diseases or other medical conditions, and the knowledge that a caregiver is assisting a patient with the medical use of marijuana could be used to embarrass, humiliate, harass, or discriminate against the patient, the caregiver, or the physician. This information could be used as a discriminatory tool by an employer who disapproves of the patient's use of marijuana, the caregiver's assistance in the use of marijuana, or the physician certification of such use.<sup>37</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless saved from repeal by the Legislature.<sup>38</sup>

During the 2021 interim, subcommittee staff<sup>39</sup> met with staff from DOH. DOH staff stated they had not had any issues interpreting or applying the exemption and that they were unaware of the existence of any complaints concerning the exemption. Further, DOH staff stated there had been no legal challenges concerning the exemption. Between January 1, 2018, and August 31, 2021, the OMMU staff received approximately 644 requests for the confidential and exempt information contained in the medical marijuana use registry. This total consists of approximately 71 subpoenas for patient medical records and 573 requests for customized medical marijuana use registry data. As such, DOH staff recommended that the exemption be reenacted as is.

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemption for certain personal identifying information of patients, caregivers, and qualified physicians relating to medical marijuana held by DOH, thereby reenacting the public record exemption. The bill also makes non-substantive technical changes to the statute and removes language permitting DOH to protect additional records at its discretion.

#### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 381.987, F.S., to save from repeal the public record exemption for personal identifying information relating to medical marijuana held by DOH.

**Section 2:** Provides an effective date of October 1, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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<sup>37</sup> Chapter 2017-231, L.O.F.

<sup>38</sup> Section 381.987(6), F.S.

<sup>39</sup> Government Operations Subcommittee, Florida House of Representatives.

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### **III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

None.