

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB HQS 17-03 Pub. Rec./Medical Marijuana Use Registry
SPONSOR(S): Health Quality Subcommittee; Plasencia
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health Quality Subcommittee	15 Y, 0 N	Royal	McElroy

SUMMARY ANALYSIS

The Compassionate Medical Cannabis Act (CMCA) (ss. 381.986, 499.0295 F.S.) legalized a low-THC and high-CBD form of cannabis for medical use by patients suffering from cancer or a physical medical condition that chronically produces symptoms of seizures or severe and persistent muscle spasms 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 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.

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 records. 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 7, 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 certified by physicians as having an enumerated debilitating medical condition. The amendment authorizes Medical Marijuana Treatment Centers (MMTCs) to be marijuana providers.

HB 1397 implements Fla. Const. art. X, s. 29 by amending the CMCA. HB 1397 renames the Compassionate Use Registry as the Medical Marijuana Use Registry and changes the requirements for its use.

PCB HQS 17-03 amends the current public records exemption in s. 381.987, F.S. to reflect the changes to the registry made by HB 1397. It makes confidential and exempt any personal identifying information in the registry of patients that obtain marijuana for medical use and the physicians that certify patients for medical use of marijuana.

The PCB also amends the current public records exemption to allow access by MMTCs to verify patients' certifications when dispensing marijuana or marijuana delivery devices.

The PCB does not have a fiscal impact on state or local governments.

The PCB takes effect on the same date that HB 1397 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

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 public record or public meeting exemption. The bill creates public record and public meeting exemptions; thus, it appears to require a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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 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 an exception provided for by the Constitution.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 Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ 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 exemption⁹ 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

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 them 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, S. 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 this section or specifically made confidential by this 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 the 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 records or open meetings 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 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.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; or
- 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

The OGSR also requires specific questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR asks the Legislature to question the purpose and necessity of reenacting the exemption. If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁹ If the exemption is reenacted without

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 Section 119.15(6)(a), F.S. The questions are: What specific records or meetings are affected by the exemption? Whom does the exemption uniquely affect, as opposed to the public? What is the identifiable public purpose or goal of the exemption? Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? Is the record or meeting protected by another exemption? Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹⁹ FLA. CONST., art. I, s. 24(c).

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 retain their exempt status unless provided for by law.²⁰

Compassionate Medical Cannabis Act

The Compassionate Medical Cannabis Act (CMCA) was enacted in 2014 and amended in 2016.²¹ The CMCA legalized a low-THC and high-CBD form of low-THC cannabis²² for medical use²³ by patients suffering from 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.²⁴

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 Records 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 records. 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 from public records requirements. The physician's name, address, telephone number, government issued identification number and Drug Enforcement Administration number are confidential and exempt from public records requirements.

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 DOH employee for purposes of maintaining the registry, DOH's relevant health care regulatory boards for purposes of investigation a possible violation of the CMCA by a physician, and a person engaged in bona fide research under certain conditions.

²⁰ S. 119.15(7), F.S.

²¹ See ch. 2014-157, L.O.F., ch. 2016-123, L.O.F. and s. 381.986, F.S.

²² 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.

²³ 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 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."

²⁴ Section 499.0295, F.S.

Amendment 2: Use of Marijuana for Debilitating Medical Conditions

On November 7, 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 with an enumerated debilitating medical condition. The amendment authorizes entities known as Medical Marijuana Treatment Centers (MMTCs) to be marijuana providers.

HB 1397

HB 1397 implements Fla. Const. art. X, s. 29 by amending the CMCA. HB 1397 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 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.

Effect of Proposed Changes

PCB HQS 17-03 amends the current public records exemption in s. 381.987, F.S. to reflect the changes to the registry made by HB 1397. It makes confidential and exempt any personal identifying information in the registry of patients that obtain marijuana for medical use and the physicians that certify patients for medical use of marijuana.

The PCB also amends the current public records exemption to allow access to MMTCs to verify patients' certifications when dispensing marijuana or marijuana delivery devices.

The PCB 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 PCB takes effect on the same date that HB 1397 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

B. SECTION DIRECTORY:

Section 1: Amends s. 381.987, relating to public records exemption for personal identifying information in the compassionate use registry.

Section 2: Creates an unnumbered section of law relating to the public necessity for making exempt and confidential the person identifying information in the Medical Marijuana Use Registry.

Section 3: Provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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. The bill does not appear to affect county or municipal governments.

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES