

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 Rules

BILL: CS/SB 60

INTRODUCER: Health Policy Committee and Senate Hays

SUBJECT: Public Records/Personal Identifying Information of Dept. of Health Personnel

DATE: March 15, 2013 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------|----------------|-----------|--------------------|
| 1. | McElheney | Stovall | HP | Fav/CS |
| 2. | Naf | McVaney | GO | Favorable |
| 3. | McElheney | Phelps | RC | Pre-meeting |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 60 creates a public records exemption for certain personal identification and location information of:

- Current or former Department of Health (DOH) personnel whose duties include the investigation or prosecution of complaints against health care practitioners or the inspection of practitioners or facilities licensed by the DOH; and
- Spouses and children of such current or former DOH personnel.

The exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and reenacted by the Legislature.

The bill contains a public necessity statement as required by the Florida Constitution.

Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

This bill substantially amends section 119.071 of the Florida Statutes.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person the right to 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 records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ It

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (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 2004); and *Williams v. City of Minneola*, 575 So.2d 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 the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹¹ The Act 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 to meet such public purpose.¹²

Public Records Exemptions for Public Employee Identification and Location Information

Current law provides public records exemptions for identification and location information of certain current or former public employees and their spouses and children.¹³ Public employees covered by these exemptions include:

- Law enforcement, including correctional, and specified investigatory personnel;¹⁴
- Firefighters;¹⁵
- Justices and judges;¹⁶
- Local and statewide prosecuting attorneys;¹⁷
- Magistrates, administrative law judges, and child support hearing officers;¹⁸
- Local government agency and water management district human resources administrators;¹⁹
- Code enforcement officers;²⁰
- Guardians ad litem;²¹
- Specified Department of Juvenile Justice Personnel;²²
- Public defenders and criminal conflict and civil regional counsel;²³
- Investigators or inspectors of the Department of Business and Professional Regulation;²⁴ and
- County tax collectors.²⁵

Although the types of exempt information vary, the following information is exempt²⁶ from public records requirements for all the above-listed public employees:

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

¹³ See s. 119.071(4)(d), F.S.

¹⁴ See s. 119.071(4)(d)1.a., F.S.

¹⁵ See s. 119.071(4)(d)1.b., F.S.

¹⁶ See s. 119.071(4)(d)1.c., F.S.

¹⁷ See s. 119.071(4)(d)1.d., F.S.

¹⁸ See s. 119.071(4)(d)1.e., F.S. This exemption applies only if the magistrate, administrative law judge, or child support hearing officer provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public.

¹⁹ See s. 119.071(4)(d)1.f., F.S.

²⁰ See s. 119.071(4)(d)1.g., F.S.

²¹ See s. 119.071(4)(d)1.h., F.S. This exemption applies only if the guardian ad litem provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public.

²² See s. 119.071(4)(d)1.i., F.S.

²³ See s. 119.071(4)(d)1.j., F.S.

²⁴ See s. 119.071(4)(d)1.k., F.S.

²⁵ See s. 119.071(4)(d)1.l., F.S.

²⁶ There is a difference between records the Legislature designates as 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. The School Board 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 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from

- Home addresses and telephone numbers of the public employees;
- Home addresses, telephone numbers, and places of employment of the spouses and children of the public employees; and
- Names and locations of schools and day care facilities attended by the children of the public employees.

If exempt information is held by an agency²⁷ that is not the employer of the public employee, the public employee must submit a written request to that agency to maintain the public record exemption.²⁸

Department of Health

Regulatory and Reporting Duties

The DOH is responsible for the licensure and regulation of a variety of health care practitioners to ensure that those health care practitioners comply with the rules and standards set by the Legislature, professional boards, and the DOH.²⁹ Such regulation includes periodic inspections of facilities of health care practitioners.³⁰ The DOH may issue citations for violations of law or rule that do not pose a serious threat to patient safety or involve a standard of care violation that resulted in patient injury.³¹

The DOH also is responsible for investigating complaints against health care practitioners. It must investigate any complaint that is legally sufficient and that meets other statutory requirements,³² and may initiate an investigation if it believes a violation of law or rule has

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. (*See* Attorney General Opinion 85-62, August 1, 1985).

²⁷ Section 119.011(2), F.S., defines “agency” to mean 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.

²⁸ Section 119.071(4)(d)2., F.S.

²⁹ *See* ss. 20.43(1)(g), 456.013(1)(a), and 456.069, F.S. Regulated professions include acupuncture; general medicine; osteopathic medicine; podiatric medicine; optometry; nursing; pharmacy; dentistry; speech-language pathology and audiology; nursing home administration; occupational therapy; athletic training; orthotists and prosthetists; massage therapy; opticianry; hearing aid specialists; physical therapy; psychology, including school psychologists; clinical social work; marriage and family therapy; mental health counseling; naturopathy; midwifery; nursing assistants; respiratory therapy; dietetics and nutrition practice; electrolysis; medical physicists; emergency medical technicians and paramedics; and radiology (*see* s. 20.43(3)(g) and 468.304, F.S.).

³⁰ Section 456.069, F.S., authorizes such routine inspections; the DOH’s bill analysis states that DOH personnel are required to complete routine inspections (the DOH bill analysis, dated November 26, 2012, is on file with the Senate Governmental Oversight and Accountability Committee).

³¹ Section 456.077, F.S.

³² The complaint must also be signed by the complainant; however, the DOH may investigate an anonymous complaint or a complaint by a confidential informant if the alleged violation of law or rule is substantial and the DOH has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true (s. 456.073(1), F.S.).

occurred.³³ Such an investigation may result in an administrative case against the health care practitioner's license.³⁴

The DOH not only conducts investigations of and prosecutes violations of regulatory laws and rules; it also has a duty to notify the proper prosecuting authority when there is a criminal violation of any statute related to the practice of a profession regulated by the DOH.³⁵

Personal Identification and Location Information of DOH Employees

Currently, the personal identification and location information of current or former personnel of the Department of Health (DOH) whose duties include the investigation or prosecution of complaints filed against health care practitioners or the inspection of practitioners or facilities licensed by the DOH, and that of such DOH personnel's spouses and children, is not exempt from public records requirements.

III. Effect of Proposed Changes:

The bill expands the current public records exemptions for identification and location information of certain public employees to include DOH personnel whose duties include the investigation or prosecution of complaints filed against health care practitioners or the inspection of practitioners or facilities licensed by the DOH, and their spouses and children.³⁶ The bill makes the following information exempt from public records requirements:

- The home addresses, telephone numbers, and photographs of such DOH personnel.
- The names, home addresses, telephone numbers, and places of employment of the spouses and children of such DOH personnel.
- The names and locations of schools and day care facilities attended by the children of such DOH personnel.

The bill provides that the exemption may be maintained only if such DOH personnel have made reasonable efforts to protect such information from being accessible through other means available to the public.

The exemption is subject to an existing general requirement that if exempt information is held by an agency that is not the employer of the protected agency personnel, then the protected agency personnel must submit to that agency a written request to maintain the public records exemption.

³³ Section 456.073(1), F.S. A complaint is legally sufficient if it contains ultimate facts that show a violation of ch. 456, F.S., of any of the practice acts relating to the professions regulated by the DOH, or of any rule adopted by the DOH or one of its regulatory boards has occurred (*id.*).

³⁴ See s. 456.073, F.S. Upon completion of an investigation, the DOH must submit a report to the probable cause panel of the appropriate regulatory board (s. 456.073(2), F.S.). If the probable cause panel finds that probable cause exists, it must direct the DOH to file a formal administrative complaint against the licensee; if the DOH declines to prosecute the complaint because it finds that probable cause has been improvidently found by the panel, the regulatory board may still pursue and prosecute an administrative complaint (s. 456.073(4), F.S.).

³⁵ Section 456.066, F.S.

³⁶ According to the DOH bill analysis, the personal identifying information of approximately 240 current or former DOH personnel and that of their families would be exempt; such personnel includes investigators, inspectors, doctors, nurses, attorneys, and other employees whose duties include the investigation or prosecution of complaints against health care practitioners or the inspection of licensed practitioners or facilities (the DOH bill analysis, dated November 26, 2012, is on file with the Senate Governmental Oversight and Accountability Committee).

The bill provides for repeal of the exemption pursuant to the Open Government Sunset Review Act on October 2, 2018, unless reviewed and reenacted by the Legislature.

The bill provides a public necessity statement as required by the Florida Constitution.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly-created or expanded public records or public meetings exemption. This bill creates a new public records exemption; therefore, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill could create a minimal fiscal impact on agencies, because staff responsible for complying with public records requests could require training related to the new public records exemption and because agencies could incur additional administrative costs to

comply with the new public records exemption. The costs would be absorbed, however, as they are part of the day-to-day responsibilities of agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Incidents Involving DOH Inspectors and Investigators

DOH inspectors and investigators have reported incidents of threats and abuse.³⁷ According to the DOH, from November 2011 through mid-2012, a complainant who was displeased with psychiatric treatment provided to a relative subsequent to a Baker Act harassed and threatened telephone staff, investigators, and supervisors.³⁸

In another case, a man made a threatening phone call to a DOH attorney who he felt was preventing him from receiving medications. During the phone call, the man told the DOH attorney that she would “pay for it” and that the DOH would find her “dead in a pool of blood.”³⁹

A DOH investigator who went to an investigation subject’s house to serve an order to compel a mental and physical examination was invited into the house by the subject’s husband. The investigator discovered upon entering the house that the husband had drawn his gun.⁴⁰

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on February 21, 2013:

The CS differs from the original bill in that it does not protect the personal identifying information of personnel whose duties *support* the investigation and prosecution of complaints filed against healthcare professionals or the inspection of practitioners and facilities regulated by the DOH.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

³⁷ A summary of the incidents was prepared by DOH staff (on file with the Senate Governmental Oversight and Accountability Committee).

³⁸ See the incident summary referenced in footnote 38.

³⁹ *Id.*

⁴⁰ *Id.*