

**The Florida Senate**  
**COMMITTEE MEETING EXPANDED AGENDA**

**HEALTH REGULATION**  
**Senator Garcia, Chair**  
**Senator Sobel, Vice Chair**

**MEETING DATE:** Tuesday, January 25, 2011

**TIME:** 11:00 a.m.—12:45 p.m.

**PLACE:** Pat Thomas Committee Room, 412 Knott Building

**MEMBERS:** Senator Garcia, Chair; Senator Sobel, Vice Chair; Senators Altman, Bennett, Diaz de la Portilla, Fasano, Gaetz, Gardiner, Jones, Latvala, Norman, and Ring

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	<b>SB 202</b> Fasano (Identical H 165)	Ice Skating Rinks; Requires the Department of Health to include in its environmental health program the testing of the air in enclosed ice skating rinks. Authorizes the department to adopt rules relating to air quality standards, monitoring, testing, recordkeeping, the maintenance and operation of equipment that affects air quality, assessment of fees, enforcement, and penalties, etc.	
		HR 01/25/2011 BI BC	
2	<b>SB 312</b> Richter (Link S 314)	Practice of Dentistry; Requires persons who apply for licensure renewal as a dentist or dental hygienist to furnish certain information to the Department of Health in a dental workforce survey. Requires the department to serve as the coordinating body for the purpose of collecting, disseminating, and updating dental workforce data. Requires the department to maintain a database regarding the state's dental workforce. Authorizes certain business entities to pay for prescription drugs obtained by practitioners licensed under ch. 466, F.S., etc.	
		HR 01/25/2011 GO BC	
3	<b>SB 314</b> Richter (Link S 312)	Public Records/Dental Workforce Surveys; Provides an exemption from public records requirements for information contained in dental workforce surveys submitted by dentists or dental hygienists to the Department of Health as a condition for license renewal. Provides exceptions to the exemption. Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act. Provides a statement of public necessity.	
		HR 01/25/2011 GO BC RC	

**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.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SB 202

INTRODUCER: Senator Fasano

SUBJECT: Ice Skating Rinks

DATE: January 24, 2011

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. O'Callaghan	Stovall	HR	<b>Pre-meeting</b>
2. _____	_____	BI	_____
3. _____	_____	BC	_____
4. _____	_____	_____	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

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**I. Summary:**

This bill requires the Department of Health (DOH) to include in its environmental health program a function related to air quality in enclosed ice skating rinks.

The bill authorizes the DOH to adopt rules that include:

- Definitions;
- Air quality standards and requirements for monitoring, testing, and recordkeeping;
- Maintenance and operation requirements for equipment that affects air quality;
- Requirements for ventilation of the ice skating facility;
- The required response activities if an operator violates air quality standards;
- The assessment of fees, which may not exceed administrative costs; and
- Requirements for enforcement, citations, and administrative penalties.

The bill also authorizes the DOH to enter and inspect an enclosed ice skating rink at reasonable hours and assess an administrative fine up to \$500 for each violation of any applicable statutes or rules.

This bill substantially amends the following sections of the Florida Statutes: 381.006 and 381.0061.

## II. Present Situation:

### Indoor Air Quality in Ice Skating Arenas

Enclosed recreational facilities, such as ice skating arenas, may be affecting the public's health due to poor indoor air quality. Poor indoor air quality of ice skating arenas is usually due to poor ventilation and the use of fuel-burning equipment, such as ice resurfacing equipment. Fuel-powered ice resurfacing equipment emits harmful gases or particles, known as combustion pollutants, into the air. The specific combustion pollutants of concern for ice skating arenas are nitrogen dioxide, carbon monoxide, and particulate matter.<sup>1</sup> In addition, hydrocarbons and carbon dioxide have harmful environmental effects.

#### *Oxides of Nitrogen*

Oxides of nitrogen or "nitrogen oxides" (NO<sub>x</sub>) is the term used to describe the sum of nitric oxide (NO), nitrogen dioxide (NO<sub>2</sub>), and other oxides of nitrogen. Most airborne nitrogen oxides come from combustion-related emissions sources of human origin, primarily fossil fuel combustion in electrical utilities, high-temperature operations at other industrial sources, and the operation of motor vehicles. However, natural sources, like biological decay processes and lightning, also contribute to airborne nitrogen oxide. Fuel-burning appliances, like home heaters and gas stoves, produce substantial amounts of nitrogen oxides in indoor settings.<sup>2</sup>

Nitrogen dioxide is a toxic gas that is a highly reactive oxidant and corrosive. Nitrogen dioxide acts mainly as an irritant affecting the eyes, nose, throat, and respiratory tract. It may also cause shortness of breath. Those with asthma, chronic obstructive pulmonary disease, and young children may in particular feel the harmful effects of nitrogen dioxide. Continued exposure to high nitrogen dioxide levels can contribute to the development of acute or chronic bronchitis, while exposure to extremely high levels can lead to pulmonary edema, which is a potentially life-threatening lung condition.<sup>3</sup>

#### *Carbon Monoxide*

Carbon monoxide (CO) is an odorless, colorless, and poisonous gas. Low levels can cause shortness of breath, mild nausea, and mild headaches. Even low levels of carbon monoxide can have long-term effects on a person's health. A person exposed to moderate levels of carbon monoxide may get severe headaches, become dizzy, mentally confused, nauseated, or faint. At high levels, carbon monoxide can cause a loss of consciousness or death. Fetuses, children, elderly people, and people with heart disease are especially susceptible to carbon monoxide poisoning.<sup>4</sup>

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<sup>1</sup> U.S. Environmental Protection Agency, *Indoor Air Quality and Ice Arenas*, available at <http://www.epa.gov/iaq/icearenas.html> (Last visited on January 19, 2010).

<sup>2</sup> U.S. Environmental Protection Agency, *Nitrogen Oxides Emissions*, available at <http://cfpub.epa.gov/eroe/index.cfm?fuseaction=detail.viewInd&lv=list.listByAlpha&r=219685&subtop=341> (Last visited on January 19, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Supra* fn. 1.

### *Particulate Matter*

Particulate matter (PM), also known as particle pollution, is a complex mixture of extremely small particles and liquid droplets, including acids, organic chemicals, metals, and soil or dust particles. Because these particles are so small, they can be inhaled and then affect the heart and lungs and can cause serious health effects. The U.S. Environmental Protection Agency (EPA) groups particle pollution into two categories: “inhalable coarse particles,” such as those found near roadways and dusty industries, which are larger than 2.5 micrometers and smaller than 10 micrometers in diameter; and “fine particles,” such as those found in smoke and haze, which are 2.5 micrometers in diameter and smaller. Fine particles can be directly emitted from sources such as forest fires or they can form when gases emitted from power plants, industries, and automobiles react in the air.<sup>5</sup>

### *Hydrocarbons*

Hydrocarbons (HC) are serious air pollutants that are a key component of smog. Hydrocarbon emissions result from incomplete fuel combustion and from fuel evaporation. Smog, and its hydrocarbon components, can cause health problems such as difficulty breathing, lung damage, and reduced cardiovascular functioning. A number of hydrocarbons are also considered toxic, meaning they can cause cancer or other health problems.<sup>6</sup>

### *Carbon Dioxide*

Carbon dioxide (CO<sub>2</sub>) is emitted naturally through the carbon cycle<sup>7</sup> and through human activities like the burning of fossil fuels. Natural sources of carbon dioxide occur within the carbon cycle where billions of tons of atmospheric carbon dioxide are removed from the atmosphere by oceans and growing plants, also known as “sinks,” and are emitted back into the atmosphere annually through natural processes, also known as “sources.” When in balance, the total carbon dioxide emissions and removals from the entire carbon cycle are roughly equal. However, since the Industrial Revolution in the 1700’s, human activities, such as the burning of oil, coal, and gas, and deforestation, have increased carbon dioxide concentrations in the atmosphere, which in turn has exacerbated the greenhouse effect.<sup>8</sup>

## **U.S. Environmental Protection Agency Guidelines and Emission Standards**

The EPA has published guidelines for ice skating arena owners to follow to protect the indoor air quality of their facilities. These guidelines suggest ice skating arena owners:

- Educate workers on their role in protecting occupants, including children, and about indoor air quality.
- Establish procedures for responding to indoor air complaints and emergencies.

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<sup>5</sup> U.S. Environmental Protection Agency, *Particulate Matter*, available at <http://www.epa.gov/pm/> (Last visited on January 19, 2010).

<sup>6</sup> U.S. Environmental Protection Agency, *Hydrocarbons*, available at <http://www.epa.gov/oms/inventory/overview/pollutants/hydrocarbons.htm> (Last visited on January 19, 2011).

<sup>7</sup> A depiction of the carbon cycle is available at <http://www.windows2universe.org/earth/Life/biogeochem.html> (Last visited on January 19, 2011) and provided by the National Earth Science Teachers’ Association.

<sup>8</sup> U.S. Environmental Protection Agency, *Carbon Dioxide*, available at <http://www.epa.gov/climatechange/emissions/co2.html>. See also U.S. Environmental Protection Agency, *Global Greenhouse Gas Data*, available at <http://www.epa.gov/climatechange/emissions/globalghg.html> (Last visited on January 19, 2011).

- Provide continuous ventilation whenever the rink is occupied because the exhaust of contaminants and a supply of fresh outdoor air are necessary to maintain good air quality in ice arenas.
- Provide adequate mechanical ventilation to exhaust contaminated air from combustion sources to the outdoors (and away from occupants), to provide fresh outdoor air to occupied areas, and at a minimum use ventilation requirements for sports arenas as described in the American Society of Heating, Refrigeration and Air-conditioning Engineers' (ASHRAE) Ventilation for Acceptable Indoor Air Quality, Standard 62.1-2007, or the most recent edition.
- Equipping the facility with two ventilation units, one for the rink area and one for public areas, as recommended by the International Ice Hockey Federation.
- Ensure that the fresh air intake is not located near the exhaust from loading areas and outside vehicles, and that the intake is not blocked.
- Consider replacing older equipment that does not meet current EPA emissions standards with newer compliant equipment, or consider an upgrade of current equipment to use the most efficient burning fuel type available and pollution control devices.
- Warm up resurfacing equipment in a well-ventilated room or a room equipped with a local exhaust.
- Use ice edgers only when the ventilation system can adequately exhaust the emissions and keep arena gates open during resurfacing to allow for better air circulation.
- At a minimum, establish a system of monitoring air quality (e.g. taking concentration measurements in the arena and on the ice) especially to detect major combustion pollutants during and shortly after the use of any fuel-fired equipment.
- Have all combustion equipment such as resurfacers, edgers, forklifts, water pumps and auxiliary generators regularly maintained by a qualified technician.<sup>9</sup>

The EPA, however, does not provide any specified standards for the indoor air quality, or provide the maximum amount of levels of certain gases, vapors, or particles that is acceptable, in enclosed ice skating arenas before human health is compromised.<sup>10</sup>

In September 2002, the EPA announced new emission standards<sup>11</sup> for new “nonroad” engines, including ice resurfacing equipment, in order to reduce ambient concentrations of ozone, carbon monoxide, and fine particulate matter; reduce personal exposure for people who operate, work with, or are otherwise close to these engines and vehicles; and improve visibility in national

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<sup>9</sup> *Supra* fn 1.

<sup>10</sup> Phone interview with a representative of the U.S. Environmental Protection Agency by professional committee staff on January 21, 2011.

<sup>11</sup> The new emission standards were required under the federal Clean Air Act, 42 U.S.C. ss. 7401 et seq.

parks.<sup>12</sup> However, these emission standards only apply to new engines manufactured after January 1, 2004.<sup>13</sup>

### **U.S. Department of Labor, Occupational Safety & Health Administration**

The Occupational Safety & Health Administration (OSHA) of the U.S. Department of Labor provides some health protections to those who may be employed by the owner of an ice skating arena and working within the facility. OSHA's role and mission under the Occupational Safety and Health Act of 1970 (Act)<sup>14</sup> is to assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; and by providing for research, information, education, and training in the field of occupational safety and health.<sup>15</sup>

OSHA and its state partners<sup>16</sup> have approximately 2,100 inspectors, plus complaint discrimination investigators, engineers, physicians, educators, standards writers, and other technical and support personnel spread over more than 200 offices throughout the country. Its staff establishes protective standards, enforces those standards, and reaches out to employers and employees through technical assistance and consultation programs.<sup>17</sup> Nearly every working man and woman in the nation comes under OSHA's jurisdiction, with some exceptions such as miners, transportation workers, many public employees, and the self-employed.<sup>18</sup>

OSHA lists a set of limits for the amount of air contaminants that an employee may be exposed to during an 8 hour period.<sup>19</sup> According to this list, exposure is limited to 50 parts per million (ppm) for carbon monoxide, 5,000 ppm for carbon dioxide, 5 ppm for nitrogen dioxide, and 15 milligram per cubic meter (mg/m<sup>3</sup>) for dust particulates.<sup>20</sup>

OSHA may penalize those employers that do not meet OSHA's standards according to the following types of violations:

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<sup>12</sup> U.S. Environmental Protection Agency Office of Transportation and Air Quality, *Regulatory Announcement: Emission Standards for New Nonroad Engines*, September 2002, available at <http://www.epa.gov/otaq/regs/nonroad/2002/f02037.pdf> (Last visited on January 19, 2011). See 40 C.F.R. 1048, available at [http://law.justia.com/us/cfr/title40/40cfr1048\\_main\\_02.html](http://law.justia.com/us/cfr/title40/40cfr1048_main_02.html), for the federal law concerning the Control of Emissions From New, Large Nonroad Spark-Ignition Engines (Last visited on January 19, 2011).

<sup>13</sup> U.S. Environmental Protection Agency Office of Transportation and Air Quality, *Regulatory Announcement: Frequently Asked Questions from Facility Managers and Other Owners of Industrial Spark-ignition Engines*, September 2002, available at <http://www.epa.gov/otaq/regs/nonroad/2002/f02041.pdf> (Last visited on January 19, 2011).

<sup>14</sup> 29 U.S.C. s. 651 et seq.

<sup>15</sup> U.S. Department of Labor Occupational Safety & Health Administration, *OSHA's Role*, available at <http://www.osha.gov/oshinfo/mission.html> (Last visited on January 20, 2011).

<sup>16</sup> A list of OSHA's 26 state partners is available at <http://www.osha.gov/dcs/osp/index.html> (Last visited on January 20, 2011). Florida is not listed as a state partner, meaning that Florida has not adopted OSHA's State Occupational Safety and Health Plan.

<sup>17</sup> *Supra* fn. 15.

<sup>18</sup> *Id.*

<sup>19</sup> See 29 C.F.R. 1910 subpart Z.

<sup>20</sup> *Id.* No exposure limit was listed for hydrocarbons.

- **Other Than Serious Violation** - A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm may be subject to a penalty of up to \$7,000 for each violation.
- **Serious Violation** - A violation where there is a substantial probability that death or serious physical harm could result and that the employer knew, or should have known, of the hazard must be penalized up to \$7,000 for each violation.
- **Willful Violation** - A violation that the employer knowingly commits or commits with plain indifference to the law, meaning the employer either knows that what he or she is doing constitutes a violation, or is aware that a hazardous condition existed and made no reasonable effort to eliminate it, may be subject to penalties of up to \$70,000 for each willful violation, with a minimum penalty of \$5,000 for each violation. If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both. A fine of up to \$250,000 for an individual, or \$500,000 for a corporation, may be imposed for a criminal conviction.
- **Repeated Violation** - A violation of any standard, regulation, rule, or order where, upon reinspection, a substantially similar violation occurs can bring a fine of up to \$70,000 for each such violation.
- **Failure to Abate Prior Violation** - Failure to abate a prior violation may bring a civil penalty of up to \$7,000 for each day the violation continues beyond the prescribed abatement date.
- **De Minimis Violation** - De minimis violations are violations of standards which have no direct or immediate relationship to safety or health and may be documented in the same way as any other violation, but are not included on a citation.<sup>21</sup>

### **Florida Department of Health Regulation of Indoor Air Quality**

Under s. 381.006, F.S., the DOH is required to conduct an environmental health program (Program) as part of fulfilling the state's public health mission. The purpose of the Program is to detect and prevent disease caused by natural and manmade factors in the environment. One of the DOH's functions under the Program is an environmental health surveillance function, which requires the DOH to collect, compile, and correlate information on public health and exposure to hazardous substances through sampling and testing of water, air, or foods. As a part of this function the DOH is to include in its surveillance an indoor air quality testing and monitoring program to assess health risks from exposure to chemical, physical, and biological agents in the indoor environment.<sup>22</sup> Currently, if a health risk is discovered after air testing, there is no authority for the DOH to impose an administrative penalty under s. 381.006 or s. 381.0061, F.S., on the entity or person creating the health risk.

In addition to its environmental health program, the DOH has the duty under s. 381.0011, F.S., to provide for a thorough investigation and study of the incidence, causes, modes of propagation and transmission, and means of prevention, control, and cure of diseases, illnesses, and hazards to human health, including harmful indoor air pollution.

<sup>21</sup> U.S. Department of Labor Occupational Safety & Health Administration, *OSH Act, OSHA Standards, Inspections, Citations and Penalties*, available at <http://www.osha.gov/doc/outreachtraining/htmlfiles/introsha.html> (Last visited on January 20, 2011).

<sup>22</sup> Section 381.006(2), F.S.

### Regulation of Indoor Air Quality of Ice Skating Arenas in Other States

Currently, three states (Massachusetts, Minnesota, and Rhode Island) have laws to regulate the indoor air quality in ice skating arenas.<sup>23</sup> Massachusetts and Rhode Island require ice skating arena owners to obtain certification before operating an arena that uses ice resurfacing equipment. Minnesota gives broad discretion to the state's commissioner of health to adopt rules relating to indoor air quality in the operation and maintenance of enclosed sports arenas. Massachusetts' law focuses strictly on carbon monoxide and nitrogen dioxide levels in indoor ice skating arenas and provides for the following:<sup>24</sup>

- Air levels exceeding 30 ppm for carbon monoxide and 0.5 ppm for nitrogen dioxide require the arena operator to take certain remedial measures to reduce those air concentrations.
- Air levels exceeding 60 ppm in a single air sample or exceeding 30 ppm in six consecutive air samples for carbon monoxide and air levels exceeding 1 ppm in a single air sample or 0.5 ppm for six consecutive samples for nitrogen dioxide require the arena operator to notify state and local officials.
- Air levels exceeding 125 ppm for carbon monoxide and 2 ppm for nitrogen dioxide require the arena operator to immediately evacuate the indoor skating arena.<sup>25</sup>

Some states like Pennsylvania and Connecticut have, through their respective state health departments, published guidelines for maintaining proper indoor air quality in ice skating arenas.<sup>26</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 381.006, F.S., to include in the DOH's program a function related to air quality inside enclosed ice skating rinks. This function serves to protect the health and safety of visitors and employees of the enclosed ice skating rink from dangers associated with oxides of nitrogen (NO<sub>x</sub>), hydrocarbons (HC), carbon monoxide (CO), carbon dioxide (CO<sub>2</sub>), and other harmful gasses, vapors, or particles as identified by the DOH.

The DOH is authorized, but not required, to adopt rules that include:

- Definitions;
- Air quality standards and requirements for monitoring, testing, and recordkeeping;
- Maintenance and operation requirements for equipment that affects air quality;<sup>27</sup>
- Requirements for ventilation of the ice skating facility;
- The required response activities if an operator violates air quality standards;

<sup>23</sup> 105 CMR 675.000 (Massachusetts), s. 144.1222, Minn. Stat. (Minnesota), and s. 23-23.6, R.I. Code (Rhode Island).

<sup>24</sup> 105 CMR 675.004.

<sup>25</sup> 105 CMR 675.008.

<sup>26</sup> See Pennsylvania Department of Health, *Guidelines on Ice Skating Rink Resurfacing Machine and Indoor Air Quality Issues*, available at

[http://www.portal.state.pa.us/portal/server.pt/community/environmental\\_health/14143/guidelines\\_on\\_ice\\_skating\\_rink\\_resurfacing\\_machine\\_and\\_indoor\\_air\\_quality\\_issues/557074](http://www.portal.state.pa.us/portal/server.pt/community/environmental_health/14143/guidelines_on_ice_skating_rink_resurfacing_machine_and_indoor_air_quality_issues/557074) (Last visited on January 21, 2011) and Connecticut Department of Public Health, *Guidance on Maintaining Indoor Air Quality in Indoor Ice Rinks for Managers, Owners and Coaches*, available at [http://www.ct.gov/dph/lib/dph/environmental\\_health/eoha/pdf/ice\\_rink\\_guidance\\_.pdf](http://www.ct.gov/dph/lib/dph/environmental_health/eoha/pdf/ice_rink_guidance_.pdf) (Last visited on January 21, 2011).

<sup>27</sup> Equipment that may affect air quality may include ventilation systems and fuel-powered ice resurfacing equipment, ice edgers, water heaters, and space heaters.



- The assessment of fees, which may not exceed administrative costs; and
- Requirements for enforcement, citations, and administrative penalties.

To carry out its function under the Program and to determine compliance with applicable statutes or rules, the DOH is authorized to enter and inspect an enclosed ice skating rink at reasonable hours.

**Section 2** amends s. 381.0061, F.S., to authorize the DOH to impose an administrative fine for any violation of the rules adopted by DOH to carry out its function under the Program related to air quality inside enclosed ice skating rinks. The administrative fine is not to exceed \$500 per violation and each day that a violation continues may constitute a separate violation.

**Section 3** provides an effective date of July 1, 2011.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of the bill have no impact on public records or open meetings issues under the requirements of article I, section 24(a) and (b), of the Florida Constitution.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

##### **D. Other Constitutional Issues:**

The bill, should it become law, may be challenged as unconstitutional under the State Constitution's separation of powers clause, because it may be determined that the Legislature gives the DOH excessive discretion, and insufficient parameters, in the rulemaking authority provided for in the bill.<sup>28</sup> The separation of powers clause states,

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Florida Supreme Court has held that the separation of powers clause encompasses two fundamental prohibitions. First, no branch of government may encroach on another

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<sup>28</sup> FLA. CONST. art. 2, s. 3.

branch's power. Second, no branch may delegate its constitutionally assigned powers to another branch, which is also known as the nondelegation doctrine.<sup>29</sup> Under the nondelegation doctrine, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.<sup>30</sup> Further, the Legislature is precluded from delegating its powers absent ascertainable minimal standards and guidelines.<sup>31</sup>

More specific parameters in the bill for the DOH to follow in its rulemaking procedures may help prevent such a challenge.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

There are at least 18 public ice skating facilities and 3 sports arenas in Florida that may be impacted by this bill, should it become law.<sup>32</sup> The owners of these facilities may incur costs associated with administrative fees for inspections; upkeep, maintenance, and potentially the purchase of new equipment to meet the DOH's standards; staffing to meet air testing and recordkeeping requirements; and administrative fines for any violations of the law.

### **C. Government Sector Impact:**

Although the bill does not require an annual inspection, the DOH estimates that the annual average cost per ice skating facility for routine inspections should not exceed \$250, and such cost per facility would cover the cost of an Environmental Specialist's salary to perform the inspections, the purchase and maintenance of equipment to perform the inspections, overhead, recordkeeping, and training. The DOH also estimated that they would need 1/12th of an FTE in total personnel time for rule development and promulgation, which would equate to \$4,910 and that such cost could be absorbed by the DOH.<sup>33</sup>

## **VI. Technical Deficiencies:**

None.

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<sup>29</sup> *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 769 (Fla. 2005).

<sup>30</sup> *Sloban v. Fla. Board of Pharmacy*, 982 So. 2d 26, 30 (Fla. 1st DCA 2008) (citing *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000)).

<sup>31</sup> *Sloban*, 982 So. 2d at 30 (citing *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So. 2d 359, 361 (Fla. 1st DCA 1985)).

<sup>32</sup> A list of the 18 ice skating facilities and 3 sports arenas is on file with the Senate Health Regulation Committee. It is important to note that seasonal ice skating facilities may also be impacted by this legislation.

<sup>33</sup> DOH Bill Analysis, Economic Statement and Fiscal Note for SB 202, dated December 23, 2010. A copy of this analysis is on file with the Senate Health Regulation Committee.

**VII. Related Issues:**

Because the bill uses the term “may” on line 37, the DOS’s rulemaking authority in the bill is discretionary. In addition, the bill does not provide specific parameters, such as the acceptable levels of air contaminants or the types of remedial measures that are expected of arena owners if poor indoor air quality is discovered by the DOH. Instead, the bill provides broad rulemaking authority to the DOH. This grant of broad discretion to the DOH may result in the bill, if enacted, being challenged as unconstitutional under the Florida Constitution’s separation of powers clause.<sup>34</sup>

Lines 42 through 43 of the bill give the DOH the authority to adopt rules to assess fees, which may not exceed the actual costs of administration. It is not clear whether the fees collected for the cost of “administration” would include the cost of inspections. If not, the DOH may need additional and specific rulemaking authority to collect inspection fees to cover the cost of inspections.

**VIII. Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

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

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<sup>34</sup> See *supra* fn. 27.

**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.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SB 312

INTRODUCER: Senator Richter

SUBJECT: Practice of Dentistry

DATE: January 24, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	<b>Pre-meeting</b>
2.			GO	
3.			BC	
4.				
5.				
6.				

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**I. Summary:**

The bill requires all Florida licensed dentists and dental hygienists to complete a workforce survey as a part of their licensure renewal, beginning in 2012. The bill provides certain information that is to be collected by the Department of Health (DOH) pursuant to a survey instrument adopted by the Board of Dentistry (Board). The Board is required to issue a nondisciplinary citation to any dentist or dental hygienist who fails to complete the survey within 90 days after the renewal of his or her license to practice as a dentist or dental hygienist. This citation must inform, and the Board must notify, the dentist or dental hygienist that his or her license will not be renewed for any subsequent license renewal unless he or she completes the survey.

The DOH is required to collect, update, and disseminate dental workforce data and maintain a database to serve as a statewide source of such data. The DOH, in conjunction with the Board, is required to develop strategies to maximize federal and state programs that provide incentives for dentists to practice in federally-designated shortage areas. The DOH and Board must use existing resources to support these activities.

The bill establishes an advisory body to assist the DOH and the Board in addressing matters relating to the state's dental workforce.

The bill also authorizes a professional corporation or limited liability company composed of dentists to pay for prescription drugs purchased by a dentist and designates the dentist as the purchaser and owner of the prescription drugs.

The bill corrects a technical problem in the statutes relating to the appointment of a dental representative to the Board of Directors of the Florida Healthy Kids Corporation, which resulted from the passage of two bills in the 2009 Regular Session dealing with the board membership.

This bill amends the following sections of the Florida Statutes: 499.01 and 624.91.

The bill creates three undesignated sections of law.

## **II. Present Situation:**

Dentists and dental hygienists are licensed and regulated by the DOH under ch. 466, F.S., related to dentistry, dental hygiene, and dental laboratories, and ch. 456, F.S., related to general provisions for health professionals and occupations. Licenses for both professions are renewed biennially.<sup>1</sup> Section 466.0285, F.S., requires a business entity that employs a dentist or dental hygienist in the operation of a dental office to be a professional corporation or limited liability company composed of dentists.

### **Dental Workforce Initiatives**

According to the Institute of Medicine's U.S. Oral Health Workforce in the Coming Decade: Workshop Summary, "The current oral health workforce fails to meet the needs of many segments of the U.S. population."<sup>2</sup> The inability of the dental workforce to provide assistance and basic oral health care to all people in Florida contributes to the number of individuals experiencing poor general health. Dental workforce planning is an essential component of ensuring that there is an adequate and appropriate supply of well-trained health care providers to meet the state of Florida's current and future dental health care service needs.<sup>3</sup>

In the last few years, the DOH has actively addressed dental workforce issues. In January of 2008, the State Surgeon General established the Florida Health Practitioner Oral Healthcare Workforce Ad Hoc Committee (Ad Hoc Committee). The mission of the Ad Hoc Committee was to evaluate and address the complex range of oral health workforce concerns that impact Florida's ability to recruit or retain available practicing dental providers (dentists, dental hygienists, and dental assistants), especially for Florida's disadvantaged and underserved populations. The Ad Hoc Committee published the Health Practitioner Oral Healthcare Workforce Ad Hoc Committee Report in February 2009, which provided recommendations on dental workforce and access to oral health care.<sup>4</sup>

The DOH received a \$200,000 federal grant in 2008 to develop a statewide needs assessment and a strategic planning report to be used to improve the state's dental workforce and service

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<sup>1</sup> Section 466.013(2), F.S.

<sup>2</sup> The workshop summary is available at <http://www.iom.edu/Reports/2009/OralHealthWorkforce.aspx> (Last visited on January 14, 2011).

<sup>3</sup> See DOH, *The Florida Oral Health Workforce Workgroup Report 2009*, December 2009, available at: <http://www.doh.state.fl.us/Family/dental/OralHealthcareWorkforce/index.html> (Last visited on January 14, 2011).

<sup>4</sup> The Ad Hoc Committee Report is available at [http://www.doh.state.fl.us/Family/dental/OralHealthcareWorkforce/200903Dental\\_Workforce\\_Report.pdf](http://www.doh.state.fl.us/Family/dental/OralHealthcareWorkforce/200903Dental_Workforce_Report.pdf) (Last visited on January 14, 2011).

delivery infrastructure for the underserved.<sup>5</sup> This grant helped support an Oral Health Workforce Workgroup (the Workgroup) to continue the work of the Ad Hoc Committee and a contract for a statewide needs assessment. The two main objectives of the needs assessment were to conduct a statewide analysis of Florida's oral health workforce relative to traditionally underserved populations and to evaluate access to dental care among low-income children, including children with special health care needs, children in the Medicaid and SCHIP programs and to identify the child and family characteristics that are associated with better access.<sup>6</sup>

Building on the efforts of previous activities, the Workgroup outlined implementation steps that address Florida's oral health workforce needs. The workgroup proposed eight goals, with specific recommendations to support each goal. These goals include:

- Increase education and preventive efforts;
- Improve data collection;
- Increase provider participation in the Medicaid program;
- Increase utilization of allied dental staff;
- Integrate oral health education and prevention into general health and medical programs;
- Increase training opportunities for providers;
- Improve the state oral health infrastructure; and
- Increase efforts to recruit practitioners to provide care to disadvantaged populations.<sup>7</sup>

The DOH has recently completed a voluntary workforce survey for all Florida licensed dentists and dental hygienists and the DOH is currently analyzing the collected data.<sup>8</sup> The compliance rate of those voluntarily completing the survey was about 90 percent.<sup>9</sup>

The DOH received an additional federal grant in September 2009, to further implement workforce strategies. A third oral health workgroup is operating as part of the Oral Health Florida Coalition.<sup>10</sup>

### **Physician Workforce Assessment and Development**

In 2007, the Florida Legislature established a structure to facilitate physician workforce assessment and planning in s. 381.4018, F.S. The legislative intent and responsibilities focused on, among other things, the need to ensure that there is an adequate and appropriate supply of well-trained physicians to meet this state's future health care service needs by ensuring the availability and capacity of quality graduate medical schools and students who are well-prepared for a medical education in this state.<sup>11</sup>

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<sup>5</sup> *Supra* fn. 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Professional committee staff received this information via email from a DOH representative on January 18, 2011. A copy of the email is on file with the Health Regulation Committee.

<sup>9</sup> Per Memoranda to the Senate Health Regulation Committee Staff from the Florida Dental Association dated March 3, 2010, on file with the committee.

<sup>10</sup> DOH Bill Analysis, Economic Statement and Fiscal Note for SB 312, dated December 29, 2010, on file in the Senate Health Regulation Committee.

<sup>11</sup> Section 381.4018(2), F.S.

### **Florida Health Services Corps**

The Florida Health Services Corp (Corps) is established in s. 381.0302, F.S., to encourage qualified medical professionals to practice in underserved locations where there are shortages of such personnel. The program offers scholarships, loan repayment assistance, and financial assistance for relocation to allopathic, osteopathic, chiropractic, podiatric, dental, physician assistant, and nursing students in return for service in a public health care program or in a medically underserved area. In addition, members of the Corps are agents of the state under s. 768.28(9), F.S., related to sovereign immunity and the waiver of sovereign immunity, while providing uncompensated services to medically indigent persons who are referred by the DOH.<sup>12</sup>

### **Advisory Bodies**

Section 20.03, F.S., defines “council” or “advisory council” to mean an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.

Section 20.052, F.S., provides that an advisory body created by specific statutory enactment as an adjunct to an executive agency must be established, evaluated, or maintained in accordance with the following provisions:

- It may be created only when it is found to be necessary and beneficial to the furtherance of a public purpose;
- It must be terminated by the Legislature when it is no longer necessary and beneficial to the furtherance of a public purpose;
- The Legislature and the public must be kept informed of the numbers, purposes, memberships, activities, and expenses of the advisory body;
- It may not be created or reestablished unless it meets a statutorily defined purpose; its powers and responsibilities conform with the definitions for governmental units in s. 20.03; F.S., its members, unless expressly provided otherwise in the State Constitution, are appointed for 4-year staggered terms; and its members, unless expressly provided otherwise by specific statutory enactment, serve without additional compensation or honorarium, and are authorized to receive only per diem and reimbursement for travel expenses as provided in s. 112.061, F.S.; and
- Any private citizen members must be appointed by the Governor, the head of the department, the executive director of the department, or a Cabinet officer.

Further, unless an exemption is otherwise specifically provided by law, all meetings of an advisory body adjunct to an executive agency are public meetings under s. 286.011, F.S. Minutes, including a record of all votes cast, must be maintained for all meetings. Records of an abolished advisory body must be appropriately stored by the executive agency to which it was made adjunct.

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<sup>12</sup> Section 381.0302(11), F.S.

### **Health Care Clinic Establishment Permit**

The Florida Drug and Cosmetic Act (Act) is found in part I of ch. 499, F.S. The DOH<sup>13</sup> is responsible for administering and enforcing efforts to prevent fraud, adulteration, misbranding, or false advertising in the preparation, manufacture, repackaging, or distribution of drugs, devices, and cosmetics.<sup>14</sup> The DOH issues 20 different types of permits to persons (defined to also include business entities) who qualify to engage in activity regulated under the Act.<sup>15</sup> The regulatory structure provides for prescription drugs to be under the responsibility of a permit at all times, until a prescription drug is dispensed to a patient, in which case the prescription from the practitioner represents the authority for the patient to possess the prescription drug.<sup>16</sup>

One of the permits issued by the DOH under the Act is the Health Care Clinic Establishment (HCCE) permit. The biennial fee for the HCCE permit is \$255 and the permit is valid for 2 years, unless suspended or revoked.<sup>17</sup>

The HCCE permit was established in 2008 to enable a business entity (medical practice) to purchase prescription drugs. In 2009, the Legislature broadened the array of business entities eligible to qualify for the HCCE permit.<sup>18</sup> The HCCE permit is an optional permit that a medical practice may obtain in order to purchase and own prescription drugs in the business entity's name. The HCCE permit is not required if a practitioner in the clinic or practice wants to purchase and own prescription drugs in his or her own name using his or her professional license that authorizes that practitioner to prescribe prescription drugs.

Under the requirements of the permit, a qualifying practitioner<sup>19</sup> or a veterinarian licensed under ch. 474, F.S., is designated to be responsible for complying with all legal and regulatory requirements related to the purchase, recordkeeping, storage, and handling of the prescription drugs purchased and possessed by the business entity. Both the qualifying practitioner and the permitted health care clinic must notify the DOH within 10 days after any change in the qualifying practitioner.

### **The Florida Healthy Kids Corporation**

The Florida Healthy Kids Corporation is established in s. 624.91, F.S., to provide comprehensive health insurance coverage to children without adequate health care services. The primary recipients are school-age children with a family income below 200 percent of the federal poverty level<sup>20</sup> who do not qualify for Medicaid.

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<sup>13</sup> However, as of October 1, 2011, all of the DOH's responsibilities under the Act will be transferred to the Department of Business and Professional Regulation. *See* Section 27, ch. 2010-161, Laws of Florida.

<sup>14</sup> Section 499.002(2), F.S.

<sup>15</sup> *See* s. 499.01(1), F.S.

<sup>16</sup> Section 499.03, F.S.

<sup>17</sup> *See* ch. 64F-12.018, F.A.C., Fees.

<sup>18</sup> *See* ch. s. 2, ch. 2009-221, Laws of Florida.

<sup>19</sup> The health care practitioners defined in s. 456.001, F.S., that are authorized to prescribe prescription drugs include a: medical physician, osteopathic physician, physician assistant, advanced registered nurse practitioner, optometrist, podiatric physician, dentist, or chiropractic physician.

<sup>20</sup> For 2010, the federal poverty levels were \$10,830 for one person; \$14,570 for a family of two; \$18,310 for a family of three; and \$22,050 for a family of four. *See* U.S. Department of Health and Human Services, *The 2010 Poverty Guidelines*



The 2009 Legislature enacted two laws amending membership of the Board of Directors for the Florida Healthy Kids Corporation, both by creating a subparagraph 11. Chapter 2009-41, Laws of Florida (L.O.F.) which added one member, appointed by the Governor, from among three members nominated by the Florida Dental Association. Chapter 2009-113, L.O.F., added the Secretary of Children and Family Services, or his or her designee. According to the rules of statutory construction found in the preface to the Florida Statutes, when amendatory acts are irreconcilable, the “last passed” version is placed in the text, absent legislative intent to the contrary. As a result, the dental representative is not included in the statutory list of members of the Board of Directors of the Florida Healthy Kids Corporation.

### **III. Effect of Proposed Changes:**

**Section 1** creates an undesignated section of law to require dentists and dental hygienists to complete a dental workforce survey as a part of their licensure renewal beginning in 2012. The Board is required to adopt procedures and forms for the survey. A dentist or dental hygienist responding to the survey must include a statement that the information provided is true and accurate to the best of his or her knowledge and belief. The bill requires the survey to elicit the following information from the licensee:

- The name of the dental school or dental hygiene program that the dentist or dental hygienist graduated from and the year of graduation;
- The year that the dentist or dental hygienist began practicing or working in this state;
- The geographic location of the dentist’s or dental hygienist’s practice or address within the state;
- For a dentist in private practice:
  - The number of full-time dental hygienists employed by the dentist during the reporting period,
  - The number of full-time dental assistants employed by the dentist during the reporting period,
  - The average number of patients treated per week by the dentist during the reporting period, and
  - The settings where the dental care was delivered;
- Anticipated plans of the dentist to change the status of his or her license or practice;
- The dentist’s areas of specialty or certification;
- The year that the dentist completed a specialty program recognized by the American Dental Association;
- For the hygienist:
  - The average number of patients treated per week by the hygienist during the reporting period, and
  - The settings where the dental care was delivered;
- The dentist’s memberships in professional organizations;
- The number of pro bono hours provided by the dentist or dental hygienist during the last biennium;

- Information concerning the availability and trends relating to critically needed services, including, but not limited to, the following types of care provided by the dentist or dental hygienist:
  - Dental care to children having special needs;
  - Geriatric dental care;
  - Dental services in emergency departments;
  - Medicaid services; and,
  - Other critically needed specialty areas, as determined by the advisory body.

The bill provides that licensure renewal in 2012 is not contingent upon the completion and submission of the dental workforce survey, however the Board may not renew the license of any dentist or dental hygienist for subsequent renewals until the survey is completed and submitted by the licensee. If a dentist or dental hygienist fails to complete the survey within 90 days after the renewal of his or her license to practice as a dentist or dental hygienist, the Board of Dentistry is required to issue a nondisciplinary citation to the dentist or dental hygienist. The nondisciplinary citation must notify the dentist or dental hygienist that his or her license will not be renewed for any subsequent license renewal unless he or she completes the survey.

The Board is also required to notify each dentist or dental hygienist that the survey must be completed before the subsequent license renewal when the license renewal notice is sent to the licensee.

**Section 2** creates an undesignated section of law to require the DOH to serve as the coordinating body for the purpose of collecting and regularly updating and disseminating dental workforce data. The DOH is required to work with stakeholders, including the Florida Dental Association and the Florida Dental Hygiene Association, to assess and share with interested parties all data collected in a timely fashion. The DOH is required to maintain a database of dental workforce data.

The DOH, in conjunction with the Board, is required to develop strategies to maximize federal and state programs that provide incentives for dentists to practice in federally-designated shortage areas. The bill requires strategies to include programs such as the Florida Health Services Corp. In addition, the DOH and the Board are required to act as a clearinghouse for collecting and disseminating information concerning the dental workforce and adopt rules to administer this section.

The bill creates an advisory body of at least 15 members. The required members include the following: the State Surgeon General or his or her designee; the dean of each dental school accredited in the United States and based in this state or his or her designee; a representative from the Florida Dental Association, Florida Dental Hygiene Association, and the Board; and a dentist from each of the dental specialties recognized by the American Dental Association's Commission on Dental Accreditation. The members of the advisory body are to serve without compensation. The DOH and the Board are to work in conjunction with the advisory body to address matters relating to the Florida's dental workforce. The advisory body is also required to provide input on developing questions for the dentist workforce survey.

**Section 3** creates an undesignated section of law requiring the DOH and the Board to implement the provisions of this act within existing resources.

**Section 4** amends s. 499.01, F.S., to authorize a professional corporation or limited liability company composed of dentists to pay for prescription drugs purchased by a dentist, using the dentist's professional license, and designates that dentist as the purchaser and owner of the prescription drugs.

**Section 5** amends s. 624.91, F.S., to add a representative from the Florida Dental Association to the Board of Directors of the Florida Healthy Kids Corporation.

**Section 6** provides an effective date of July 1, 2011.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

Senate Bill 314 is the companion bill, which exempts personal identifying information contained in the dental workforce surveys from the public records requirements under s. 119.07(1), F.S., and article I, subsection 24(a), of the Florida Constitution.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

The bill authorizes a dentist to purchase and pay for prescription drugs without obtaining the health care clinic establishment permit, which allows a dental practice that is a health care clinic establishment to avoid the \$255 biennial fee for the health care clinic establishment permit.

##### **B. Private Sector Impact:**

A dentist or dental hygienist who does not complete the dental workforce survey will not be able to renew his or her dental or dental hygienist license beginning in 2014. If false or misleading information is intentionally provided on the workforce survey, the dentist or

dental hygienist providing such information may be subject to administrative or criminal penalties.<sup>21</sup>

**C. Government Sector Impact:**

The DOH and the Board are required to adopt rules related to the dental workforce survey and convene meetings of the advisory group. Although the bill requires the DOH to implement the bill within existing resources, the DOH has indicated that a .05 full time equivalent (FTE) administrative assistant is required to assist with the activities of the advisory group. If meetings of the advisory group are not handled electronically, then the DOH estimates it will cost approximately \$41,000 annually in related travel expenses to convene the 15 members four times per year.<sup>22</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Lines 112 through 116 of the bill require the DOH to work with multiple stakeholders “to assess and share with all communities of interest all data collected in a timely fashion.” It is unclear whether the intent of this language is to require data to be collected in a timely fashion or whether the intent is to require the DOH to assess and share in a timely fashion the data with all communities.

Line 128 of the bill uses the term “dentist” and it should probably use the term “dental” instead, if the intent is to address both dentists and dental hygienists as does the rest of the bill.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

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

None.

**B. Amendments:**

None.

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

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<sup>21</sup> See ss. 456.072, 837.06, and 456.067, F.S.

<sup>22</sup> *Supra* fn. 10.



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LEGISLATIVE ACTION

Senate

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House

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The Committee on Health Regulation (Bennett) recommended the following:

**Senate Amendment**

Delete lines 115 - 128

and insert:

to assess and share in a timely fashion with all communities of interest all data collected.

(2) The Department of Health shall maintain a current database to serve as a statewide source of data concerning the dental workforce. The department, in conjunction with the board, shall also:

(a) Develop strategies to maximize federal and state programs that provide incentives for dentists to practice in



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13 shortage areas that are federally designated. Strategies shall  
14 include programs such as the Florida Health Services Corps  
15 established under s. 381.0302, Florida Statutes.

16 (b) Work in conjunction with an advisory body to address  
17 matters relating to the state's dental workforce. The advisory  
18 body shall provide input on developing questions for the dental  
19

**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.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SB 314

INTRODUCER: Senator Richter

SUBJECT: Public Records/Dental Workforce Surveys

DATE: January 24, 2011

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. O'Callaghan	Stovall	HR	<b>Pre-meeting</b>
2. _____	_____	GO	_____
3. _____	_____	BC	_____
4. _____	_____	RC	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

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## I. Summary:

The bill makes personal identifying information of a dentist or dental hygienist, who responds to the Department of Health (DOH) dental workforce surveys, confidential and exempt from the public records law and the constitutional provision related to public records. The bill provides a statement of the public necessity for the public records exemption.

Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.<sup>1</sup>

This bill creates three undesignated sections of law.

## II. Present Situation:

### Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>2</sup> One-hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24, of the State Constitution, provides that:

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<sup>1</sup> FLA. CONST. art. I, s. 24(c).

<sup>2</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>3</sup> FLA. CONST. art. I, s. 24.

(a) Every person has 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>4</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>5</sup> Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined 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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> The word "agency" is defined in s. 119.011(2), F.S., 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." The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>6</sup> Section 119.011(12), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>9</sup> *Supra* fn. 1.



accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>13</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>14</sup>

The Open Government Sunset Review Act (Act)<sup>15</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

### Criteria for Exemption

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>16</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>17</sup>

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?

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<sup>10</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> *Supra* fn. 1.

<sup>13</sup> Florida Attorney General Opinion 85-62.

<sup>14</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5<sup>th</sup> DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>15</sup> Section 119.15, F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> *Id.*

- 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>18</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Unauthorized Disclosure**

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that subsection, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

### **Workforce Surveys**

Senate Bill 312 requires all Florida licensed dentists and dental hygienists to complete a workforce survey as a part of their licensure renewal, beginning in 2012. The bill provides that licensure renewal in 2012 is not contingent upon the completion and submission of the dental workforce survey; however, the Board may not renew the license of any dentist or dental hygienist for subsequent renewals until the survey is completed and submitted by the licensee.

Medical physicians and osteopathic physicians are required to respond to physician workforce surveys required as a condition of license renewal.<sup>19</sup> All personal identifying information contained in records provided by physicians in response to these physician workforce surveys are confidential and exempt under s. 458.3193, F.S.

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<sup>18</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

<sup>19</sup> Section 381.4018, F.S.

### III. Effect of Proposed Changes:

**Section 1** creates an undesignated section of law to provide that personal identifying information of a dentist or dental hygienist, who responds to dental workforce surveys that are mandated as a part of licensure renewal by SB 312, is confidential and exempt. The bill authorizes disclosure of such information with the written consent of the individual to whom the information pertains; by court order; or to a research entity, if the entity seeks the records or data pursuant to a research protocol approved by the DOH.

The bill provides that the public records exemption created in this act is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** creates an undesignated section of law providing justification of public necessity for the exemption. The public necessity statement states that responding to the dental workforce survey is a condition of licensure renewal for dentists and dental hygienists licensed in Florida, and that candid and honest responses to the workforce survey will ensure that timely and accurate information is available to the DOH. The failure to maintain the confidentiality of the personal identifying information would prevent the resolution of important state interests to ensure the availability of dentists or dental hygienists in this state.

**Section 3** provides that this public records exemption takes effect on the same date that its linked substantive bill takes effect.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

#### B. Public Records/Open Meetings Issues:

##### **Vote Requirement**

Section 24(c), art. I, of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

##### **Subject Requirement**

Section 24(c), art. I, of the State Constitution requires the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

##### **Public Necessity Statement**

Section 24(c), art. I, of the State Constitution requires a public necessity statement for a newly created public records or public meetings exemption. Because this bill creates a new public records exemption, it includes a public necessity statement.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill will protect personal identifying information of dentists and dental hygienists who respond to the dental workforce survey, which is a requirement of licensure renewal.

**C. Government Sector Impact:**

The DOH and the Board will need to ensure that policies and procedures are in place to prevent the release of the personal identifying information except under the limited situations provided for in the bill.

**VI. Technical Deficiencies:**

The substantive companion bill needs to be identified in line 62 of the bill.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

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

None.

**B. Amendments:**

None.



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LEGISLATIVE ACTION

Senate

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House

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The Committee on Health Regulation (Bennett) recommended the following:

**Senate Amendment**

Delete line 62  
and insert:  
Senate Bill 312 or similar legislation takes effect, if  
such