

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: January 9, 1998 Revised: _____

Subject: Public Records; Employee Assistance Programs

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	Rhea	Wilson	GO	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill creates public records exemptions for sensitive information relating to public employees who participate in employee assistance programs at the state, county, and municipal levels. Although several public records exemptions are created by the bill, each exemption protects the same types of records, i.e., information relating to state, county, and municipal employees who participate in employee assistance programs.

The bill amends section 110.1091, Florida Statutes. The bill creates sections 125.585 and 166.0444, Florida Statutes.

II. Present Situation:

Chapter 110, F.S., relates to state employment and state employees. Section 110.1091, F.S., authorizes a state agency to provide a program to assist an employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects that employee's job performance, through referral for counseling, therapy, or other professional treatment. Each employing state agency may designate community diagnostic and referral resources as necessary to implement the program.

Upon entry into an employee assistance program, any communication between program personnel of the employing agency and any participating employee, relative to that employee's participation in the program, is a confidential communication ". . . as provided by s. 112.313(8), F.S." That section of law prohibits a public officer, employee of an agency, or local government attorney from disclosing or using information that is unavailable to members of the general public and gained by reason of his or her official position ". . . for personal gain or for the personal gain of any other person or business entity."

Additionally, s.110.1091, F.S., provides that all records relative to an employee's participation in an employee assistance program are exempt from public disclosure, "except as provided by s. 112.0455(11)." Since the exemption includes all records relative to an employee's participation in an assistance program, the exemption would appear to include records held by the employing agency as well as records of the service provider. Further, the law provides for an exception to the exemption as set forth in s. 112.0455(11), F.S.

Section 112.0455, F.S., is known as the "Drug-Free Workplace Act." The law provides, in part, with emphasis added:

- (11)(a) Except as otherwise provided in this subsection, all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced as a result of a drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section.
- (b) Employers, laboratories, *employee assistance programs*, drug and alcohol rehabilitation programs, and their agents may not release any information concerning drug test results obtained pursuant to this section without a written consent form signed voluntarily by the person tested, except where such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, or where deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:
 - 1. The name of the person who is authorized to obtain the information,
 - 2. The purpose of the disclosure.
 - 3. The precise information to be disclosed.
 - 4. The duration of the consent.
 - 5. The signature of the person authorizing release of the information.
- (c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section shall be inadmissible as evidence in any such criminal proceeding.

Currently, the law, in s. 627.351(6)(n)1.g., F.S., also affords an exemption to records of the Residential Property and Casualty Joint Underwriting Association pertaining to an employee's participation in an employee assistance program.¹

Chapter 125, F.S., relates to county government, ch. 166, F.S., relates to municipalities. The law does not currently authorize a county or a municipality to operate an employee assistance program. Under the home rule authority granted to local entities by the State Constitution, however, many cities and counties offer employee assistance programs among the other benefits available to their respective employees. Absent a specific exemption protecting the confidentiality of local employee assistance program records, it is not clear that the records are protected from public scrutiny as are similar records of state employees.

¹This provisions states: "Upon an employee's entrance into the employee assistance program, a program to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance, all records relative to that participation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except as otherwise provided in s. 112.0455(11)."

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides for the repeal and prior legislative review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The law states that an exemption may be created or expanded only if the exemption:

- 1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) 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
- 3) 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. (See s. 119.15(4)(b), F.S.)

Under s. 24, Art. I, of the State Constitution, a bill that creates an exemption from a public records law must also contain a statement of public necessity that justifies the exemption. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject. *See s. 24(c), Art. I, Fla. Const.*

III. Effect of Proposed Changes:

The current provisions of s. 110.1091, F.S., regarding state agency employee assistance programs would be amended. The cross-references to ss. 112.313(8) and 112.0455(11), F.S., would be deleted, thus affording confidentiality to state employee assistance program records without referencing the statutes relating to counties and municipalities. The word “state” would be added to references regarding “agency” and “employee,” to clarify that the exemption covers only employee assistance program records of state employees. The bill also provides that routine monitoring of telephone calls by the state agency does not violate the exemption.

Section 125.585, F.S., would be created by the bill to authorize a county to operate an employee assistance program. The term “employee assistance program” would be defined to mean “a program provided by a county to assist any county employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee’s job performance, through referral for counseling, therapy, or other professional treatment.” The bill also would afford confidentiality to a county employee’s records relating to participation in an employee assistance program. The bill also provides that routine monitoring of telephone calls by the county does not violate the exemption.

The bill also would create s. 166.044, F.S., relating to municipal employee assistance programs. The term “employee assistance program” would be defined to mean the same thing as an

employee assistance program for a state or county employee. Confidentiality also would be afforded to municipal employee participation in an employee assistance program. As in the state and county exemptions, routine monitoring of telephone calls by the municipality would not violate the exemption.

The exemptions in all three statutory sections would be subject to the Open Government Sunset Review Act of 1995 and thus, would repeal October 2, 2003, unless reenacted by the Legislature.

A statement of the public necessity justifying the creation of the three exemptions also would be included. The statement would provide that public employees have a right of privacy to protect personal, sensitive information. The statement of necessity would further provide that “public knowledge of such information could lead to discrimination against the employee, and could compromise the therapeutic process.”

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Several public records exemptions would be created by the bill. The protected information would be for the same types of records, i.e., information relating to state, county, and municipal employees who participate in employee assistance programs. The bill relates only to exemptions and it includes a statement of the public necessity that justifies the exemptions. For these reasons, the bill appears to comply with the provisions of s. 24(c), Art. I, Fla. Const.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

During the 1997 Regular Session, the Committee Substitute for Senate Bill 1832 passed the Committee on Governmental Reform and Oversight and the Committee on Community Affairs. The committee substitute, which was substantially similar to this bill (the differences between the two are grammatical and organizational in nature), died on the calendar, however.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
