

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: April 10, 1998 Revised: 4/14/98 _____

Subject: Public Records; Notification of Adverse Incident

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Carter</u>	<u>Wilson</u>	<u>HC</u>	<u>Fav/1 amendment</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/1 amendment</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Under Art. I, s. 24 of the State Constitution, and ch. 119, F.S., the Public Records Law, records of governmental and other public entities are open to the public unless made exempt. Senate Bill 316 creates a public records exemption for information contained in a notice of adverse incident pursuant to s. 395.0197, F.S., and makes such information confidential. The bill provides that the information contained in the notice is not discoverable or admissible in a civil or administrative action, unless the action is a disciplinary proceeding by the Agency for Health Care Administration or the appropriate regulatory board.

This bill creates two undesignated sections of law.

II. Present Situation:

A. The Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.¹ In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.

Article I, s. 24 of the State Constitution, provides:

- (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

¹Section 1, ch. 5942 (1909).

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 Law² specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

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

The Public Records Law states that, unless specifically exempted, all agency³ records are to be 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.⁴

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.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Exemptions to public records requirements are permitted by the State Constitution and statute. Article I, s. 24(c) of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not

²Chapter 119, F.S.

³The 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."

⁴Section 119.011(1), F.S.

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So.2d 420 (1979).

contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

The Open Government Sunset Review Act of 1995⁸ states that an exemption may be created 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. 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. The three statutory criteria are 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.⁹

Article I, s. 23, of the State Constitution, also provides Floridians with a right of privacy. That constitutional right, however, does contain a limitation relating to public records:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

As noted above, there is a constitutional right of access to judicial records. The public has a right of access to records in the judicial branch of government, except for those records exempted in the Constitution, records exempted by law in effect on July 1, 1993, records exempted pursuant to court rules in effect on November 3, 1992, and records exempted by law in the future in accordance with the procedures specified in Art. I, s. 24(c) of the State Constitution.¹⁰

B. Adverse Incident Notification

⁷Art. I, s. 24(c) of the State Constitution.

⁸Section 119.15, F.S.

⁹Section 119.15(4)(b), F.S.

¹⁰Article I, s. 24, State Constitution.

Chapter 395, F.S., provides for the licensure and regulation of hospitals in Florida. Pursuant to s. 395.0197(1), F.S., every licensed facility must establish an internal risk management program. Each such program must include all of the components listed in statute.¹¹

The statute¹² defines the term “adverse or untoward incident,” for purposes of reporting to the Agency for Health Care Administration, to mean

an event over which health care personnel could exercise control, which probably associated in whole or in part with medical intervention rather than the condition for which such intervention occurred, and which causes injury to a patient, and which:

- (a) Is not consistent with or expected to be a consequence of such medical intervention;
- (b) Occurs as a result of medical intervention to which the patient has not given his or her informed consent;
- (c) Occurs as the result of any other action or lack of any other action on the part of the hospital or personnel of the hospital;
- (d) Results in a surgical procedure being performed on the wrong patient; or
- (e) Results in a surgical procedure being performed that is unrelated to the patient’s diagnosis or medical needs.

Section 395.0197, F.S., requires that licensed facilities file certain reports. Specifically, if an adverse or untoward incident results in the death of a patient, damage to a patient’s brain or spinal cord, the performance of surgery on the wrong patient, or surgery unrelated to the patient’s diagnosis, a licensed facility must report the incident to the Agency for Health Care Administration within 15 calendar days after the occurrence. A final report may be required by the agency.

In either case, s. 395.0197(6), F.S., provides that these reports are not available to the public pursuant to s. 119.07(1), F.S., or any other law providing access to public records. Further, these reports are not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board. They are not available to the public as part of the record of investigation for and prosecution in disciplinary proceedings made available to the public by the agency or the appropriate regulatory board. A health care professional against whom probable cause has been found may be provided with copies of any records which form the basis of the determination.

¹¹Section 395.0197(1)(a)-(d), F.S., requires each internal risk management program to include: (a) the investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients; (b) the development of appropriate measures to minimize the risk of injuries and adverse incidents to patients; (c) the analysis of patient grievances that relate to patient care and the quality of medical services; and (d) the development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and all agents and employees of the licensed health care facility to report adverse incidents to the risk manager.

¹²Section 395.002(2), F.S.

Additionally, each licensed facility must file an annual report that summarizes the incident reports that have been filed in the facility for that year. The annual report is confidential and is not available to the public pursuant to s. 119.07(1), F.S., or any other law providing access to public records. The annual report is not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board. Further, the report is not available to the public as part of the record of investigation for and prosecution in disciplinary proceedings made available to the public by the agency or the appropriate regulatory board. A health care professional against whom probable cause has been found may be provided with copies of any records which form the basis of the determination.

The Agency for Health Care Administration has access to all licensed facility records necessary to carry out the provisions of s. 395.0197, F.S. The records obtained are not available to the public under s. 119.07(1), F.S. Further, these records are not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board. Further, records obtained pursuant to s. 455.223, F.S., are not available to the public as part of the record of investigation for and prosecution in disciplinary proceedings by the agency or the appropriate regulatory board. Once again, a health care professional against whom probable cause has been found may be provided with copies of any records which form the basis of the determination.

III. Effect of Proposed Changes:

Senate Bill 316 makes confidential and exempt information contained in a notice of adverse incident pursuant to s. 395.0197, F.S., and provided to the Agency for Health Care Administration by a facility licensed under ch. 395, F.S. The bill also provides that such information is not discoverable or admissible in a civil or administrative action, unless the action is a disciplinary proceeding by the Agency for Health Care Administration or the appropriate regulatory board. The information may not be made available to the public as part of the record of investigation or prosecution in a disciplinary proceeding which is made available by the agency or a regulatory board.

The public necessity stated for the exemption is that it would be an invasion of a patient's privacy for information contained in the notification of an adverse incident to be publicly available. Additionally, the bill makes a legislative finding that such information is of a sensitive personal nature and that it must be kept confidential so that the agency can effectively carry out its responsibilities.

Section 395.0197, F.S., is amended by the Committee Substitute for Senate Bill 314. Senate Bill 314 modifies the definition of an adverse incident, defining it to mean

an event over which health care personnel could exercise control and which is associated in whole or in part with medical intervention, rather than the condition for which such intervention occurred, and which:

- (a) Results in one of the following injuries:

1. Death;
 2. Brain or spinal damage;
 3. Permanent disfigurement;
 4. Fracture or dislocation of bones or joints;
 5. A resulting limitation of neurological, physical, or sensory function which continues after discharge from the facility;
 6. Any condition that required specialized medical attention or surgical intervention resulting from nonemergency medical intervention, other than an emergency medical condition, to which the patient has not given his or her informed consent; or
 7. Any condition that required the transfer of the patient, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the patient's condition prior to the adverse incident;
- (b) Was the performance of a surgical procedure on the wrong patient, a wrong surgical procedure, a wrong-site surgical procedure, or a surgical procedure otherwise unrelated to the patient's diagnosis or medical condition;
- (c) Required the surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage was not a recognized specific risk, as disclosed to the patient and document through the informed-consent process; or
- (d) Was a procedure to remove unplanned foreign objects remaining from a surgical procedure.

Senate Bill 314 requires a licensed facility to notify the Agency for Health Care Administration to later than 1 business day after the risk manager or his or her designee has received a report and is able to determine within 1 business day that specific adverse incidents has occurred. Notice is not required if the risk manager is unable to determine within 1 business day that any of the following incidents occurred: (a) the death of a patient; (b) brain or spinal damage to a patient; (c) the performance of a surgical procedure on the wrong patient; (d) the performance of a wrong-site surgical procedure; or (e) the performance of a wrong surgical procedure. Notification must be made in writing and must be provided by facsimile or overnight mail delivery.

The notification must include information regarding the identity of the affected patient, the type of adverse incident, the initiation of an investigation by the facility, and whether the events causing or resulting in the adverse incident represent a potential risk to other patients.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates an exemption from the Public Records Law, s. 119.07(1), F.S., and the public records requirements of s. 24(a), Art. I of the State Constitution. The exemption

pertains to information contained in the notification of an adverse incident that, under the provisions of CS/SB 314, is to be submitted to the Agency for Health Care Administration by a hospital or ambulatory surgical center licensed under ch. 395, F.S.

The provisions of this bill have no impact on open meetings issues under the Open Meetings Law, s. 286.011, F.S., and the requirements of s. 24(b), Art. I of the State Constitution.

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:

None.

VIII. Amendments:

#1 by Health Care:

Technical amendment - reference to companion bill number.

#2 by Governmental Reform and Oversight:

Amendment provides a more detailed explanation of the reasons for the exemption.