

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 17, 1998 Revised: 1/22/98 \_\_\_\_\_

Subject: Public Records Exemption; Adverse Incident Reports

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

I. Summary:

Senate Bill 316 creates an exemption from the Public Records Law as provided under s. 119.07, F.S., and s. 24(a), Article I of the State Constitution. The exemption created applies to certain information contained in notification of an adverse incident. The notice is submitted to the Agency for Health Care Administration as required by Senate Bill 314 under s. 395.0197, F.S., relating to internal risk management program requirements for hospitals and ambulatory surgical centers.

This bill creates two undesignated sections of law.

II. Present Situation:

The Right to Privacy

The State Constitution contains an explicit declaration in Article I, section 23 that:

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.

Federal and state governments often must engage in a "balancing act" between the generally recognized right of an individual to be "let alone and free from governmental intrusion" and the needs of society to have access to information about or control over an individual for purposes of public health, safety, or welfare. The individual's recognized right to privacy often is a social policy that conflicts with another recognized social policy, that of the public's right of access to

public records and meetings, especially as both policies have been elevated to constitutional status in Florida.

### *Government in the Sunshine*

Floridians have expressed an unequivocal preference for “open government” or “government in the sunshine” as most recently indicated in a 1992 statewide “referendum” by which they amended the *State Constitution* by adopting Article I, section 24 entitled, “Access to Public Records and Meetings Requirements.” As authorized under this constitutional provision, the Legislature has enacted general laws that provide for the exemption of records, s. 119.07(1), F.S., and meetings, s. 286.011, F.S., from the requirements relating to public records and public meetings, as specified in subsections (a) and (b), respectively, of section 24 of Article I of the *State Constitution*. An exemption from the requirement of access to public records and meetings may be created constitutionally only by stating specifically the public necessity justifying the exemption. Furthermore, the exemption created may be no broader than necessary to accomplish the stated purpose of the law. Specifically, Article I, section 24 of the *State Constitution*, as relates to public records requirements, states:

**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. . . . This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . Laws enacted pursuant to [subsection (c) of section 24] shall contain only exemptions from the requirements of subsection (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.**

The term “public record” is defined in subsection 119.011, F.S., 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. The term “agency” is defined under the same subsection 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 the Public Records Law, 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.

Paragraph 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. . . .**

Paragraph 119.15(2)(e), F.S., defines the term “exemption” to mean a provision of the *Florida Statutes* which creates an exception to s. 119.07(1), F.S., or s. 286.011, F.S., and which applies to the executive branch of state government or to local government, but it does not include any provision of a special or local law.

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., relating to legislative review of exemptions from public meetings and public records requirements, sets forth specific criteria for evaluating whether confidentiality provisions serve an identifiable public purpose and are no broader than necessary to meet the public purpose they serve. Paragraph 119.15(4)(b), F.S., states, in pertinent part:

(4)(a) The Legislature shall review the exemption before its scheduled repeal and consider as part of the review process the following:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

(b) An exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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:

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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would

jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

### ***Confidentiality of Patient Information and Medical Records***

The *Florida Statutes* contain more than 250 provisions relating to the confidentiality of medical records. In fact, s. 119.07(1), F.S., the Public Records Law, contains several exemptions relating to such records. Under state law, patient information is confidential in the possession of a health care practitioner or a state agency, as provided under s. 455.667, F.S., (formerly s. 455.241, F.S.), except under certain specific circumstances. As confidential information, patient records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. There are some significant exceptions to the, otherwise, exclusive control given patients over such information. These exceptions include: 1) release, without written authorization, of physical or mental examination or administered treatment information to a person that procures such examination or treatment with the patient's consent, 2) forwarding of examination results obtained when a compulsory physical examination is performed for purposes of civil litigation in conformity with the Rules of Civil Procedure or upon issuance of a subpoena in a civil or criminal action and under other similar circumstances.

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

**Section 1.** Creates an exemption from the Public Records Law as provided under s. 119.07, F.S., and s. 24(a), Article I of the *State Constitution*. The exemption created applies to information that is contained in the notification of an adverse incident, as required by Senate Bill 314 under s. 395.0197, F.S. The notification is submitted to AHCA. Furthermore, such information is not discoverable or admissible in a civil or administrative action, except in disciplinary proceedings by AHCA or the appropriate regulatory board. Additionally, the information may not be made available to the public by AHCA or a regulatory board as a part of the record of investigation or

prosecution in a disciplinary proceeding. The exemption is scheduled for repeal effective October 2, 2003, subject to legislative review prior to that date and reenactment saving the exemption from repeal.

**Section 2.** Provides a legislative finding that the Public Records Law exemption for information contained in a notification of adverse incidents to AHCA or a regulatory board, as created in section 1 of this bill, is a public necessity. If not exempted from the requirements of the Public Records Law, availability to the public of the patient care information contained in a notification of an adverse incident could result in an invasion of a patient's privacy. The public necessity is also based on a legislative finding that such patient information is of a sensitive nature that must remain confidential in order to allow AHCA to effectively carry out its responsibilities.

**Section 3.** Provides for the act to take effect on the date that Senate Bill 314 becomes a law, but the bill shall not take effect if Senate Bill 314 does not become a law.

#### **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:**

This bill creates an exemption from the Public Records Law, s. 119.07(1), F.S., and the public records requirements of Article I, Section 24(a) of the Florida Constitution. The exemption pertains to information contained in the notification of an adverse incident that, under the provisions of Senate Bill 314, is to be submitted to AHCA by a hospital or ambulatory surgical center licensed under chapter 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 Subsection 24(b) of Article I 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. Economic Impact and Fiscal Note:**

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

None.

**B. Private Sector Impact:**

With the public confident that sensitive, personal information will not be generally available to the public, the public will remain supportive of AHCA's regulatory functions. Maintenance of sufficient regulatory oversight helps to ensure good quality health care.

**C. Government Sector Impact:**

The Public Records Law exemption created by this bill will help to ensure the cooperation of hospitals and ambulatory surgical centers in maintaining effective oversight of the quality of care provided in hospital settings and ambulatory surgical center settings.

**VI. Technical Deficiencies:**

The bill reference in the effective date provision contained in section 3 of the bill should be revised to read "Senate Bill 314."

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Health Care:

Technical amendment - reference to companion bill number.