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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 605

RELATING TO: Public Records and Meetings

SPONSOR(S): Committee on Health Care Standards & Regulatory Reform & Representative Kelly

STATUTE(S) AFFECTED: ss. 455.225 & 455.261

COMPANION BILL(S): SB 660(s), HB 329(c), CS/SB 490(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) HEALTH CARE STANDARDS & REGULATORY REFORM YEAS 5 NAYS 0
(2) GOVERNMENTAL OPERATIONS
(3)
(4)
(5)

I. SUMMARY:

This bill extends exemptions from the public records and meetings laws (Chapters 119 and 286, F.S., and Article I, s. 24, of the State Constitution) to provisional psychologists, registered clinical social worker interns, registered mental health counselor interns, provisional marriage and family therapists and provisional mental health counselors. It takes effect upon adoption of legislation creating these categories of practitioners and revision of chapters 490 and 491, F.S.

The exemptions pertain to probable cause panel meetings and investigative reports and complaints as well as treatment information regarding impaired practitioners. This bill provides a public necessity statement for the exemptions. The exemptions are made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2002, unless reenacted by the Legislature.

This bill has no fiscal impact on the state, and no fiscal impact on local government and the private sector.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Public Records Law, chapter 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. Article I, s. 24, Florida Constitution, provides that records and meetings of public bodies are open to the public. It also provides that the Legislature may create exemptions to these requirements by general law if a public necessity exists and certain procedural requirements are met.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act, contained in s. 119.14, F.S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The Open Government Sunset Review Act of 1995 provides for the repeal and prior review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The next review cycle will begin in 2001. The chapter defines the term "substantial amendment" for purposes of initiating a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

Effective July 1, 1997, the regulation of various health care professions transfer from the Agency for Health Care Administration (AHCA) to the Department of Health (DOH), except the law imposes specific limitations on the transfer of specified functions. The law expressly transfers to the DOH specific regulatory functions relating to the health professions including all licensing, examination, publication, administrative, and management information services, but requires the DOH to contract with AHCA for the provision of consumer complaint, investigative, and prosecutorial services.

Chapter 455, F.S., provides the general regulatory provisions for professions regulated by the Department of Business and Professional Regulation (DBPR) and AHCA. Section 455.225, F.S., provides procedures for disciplinary proceedings against professions under the department's and agency's regulatory jurisdiction. Section 455.225, F.S., provides that complaints and information obtained by the DBPR and AHCA during their investigations are exempt from the public records law until 10 days after probable cause has been found to exist by the probable cause panel of the appropriate board, the department or agency, or until the subject of the investigation waives confidentiality.

Section 455.261, F.S., requires AHCA to retain one or more impaired practitioner consultants to administer and implement the impaired practitioner program. The section requires the consultant to be a licensed practitioner or recovered practitioner under the agency's jurisdiction and at least one of the consultants must be a medical physician, osteopathic physician, or nurse. The consultant works closely with approved treatment providers regarding intervention, evaluation, and treatment of impaired practitioners participating in the program. An approved treatment provider is required, upon request, to disclose to the consultant all information in its possession regarding an impaired practitioner's impairment and participation in the program.

Section 455.261, F.S., provides that this treatment information maintained by AHCA or DBPR, as appropriate, or the consultant as the agency's agent, is confidential and exempt from the public records law. If in the opinion of the consultant, after consultation with the treatment provider, the impaired practitioner fails to satisfactorily progress in a treatment program, all information regarding the practitioner's impairment and participation in the treatment program must be disclosed to the agency. The disclosure constitutes a disciplinary complaint, which remains confidential until probable cause is found that the licensee has violated regulations applicable to the practice of the licensee's profession.

Chapter 490, F.S., provides for the regulation of psychologists and school psychologists by the Board of Psychology within AHCA. Chapter 491, F.S., provides for the regulation of psychotherapists by the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling within AHCA.

Interns and provisional licensees of chapters 490 and 491, F.S., are not currently regulated.

B. EFFECT OF PROPOSED CHANGES:

This bill provides that existing public records and meetings law exemptions for information concerning participation in the impaired practitioner treatment program, disciplinary complaints, and related investigative information, and the proceedings of the probable cause panel for health care professionals under the regulatory jurisdiction of AHCA and DOH are extended to also apply to provisionally licensed psychologists under chapter 490, F.S., registered clinical social workers, registered marriage and family therapist interns, registered mental health counselor interns, and provisionally licensed clinical social workers, marriage and family therapists, and mental health counselors under chapter 491, F.S. This legislation provides findings of public necessity to justify the exemptions.

This bill provides an effective date that is contingent upon the passage of HB 329, or similar legislation revising chapters 490 and 491, F.S., to create provisional licensing categories and intern registration of psychologists and psychotherapists.

C. APPLICATION OF PRINCIPLES:

1. <u>Less Government:</u>

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      No.

   b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      No.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      No.

5. Family Empowerment:

   a. If the bill purports to provide services to families or children:

      This bill does not purport to provide services to families or children.

      (1) Who evaluates the family's needs?

          N/A

      (2) Who makes the decisions?

          N/A

      (3) Are private alternatives permitted?

          N/A

      (4) Are families required to participate in a program?

          N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Extends certain public records and meetings exemptions to provisional licensees and interns in psychology, mental health, clinical social work, marriage and family therapists, and mental health counselors.

Section 2. Reprints, unchanged, ss. 455.225(2), (4), (10), F.S., regarding disciplinary proceedings.

Section 3. Reprints, unchanged, ss. 455.261(3)(e) and (5)(a), F.S., regarding treatment programs for impaired practitioners.

Section 4. Provides a public necessity statement for the exemptions discussed in Section 1 above.

Section 5. Provides that this act shall take effect upon the same date as HB 329 or similar legislation revising chapters 490 and 491, F.S., to create these new categories of (provisional and intern) practitioners.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Comments by the House Committee on Governmental Operations:

1. CS/HB 605 references exemptions from "s. 119.07(2), Florida Statutes". That is an incorrect reference. The appropriate reference is to s. 119.07(1), Florida Statutes.

2. There is a strong argument that the newly created licensees mentioned in CS/HB 605 are already covered by the existing exemptions this bill identifies. The public records and meetings exempted by ss. 455.225(2) & (10), F.S.; ss. 455.261(3)(e) & (5)(a), F.S.; and, s. 455.225(4), F.S., are with regard to impaired licensed practitioner program information and complaints and investigatory information and proceedings regarding "licensees". A "licensee" is defined to mean "***any*** person issued a permit, registration, certificate, or license...". The fact that the class of persons licensed expands after the exemption is created should not preclude such new licensees from the protections afforded by the existing exemptions. The rationale and need for the exemption remains the same for the new type of licensees. Furthermore, it appears that the Legislature, by virtue of its broad, non-exclusive definition of licensee, envisioned future changes as to who those licensees might be and accordingly who might be covered by the exemptions. However, if the rationale behind this bill prevails, that is that these exemptions are only applicable to those licensees who were receiving licensees at the time the exemptions became law, then new exemptions would have to be created

every time a new type of license was required. This is logically counterintuitive and essentially eviscerates the notion of generic-type exemptions.

Exemptions range from very specific type exemptions (e.g., All medical records received by Agency X with regard to preemployment screening on applicants for the Help the Kids Program established pursuant to s. xxx.xxx, F.S., are confidential and exempt.) to generic-type exemptions such as those that simply apply to a type of information received, and which are not tied to any specific program or individuals. For example, an agency may have a generic-type public records exemption simply for trade secrets, e.g., Trade secrets, as defined in s. 812.081, F.S., received by this agency are confidential and exempt. At the time the exemption became law, the agency may have only received trade secrets pursuant to two of its programs and only from savings and loan associations. Years later the agency develops another program which necessitates the collection of trade secret information from banks. The existing exemption should cover this newly collected trade secret information because the exemption was not specifically tied to the two programs or to savings and loan associations. The purpose of the exemption was to protect trade secrets because of the inherent nature of trade secrets. If such secrets are released, the owner of the trade secret will be harmed. It does not matter who is submitting the trade secret information or pursuant to what program or when, the exemption is to protect all trade secrets in the hands of the agency (like protecting certain information about licensees). Such exemptions are designed to apply prospectively and generally and are a necessity. To the contrary, if the trade secret exemption was drawn very specifically, e.g., trade secret information submitted by savings and loan associations pursuant to the Honesty In Savings and Loan Reporting Act as authorized in s. xxx.xx, F.S., are confidential and exempt, then clearly only trade secrets submitted by such associations pursuant to that act would be held exempt. However, such a specifically drawn exemption is not before us for review for purposes of this bill analysis.

The exemptions addressed in this bill are broad, generic-type exemptions, and they were in effect before July 1, 1993. Accordingly, they were grandfathered in by Article I, s. 24, of the Florida Constitution. All exemptions created after July 1, 1993, must be drawn, according to Article I, s. 24, as narrowly as possible to effectuate their purpose, be placed in a separate bill, and contain a public necessity statement. These requirements are not applicable to those exemptions in law before July 1, 1993. Accordingly, any criticisms about the overbreadth of generic-type exemptions in place as of July 1, 1993, including those before us in this bill, are clearly mooted by the grandfather provision in the constitution. (This is not to suggest, however, that generic exemptions are inherently overbroad because they may be as narrow as they can be to effectuate their purpose and clearly meet a public necessity.)

If such generic-type exemptions as those referenced in this bill cannot be construed to apply to new types of licensees, then many other generic-type exemptions arguably can be attacked as only applying to those programs (or individuals) in existence at the time the exemption became law. In application, this could be very problematic.

Many different types of generic-type exemptions exist in Chapter 119, F.S. For example, there is an exemption for financial statements submitted to an agency (any agency as defined in Chapter 119, F.S.) from a prospective bidder. What if an agency decides to solicit bids for the first time as a result of the needs or requirements of a new program. Because no such prospective bidder or program existed at the time the exemption

became law, does that mean that the needed financial information the prospective bidder submits to the agency is not exempt? This cannot be the new law we are fashioning for ourselves.

What about the exemption for social security numbers "of all *current* and former agency employees" which are contained in agency employment records. If a generic application is not given to this exemption, then only social security numbers of employees employed at the time the exemption became law are exempt (and former employees) -- and all new employees thereafter are not covered. What about all the generic exemptions that simply run to "agencies" as defined in Chapter 119, F.S. What if a new agency is created that meets the definition of agency? Do the existing generic exemptions not apply to that new agency because it was not in existence at the time the generic exemptions became law? Does the Legislature now have to, through the new exemption procedure outlined in Article I, s. 24, expand every existing generic exemption (in a separate bill, with a public necessity statement) to include the new agency as is being done in this bill for new licensees? Clearly, this does not appear to be a logical result.

Additionally, proponents of this exemption bill argue that it is needed because new agencies are taking over some of the responsibilities of an existing agency, and that the exemption runs to the existing agency and not to the agencies taking over the related functions. This argument is flawed and their is precedent to the contrary. This Legislature has transferred from one agency to another functions and exemptions and has done so without the use of a separate exemption bill. This is so because no new exemption was created; only the entity receiving the exempt information was changed. The logical test for determining whether an exemption has been created is whether the public could get the information before the law passed, and then as a result of the law, could no longer get the information. If such is the case then an exemption has been created. If the public could not get the information before the law passed and likewise cannot get it after the law has passed, no new exemption has been created thus no separate exemption bill is required. The whole purpose of Article I, s. 24, Florida Constitution, was to separate out from other legislation and red flag exemptions in a separate bill so that a more deliberative legislative process would result with regard to creating exemptions. Article I, s. 24, was not intended to dismantle a reasonable and logical interpretation of the application of generic-type exemptions in light of the level of specificity of those exemptions.

Finally proponents of this bill argue that because there is no statutory or case law explicating and affirming the arguments made above, then, in an abundance of caution, and to avoid litigation, this separate "exemption expansion" bill should be passed. What this argument fails to consider is the significant weight courts give to legislative interpretation of the law in this area. By passing this "exemption expansion" bill the Legislature would appear to concede to the need for such legislation. In so doing, it puts at risk the current application of generic-type exemptions, and more particularly could provide grounds for challenging the propriety of the Legislature's transfer of programs and exemptions among agencies without the use of separate exemption bills. Thus, quite to the contrary, litigation may inadvertently be spawned. (Before promulgating such legislation, an Attorney General opinion could have proved helpful in providing guidance regarding this matter.)

3. Other exemptions exist in Chapter 455, F.S., that are not addressed in this bill. For example, s. 455.229(1), F.S., exempts certain information submitted by licensee

applicants, e.g., financial information, medical information, school transcripts. Section 455.241(2), F.S., exempts patient records received by certain licensees. Although this author thinks that these exemptions would be applicable to the newly created provisional and intern licensees (if otherwise authorized to receive such information), by the very logic of this bill these exemptions would not apply because they are not cross-referenced in this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The difference between the original bill and the Committee Substitute is that HB 329 is identified specifically as having the effective date that would also apply to this bill.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE STANDARDS & REGULATORY REFORM

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