SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 414

SPONSOR: Health, Aging & Long-Term Care Committee

SUBJECT: Public Records Exemption - Health Care Provider Information for Antitrust Review

DATE: February 14, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable
2.			GO	
3.			RC	
4.				
5.				

I. Summary:

This bill reenacts section 408.185, Florida Statutes, without substantive changes, in accordance with a review pursuant to the Open Government Sunset Review Act of 1995. Section 408.185, F.S., makes trade secrets and other confidential proprietary business information held by the Office of the Attorney General which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter confidential and exempt from the Public Records Law for one year after the date of submission. This section of law is subject to the Open Government Sunset Review Act of 1995, and expires on October 2, 2001, unless reviewed and saved from repeal by reenactment of the Legislature.

The bill amends s. 408.185, F.S.

II. Present Situation:

Public Records Law

The Public Records Law, ch. 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. While the state constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, Florida Constitution, governs the creation and expansion of exemptions, to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, Florida Constitution, provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meeting requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
(b) The exemption is necessary for the effective and efficient administration of a governmental program; or
(c) The exemption affects confidential information concerning an entity.

Further, s. 119.15(4)(a), F.S., requires consideration of the following specific questions as part of the review:

(a) What specific records or meetings are affected by the exemption?
(b) Whom does the exemption uniquely affect, as opposed to the general public?
(c) What is the identifiable public purpose or goal of the exemption?
(d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Additionally, under s. 119.15(4)(b), F.S., 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:

(a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?
(b) Does the exemption protect 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 paragraph, only information that would identify the individuals may be exempted; or,

(c) Does the exemption protect 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?

Health Care Antitrust Protection

The federal and state governments both regulate business activities under their respective antitrust laws. Antitrust regulation is intended to discourage monopolies and control the exercise of "monopoly power," meaning the power to fix prices and exclude competition. The application of antitrust laws to the health care sector, a relatively recent phenomenon, has increased as the health care market has been restructured and market competition has increased. Antitrust issues arise not from the actual delivery of care, but from the economic and business relationships that prevail in the health care industry.

Before 1975, the health care industry was not viewed as commerce, but as a "learned profession" regulated under state law to which antitrust laws did not apply. The United States Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 42 U.S. 773 (1975), held that the learned professions are engaged in commerce and do not have an exemption from antitrust laws. The *Goldfarb* decision has had an effect on health care policy by providing the background for competition and in effect has revolutionized the notion that health care providers could be trusted to determine the framework under which health care is provided. After *Goldfarb*, health care competitors would potentially be in violation of antitrust law for business activities in the provision of health care services that restrained competition. *Goldfarb* allowed antitrust enforcement in an industry that regulated itself without market forces and, in effect, opened the door to competition in the health care industry, by making providers accountable to consumers for cost as well as the quality of their services.

Federal antitrust laws (the Sherman Antitrust Act, 15 U.S.C.A. §§1-7, the Clayton Act, 15 U.S.C.A. §§12-27 and the Federal Trade Commission Act, 15 U.S.C.A. §§45) prohibit anti-competitive conduct and are enforced by the U.S. Department of Justice and the Federal Trade Commission (FTC). In September 1993, both agencies released antitrust enforcement guidelines, which created "safety zones" for six specific merger or joint activities and provided additional guidance for similar activities falling outside of the safety zones. The safety zones represent certain acceptable collaborative activities, which the federal government will not challenge. Both federal agencies have issued new and revised statements of enforcement policy and analytical principles relating to health care and antitrust since 1993.

The Florida Antitrust Act of 1980 (ch. 542, F.S.) and other antitrust laws are enforced by the Department of Legal Affairs administered by the Attorney General.

Florida Health Care Community Antitrust Guidance Act

In 1996, the Florida Legislature created the Florida Health Care Community Antitrust Guidance Act, codified at s. 408.18, F.S., to provide a mechanism for members of the health care community who desire antitrust guidance to request a review of their proposed business activities by the Attorney General's office. The act defines "health care community" to include all licensed health care providers, insurers, networks, purchasers, and other participants in the health care system. "Antitrust no-action letter" is defined to mean a letter that states the intention of the Attorney General's office not to take antitrust enforcement actions with respect to the requesting party, based on the specific facts then presented, as of the date the letter is issued.

To obtain the review, a member of the health care community must submit a written request for an antitrust no-action letter to the Attorney General's office. The requesting party is under an affirmative obligation to make full, true, and accurate disclosure with respect to activities for which the antitrust no-action letter is requested. Each request must be accompanied by all relevant material information; relevant data; complete copies of all operative documents; the provisions of law under which the request arises; and detailed statements of all collateral oral understandings, if any. All parties requesting the letter must provide the Attorney General's office with whatever additional information or documents the office requests.

The Attorney General's office may seek whatever documentation, data or other material it deems necessary from the Agency for Health Care Administration, the State Center for Health Statistics, and the Department of Insurance. The Agency for Health Care Administration is to collect, coordinate, and analyze health care data and the Department of Insurance is to make available any relevant information on entities regulated by the Department of Insurance.

Within 90 days after it receives all information necessary to complete the review, the Attorney General's office must act on the no-action letter request. Upon review of the proposal, the Attorney General's office may either issue an antitrust no-action letter, decline to issue any type of letter, or take other appropriate action.

If an antitrust no-action letter is issued, the recipient must annually file with the Attorney General's office an affidavit stating that there has been no change in the facts presented, at which time the Attorney General's office is stopped from bringing an antitrust action concerning any specific conduct that is the subject of the no-action letter, as long as there is no change in any material fact. The no-action letter is, if relevant, admissible as evidence in any court proceeding in Florida. The Attorney General's office may bring any other action or proceeding based on a different set of facts.

Section 408.185, Florida Statutes

408.185 Information submitted for review of antitrust issues; confidentiality.--The following information held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 1 year after the date of submission.

(1) Documents that reveal trade secrets as defined in s. 688.002.
(2) Preferred provider organization contracts.
(3) Health maintenance organization contracts.
(4) Documents that reveal a health care provider's marketing plan.
(5) Proprietary confidential business information as defined in s. 364.183(3).

This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s.119.15 and shall stand repealed on October 2, 2001, unless reviewed and saved from repeal by reenactment of the Legislature.

III. Effect of Proposed Changes:

This bill reenacts s. 408.185, F.S., without substantive changes, in accordance with a review pursuant to the Open Government Sunset Review Act of 1995. Staff reviewed the exemption to the public records requirements in s. 408.185, F.S., for trade information and other proprietary business information submitted to the Office of the Attorney General by a member of the health care community who is seeking guidance on antitrust issues. Staff found that the Office of the Attorney General would not be able to effectively administer the Florida Health Care Community Antitrust Guidance Act without the public records exemption. Staff also found that the identifiable public purpose or goal of the exemption is to provide assurance to the members of the health care community who seek guidance from the Attorney General's office on antitrust issues relating to health care business activities that their otherwise confidential, proprietary information will not be disclosed to competitors for at least one year after a request for an antitrust no-action letter has been submitted.

Staff recommended that the exemption to the public records requirements in s. 408.185, F.S., be reenacted without substantive changes. Staff's findings and recommendations are detailed in *Interim Project Report 2001-044.*

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:

In accordance with a review pursuant to the Open Government Sunset Review Act of 1995, this bill reenacts s. 408.185, F.S., which provides an exemption to the public records requirements for trade information and other proprietary business information submitted to the Office of the Attorney General by a member of the health care community who is seeking guidance on antitrust issues.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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