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**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 277 (PCB SA 02-04)

RELATING TO: Public Records / Practitioner Profiles

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMITTEE ON STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 10 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) provides that an exemption from the requirements of the public records or public meetings laws 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. The Act, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 456.046, F.S., provides a public records exemption for certain information obtained by the Department of Health for the purpose of creating a practitioner (physician) profile. A practitioner profile may include such information as criminal information relating to the practitioner, a criminal history statement, and any other information that is a public record and that relates to the practitioner's ability to competently practice his or her profession. This section was certified by the Division of Statutory Revision for repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

This bill reenacts this public records exemption. More specifically, this bill provides that any patient name or other information that identifies a patient obtained by the Department of Health for the purpose of compiling a practitioner profile is confidential and exempt from public disclosure. Other data received by the Department of Health or its agent as a result of its duty to compile and promulgate practitioner profiles are confidential and exempt. Also, any information or record that the Department of Health obtains from the Agency for Health Care Administration or any other governmental entity for the purpose of compiling a practitioner profile or substantiating other information or records submitted for that purpose, which is otherwise exempt from public disclosure, must remain exempt as otherwise provided by law. **In addition, the language directing the repeal of the exemption is removed and cross-references and clarifying language are added to the exemption.**

If this exemption was repealed, release of a patient's name or any other identifying information could adversely affect the integrity and trust of the physician-patient relationship and may deter affected parties from seeking needed health care services. In addition, it is a matter of public necessity to protect the confidentiality of the "other data" submitted to the Department of Health for purposes of constructing practitioner (physician) profiles, in order to ensure the accuracy of the data, to refrain from unnecessarily affecting the livelihood of persons who are the subject of practitioner profiles, and to maintain the integrity and trust of the physician-patient relationship without unwarranted aspersions on the professional competence and ability of these persons.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

Every person has the right to inspect or copy any public records 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.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

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 a

reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 456.046, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do

¹ An exemption is "substantially amended" if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

not have to be met.² Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁴

Section 456.039, F.S., Designated health care professionals; information required for licensure

Section 456.039, F.S., requires each person who applies for initial licensure as a physician, or for license renewal, to furnish information to the Department of Health that includes

- The name of each medical school that the applicant has attended, with the dates of attendance and the date of graduation, and a description of all graduate medical education completed by the applicant, excluding any coursework taken to satisfy medical licensure continuing education requirements;
- The name of each hospital at which the applicant has privileges;
- The address at which the applicant will primarily conduct his or her practice;
- Any certification that the applicant has received from a specialty board that is recognized by the board to which the applicant is applying;
- The year that the applicant began practicing medicine; and
- A set of fingerprints.

Section 456.041, F.S., Practitioner profile; creation

Pursuant to s. 456.041(1), F.S., the Department of Health must compile the information submitted pursuant to s. 456.039, F.S., into a practitioner profile. The Department of Health may include in a practitioner's profile criminal information that directly relates to the practitioner's ability to competently practice his or her profession.⁵ The Department of Health must also include in each practitioner's profile the following statement: "The criminal history information, if any exists, may be incomplete; federal criminal history information is not available to the public."⁶ Any other information that is a public record and that relates to a practitioner's ability to competently practice his or her profession may be included in the practitioner profile.⁷ The Department of Health may not

² The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

³ Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

⁴ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

⁵ Section 456.041(3), F.S.

⁶ *Id.*

⁷ Section 456.041(6), F.S.; The Department of Health must consult with the board having regulatory authority over the practitioner before including such information in that practitioner's profile.

include "disciplinary action taken by a licensed hospital or an ambulatory surgical center in the practitioner profile."⁸

Once a practitioner profile has been completed, the Department of Health must furnish a copy of it to the practitioner who is the subject of the profile.⁹ The practitioner has 30 days to review the profile and to correct any factual inaccuracies in that profile.¹⁰ At the end of the 30-day period, the Department of Health must make the profile available to the public through the "World Wide Web and other commonly used means of distribution."¹¹ Each practitioner profile must be updated periodically by the Department of Health.¹²

Section 456.046, F.S., Practitioner's profiles; confidentiality

Section 456.046, F.S., created pursuant to Chapter 97-175, Laws of Florida (L.O.F.), established a public records exemption for certain information obtained by the Department of Health or its agent for the purpose of creating a practitioner profile, which is a profile on a physician.

Specifically, s. 456.046, F.S., states:

Any patient name or other information that identifies a patient which is in a record obtained by the Department of Health or its agent for the purpose of compiling a practitioner profile is confidential and exempt . . . Other data received by the department or its agent as a result of its duty to compile and promulgate practitioner profiles are confidential and exempt . . . Any information or record that the Department of Health obtains from the Agency for Health Care Administration or any other governmental entity for the purpose of compiling a practitioner profile or substantiating other information or records submitted for that purpose and that was exempt . . . does not lose that character . . .

The 1997 Legislature found that the release of a patient's name or "any other information that identifies a patient . . . may adversely affect the integrity and trust of the physician-patient relationship and may deter affected parties from seeking needed health care services." In addition,

because of the nature of the data submitted to the Department of Health or its agent for purposes of constructing practitioner [physician] profiles, the necessity of ensuring the accuracy of those data, the need to refrain from unnecessarily affecting the livelihood of persons who are the subject of practitioner profiles, and the need to maintain the integrity and trust of the physician-patient relationship without unwarranted aspersions on the professional competence and ability of these persons, it is a matter of public necessity to protect the confidentiality of the data during the period of their verification.¹³

⁸ Section 456.041(5), F.S.

⁹ Section 456.041(7), F.S.

¹⁰ Section 456.041(7), F.S.

¹¹ *Id.*

¹² Section 456.042, F.S.

¹³ Section 2, Chapter 97-175, L.O.F.

Open Government Sunset Review Questionnaire.

The Florida House of Representatives Committee on State Administration mailed a questionnaire to the Department of Health regarding the repeal of s. 456.046, F.S. The Department of Health was asked what its position was regarding repealing or reenacting the exemption. The department's response was "No Opinion."¹⁴ The Department of Health did, however, state that information made confidential and exempt pursuant to s. 456.046, F.S., is also made confidential and exempt pursuant to

- Section 456.057(5), F.S.;¹⁵
- Section 456.039(4)(b), F.S.;¹⁶
- Section 456.039(4)(c), F.S.;¹⁷
- Title 28, Chapter 1, Part 20b, C.F.R.;¹⁸
- Title 28, Chapter 1, Part 20c, C.F.R.;¹⁹
- Chapter 943, F.S.;²⁰ and
- Chapter 11C-6, F.A.C.²¹

After review of the aforementioned laws and rules, it does not appear that the information made confidential and exempt pursuant to s. 456.046, F.S., is made confidential and exempt pursuant to those laws and rules.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts the public records exemption contained in s. 456.046, F.S. Any patient name or other information that identifies a patient obtained by the Department of Health for the purpose of compiling a practitioner profile, on a physician, is confidential and exempt from public disclosure. Other data received by the Department of Health as a result of its duty to compile and promulgate practitioner profiles are also made confidential and exempt until such data are incorporated or with respect to which the data are submitted is made public pursuant to the requirements of s. 456.041. Section 456.041, F.S., provides that the Department of Health must make the practitioner profile on a physician available to the public at the end of the practitioner's 30-day review period. The practitioner profile must be made available to the public through the "World Wide Web and other commonly used means of distribution."²²

This bill also clarifies and reenacts the provision that keeps any information or record that the Department of Health obtains from the Agency for Health Care Administration or any other governmental entity for the purpose of compiling a practitioner profile or substantiating other

¹⁴ House Committee on State Administration Open Government Sunset Review Questionnaire, Department of Health response, July 6, 2001.

¹⁵ Section 456.057(5), F.S., provides that a health care practitioner may not furnish a patient's records to, or discuss a patient's medical condition with any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.

¹⁶ Section 456.039(4)(b), F.S., provides that a physician applying for renewed licensure must submit a set of fingerprints for the initial renewal of his or her license after January 1, 2000, to the agency regulating the applicant's profession.

¹⁷ Section 456.039(4)(c), F.S., provides that the Department of Health must submit the fingerprints of an applicant for initial licensure to the Florida Department of Law Enforcement (FDLE) for a statewide criminal history check. FDLE must forward the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The same process applies for fingerprints submitted by an applicant for renewed licensure.

¹⁸ Title 28, Part 20, C.F.R., pertains to Criminal Justice Information Systems.

¹⁹ *Id.*

²⁰ Chapter 943, F.S., regulates the Florida Department of Law Enforcement.

²¹ Chapter 11C-6, F.A.C., pertains to the Criminal History Records Dissemination Policy.

²² Section 456.041(7), F.S.

information or records submitted for that purpose, which is otherwise exempt from public disclosure, exempt as otherwise provided by law.

This bill amends s. 456.046, F.S., by adding cross-references, adding clarifying language, and removing the language that requires repeal of the exemption.

If this exemption was repealed, release of a patient's name or any other identifying information could adversely affect the integrity and trust of the physician-patient relationship and may deter affected parties from seeking needed health care services. In addition, it is a matter of public necessity to protect the confidentiality of the "other data" submitted to the Department of Health for purposes of constructing practitioner (physician) profiles, in order to ensure the accuracy of the data, to refrain from unnecessarily affecting the livelihood of persons who are the subject of practitioner profiles, and to maintain the integrity and trust of the physician-patient relationship without unwarranted aspersions on the professional competence and ability of these persons.

D. SECTION-BY-SECTION ANALYSIS:

See "Effects of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities 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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

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Staff Director:

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AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

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