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DATE: May 1, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 35-E

RELATING TO: Public Records / Rx Recipient ID

SPONSOR(S): Representative(s) Crow

TIED BILL(S): HB 15-E

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

- (1) STATE ADMINISTRATION YEAS 3 NAYS 2
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill creates a public records exemption for the following information held by the Department of Health and contained in the department's electronic prescription-monitoring system: the identity of a recipient of the monitored controlled substances, if the recipient is not the patient, and the recipient's driver's license number or other identification number; a dispenser's National Association of Boards of Pharmacy number; a practitioner's United States Drug Enforcement Administration number; and the identity of a patient to whom a controlled substance has been prescribed and such patient's address, including the state and zip code.

This bill provides for exceptions to the public records exemption, provides for future review and repeal of the exemption, and provides penalty provisions.

This bill provides a public necessity statement, as required by the Florida Constitution, which states that the public records exemption is necessary in order to facilitate the Department of Health's efforts to maintain compliance with the state's drug laws by the accurate and timely reporting by health care practitioners of potential drug diversion without compromising a patient's, recipient's, pharmacist's, or health care practitioner's privacy.

This bill has a linked effective date.

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

On May 1, 2002, the Committee on State Administration reported HB 35-E favorably with one amendment. That amendment is traveling with the bill. See "Amendments or Committee Substitute Changes" section for further details.

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes No N/A

This bill limits a person's right of access to records.

2. Lower Taxes Yes No N/A

3. Individual Freedom Yes No N/A

4. Personal Responsibility Yes No N/A

5. Family Empowerment Yes No N/A

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

B. PRESENT SITUATION:

Electronic Prescription-Monitoring System

The electronic prescription-monitoring system, created in section 5 of HB 15-E by Representatives Crow and Fasano, requires the Department of Health, Bureau of Pharmacy Services (bureau) to design and establish an electronic system to monitor the prescribing of Schedule II controlled substances;¹ other drugs designated by the bureau; and codeine, hydrocodone, dihydrocodeine, ethylmorphine, and morphine, as scheduled in schedules II and III, by health care practitioners within Florida. The following information is required to be reported to the electronic prescription-monitoring system:

- The identity of the patient and of the individual obtaining the controlled substance or drug dispensed for that patient, including their full names and the driver's license number or other suitable identification number of the individual obtaining the controlled substance or drug;
- The address of the patient, including state and zip code;
- The national drug code number of the controlled substance or drug dispensed;
- The date the controlled substance or drug is dispensed;
- The quantity of controlled substance or drug dispensed;
- The dispenser's National Association of Boards of Pharmacy number; and
- The prescribing practitioner's United States Drug Enforcement Administration number.

The dispenser must transmit the required information in an electronic format to the bureau.

Section 893.065

Section 893.065, created in section 41 of HB 15-E by Representatives Crow and Fasano, provides a voluntary program for counterfeit-resistant prescription documents. This section allows the bureau, after consultation with the prescription-monitoring program advisory council,² to develop a

¹ A Schedule II controlled substance "has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence." Section 893.03(2), F.S.

² Section 5 of HB 15-E creates the prescription-monitoring program advisory council.

voluntary program for counterfeit-resistant prescription documents to be used by practitioners who prescribe controlled substances or any drug of abuse designated by the bureau.

The section allows the bureau to develop a “counterfeit-resistant prescription blank, optically scannable form, or smart card form for voluntary use by practitioners who prescribe controlled substances or any drug of abuse that is reportable under the electronic prescription-monitoring system.”³ The bureau may require the prescription documents to be “printed or produced on distinctive paper or material, to be serially numbered, and to bear the preprinted or encoded name, address, and category of professional licensure of the practitioner to whom they are issued and that practitioner’s federal registry number for controlled substances.” The prescription documents may be issued by the bureau. If such documents are issued by the bureau then “a copy or other record or each document utilized must be available for inspection” by the bureau.

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.

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

³ Emphasis added.

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.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a public records exemption for the following information held by the Department of Health and contained in the department's electronic prescription-monitoring system:⁴

- The identity of a recipient of the monitored controlled substances, if the recipient is not the patient, and the recipient's driver's license number or other identification number;
- A dispenser's National Association of Boards of Pharmacy number; and
- A practitioner's United States Drug Enforcement Administration number.⁵

A dispenser's National Association of Boards of Pharmacy number is used by a pharmacy to process and bill third party claims.⁶ Since such number's primary use is for billing purposes, it is unclear why such number should be made exempt from public disclosure.

The information listed above is only made *exempt* by this bill. Information and records that are simply made *exempt* from public disclosure are still permitted to be disclosed under certain circumstances. An agency is permitted to share exempt information with another agency if it is necessary for the furtherance of official business.⁷

This bill also creates a public records exemption for the identity of a patient to whom a controlled substance has been prescribed and such patient's address, including the state and zip code, held by the Department of Health pursuant to s. 893.065,⁸ and also contained in the department's electronic prescription-monitoring system. Such information is made *confidential and exempt*.

⁴ Section 5 of HB 15-E creates the electronic prescription-monitoring system.

⁵ If a physician's National Association of Board of Pharmacy number was made available to the public, a person could *illegally* use such number to call in or write his or her own prescriptions.

⁶ Telephone conversation, Executive Director, Florida Pharmacy Association. Telephone conversation, Staff, Florida Board of Pharmacy.

⁷ See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994).

⁸ Section 41 of HB 15-E creates s. 893.065.

Information and records that are made *confidential and exempt* may not be released to anyone other than to the persons or entities specifically designated in the statutory exemption.⁹

The department may disclose a patient's identity to:

- A health care practitioner as defined in s. 456.001(4), F.S.,¹⁰ who requests information and certifies that the information is necessary to provide medical or diagnostic treatment to a current patient;
- A pharmacist licensed in this state who requests information and certifies that the requested information is to be used to dispense controlled substances to a current patient in accordance with s. 893.04, F.S.;¹¹ and
- A criminal justice agency, as defined in s. 119.011, F.S.,¹² which enforces the laws of this state of the United States relating to drugs and which is engaged in a specific investigation involving a violation of law.

This bill makes it a misdemeanor of the first degree to violate the bill's provisions. A misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year¹³ and a \$1000 fine.¹⁴ It is a felony of the third degree for any person who commits a second or subsequent violation of the bill's provisions. A felony of the third degree is punishable by a term of imprisonment not to exceed five years¹⁵ and a \$5000 fine.¹⁶

This bill provides a public necessity statement, as required by s. 24, Art. I of the State Constitution, which states that the public records exemption is necessary "in order to facilitate the Department of Health's efforts to maintain compliance with the state's drug laws by the accurate and timely reporting by health care practitioners of potential drug diversion without compromising a patient's, recipient's, pharmacist's, or health care practitioner's privacy."

⁹ See Attorney General Opinion 85-62, August 1, 1985.

¹⁰ Section 456.001(4), F.S., defines "health care practitioner" as "any person licensed under chapter 457; chapter 458; chapter 459; chapter 460; chapter 461; chapter 462; chapter 463; chapter 464; chapter 465; chapter 466; chapter 467; part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468; chapter 478; chapter 480; part III or part IV of chapter 483; chapter 484; chapter 486; chapter 490; or chapter 491." Chapter 457, F.S., relates to acupuncture. Chapter 458, F.S., relates to medical practice (physicians). Chapter 459, F.S., relates to osteopathic medicine. Chapter 460, F.S., relates to chiropractic medicine. Chapter 461, F.S., relates to podiatric medicine. Chapter 462, F.S., relates to naturopathy. Chapter 463, F.S., relates to optometry. Chapter 464, F.S., relates to nursing. Chapter 465, F.S., relates to pharmacy. Chapter 466, F.S., relates to dentistry. Chapter 467, F.S., relates to midwifery. Part I of chapter 468, F.S., relates to speech-language pathology and audiology. Part II of chapter 468, F.S., relates to nursing home administration. Part III of chapter 468, F.S., relates to occupational therapy. Part V of chapter 468, F.S., relates to respiratory therapy. Part X of chapter 468, F.S., relates to dietetics and nutrition practice. Part XIII of chapter 468, F.S., relates to athletic trainers. Part XIV of chapter 468, F.S., relates to orthotics, prosthetics, and pedorthics. Chapter 478, F.S., relates to electrolysis. Chapter 480, F.S., relates to massage practice. Part III of chapter 483, F.S., relates to clinical laboratory personnel. Part IV of chapter 483, F.S., relates to medical physicists. Chapter 484, F.S., relates to the dispensing of optical devices and hearing aids. Chapter 486, F.S., relates to physical therapy practice. Chapter 490, F.S., relates to psychological services. Chapter 491, F.S., relates to clinical, counseling, and psychotherapy services.

¹¹ Section 893.04, F.S., provides guidelines that a pharmacist must follow when dispensing a controlled substance.

¹² Section 119.011(4), F.S., defines "criminal justice agency" as "any law enforcement agency, court, or prosecutor. The term also includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The term also includes the Department of Corrections."

¹³ Section 775.082(4)(a), F.S.

¹⁴ Section 775.083(1)(d), F.S.

¹⁵ Section 775.082(3)(d), F.S.

¹⁶ Section 775.083(1)(c), F.S.

The effective date of this bill is linked to the passage of "HB ____ or similar legislation." This bill should be linked to the passage of HB 15-E. *The Committee on State Administration, however, adopted an amendment that addresses this issue.*

This exemption is made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2007, unless reviewed and saved from repeal through reenactment by the legislature.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect 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:

This bill may raise a constitutional concern. The public records exemption appears overly broad in that it creates an exemption for a dispenser's National Association of Boards of Pharmacy number and a practitioner's United States Drug Enforcement Administration number. The "principal purpose" of the electronic prescription-monitoring system is to reasonably monitor the prescription practices of licensed health care practitioners. An effort must be made to "identify licensees and individuals obtaining controlled substances or drugs of abuse who may be involved, knowingly or unknowingly, in fraudulent or illegal practices relating to the use, distribution, or prescribing of controlled substances or drugs of abuse."¹⁷ If the primary purpose of such system is to monitor the prescription practices of licensed health care practitioners, then it would appear that the public has a right to know the dispenser's National Association of Boards of Pharmacy number and the practitioner's United States Drug Enforcement Administration number in order to monitor such practices.¹⁸ *The Committee on State Administration, however, adopted an amendment that addresses this issue.*

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee on State Administration

On May 1, 2002, the Committee on State Administration reported HB 35-E favorably with one amendment. That amendment is traveling with the bill. The amendment narrows the public records exemption contained in the bill by no longer exempting a dispenser's National Association of Boards of Pharmacy number. The amendment also conforms the public necessity statement to the exemption and inserts the linked bill's number into the effective date.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

J. Marleen Ahearn, Ph.D., J.D.

¹⁷ Section 5, HB 15-E, at 13.

¹⁸ Telephone conversation, President, First Amendment Foundation, April 30, 2002.