

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 866

INTRODUCER: Governmental Oversight and Accountability Committee and Health Policy Committee

SUBJECT: OGSR/Department of Health

DATE: April 8, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Looke	Stovall		HP SPB 7014 as introduced
1.	Kim	McVane	GO	Fav/CS
2.	Looke	Phelps	RC	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 866 amends, s. 893.0551, F.S., the public records exemption for the prescription drug monitoring program (PDMP). Currently, personal identifying information in the prescription drug monitoring program (PDMP) is confidential and exempt from public records may only be released in limited circumstances.

CS/SB 866 modifies the conditions for releasing confidential and exempt records in the following manner:

- Assistant Attorneys General prosecuting prescription Medicaid fraud cases may only disclose relevant information to a criminal justice agency.
- Department of Health's (DOH's) health care regulatory boards may receive information, however, they may only disclose relevant information to a law enforcement agency.
- Law enforcement agencies may only have access to confidential information if they have entered into a user agreement with the DOH;
- Law enforcement agencies may disclose only relevant information to a criminal justice agency.
- Health care practitioners may disclose a patient's information to the patient.
- Consultants monitoring a health care practitioner with a substance abuse problem may have access to the practitioner's profile.
- State Attorneys may release information only in response to a request for discovery or pursuant to a court order.

The bill saves the exemption for personal identifying information in the PDMP from repeal on October 2, 2014.

II. Present Situation:

Florida's Prescription Drug Monitoring Program

Chapter 2009-197, Laws of Florida, established the PDMP in s. 893.055, F.S. The PDMP uses a comprehensive electronic system/database to monitor the prescribing and dispensing of certain controlled substances.¹ Dispensers of certain controlled substances must report specified information to the PDMP database, including the name of the prescriber, the date the prescription was filled and dispensed, and the name, address, and date of birth of the person to whom the controlled substance is dispensed.²

The PDMP became operational on September 1, 2011, when it began receiving prescription data from pharmacies and dispensing practitioners.³ Dispensers have reported over 87 million controlled substance prescriptions to the PDMP since its inception.⁴ Health care practitioners began accessing the PDMP on October 17, 2011.⁵ Law enforcement began requesting data from the PDMP in support of active criminal investigations on November 14, 2011.⁶

Accessing the PDMP database

Section 893.0551, F.S., makes certain identifying information⁷ of a patient or patient's agent, a health care practitioner, a dispenser, an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, a pharmacist, or a pharmacy that is contained in records held by the department under s. 893.055, F.S., confidential and exempt from the public records laws in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.⁸

Direct access to the PDMP database is presently limited to medical doctors, osteopathic physicians, dentists, podiatric physicians, advanced registered nurse practitioners, physician assistants, and pharmacists.⁹ Currently, prescribers are not required to consult the PDMP database prior to prescribing a controlled substance for a patient however physicians and pharmacists queried the database more than 3.7 million times during fiscal year 2012-2013.¹⁰

Indirect access to the PDMP database is provided to:

- The DOH or its relevant health care regulatory boards;

¹ S. 893.055(2)(a), F.S.

² S. 893.055(3)(a)-(c), F.S.

³ 2012-2013 PDMP Annual Report, available at <http://www.floridahealth.gov/reports-and-data/e-forcse/news-reports/documents/2012-2013pdmp-annual-report.pdf>, last visited on Jan. 9, 2014.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Such information includes name, address, telephone number, insurance plan number, government-issued identification number, provider number, and Drug Enforcement Administration number, or any other unique identifying information or number.

⁸ S. 893.0551(2)(a)-(h), F.S.

⁹ S. 893.055(7)(b), F.S.

¹⁰ Supra at n. 3

- The Attorney General for Medicaid fraud cases;
- Law enforcement agencies during active investigations¹¹ involving potential criminal activity, fraud, or theft regarding prescribed controlled substances; and
- Patients, or the legal guardians or designated health care surrogates of incapacitated patients.¹²

Law enforcement agencies may receive information from the PDMP database through the procedures outlined in the DOH's "Training Guide for Law Enforcement and Investigative Agencies."¹³ Agencies that wish to gain access to the PDMP database must first appoint a sworn law enforcement officer as an administrator who verifies and credentials other law enforcement officers' within the same agency.¹⁴ The administrator may then register individual law enforcement officers with the DOH.

Registered law enforcement officers may not directly access the PDMP, instead when they wish to obtain information from the PDMP database, they must submit a query to the DOH.¹⁵ These queries may be for a patient's history, a prescriber's history, or a pharmacy's dispensing history.¹⁶ The registered law enforcement officer must fill out a form indicating what type of search they want to perform, what parameters (name, date, time period, etc.) they want to include, and some details of the active investigation they are pursuing including a case number. This form is submitted to the DOH and, in most instances, the requested information is made available to the requesting officer. In some cases a request is denied. Generally, a request is denied due to lack of sufficient identifying information (incorrect spelling of a name, wrong social security number, etc.) or, alternatively, a request may return no results. The DOH may also deny a request that it finds not to be authentic or authorized.¹⁷

Prescription Drug Monitoring Programs in Other States

As of December 2013, every state except Missouri has passed PDMP legislation and only New Hampshire and Washington D.C. have yet to bring their PDMP to operation status.¹⁸ The Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) examined the PDMPs of 26 of those states, including Florida.¹⁹ All PDMPs examined are either

¹¹ S. 893.055(1)(h), F.S., defines an "active investigation" as an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings, or that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

¹² S. 893.055(7)(c)1.-4., F.S.

¹³ This training guide may be found at

http://www.hidinc.com/assets/files/flpdms/FL%20PDMP_Training%20Guide%20for%20Enforcement%20and%20Investigative%20Agencies.pdf, last viewed on Jan. 9, 2014.

¹⁴ See the DOH's "Law enforcement administrator appointment form," available at <http://www.floridahealth.gov/reports-and-data/e-forcse/law-enforcement-information/documents/admin-appoint-form.pdf>, last visited on Jan. 9, 2014.

¹⁵ During FY 2012-2013 a total of 487 authorized law enforcement users queried the PDMP database 32,839 times. Id. at note 3.

¹⁶ Id. at note 11.

¹⁷ S. 893.055(7)(c), F.S., requires the DOH to verify a request as being "authentic and authorized" before releasing information from the PDMP.

¹⁸ National Alliance for Model State Drug Laws. *Compilation of State Prescription Monitoring Programs Maps*, can be found at <http://www.namsdl.org/library/6D4C4D9F-65BE-F4BB-A428B392538E0663/>, last visited on Jan. 10, 2014.

¹⁹ *OPPAGA Review of State Prescription Drug Monitoring Programs*, Jan. 31, 2013, on file with the Senate Health Policy Committee.

run by the states in-house or by contract with private vendors. Most states do not require prescribers to register in order to use the PDMP and primarily encourage prescribers to use the database through education and outreach programs.²⁰ Only three of the 26 states require prescribers to access the database prior to prescribing most or all controlled substances.²¹ In 17 of 23 states, including Florida, accessing the database is strictly voluntary and in the remaining six states accessing the database is only required under limited circumstances.²²

All states reviewed have the authority to take punitive action against dispensers of prescription drugs that do not comply with their state's respective laws and rules on their state's PDMP. These punitive actions can come in the form of fines, licensure disciplinary action, and/or criminal charges, however, states rarely use these punitive measures when dispensers do not comply with PDMP requirements.

As of December 5, 2013, 18 states require law enforcement to obtain a search warrant, subpoena, court order, or other type of judicial process in order to access the information in their state's PDMP.²³

Unauthorized Release of PDMP Data

In the early summer of 2013, the PDMP information of approximately 3,300 individuals was improperly shared with a person or persons who were not authorized to obtain such information.²⁴ The original information was released from the PDMP by the DOH during a Drug Enforcement Administration (DEA) investigation of a ring of individuals who used four doctor's information to conduct prescription fraud. Although as a result of the investigation only six individuals were ultimately charged, the information of approximately 3,300 individuals was released to the DEA because the DEA searched the PDMP for the records of all the patients of the four doctors who had been the victims of the prescription drug fraud.²⁵ During the investigation and the resulting prosecution, the DEA shared the full file with the prosecutor who, in turn, shared the full file with the defense attorney during discovery. The improper release of information occurred when a defense attorney associated with the case shared the file with a colleague who was not associated with the case.²⁶

²⁰ Id., p. 8

²¹ Kentucky, New Mexico, and New York. Id., p. 4

²² These circumstances typically revolve around how often a drug is prescribed, if the drug is in a specific class or schedule, if there is a reasonable suspicion that the patient is abusing drugs, or if the prescription was written in a pain clinic. Id.

²³ These states are: Alaska, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, and Wisconsin. See the National Alliance for Model State Drug Laws, *Law Enforcement Access to State PMP Data*, available at <http://www.namsdl.org/library/C4AA9EA3-65BE-F4BB-AAFBAB1F5736F070/>, last visited on Jan 10, 2014.

²⁴ See John Woodrow Cox, *Did Florida's prescription pill database really spring a leak?*, Tampa Bay Times, July 5, 2013. Available at <http://www.tampabay.com/news/politics/did-floridas-prescription-pill-database-really-spring-a-leak/2130108>, Last visited on Jan. 9, 2014, and see the DOH presentation to the Senate Health Policy Committee on the PDMP, Sep. 24, 2013, on file with Health Policy Committee staff.

²⁵ Id.

²⁶ Id.

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.²⁷ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.²⁸ Article I, s. 24 of the State Constitution, provides that:

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.

In addition to the State Constitution, the Public Records Act,²⁹ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency³⁰ records are available for public inspection. The term “public record” is broadly defined 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.³¹

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.³²

²⁷ Section 1390, 1391 Florida Statutes. (Rev. 1892).

²⁸ Article I, s. 24 of the State Constitution.

²⁹ Chapter 119, F.S.

³⁰ The word “agency” is defined in s. 119.011(2), F.S., 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 this chapter, 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.”

³¹ S. 119.011(12), F.S.

³² *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

Only the Legislature is authorized to create exemptions to open government requirements.³³ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.³⁴ A bill enacting an exemption³⁵ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.³⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.³⁷ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.³⁸

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act)³⁹ provides for the systematic review, through a five year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Sunshine Law.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.⁴⁰

³³ Article I, s. 24(c) of the State Constitution.

³⁴ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

³⁵ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

³⁶ Article I, s. 24(c) of the State Constitution.

³⁷ Attorney General Opinion 85-62.

³⁸ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

³⁹ S. 119.15, F.S.

⁴⁰ S. 119.15(6)(b), F.S.

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.⁴¹ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Senate Review of s. 893.0551, F.S.

In the course of conducting the Open Government Sunset Review of s. 893.0551, F.S., Senate Health Policy Committee staff invited input from various stake holders. Staff met with representatives from various agencies and groups including the DOH, the Florida Department of Law Enforcement, the DEA, Florida Sheriffs Association, Florida Police Chiefs Association, the Attorney General's office, and various advocacy groups representing pharmacists and pain management physicians. Staff also observed several meetings held by the DOH on proposed rule amendments for the PDMP.⁴²

⁴¹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

⁴² CS/SB 866 is not linked to CS/SB 862, which amends the statute governing prescription drug monitoring program, s. 893.055, F.S., however the two bills are highly related. CS/SB 862 makes substantive changes to:

- Require the DOH to adopt a user agreement rule that requires users to maintain procedures to protect the confidentiality of information from the prescription drug monitoring program's database;
- Require a law enforcement agency to execute the user agreement before information from the prescription drug monitoring program is released to the agency;
- Allow the DOH to send only relevant information which is not personal identifying information to a law enforcement agency when the DOH determines a pattern consistent with indicators of controlled substance abuse exists;
- Provide requirements for the release of information from the prescription drug monitoring program's database shared with a state attorney in response to a discovery demand;
- Authorize a law enforcement agency to use information from the prescription drug program database to determine whether an active investigation is warranted;
- Allow DOH to provide a patient advisory report to the appropriate health care practitioner if the manager of the prescription drug monitoring program determines that a specified pattern exists;

III. Effect of Proposed Changes:

The bill saves the public records exemption for personal identifying information in the PDMP from repeal and enhances the security pertaining to information that is released from the PDMP.

The following entities may receive and disclose confidential and exempt information from the PDMP:

- Assistant Attorneys General prosecuting prescription Medicaid fraud cases may only disclose information relevant to an active investigation prompting the request for information from the PDMP. Disclosure may be made to a criminal justice agency, and Assistant Attorneys General must take steps to ensure the continued confidentiality of all confidential and exempt information, including making redactions.
- DOH's health care regulatory boards may release information relevant to a specific investigation to a law enforcement agency. The boards must take steps to ensure the continued confidentiality of all confidential and exempt information, including making redactions.
- Law enforcement agencies may only have access to confidential and exempt information if they have entered into a user agreement with the DOH. Law enforcement agencies may disclose information to a criminal justice agency, but must take steps to ensure the continued confidentiality of all confidential and exempt information, including making redactions.
- Health care practitioners may disclose a patient's PDMP information to the patient and put the information in the patient's file.
- Consultants monitoring a health care practitioner with substance abuse problems may have access to the practitioner's profile.
- State Attorneys may only release information directly related to a criminal case in response to a request for discovery. Information that is unrelated to the criminal case may only be released pursuant to a court order.

This bill also deletes the Open Government Sunset Review language that automatically repeals this section of law on October 2, 2014.

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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- Define the term "dispense" or "dispensing" using existing language in the statute and in the definitions section of chapter 893, F.S.;
 - Allow an impaired practitioner consultant retained by the DOH access to information in the prescription drug monitoring program's database which relates to a practitioner who has agreed to be evaluated or monitored by the consultant.

B. Public Records/Open Meetings Issues:

This bill does not create or expand a public records exemption and therefore does not require two-thirds vote for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Attorney General's office, the DOH's regulatory boards, and law enforcement agencies may incur costs associated with redacting or deleting non-relevant PDMP information.

VI. Technical Deficiencies:

This bill does not state with specificity what information is considered "relevant" or "nonrelevant" to an investigation. This is a vague and subjective standard for each agency. For example, information that is not relevant to a health regulatory board's investigation may be relevant to a law enforcement agency's investigation.

By requiring agencies to redact information before passing it along to the next agency, it may make it difficult to identify, investigate and prosecute cases involving several conspirators or witnesses.

CS/SB 866 makes several references to provisions CS/SB 862. CS/SB 866 and CS/SB 862 are not linked bills and if CS/SB 862 does not pass, CS/SB 866 will make references to provisions which do not exist.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.0551 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 3, 2014:

The CS makes the following substantive changes:

- Provides that information may be released to a law enforcement agency pursuant to a user agreement, rather than a court order.
- Permits DOH consultants who monitor health care practitioners with substance abuse problems to have access to PDMP information.
- Provides that state attorneys may only release relevant information if a demand for discovery is made in a criminal case. A state attorney may only release unrelated information pursuant to a court order.

- B. **Amendments:**

None.