

STORAGE NAME: h3209s1.go
DATE: March 24, 1998

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

BILL #: CS/HB 3209

RELATING TO: Public Records and Meetings

SPONSOR(S): Committee on Health Care Standards and Regulatory Reform and Representative Wise

COMPANION BILL(S): SB 870(i), CS/HB 3207(c), SB 402(c)

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

- (1) HEALTH CARE STANDARDS AND REGULATORY REFORM YEAS 8 NAYS 0
- (2) GOVERNMENTAL OPERATIONS
- (3)
- (4)
- (5)

I. SUMMARY:

HB 3209 creates an exemption from the Public Records Law as provided under s. 119.07, F.S., and s. 24(a) Article I of the State Constitution. It applies to licensed master social workers or bachelor social workers, providing for application of public meetings exemptions for probable cause, public meetings, public records, and with respect to disciplinary proceedings and treatment of impaired practitioners.

There is no fiscal impact on state and local government, or the private sector.

Comments by the Committee on Governmental Operations:

*This is the research statement received by the Committee on Governmental Operations. No changes have been made to this statement, as received. Although the heading identifies this as a statement pertaining to CS/HB 3209, and the "Amendments or Committee Substitute Changes" section is addressed, the body of the statement runs to HB 3209. **The Committee on Governmental Operations' research statement can be found in the "Comments" section herein.***

This bill's public necessity statement explaining the need for the exemptions is fairly conclusive in nature. Article I, s. 24, of the State Constitution, requires that the Legislature state with specificity the need for the exemption. The statement mentions "unwarranted invasion into the personal privacy of the practitioner". To this researcher's best knowledge and information, no public necessity statement to date has solely relied upon privacy concerns. This is not to say that such a rationale, standing alone, could not withstand judicial scrutiny. However, it would appear that other reasons also exist in support of such an exemption. All reasons for an exemption should be stated in the public necessity statement.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Chapter 491, F.S., regulates the practice of clinical social work, marriage and family therapy, and mental health counseling. The three licenses issued under the chapter are licensed clinical social worker, licensed marriage and family therapist, and licensed mental health counselor. There are also provisions for certification of master social workers by the Department of Health (department).

The State Constitution contains an explicit declaration in Article I, section 24 that:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Federal and state governments often must engage in a "balancing act" between the generally recognized right of an individual to be "let alone and free from governmental intrusion" and the needs of society to have access to information about or control over an individual for purposes of public health, safety, or welfare. The individual's recognized right to privacy often is a social policy that conflicts with another recognized social policy, that of the public's right of access to public records and meetings, especially as both policies have been elevated to constitutional status in Florida.

The term "public record" is defined in subsection 119.011, F.S., 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. The term "agency" is defined under the same subsection 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 the Public Records Law, 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.

Paragraph 119.07(1)(a), F.S. requires:

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

Paragraph 119.15(2)(e), F.S., defines the term "exemption" to mean a provision of the Florida Statutes which creates an exception to s. 119.07(1), F.S., or s. 286.011, F.S., and which applies to the executive branch of state government or to local government, but it does not include any provision of a special or local law.

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., relating to legislative review of exemptions from public meetings and public records requirements, sets forth

specific criteria for evaluating whether confidentiality provisions serve an identifiable public purpose and are no broader than necessary to meet the public purpose they serve. Paragraph 119.15(4)(b), F.S., states, in pertinent part:

(4)(a) The Legislature shall review the exemption before its scheduled repeal and consider as part of the review process the following:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

(b) 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.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

B. EFFECT OF PROPOSED CHANGES:

An exemption is created from the Public Records law as provided under s. 119.07, F.S., and s. 24(a), Article I of the State Constitution. Current statutory exemptions for disclosure of proceedings of probable cause panels and of information concerning an impaired practitioner are applied to licensed graduate social workers and licensed bachelor social workers.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

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:

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

Not Applicable.

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

Not Applicable.

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

Not Applicable.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

Not Applicable.

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

Not Applicable.

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

Not Applicable.

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

Not Applicable.

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

Not Applicable.

3. Personal Responsibility:

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

Not Applicable.

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

Not Applicable.

4. Individual Freedom:

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

Not Applicable.

- 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:

(1) Who evaluates the family's needs?

Not Applicable.

(2) Who makes the decisions?

Not Applicable.

(3) Are private alternatives permitted?

Not Applicable.

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

Not Applicable.

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

Not Applicable.

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

Not Applicable.

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:

(1) parents and guardians?

Not Applicable.

(2) service providers?

Not Applicable.

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(3) government employees/agencies?

Not Applicable.

D. STATUTE(S) AFFECTED:

Chapter 468, part XV, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Enacts a provision to chapter 468, part XV, F.S., to add an exemption from the public records requirements per Section 24(a), Article I of the State Constitution, disclosure of proceedings of probable cause panels and of information concerning an impaired practitioner to licensed graduate social workers and licensed bachelor social workers. Provides for future review and repeal per the Open Government Sunset Review Act of 1995.

Section 2. No change.

Section 3. No change.

Section 4. Enacts a provision that the language provided for in Section 1 is a public necessity in order that disclosure of proceedings of probable cause panels and of information concerning an impaired practitioner not be made available to the public.

Section 5. Provides for an effective date being the same of that as Committee Substitute for HB 3207, relating to social workers, or similar legislation creating part XV of chapter 468, F.S. becoming law.

III. FISCAL RESEARCH & 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:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

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 Committee on Governmental Operations:

Present Situation

The Division of Medical Quality Assurance, within the Department of Health, is responsible for numerous boards and professions. Some of the boards include the Board of Acupuncture, Board of Medicine, Board of Osteopathic Medicine, Board of Chiropractic, Board of Podiatric Medicine, Board of Nursing, Board of Pharmacy. The responsibilities of these boards include the discipline of the professionals within their jurisdiction. Additionally, the Department of Health "may contract with the Agency for Health Care Administration who shall provide consumer complaint, investigative, and prosecutorial services required by the Division of Medical Quality Assurance, councils, or boards, as appropriate." s. 20.43(3), F.S.

Chapter 455, F.S., provides general provisions regarding the regulation of professions and occupations. More particularly, s. 455. 621, F.S., provides for board disciplinary proceedings. The Department of Health, for the boards under its jurisdiction, must investigate any complaint that is filed, if the complaint is in writing, signed by the complainant, and legally sufficient. Subsection (10) provides that the complaint and all information obtained pursuant to the investigation by the department are confidential and exempt until 10 days after probable cause has been found to exist by the probable cause panel or by the department, or until the regulated professional or subject of the investigation waives that confidentiality.

Furthermore, subsection (2) provides that when an investigation is complete and legally sufficient, the Department of Health must prepare and submit to the probable cause panel of the appropriate regulatory board an investigative report. The report must contain the investigative findings and the recommendations of the department concerning the existence of probable cause. The department must provide a detailed report to the appropriate probable cause panel prior to dismissal of any case or part thereof, and to the subject of the complaint after dismissal of any case or part thereof. For cases dismissed prior to a finding of probable cause, such report is confidential and exempt.

Subsection (4), of s. 455.621, F.S., provides that the determination as to whether probable cause exists must be made by a majority vote of a probable cause panel of the board, or by the department, as otherwise specified. All proceedings of the probable cause panel are made exempt from the Open Meetings Law (s. 286.011, also known as the "Sunshine Law") until 10 days after probable cause has been found to exist by the panel or until the subject of the investigation waives that confidentiality. This is consistent with subsection (10).

Section 455.707, F.S., deals with treatment programs for impaired practitioners. Section 455.707(1) provides that for professions that do not have impaired practitioner programs provided for in their practice acts, the Department of Health will, by rule, designate approved treatment programs. The department may adopt rules setting forth appropriate criteria for approval of treatment providers based on the policies and guidelines established by the Impaired Practitioners Committee. The department must retain one or more impaired practitioner consultants as recommended by the committee.

Subsection (5)(a) of s. 455.707, F.S., provides that an approved treatment provider must, upon request, disclose to the consultant all information in its possession regarding the issue of a licensee's impairment and participation in the treatment program. All information obtained by the consultant and department pursuant to s. 455.707, F.S., is confidential and exempt, with certain exceptions as otherwise provided.

Subsection (3)(e) of s. 455.707, F.S., provides that the probable cause panel, or the Department of Health when there is no board, must work directly with the consultant, and all information concerning a practitioner obtained from the consultant by the panel, or the department when there is no board, must remain confidential and exempt, except as otherwise provided.

Effect of Proposed Changes:

This committee substitute incorporates by reference

- 1) the public records exemptions found in ss. 455.621(2) and (10), F.S., discussed above, regarding disciplinary proceedings; and
- 2) the public records exemptions found in ss. 455.707(3)(e) and (5)(a), F.S., regarding impaired practitioners.

The exemptions are made applicable to the Department of Health and the Agency for Health Care Administration (AHCA) regarding information concerning a licensed graduate social worker or a licensed bachelor social worker. AHCA needs the exemptions in that they may provide investigative and prosecutorial services to the department. See s. 20.43(3), F.S.

The public meetings exemption found in s. 455.621(4), F.S., regarding proceedings of a probable cause panel, is also made applicable to a probable cause panel with respect to an investigation concerning a licensed graduate social worker or a licensed bachelor social worker regulated by the department. A licensed graduate social worker and a licensed bachelor social worker are established pursuant to CS/HB 3207 which sets forth various licensure and regulatory requirements. The effective date of this exemption bill, CS/HB 3209, is tied to the passage of CS/HB 3207. If these two new licensed positions are not created, then there is no need for the exemptions.

This committee substitute also provides a public necessity statement for the exemptions. The statement explaining the need for the exemptions is fairly conclusive in nature. Article I, s. 24, of the State Constitution, requires that the Legislature state with specificity the need for the exemption. The statement mentions "unwarranted invasion into the personal privacy of the practitioner". To this researcher's best knowledge and information, no public necessity statement to date has solely relied upon privacy concerns. This is not to say that

such a rationale, standing alone, could not withstand judicial scrutiny.¹ However, it would appear that other reasons exist in support of such an exemption. All reasons for an exemption should be stated in the public necessity statement.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The difference between the original bill and the Committee Substitute is that wording was changed to reflect that the provisions apply to chapter 468, part XV, F.S., instead of chapter 491, F.S.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE STANDARDS AND REGULATORY REFORM:

Prepared by:

Legislative Research Director:

TERRI L. PADDON

ROBERT W. COGGINS

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Prepared by:

Legislative Research Director:

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

Jimmy O. Helms

¹ Article I, s. 23, of the State Constitution provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. **This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.**" "As provided by law" could mean, unless a public records or meetings exemption otherwise exists in law. Thus, privacy rights could be protected even with respect to public access to records and meetings, if an exemption otherwise exists. Or this provision could mean that open access to public records and meetings as provided by law (Ch. 119, F.S., and Ch. 286, F.S., respectively) cannot be limited based on theories of governmental intrusion into a person's private life.