

STORAGE NAME: h3311s1.go

DATE: March 3, 1998

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

BILL #: CS/HB 3311

RELATING TO: Public Record/Health Care Facilities

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

COMPANION BILL(S): SB 316 (s), CS/CS/CS/HB 349 (c), CS/SB 314 (c)

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

- (1) HEALTH CARE STANDARDS AND REGULATORY REFORM YEAS 7 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

CS/HB 3311 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. The exemption created applies to certain information contained in notification of an adverse incident. The notice is submitted to the Agency for Health Care Administration (agency) as required by CS/CS/CS/HB 349 under s. 395.0197, F.S., relating to internal risk management.

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

Comments by the Committee on Governmental Operations:

- 1) *This bill creates a public records exemption for information which is "required under section 395.0197, Florida Statutes". There are numerous subsections in this section, and in fact the new exemption only applies to the information provided pursuant to subsection (7). Accordingly, an amendment has been filed to specifically cross-reference subsection (7).*
- 2) *Section 2 of this bill provides a public necessity statement for the exemption, as is required by s. 24, Art. I, Fla. Const. The statement appears to address only patient privacy concerns. The exemption, however, exempts more than just patient identifying information. The public necessity statement must explain the necessity for all of the information made exempt. If this bill passes with a defective public necessity statement, the exemption could be challenged as unconstitutional pursuant to s. 24, Art. I.*

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Chapter 395, F.S., governs the licensure of hospitals and ambulatory surgical centers, and is administered by the Agency for Health Care Administration (agency).

Currently, there are approximately 325 licensed hospitals and 210 licensed ambulatory surgical centers (ACSS) in Florida. Each year, approximately 200 short-term, general acute care hospitals admit more than 2 million patients.

Section 395.0197, F.S., requires that each hospital and ambulatory surgical center have a risk management program that detects and responds to adverse incidents and injuries to patients. An adverse incident is an event over which health care personnel could exercise control, is associated with medical intervention rather than the patient's medical condition, and which injures the patient. Facilities are required to submit an annual report to the agency of adverse incidents; additionally, they are required to submit a report within 15 days of the occurrence of unusually serious incidents (e.g., death; brain and spinal cord damage; surgery on the wrong patient; wrong procedure surgery; wrong site surgery; a surgical procedure unrelated to the patient's diagnosis or medical needs, including surgical repair of injuries or damage resulting from a planned surgical procedure; and procedures to remove foreign objects remaining from surgical procedures). Of the approximately 2 million annual admissions to hospitals, approximately 850 serious adverse incidents were reported to the agency in 1996.

Presently, s. 395.0197, F.S., exempts risk management reports submitted by facilities to the agency from public disclosure, as required by chapter 119, F.S.

The State Constitution contains an explicit declaration in Article I, section 23 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), 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.

The Florida Statutes contain more than 250 provisions relating to the confidentiality of medical records. Section 119.07(3), F.S., the Public Records Law, contains several exemptions relating to such records. Under state law, patient information is confidential in the possession of a health care practitioner or a state agency, as provided under s. 455.667, F.S. (formerly s. 455.241, F.S.), except under certain specific circumstances. As confidential information, patient records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. There are some significant exceptions to the, otherwise, exclusive control given patients over such information. These exceptions include: 1) release, without written authorization, of physical or mental examination or administered treatment information to a person that procures such examination or treatment with the patient's consent; and 2) forwarding of examination results obtained when a compulsory physical examination is performed for purposes of civil litigation in conformity with the Rules of Civil Procedure or upon issuance of a subpoena in a civil or criminal action and under other similar circumstances.

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. The exemption applies to information that is contained in the notification of an adverse incident. The notification is required to be submitted to the agency, and is not discoverable or admissible in a civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board.

A legislative finding is provided that the Public Records Law exemption for information contained in a notification of adverse incidents to the agency is a public necessity.

The act takes effect on the date that either Committee Substitute for Senate Bill 314 or Committee Substitute for Committee Substitute for Committee Substitute for House Bill 349 becomes a law.

Comments by the Committee on Governmental Operations:

Section 2 of this bill provides a public necessity statement for the exemption, as is required by s. 24, Art. I, Fla. Const. The statement appears to address only patient privacy concerns. The exemption, however, exempts more than just patient identifying

information, it exempts "the information contained in the notification of an adverse incident." According to s. 395.0197(7) [see section 31 of CS/CS/CS HB 349] the notification must include information regarding the identity of the affected patient, the type of adverse incident, the initiation of an investigation by the facility, and whether the events causing or resulting in the adverse incident represent a potential risk to other patients.

The public necessity statement must explain the necessity for all of the information made exempt. If this bill passes with a defective public necessity statement, the exemption could be challenged as unconstitutional pursuant to s. 24, Art. I.

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.

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(2) service providers?

Not Applicable.

(3) government employees/agencies?

Not Applicable.

D. STATUTE(S) AFFECTED:

Section 395.0197, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Enacts a provision to s. 395.0197, F.S., to add an exemption from the public records requirements per Section 24(a), Article I of the State Constitution on information contained in adverse incident reports which are required to be submitted to the Agency under s. 395.0197, F.S. Provides for future review and repeal per the Open Government Sunset Review Act of 1995.

Section 2. Enacts a provision that the language provided for in Section 1 is a public necessity in order that patient information contained in an adverse incident report not be available to the public, to protect the patient's privacy.

Section 3. Provides for an effective date of Committee Substitute for Senate Bill 314 or Committee Substitute for Committee Substitute for Committee Substitute for House Bill 349, which relate to regulation of health care facilities, or similar legislation 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.

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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:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The difference between the original bill and the Committee Substitute is that one amendment was added which provides that the act shall take effect on the date that either Committee Substitute for Senate Bill 314 or Committee Substitute for Committee Substitute for Committee Substitute for House Bill 349 becomes law, whichever passes.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE STANDARDS AND REGULATORY REFORM:

Prepared by:

Legislative Research Director:

TERRIL PADDON

ROBERT W. COGGINS

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

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