

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: February 4, 1998 Revised: \_\_\_\_\_

Subject: Public Records Law Exemption for Health, Medical, Patient, and Health Insurance Records

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Carter</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 364 adds an exemption to the Public Records Law, s. 119.07(1), F.S., for information contained in health, medical, patient, and health insurance records that relates to natural persons, except as otherwise provided in law. Governmental agencies that are in possession of information contained in such records are prohibited from disclosing such information to the inquiring public. The bill also creates an exemption to the Public Meetings Law, s. 286.011, F.S., for portions of public meetings where such information is discussed. However, disclosure of such information is authorized, under the Public Records Law or the Public Meetings Law, if the person who is the subject of the record or who provides information about the person who is the subject of the record authorizes disclosure, or if a court of competent jurisdiction orders disclosure. However, the Public Meetings Law exemption created in the bill is explicitly made inapplicable to disciplinary proceedings of licensed health care personnel.

This bill amends ss. 119.07, 286.011, and creates one undesignated section of law.

II. Present Situation:

*The Right to Privacy*

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.

***Government in the Sunshine***

Floridians have expressed an unequivocal preference for “open government” or “government in the sunshine” as most recently indicated in a 1992 statewide “referendum” by which they amended the *State Constitution* by adopting Article I, section 24 entitled, “Access to Public Records and Meetings Requirements.” As authorized under this constitutional provision, the Legislature has enacted general laws that provide for the exemption of records, s. 119.07(1), F.S., and meetings, s. 286.011, F.S., from the requirements relating to public records and public meetings, as specified in subsections (a) and (b), respectively, of section 24 of Article I of the *State Constitution*. An exemption from the requirement of access to public records and meetings may be created constitutionally only by stating specifically the public necessity justifying the exemption. Furthermore, the exemption created may be no broader than necessary to accomplish the stated purpose of the law. Specifically, Article I, section 24 of the *State Constitution*, as relates to public records requirements, states:

**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. . . . This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . Laws enacted pursuant to [subsection (c) of section 24] shall contain only exemptions from the requirements of subsection (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.**

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.

### ***Public Records Exemptions***

Statutory exemptions relating to personal health care records are found under the *Florida Statutes*, General Index heading "Public Records: Exemptions from Disclosure: Medical Records." There are 55 entries. Some public records exemptions for patient medical records are associated with statutory provisions that may not be obvious to someone pursuing such a query, e.g., "patient records" rather than "medical records" located in the General Index under "Public Records: Exemptions from Disclosure: Hospitals: Patient Records." All combined, almost 70 health care-related public records exemptions are currently codified in Florida law, as classified by staff.

In addition to the confusion existent in the index to the *Florida Statutes*, two features of the law, as currently compiled, could frustrate reasonable efforts by members of the public to locate public records exemptions pertaining to personal health care records. The first problem is that the exemptions are located in several different chapters of statute that address issues ranging from public health to mental health to worker's compensation. Second, the terminology varies. These exemptions apply to information referred to as: "medical details;" "medical records;" "patient

records;” “patient care, transport, or treatment records or reports,” or by specific diseases such as: “tuberculosis,” “human immunodeficiency virus,” or “sexually transmissible disease.”

The *Florida Statutes* serve as the public's source of notice of expected public conduct and prohibitions or restrictions on private conduct, in addition to serving as the most readily available compilation of the laws enacted by the Legislature. With the broader retrieval of the statutes afforded *via* the Internet, efficient organization of the law becomes even more important so that individuals unfamiliar with the various laws contained in the statute may be able to locate needed information with reasonable effort.

Sections 395.3025 and 455.241, F.S., respectively, provide statutory exemptions from the Public Records Law for personal health care records held in hospitals and professional offices. These are just two examples of such exemptions in statute. However, the exemption of personal health care records may be overcome by issuance of a subpoena, as provided under s. 455.223, F.S., for example.

### III. Effect of Proposed Changes:

**Section 1.** Amends subsection 119.07(3), F.S., listing exemptions from the requirements of the Public Records Law and the state constitutional requirements relating to public records, to create an exemption from public disclosure for information contained in health, medical, patient, or health insurance records of natural persons when such records are held by a governmental entity. However, information contained in such records may be made available to the public if the person to whom the information pertains or that person's legal representative gives written permission or a judicial court orders disclosure.

**Section 2.** Amends s. 286.011, F.S., providing requirements relating to public meetings and records, to add language that requires closure of that portion of a public meeting when the contents of a health, medical, patient, or health insurance record pertaining to a natural person or containing information provided by a natural person about the person who is the subject of the record is discussed. If, however, the person who is the subject of the record or the person who provided information about the person who is the subject of the record or either of their legal representatives gives written consent or a judicial court orders it, discussion of such records may be conducted publicly. The Public Meetings Law exemption created under this subsection is made inapplicable to disciplinary proceedings of licensed health care personnel. Therefore, no portion of a public meeting at which disciplinary proceedings against the specified personnel is undertaken may be closed to the public.

**Section 3.** Provides a statement of public necessity, as required under subsection 24(c) of Article I of the *State Constitution*, justifying the exemptions from the Public Records and Public Meetings Laws that are created in sections 1 and 2 of this bill. Exemption of information concerning a natural person included in health, medical, patient, and health insurance records from public disclosure when such records are held by a governmental agency, as authorized by the *public records requirements of the State Constitution under subsection 24(a) of Article I and the*

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*statutory* Public Records Law, s. 119.07, F.S., and the *public meetings requirements of the State Constitution under subsection 24(b), Article I and the statutory* Public Meetings Law, s. 286.011, F.S., is necessary in order to protect the privacy rights of persons who receive health care services from public institutions or through public programs and to maintain a cohesive and consistent health care delivery system. Persons utilizing public health care facilities and services should be protected, as are persons who use private-sector facilities and who obtain health care services through the private sector, from aimless, casual, or sensationalized public scrutiny of personal, sensitive information about their physical or mental status. Otherwise, such disparate treatment of health, medical, patient, and health insurance records between the public sector and the private sector will undermine the integrity and availability of public health services and public health facilities and could, then, result in loss of public confidence in the state's public health system. A legislative finding is provided which acknowledges that such a benefit substantially outweighs the public benefit of allowing such disclosure.

**Section 4.** Provides that the bill shall take effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

This bill amends the Public Records Law, s. 119.07, F.S., and the Public Meetings Law, s. 286.011, F.S., to create a general exemption from the state policy of broad public access to information held by public entities. The exemption is limited to information contained in health, medical, patient, and health insurance records, and would authorize public officials to deny public access to information contained in such records, when held by a governmental agency.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The First Amendment Foundation, an organization that advocates open government issues, has taken the position that the exemption created in this bill is “overbroad, and thus violates Article I, section 24 of the *Florida Constitution*.” Furthermore, because the exemption covers information pertaining to a natural person that is in a health, medical, patient, or health insurance record, the Foundation objects to protection of the “identity of all health care personnel included in those same reports. . . . we firmly believe . . . that the exemption for the identity of health care personnel is not justified, and we respectfully oppose SB 364 . . . “

**VIII. Amendments:**

None.