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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 901

RELATING TO: Public Records/Employee Assistance Program

SPONSOR(S): Representative Fischer

STATUTE(S) AFFECTED: s. 110.1091; creates ss. 125.585 and 166.0444

COMPANION BILL(S): SB 1832(I)

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

- (1) GOVERNMENTAL OPERATIONS
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

This bill, with regard to a state employee assistance program, expands “confidential communications” to include communications between an employee and service providers. This bill eliminates the requirement that an employee must have entered into the employee assistance program before communications relative to that employee’s participation in the program are deemed confidential communications. Currently all records relative to participation in a state employee assistance program are exempt; HB 901 makes such records confidential as well.

HB 901 defines “employee assistance program” with regard to county and municipal employee assistance programs. This bill also makes any communication, between a county employee or a municipal employee and personnel or service providers of a county or municipal employee assistance program, respectively, relative to the employee’s participation in the program, a confidential communication. All records relative to participation in a county or municipal employee assistance program are made confidential and exempt.

HB 901 provides a public necessity statement for the exemptions described above, and the exemptions are made subject to the Open Government Sunset Review Act of 1995. The exemptions will repeal on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

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

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Public Records Law

Article I, s. 24, Florida Constitution, expresses Florida's public policy regarding access to government records in providing that:

(a) 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, 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 exempting the records must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, 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.

Section 119.15, F.S., 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 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.

Employee Assistance Programs

Chapter 110, F.S., deals with "State Employment", accordingly the provisions of s. 110.1091, F.S., are construed to apply to state agencies and state employees. Section 110.1091, F.S., provides that a state agency may provide a program to assist an employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects that employee's job performance, through referral for counseling, therapy, or other professional treatment. Each employing state agency may designate community diagnostic and referral resources as necessary to implement the program. Section 110.1091, F.S., further provides that upon entry into an employee assistance program, any communication between program personnel of the employing agency and any participating employee, relative to that employee's participation in the program, is a confidential communication as provided by s. 112.313(8), F.S.

Section 110.1091, F.S., became law in 1990 (s. 1, Ch. 90-196, L.O.F.). In 1990, and currently, the exemption in s. 110.1091, F.S., cross-references s. 112.313(8), F.S., which provides:

No public officer, employee of an agency, or local government attorney shall disclose or use information not available to members of the general public and gained by reason of his or her official position for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

If a communication is confidential "as provided by s. 112.313(8), F.S.", then apparently it is only confidential if its disclosure would cause personal gain or benefit for the public officer, agency employee, or local government attorney who disclosed the information, or if disclosure of the communication would cause personal gain or benefit for any other person or business entity. Accordingly, if there were no gain or benefit involved, then the public officer, agency employee, or local government attorney could arguably disclose the communication. Thus, for example, disclosure of a communication regarding an employee's participation in an employee assistance program in order to harm a program participant (though not for anyone's gain or benefit) would be permissible. This does not appear to be a logical or intended outcome. In sum, it appears overly restrictive to make the confidentiality of such communications contingent upon the provisions in s. 112.313(8), F.S.

Section 110.1091, F.S., also provides that "all records relative to ... participation" in an employee assistance program are exempt from public disclosure, "except as provided by s. 112.0455(11)". This exemption runs to "all records relative to participation" which would appear to include records held by the employing agency as well as the service provider. Furthermore, this exemption provides for an exception to the exemption as set forth in s. 112.0455(11), F.S.

Section 112.0455, F.S., is known as the "Drug-Free Workplace Act". Section 112.0455(11), F.S., (emphasis added) provides:

(a) Except as otherwise provided in this subsection, all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise received or produced as a result of a drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section.

(b) Employers, laboratories, *employee assistance programs*, drug and alcohol rehabilitation programs, and their agents may not release any information concerning drug test results obtained pursuant to this section without a written consent form signed voluntarily by the person tested, except where such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, or where deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

1. The name of the person who is authorized to obtain the information,
2. The purpose of the disclosure.
3. The precise information to be disclosed.
4. The duration of the consent.
5. The signature of the person authorizing release of the information.

(c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section shall be inadmissible as evidence in any such criminal proceeding.

(d) Nothing herein shall be construed to prohibit certifying bodies of special risk employees from receiving information on positive confirmed drug test results for the purpose of reviewing certification.

(e) Nothing herein shall be construed to prohibit the employer, agent of the employer, or laboratory conducting a drug test from having access to employee drug test information when consulting with legal counsel in connection with actions brought under or related to this section or where the information is relevant to its defense in a civil or administrative matter.

If one assumes that drug tests are conducted pursuant to an employee assistance program envisioned by s. 110.1091, F.S., then apparently, as a result of the cross-reference to s. 112.0455(11), F.S., drug test results can be released if the affected person provides a signed written consent form; if compelled by a hearing officer or court of competent jurisdiction; or, where deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. It is important to note that hearing officers, judges, and licensing boards already have the authority to compel disclosure of confidential and exempt information.

Furthermore, certifying bodies of special risk employees would also apparently not be prohibited from receiving positive drug test results, provided of course, any were conducted as a result of an employee's participation in an employee assistance program. This exception is, however, only relevant if the affected employee is in the Florida Retirement System where special risk employees are identified.

It is unclear as to whether any other provisions set forth in s. 112.0455(11), F.S., are made applicable to s. 110.1091, F.S. Incorporating provisions from one section of law to another by cross-reference is often a very unsatisfactory practice, as in this case. Multiple provisions exist in the cross-referenced section, yet only those that are exceptions to the nondisclosure requirements are apparently applicable. It would have been preferable to have simply listed in s. 110.1091, F.S., the exceptions desired. Finally, the provisions in s. 112.0455(11), F.S., are tailored-made for entities that participate in the Drug-Free Workplace Program and are not easily adaptable to stand alone "employee assistance programs" that may be independently established by governmental entities for their employees. An entity participating in the Drug-Free Workplace Program is governed by the procedures, exemptions, and exceptions set forth in s. 112.0455, F.S.

Currently, records of the Residential Property and Casualty Joint Underwriting Association pertaining to an employee's assistance program are confidential and exempt:

Upon an employee's entrance into the employee assistance program, a program to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance, all records relative to that participation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except as otherwise provided in s. 112.0455(11).

Again, the exceptions provided for in s. 112.0455(1), F.S., are cross-referenced.

B. EFFECT OF PROPOSED CHANGES:

HB 901 amends s. 110.1091, F.S., regarding state agency employee assistance programs. It eliminates the cross-references to ss. 112.313(8) and 112.0455(11), F.S. HB 901 adds the word "state" to references regarding "agency" and "employee". In addition, HB 901 amends the existing provision in s. 110.1091, F.S., regarding "a confidential communication". Currently a confidential communication is one between "program personnel of the employing agency and any participating employee", upon the entry of the employee into the employee assistance program, relative to that employee's participation in the program. ("Communication" is not a defined term.)

HB 901 eliminates the requirement that the communication be contingent upon the state employee's entry into a employee assistance program in order for it to be a "confidential communication". This bill simply provides that the communication relate to the state employee's participation in the program (which could include pre-entry communications) and that the communication be between "a state employee and personnel or service providers of a state employee assistance program". Thus, not only are communications between personnel of a state employee assistance program and a state employee confidential (as is the current situation), communications between that employee and a service provider relative to that employee's participation in the employee assistance program are confidential.

Currently, s. 110.1091, F.S., provides that "all records relative to" participation in the employee assistance program are exempt. This means records in the agency's or service provider's custody. HB 901 amends the exemption to provide that such records are "confidential" as well as exempt.

HB 901 creates s. 125.585, F.S., which establishes an employee assistance program at the county level. "Employee assistance program" is defined to mean "a program provided by a county to assist any county employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance, through referral for counseling, therapy, or other professional treatment." Section 125.585, F.S., also provides for confidential communications, as described above, with regard to county employee assistance programs. Additionally, all records relating to participation in a county employee assistance program are made confidential and exempt.

HB 901 also creates s. 166.044, F.S., with regard to municipal employee assistance programs. "Employee assistance program" is defined as stated above except that it is

made applicable to a municipality and municipal employees. Section 166.044, F.S., also provides for confidential communications, as described above, with regard to municipal employee assistance programs. Additionally, all records relating to participation in a municipal employee assistance program are made confidential and exempt.

All exemptions are made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

HB 901 also provides a public necessity statement for the exemptions, as is required by Article I, section 24, of the Florida Constitution. The public necessity statement provides, in part, that public employees have a right of privacy to protect personal, sensitive information regarding them. Furthermore, "public knowledge of such information could lead to discrimination against the employee, and could compromise the therapeutic process."

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?

State, county, and municipal agencies are responsible for keeping certain communications and records confidential and exempt from public disclosure.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

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

N/A

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

N/A

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

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

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

No.

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

No.

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

No.

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

No.

3. Personal Responsibility:

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

No.

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

N/A

4. Individual Freedom:

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

Providers of services to employee assistance programs would have the protection of having their communications with employee participants held confidential.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Currently service provider communications with an employee in an employee assistance program may not be considered confidential. HB 901 clearly makes such communications confidential and therefore not subject to disclosure.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

No.

- 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:

This bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Amends s. 110.1091, F.S.; broadens the type of communication considered a confidential communication with respect to state employee assistance programs; deletes the cross-references to ss. 112.313(8) and 112.0455(11), F.S.; makes currently exempt records also confidential; and, provides for repeal of the exemption.

Section 2 -- Creates s. 125.585, F.S.; defines a county "employee assistance program"; provides for confidential communications with regard to county employee assistance programs; makes all records relating to participation in county employee assistance programs confidential and exempt; and, provides for repeal of the exemption.

Section 3 -- Creates s. 166.0444, F.S.; defines a municipal "employee assistance program"; provides for confidential communications with regard to municipal employee assistance programs; makes all records relating to participation in municipal employee assistance programs confidential and exempt; and, provides for repeal of the exemption.

Section 4 -- Provides a public necessity statement for the exemptions described in Sections 1, 2, and 3 above.

Section 4 -- Provides an effective date of October 1, 1997.

III. FISCAL ANALYSIS & 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 action which requires the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

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