STORAGE NAME: h0829.hcl
DATE: February 14, 2000

HOUSE OF REPRESENTATIVES
COMMITTEE ON
HEALTH CARE LICENSING & REGULATION
ANALYSIS

BILL #: HB 829

RELATING TO: Public Records/Exemption

SPONSOR(S): Representative Kyle

TIED BILL(S):

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

(1) HEALTH CARE LICENSING & REGULATION
(2) GOVERNMENTAL OPERATIONS
(3)
(4)
(5)

I. SUMMARY:

This bill provides exemptions to the public records laws for three types of reports required to be filed with the Department of Health. The first exemption to the public records law conforms the reporting requirement of s. 455.565(1)(a)8., F.S., to the reporting requirement of s. 395.0193(4) and (7), F.S., regarding peer review disciplinary action taken by a licensed hospital or ambulatory surgical center against a physician which is confidential and exempt pursuant to s. 395.0193(7), F.S., and is inadmissible and immune from discovery pursuant to s. 395.0193(8), F.S.

The second exemption to the public records law conforms the self-reporting by allopathic and osteopathic physicians of adverse incidents that occur in the physician's office required by ss. 458.351 and 459.026, F.S. to the self-reporting of adverse incidents by licensed facilities of adverse incidents required by s. 395.0197, F.S., which are confidential and exempt from the public records laws and inadmissible and immune from discovery, except in disciplinary proceedings, pursuant to s. 395.0198, F.S.

The third exemption to the public records law clarifies that all presuit notices should be confidential and exempt, even if the Department of Health determines that there was no wrongdoing by a licensed health care practitioner that requires investigation.

This bill provides for repeal of the exemptions on October 2, 2005, unless reviewed and reenacted by the Legislature prior to such repeal date.

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Peer review final disciplinary action:

In 1997, the Florida Legislature passed s. 127 of ch. 97-237, L.O.F., requiring allopathic, osteopathic, chiropractic, and podiatric physicians to self-report information on a "practitioner profile" about the physician's education, training, and background to the Department of Health at the time of initial application and renewal of license. One of the items required to be self-reported by the physician is final disciplinary action taken against that physician within the previous 10 years by a licensed hospital, health maintenance organization, prepaid health clinic, ambulatory surgical center, or nursing home. This provision is consistent with s. 395.0193, F.S., which requires licensed facilities to report the same disciplinary action against health care practitioners. However, when the department began promulgating rules for the form of the profile, it discovered that the peer review disciplinary information reported under the profiling laws, ss. 455.565-455.5656, F.S., did not have the same exemptions to the public records laws as the identical peer review disciplinary information when reported under s. 395.0193, F.S.

Section 395.0193(4), F.S., clearly states that reports of peer review final disciplinary action "are not subject to inspection under s. 119.07(1) even if" the investigation results in a finding of probable cause. However, if the underlying action of the health care practitioner results in a finding of probable cause, then the underlying action which caused the disciplinary action will become public information 10 days after the finding of probable cause, pursuant to s. 455.621, F.S.

The current peer review disciplinary action public records exemption in s. 395.0193, F.S., is presumed to be constitutional because it is narrowly tailored and allows the state to regulate licensed facilities and licensed health care practitioners effectively and efficiently while still protecting sensitive patient records and employee information which could be defamatory or cause unwarranted damage to the good name or reputation of such individuals.

In 1998, the Florida Legislature amended the profiling laws, specifically s. 455.5651(5), F.S., to prohibit the department from publishing peer review disciplinary action taken by a licensed hospital or an ambulatory surgical center in a practitioner profile. The department

may only use the peer review discipline reported under either law for the purpose of investigating a health care practitioner pursuant to s. 455.621, F.S. That section provides that the complaint and all information obtained pursuant to the investigation by the department remain confidential and exempt from s. 119.07(1), F.S., until 10 days after probable cause is found to exist.

Therefore, the present laws requiring dual reporting are inconsistent in that the peer review information is public if reported under one law and is confidential and exempt under another law.

Adverse incident reports:

In 1999, the Legislature passed a law requiring allopathic and osteopathic physicians to self-report adverse incidents that occur in the physician's office. The model used for physician office adverse incident reporting in ss. 458.351 and 459.026, F.S., was the licensed facility adverse incident model found in s. 395.0197, F.S. Adverse incident reports filed with the state by licensed facilities pursuant to s. 395,0197, F.S., are confidential and exempt from the public records laws, pursuant to s. 395.0198, F.S. In addition, facility adverse incident reports are inadmissible and not discoverable in civil or administrative actions unless the action is a disciplinary proceeding against the facility or a licensed practitioner. Moreover, s. 395.0198, F.S., prohibits public release of the information contained in the facilities' adverse incident reports even as part of the record of investigation or prosecution in a disciplinary proceeding.

The current facility adverse incident public records exemption in s. 395.0198, F.S., is presumed to be constitutional because it is narrowly tailored and allows the state to regulate licensed facilities and licensed health care practitioners effectively and efficiently while still protecting sensitive patient records and employee information which could be defamatory or cause unwarranted damage to the good name or reputation of such individuals or the facility.

When the House of Representatives passed the physician office adverse incident reporting requirement in 1999, it also unanimously passed HB 1843, a "tied bill," making the adverse incident reports confidential and exempt. However, the Senate failed to pass this bill, and therefore, physician office adverse incident reports are currently considered public records once filed with the state. The physician office adverse incident law is the exact opposite of the facility adverse incident law with respect to the confidential nature of the public record.

The Agency for Health Care Administration, under contract with the Department of Health to review and investigate physicians, reports that no physician adverse incident reports have been received as of February 14, 2000. While the adverse incident laws, ss. 458.351 and 459.026, F.S., require any adverse incident that occurs on or after January 1, 2000, to be reported to the state, because the Board of Medicine and Board of Osteopathic Medicine have not yet completed the rulemaking process, physicians are unclear as to how to report such incidents and therefore have not filed any such reports.

Presuit notices:

Section 766.106, F.S., requires potential medical malpractice claimants to notify each prospective defendant, and the Department of Health if the defendant is an allopathic, osteopathic, chiropractic, or podiatric physician or dentist, of the claimant's intent to initiate litigation for medical malpractice. The presuit notice is not discoverable or admissible in

any civil or administrative action. The presuit notice becomes a public record once filed with the Department of Health.

The department is required to review each presuit notice and determine whether the incident involved conduct by a licensee which should be investigated. If the department decides to investigate, then the provisions of s. 455.621, F.S., apply. That section provides that the complaint and all information obtained pursuant to the investigation by the department remain confidential and exempt from s. 119.07(1), F.S., until 10 days after probable cause is found to exist. However, it is unclear whether the presuit notice itself becomes a "complaint" and is protected by the provisions of s. 455.621, F.S., if the department decides to investigate. Also, it is unclear if presuit notices which the department determines not to warrant investigation are public records. Because this section is unclear, it has been the subject of on-going litigation.

C. EFFECT OF PROPOSED CHANGES:

Peer review final disciplinary action:

The first exemption to the public records law conforms the reporting requirement of s. 455.565(1)(a)8., F.S., to the reporting requirement of s. 395.0193(4) and (7), F.S., regarding peer review disciplinary action taken by a licensed hospital or ambulatory surgical center against a physician. Peer review disciplinary action is confidential and exempt pursuant to s. 395.0193(7), F.S., and is inadmissible and immune from discovery pursuant to s. 395.0193(8), F.S. This bill keeps peer review disciplinary action confidential and exempt regardless of which licensee, the facility or the physician, informs the state of the peer review action.

The purpose of both reporting requirements is to allow the state to investigate and take disciplinary action against the physician when appropriate. This bill will not change the purpose of either reporting requirement. However, it will make the reporting requirements easier for affected parties to understand and therefore, will increase compliance because the bill will make the reporting requirements of both laws consistent with each other. It is argued that the failure of this bill to pass may have a chilling effect on peer review discipline and may decrease compliance with self-reporting.

Adverse incident reports:

The second exemption to the public records law conforms the self-reporting by allopathic and osteopathic physicians of adverse incidents that occur in the physician's office required by ss. 458.351 and 459.026, F.S., to the self-reporting of adverse incidents by licensed facilities of adverse incidents required by s. 395.0197, F.S. Self-reporting of adverse incidents by licensed facilities are confidential and exempt from the public records laws and inadmissible and immune from discovery, except in disciplinary proceedings, pursuant to s. 395.0198, F.S. This bill makes adverse incident reports filed by licensed physicians confidential and exempt from the public records laws in the same manner as adverse incident reports filed by licensed facilities. This bill also makes the information reported inadmissible and not discoverable in civil or administrative actions unless the proceeding is a licensure disciplinary proceeding against the physician.

This bill will encourage self-reporting by physicians of adverse incidents since the adverse incident will only become public if probable cause is found. This bill will help minimize litigation between health care practitioners and the Department of Health regarding self-

incrimination and will encourage health care practitioners to admit their mistakes as evidence in mitigation. This bill has no effect on a patient's ability to discuss the patient's injury or adverse incident with whomever the patient chooses.

Presuit notices:

The third exemption to the public records law clarifies that all presuit notices should be confidential and exempt, even if the Department of Health determines that there was no wrongdoing by a licensed health care practitioner that should be investigated. The effect of this bill is that presuit notices filed with the Department of Health will not be released pursuant to public records requests. This bill has no effect on a patient's ability to discuss the patient's injury or claim against the health care provider with whomever the patient chooses.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 455.647, F.S., to provide that all final peer review disciplinary action taken by a licensed hospital or ambulatory surgical center is confidential and exempt from s. 119.07(1) and s. 24(a), Article I of the State Constitution. Provides for repeal of said exemption on October 2, 2005, unless reviewed and reenacted by the Legislature.

Section 2. Creates s. 458.353, F.S., to provide that adverse incident reports filed by allopathic physicians pursuant to s. 458.351, F.S., are confidential and exempt from s. 119.07(1) and s. 24(a), Article I of the State Constitution. Also, provides that the adverse incident report is not discoverable or admissible except in disciplinary proceedings. Provides for repeal of said exemption on October 2, 2005, unless reviewed and reenacted by the Legislature.

Section 3. Creates s. 459.028, F.S., to provide that adverse incident reports filed by osteopathic physicians pursuant to s. 459.026, F.S., are confidential and exempt from s. 119.07(1) and s. 24(a), Article I of the State Constitution. Also, provides that the adverse incident report is not discoverable or admissible except in disciplinary proceedings. Provides for repeal of said exemption on October 2, 2005, unless reviewed and reenacted by the Legislature.

Section 4. Amends s. 766.106, F.S., to clarify that all presuit notices and information obtained by the Department of Health pursuant to an investigation are confidential and exempt from s. 119.07(1) and s. 24(a), Article I of the State Constitution until 10 days after probable cause has been found or until the subject of the investigation waives the privilege of confidentiality in accordance with s. 455.621, F.S. Provides for repeal of said exemption on October 2, 2005, unless reviewed and reenacted by the Legislature.

Section 5. Provides legislative findings necessitating these public records exemptions, including protecting the patient from an invasion of privacy, maximizing collection and reporting of information, assisting the department in effectively carrying out its mission to enforce safe patient care and take appropriate disciplinary action, and conforming these sections to related sections of existing law.

Section 6. Provides an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to expend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The 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:

The bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Article I, section 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records. This section provides that:

> 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 1, section 24, Florida Constitution, also provides that the Legislature may, by general law, exempt public records from the requirements of s. 24(a). Such a general law exempting records from public disclosure 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., the Open Government Sunset Review Act of 1995, states that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to meet that public purpose. 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 that such purpose 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.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE LICENSING & REGULATION:

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