

STORAGE NAME: h1067a.sa.doc
DATE: April 3, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 1067
RELATING TO: Physician Records/Adverse Incidents
SPONSOR(S): Representative Kyle
TIED BILL(S): None

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

- (1) HEALTH REGULATION YEAS 9 NAYS 0
 - (2) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (3) COUNCIL FOR HEALTHY COMMUNITIES
 - (4)
 - (5)
-

I. SUMMARY:

This bill provides an exemption to the public records laws for personal and sensitive information which identifies the name of the patient, practitioner, or office contained in adverse incident reports required to be filed with the Department of Health. The exemption to the public records law in this bill for 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., is similar to the exemption to the public records law for the self-reporting of adverse incidents by licensed facilities required by s. 395.0197, F.S. Facility adverse incident reports 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 provides for repeal of the exemption on October 2, 2006, 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.

See Amendment section of this analysis for changes made by an amendment that is traveling with the bill.

See "Other Comments" section for comments by the Committee on State Administration.

On April 3, 2001, the Committee on State Administration heard HB 1067 and adopted an amendment to the bill. The amendment is traveling with the bill.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

B. PRESENT SITUATION:

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.

When the House of Representatives passed the physician office adverse incident reporting requirement in 1999 (enacted as s. 197, ch. 99-397, Laws of Florida), 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, but are not confidential, whereas similar required reports by hospitals are by statute confidential.

The Commission on Excellence in Health Care recommended that physician adverse incidents be placed on the Department of Health's website without including information that would identify the patient or the practitioner. A public records exemption is necessary to accomplish the recommendations and intent of the Commission.

C. EFFECT OF PROPOSED CHANGES:

The 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 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.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 458.353, F.S., to provide that personal information contained in adverse incident reports filed by allopathic physicians pursuant to s. 458.351, F.S., which identifies a patient, practitioner, or office by name, location, or other identifier, 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, 2006, unless reviewed and reenacted by the Legislature.

Section 2. Creates s. 459.028, F.S., to provide that personal information contained in adverse incident reports filed by osteopathic physicians pursuant to s. 459.026, F.S., which identifies a patient, practitioner, or office by name, location, or other identifier, 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, 2006, unless reviewed and reenacted by the Legislature.

Section 3. 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 4. 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:

This bill is virtually identical to a bill filed in 1999, HB 1843 by the Committee on Health Care Licensing and Regulation and Representative Fasano, which passed out of all three committees of reference unanimously: Health Care Licensing 11-0; Judiciary 8-0; and Governmental Operations 5-0. This bill is also similar to CS/HB 829 by the Committee on Health Care Licensing and Regulation and Representative Kyle, filed in 2000, which passed two committees unanimously: Health Care Licensing and Regulation by a vote of 13-0 and Governmental Operations by a vote of 6-0. In 2000, the bill passed the House unanimously, 118-0, but died in the Senate.

The Florida Board of Medicine supports a public records exemption for the personal, sensitive information contained in adverse incident reports. The board believes that the lack of a public records exemption will deter the collection and reporting of this information to the department, which would prevent the department, and the regulatory boards from effectively carrying out their responsibility to enforce safe patient care.

Comments by the Committee on State Administration

A portion of a sentence in HB 1067 is confusing. It states, "The information may not be made available to the public as part of the record of investigation or prosecution in a disciplinary proceeding *that is made available for the department or a regulatory board.*" The Department of Health and the Board of Medicine within the department already receive this information; therefore, nothing need be made "available" for them. An amendment will be filed to remove the unnecessary language.

The First Amendment Foundation is opposed to this bill and believes that the "argument that the exemption is justified by concern with patient privacy . . . misses the mark."¹ They believe that if patient privacy were the issue, then an exemption for patient identifying information should be created. Also, the First Amendment Foundation believes that making the entire adverse incident report exempt "because it contains patient identifying information is obviously far broader than necessary to protect patient privacy."²

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 27, 2001, the Committee on Health Regulation adopted one amendment. The amendment removes from the bill, in two places, language that would have made adverse incident reports not discoverable or admissible in a civil or administrative proceeding, unless the action was a disciplinary proceeding by the Department of Health or the appropriate regulatory board. This amendment conforms HB 1067 with the Senate companion, SB 692. This amendment is traveling with the bill.

On April 3, 2001, the Committee on State Administration heard HB 1067 and adopted an amendment to the bill. The amendment is editorial in nature and removes unnecessary language from the bill. The amendment is traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON HEALTH REGULATION:

Prepared by:

Wendy Smith Hansen, Senior Attorney

Staff Director:

Lucretia Shaw Collins

AS REVISED BY THE COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

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

¹ Letter to Francesca Plendl, Director of Governmental Affairs of the Florida Medical Association, from Barbara Peterson, Executive Director of the First Amendment Foundation, February 2, 2001.

² *Id.*; In addition, the First Amendment Foundation believes that the argument that the "exemption is justified by a need to encourage physicians to comply with the law requiring them to make these reports is . . . quite disturbing. The First Amendment Foundation has stated that they "cannot subordinate our constitutional right of access to a tender solicitude for illegal behavior by any group or class of persons, much less the relatively privileged and highly regulated class of physicians."