

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 692

SPONSOR: Senator Clary and others

SUBJECT: Public Records; Adverse Incident Reports

DATE: March 30, 2001

REVISED: 04/05/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Fav/1 amendment
2.	Rhea	Wilson	GO	Fav/1 amendment
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill creates exemptions from chapter 119, Florida Statutes, relating to the Public Records Law, and Section 24(a), Article I of the State Constitution, and makes information contained in the notification of adverse incidents involving physician office surgery confidential. Such information is also not discoverable or admissible in a civil or administrative action, except disciplinary proceedings by the Department of Health or a regulatory board. The bill makes the exemptions subject to a future review and repeal date of October 2, 2006, as required by s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The bill provides findings and statements of public necessity to justify the creation of the public records exemptions.

This bill creates one undesignated section and ss. 458.353 and 459.028, Florida Statutes.

II. Present Situation:

Public Records Law

The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. While the state constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, Fla. Const. governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, Fla. Const. provides that any bill

that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act, contained in s. 119.14, F. S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The Open Government Sunset Review Act of 1995 provides for the repeal and prior review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The review cycle begins in 2001. The chapter defines the term “substantial amendment” for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

Hospital Adverse Incident Reporting

Ambulatory surgical centers and hospitals must be licensed under ch. 395, F.S. Chapter 395, F.S., imposes requirements on ambulatory surgical centers and hospitals which include inspection and accreditation, and reporting of adverse incidents that result in serious patient injury. Ambulatory surgical centers and hospitals, under s. 395.0197(8), F.S., must report the following incidents within 15 calendar days after they occur to the Agency for Health Care Administration:

- < Death of a patient;
- < Brain or spinal damage to a patient;
- < Performance of a surgical procedure on the wrong patient;
- < Performance of a wrong-site surgical procedure;
- < Performance of a wrong surgical procedure;
- < Performance of a surgical procedure that is medically unnecessary or otherwise unrelated to the patient’s diagnosis or medical condition;
- < Surgical repair of damage resulting to the patient from a planned surgical procedure where damage is not a recognized specific risk, as disclosed to the patient and documented through the informed consent process; or
- < Performance of procedures to remove unplanned foreign objects remaining in a patient following surgery.

Pursuant to s. 395.0197(8), F.S., the incident reports filed with the Agency for Health Care Administration may not be made available to the public under s. 119.07(1), F.S., or any other law providing access to public records, nor be discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the Department of Health or the appropriate regulatory board. The incident reports may not be made available to the public as part of the records of investigation for and prosecution in disciplinary proceedings that are made available to the public. The Department of Health (DOH) or the appropriate regulatory board must make available, upon written request by a health care professional against whom probable cause has been found, any such records which form the basis of the determination of probable cause. The DOH must review each incident and determine whether it potentially involved

conduct by the health care professional who is subject to disciplinary action under the provisions of s. 456.073, F.S.

Patient Confidentiality under Disciplinary Procedures

Section 456.073, F.S., provides procedures to be used for the discipline of health care practitioners. Disciplinary complaints and all information obtained by the DOH are confidential and exempt from the public records and meetings laws until 10 days after probable cause is found or the subject of the complaint waives confidentiality. Section 456.057(8), F.S., provides that all patient records obtained by the DOH and any other documents maintained by the department which identify the patient by name are confidential and exempt from the public records and meetings laws, and may be used solely by the department and the appropriate regulatory board in their investigation, prosecution, and appeal of disciplinary proceedings. The patient records may not be made available to the public as part of the record of investigation for and prosecution in disciplinary proceedings.

Physician Office Surgery Adverse Incident Reporting

Licensed medical physicians may perform surgery in their medical offices, ambulatory surgical centers, or hospitals. Sections 458.351 and 459.026, F.S., require any medical physician, osteopathic physician, or physician assistant to notify the DOH of any adverse incident that involved the physician or physician assistant which occurred on or after January 1, 2000, in any office maintained by the physician for the practice of medicine that is not licensed under ch. 395, F.S., relating to licensure for hospitals and ambulatory surgical centers. The sections require any medical physician, osteopathic physician, or physician assistant to notify the department in writing and by certified mail of the adverse incident within 15 days after the adverse incident occurred. The notice must be postmarked within 15 days after the adverse incident occurred.

“Adverse incident” is defined under ss. 458.351 and 459.026, F.S., to mean an event over which the physician or physician assistant could exercise control and which is associated in whole or in part with a medical intervention, rather than the condition for which such intervention occurred, and which results in the following patient injuries:

- < Death of a patient; brain or spinal damage to a patient;
- < Performance of a surgical procedure on the wrong patient;
- < Any condition that required the transfer of a patient to a hospital licensed under ch. 395, F.S., from an ambulatory surgical center licensed under ch. 395, F.S., or from any facility or any office maintained by a physician for the practice of medicine which is not licensed under ch. 395; or
- < Performance of a procedure to remove unplanned foreign objects remaining from a surgical procedure.

Under the definition of adverse incident, a medical physician, osteopathic physician, or physician assistant must provide notice of patient injuries only if they result in death, brain or spinal damage, permanent disfigurement, fracture or dislocation of bones or joints, a limitation of neurological, physical or sensory function, or any condition that required the transfer of the

patient. The DOH must review each adverse incident and determine whether the incident potentially involved conduct by a health care professional who is subject to disciplinary action, and provides that the procedures for handling disciplinary complaints under s. 456.073, F.S., apply.

III. Effect of Proposed Changes:

Section 1. Creates s. 458.353, F.S., to make the information contained in the notification of an adverse incident that occurred in a physician's office as a result of surgery confidential and exempt from the Public Records Law, and immune from discovery and inadmissible in any civil or administrative action, except a disciplinary proceeding maintained by the DOH or the appropriate regulatory board. Such information may not be released to the public as part of the records relating to the disciplinary proceeding. The exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Creates s. 459.028, F.S., to make the information contained in the notification of an adverse incident which occurred in an osteopathic physician's office as a result of surgery confidential and exempt from the Public Records Law, and immune from discovery and inadmissible in any civil or administrative action, except a disciplinary proceeding maintained by the DOH or the appropriate regulatory board. Such information may not be released to the public as part of the records relating to the disciplinary proceeding. The exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 3. Creates an undesignated section, to provide legislative findings and a statement of public necessity for the exemptions from the Public Records Law provided in the bill for information contained in the notification of an adverse incident involving physician office surgery. The section provides that the exemptions are a public necessity and that it would be an invasion of a patient's privacy for such personal, sensitive information contained in the notification of an adverse incident to be publicly available. The section states that failure to protect the confidentiality of any information submitted or collected by the DOH regarding an adverse incident, such as the identity of the patient, the type of adverse incident, and the fact that a disciplinary investigation is being conducted would deter the collection and reporting of this information to the department. Without the exemptions from the Public Records Law, the section indicates that the DOH and the appropriate regulatory boards would be prevented from effectively carrying out their responsibility to enforce safe patient care and take necessary disciplinary action for practice violations. Release of the information contained in adverse incidents would deter reporting of such information. The bill states that these exemptions apply the same exemption accorded under other sections of the Florida Statutes for similar information.

Section 4. Provides that this act 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 Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill creates exemptions from ch. 119, F.S., relating to the Public Records Law, and s. 24(a), Art. I of the State Constitution, for specified records maintained by the DOH and provides findings of necessity to justify the creation of the exemptions.

The bill states that it is a public necessity to make adverse incident reports confidential and exempt because it would be an invasion of a patient's privacy for personal, sensitive information contained in the report to be publicly available. Under the requirements of the s. 24(a), Art. I of the State Constitution, exemptions must be narrowly tailored and be no broader than necessary to effect the public necessity. Typically, if an individual's privacy is affected because information about the person is contained in a document, the narrowest means of protecting the individual is to make only identifying information about the individual in the report confidential and exempt. Instead, the bill makes the entire report confidential and exempt.

Another stated basis for the public necessity of the exemption is that, if an adverse incident report is made available, it would deter the collection and reporting of this information to the department as physicians and osteopathic physicians would be deterred from reporting adverse incidents. Physicians and osteopathic physicians are required by law under ss. 458.351 and 459.026, F.S., to file these reports.

On page 1, lines 22-25 and on page 2, lines 11-14, the bill provides that information contained in the notification of adverse incidents involving physician office surgery is not discoverable or admissible in a civil or administrative action, except proceedings by the DOH or a regulatory board. This is a substantive provision which is not a public records exemption. Section 24(c), Art. I of the State Constitution provides that legislation enacting public records exemptions or public meeting exemptions may *only* contain such exemptions and may only relate to one subject.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Unnecessary and redundant language is contained on page 1, lines 27 and 28 and page 2, lines 16 and 17, that could be removed. If removed, the bill would conform to its companion in the House of Representatives, House Bill 1067.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Governmental Oversight & Productivity:

Removes redundant and unnecessary language from two sections of the bill.

#1 by Health, Aging and Long-Term Care:

Deletes a substantive provision which provides that information contained in the notification of adverse incidents involving physician office surgery is not discoverable or admissible in a civil or administrative action, except proceedings by the Department of Health or a regulatory board. This is a substantive provision which is not a public records exemption. Section 24(c), Article I of the State Constitution provides that legislation enacting public records exemptions or public meeting exemptions may *only* contain such exemptions and may only relate to one subject.