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**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 279 (PCB SA 02-05)
RELATING TO: Health Care Practitioners
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S):

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

- (1) COMMITTEE ON STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 11 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) provides that an exemption from the requirements of the public records or public meetings laws 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. The Act, in pertinent part, sets forth a review process, and requires that on October 2nd in the fifth year after enactment of a new exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Sections 490.00515 and 491.0047, F.S., provide that the existing public records and public meetings exemptions for information concerning participation in the impaired practitioner treatment program, disciplinary complaints, and related investigative information, and the proceedings of the probable cause panel for health care professionals under the regulatory jurisdiction of the Agency for Health Care Administration and the Department of Health are extended to also apply to a provisionally licensed psychologist, a registered clinical social worker intern, a registered marriage and family therapist intern, a registered mental health counselor intern, a provisional clinical social worker, a provisional marriage and family therapist, and a provisional mental health counselor. These exemptions appear to be duplicative of those exemptions found in chapter 456, F.S.

This bill removes duplicative public records and public meetings exemptions found in ss. 490.00515 and 491.0047, F.S., by repealing those sections. Those exemptions can still be found in chapter 456, F.S. In addition, in an abundance of caution, the definitions of "license" and "licensee" are amended to include a "provisional license."

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

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:

Public Records and Public Meetings Laws

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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.

In regard to public meetings, Article I, s. 24(b), Florida Constitution, provides that

[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records and meetings from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Article 1, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

With regard to public meetings, section 286.011, F.S., provides that

[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority or any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or “substantial amendment”¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Sections 641.70 and 641.78, F.S., were certified by the Division of Statutory Revision and will repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met. Nonetheless, because the certified exemptions as found in the Florida Statutes actually contain language that repeal the exemption as of October 2nd, 2002, these exemptions *will* repeal unless the legislature reenacts the exemption. However, allowing the exemption to repeal by its own terms, without affirmatively repealing the exemption through legislation leads to confusion, because the exemption, albeit technically repealed, remains in statute. Affirmatively removing the exemption from statute provides a clear directive regarding the status of the exemption.

Sections 490.00515 and 491.0047, F.S., Exemptions from public records and meetings requirements

Sections 490.00515 and 491.0047, F.S., created by chapter 97-209, Laws of Florida (L.O.F.), are identical exemptions that provide public records exemptions for certain information relating to disciplinary proceedings and treatment programs for impaired practitioners, and public meetings exemptions for certain meetings wherein such information is discussed. Sections 490.00515 and 491.0047, F.S., extend certain existing public records exemptions for information concerning participation in the impaired practitioner treatment program, disciplinary complaints, and related investigative information, and public meetings exemptions for the proceedings of the probable cause panel for health care professionals under the regulatory jurisdiction of the Agency for Health Care Administration (AHCA) and the Department of Health (DOH) to also apply to a provisionally licensed psychologist under chapter 490, F.S.,² a registered clinical social worker intern,³ a registered marriage and family therapist intern,⁴ a registered mental health counselor intern,⁵ a provisional clinical social worker,⁶ a provisional marriage and family therapist,⁷ and a provisional

¹ An exemption is “substantially amended” if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

² Section 490.003(6), F.S., defines a provisional psychologist licensee as a person provisionally licensed under chapter 490, F.S., to provide psychological services under supervision.

³ Section 491.003(14), F.S., defines a “registered clinical social worker intern” as a person registered under chapter 491, F.S., who is completing the postgraduate clinical social work experience requirement specified in s. 491.005(1)(c), F.S.

⁴ Section 491.003(15), F.S., defines a “registered marriage and family therapist intern” as a person registered under chapter 491, F.S., who is completing the post-master’s clinical experience requirement specified in s. 491.005(3)(c), F.S.

⁵ Section 491.003(16), F.S., defines a “registered mental health counselor intern” as a person registered under chapter 491, F.S., who is completing the post-master’s clinical experience requirement specified in s. 491.005(4)(c), F.S.

⁶ Section 491.003(10), F.S., defines a “provisional clinical social worker licensee” as a person provisionally licensed under chapter 491, F.S., to provide clinical social work services under supervision.

mental health counselor⁸ under chapter 491, F.S.⁹ The exemptions referenced are found in ss. 456.073(2) and (10) and 456.076(3)(e) and (5)(a), F.S.

Sections 456.073(2), (4), and (10) and 456.076(3)(e) and (5)(a), F.S.

Section 456.073(2), F.S., provides a public records exemption for the investigative report, regarding a complaint filed against a "licensee,"¹⁰ of cases dismissed prior to a finding of probable cause. An investigative report must contain the investigative findings and the recommendations of DOH concerning the existence of probable cause. Section 456.073(4), F.S., provides a public meetings exemption for all proceedings of the probable cause panel until 10 days after probable cause has been found to exist by the panel or until the subject of the investigation waives confidentiality. Section 456.073(10), F.S., provides a public records exemption for the complaint and all information obtained pursuant to DOH's investigation until 10 days after probable cause has been found to exist by the probable cause panel or by DOH, or until the regulated professional or subject of the investigation waives confidentiality, whichever occurs first.

Section 456.076(3)(e), F.S., requires the probable cause panel or DOH to work directly with an impaired practitioner's consultant. In addition, the section provides a public records exemption for all information concerning an impaired practitioner obtained from the impaired practitioner's consultant by the probable cause panel or DOH. Section 456.076(5)(a), F.S., requires an approved treatment provider, upon request, to disclose to the impaired practitioner's consultant all information in its possession regarding the issue of an impaired practitioner's impairment and participation in the treatment program. In addition, all information obtained by such consultant and DOH is confidential and exempt.

Licenses covered by the exemptions in ss. 490.00515 and 491.0047, F.S., are already covered by the exemptions in chapter 456, F.S. The public records and meetings exempted by ss. 456.073(2) and (10) and 456.076(3)(e) and (5)(a), F.S., are with regard to impaired licensed practitioner program information and complaints and investigatory information and proceedings regarding a "licensee." Section 456.001(6), F.S., defines "licensee" as any person or entity issued a permit, registration, certificate, or license by DOH. The fact that the class of persons licensed expands after the exemption is created should not preclude such new licensees from the protections afforded by the existing exemptions. The rationale and need for the exemption remains the same for the new type of licensees. Furthermore, it appears that the Legislature, by virtue of its broad, non-exclusive definition of licensee, envisioned future changes as to who those licensees might be and accordingly who might be covered by the exemptions.¹¹

Exemptions range from very specific type exemptions¹² to generic-type exemptions such as those that simply apply to a type of information received, and which are not tied to any specific program or individuals. For example, an agency may have a generic-type public records exemption for trade

⁷ Section 491.003(11), F.S., defines a "provisional marriage and family therapist licensee" as a person provisionally licensed under chapter 491, F.S., to provide mental health counseling services under supervision.

⁸ Section 491.003(12), F.S., defines a "provisional mental health counselor licensee" as a person provisionally licensed under chapter 491, F.S., to provide mental health counseling services under supervision.

⁹ A registered clinical social worker intern, a registered marriage and family therapist intern, a registered mental health counselor intern, a provisional clinical social worker, a provisional marriage and family therapist, and a provisional mental health counselor are regulated by the Agency for Health Care Administration and the Department of Health under chapter 491, F.S.

¹⁰ Section 456.001(6), F.S., defines "licensee" as any person or entity issued a permit, registration, certificate, or license by the Department of Health.

¹¹ House of Representatives as Revised by the Committee on Governmental Operations Bill Research & Economic Impact Statement for CS/HB 605, April 15, 1997, Comments by the House Committee on Governmental Operations.

¹² For example, all medical records received by Agency X with regard to preemployment screening on applicants for the Help the Kids Program established pursuant to s. xxx.xxx, F.S., are confidential and exempt.

secrets. For example, trade secrets received by this agency are confidential and exempt. At the time the exemption became law, the agency may have only received trade secrets pursuant to two of its programs and only from savings and loan associations. Years later the agency develops another program that necessitates the collection of trade secret information from banks. The existing exemption should cover this newly collected trade secret information because the exemption was not specifically tied to the two programs or to savings and loan associations. The purpose of the exemption was to protect trade secrets because of the inherent nature of trade secrets. If such secrets are released, the owner of the trade secret will be harmed. It does not matter who is submitting the trade secret information or pursuant to what program or when, the exemption is to protect all trade secrets in the hands of the agency (like protecting certain information about licensees). To the contrary, if the trade secret exemption was drawn very specifically, for example; "Trade secret information submitted by savings and loan associations pursuant to the Honesty In Savings and Loan Reporting Act as authorized in s. xxx.xx, F.S., is confidential and exempt," then clearly only trade secrets submitted by such associations pursuant to that act would be held exempt.¹³

The exemptions created in chapter 456, F.S., are broad, generic-type exemptions, and they were in effect before July 1, 1993. Accordingly, the exemptions were grandfathered in by s. 24, Art. I of the Florida Constitution. All exemptions created after July 1, 1993, must be drawn according to s. 24, Art. I of the Florida Constitution, as narrowly as possible to effectuate their purpose, be placed in a separate bill, and contain a public necessity statement. These requirements are not applicable to those exemptions in law before July 1, 1993.¹⁴

If such generic-type exemptions as those referenced in these sections cannot be construed to apply to new types of licensees, then many other generic-type exemptions arguably can be attacked as only applying to those programs or individuals in existence at the time the exemption became law. In application this could be very problematic.¹⁵

Sections 490.00515 and 491.0047, F.S. / Chapter 456, F.S., exemptions

Licensees covered by the exemptions in ss. 490.00515 and 491.0047, F.S., are already covered by the exemptions in chapter 456, F.S. Therefore, the exemptions found in ss. 490.00515 and 491.0047, F.S., are duplicative.

C. EFFECT OF PROPOSED CHANGES:

This bill removes duplicative public records and public meetings exemptions found in ss. 490.00515 and 491.0047, F.S., by repealing those sections. The exemptions provided for in ss. 490.00515 and 491.0047, F.S., for information concerning participation in the impaired practitioner treatment program, disciplinary complaints, and related investigative information, and the proceedings of the probable cause panel for health care professionals under the regulatory jurisdiction of AHCA and DOH, which apply to a provisionally licensed psychologist under chapter 490, F.S., a registered clinical social worker intern, a registered marriage and family therapist intern, a registered mental health counselor intern, a provisional clinical social worker, a provisional marriage and family therapist, and a provisional mental health counselor under chapter 491, F.S., otherwise exist in chapter 456, F.S. However, in an abundance of caution, the definitions of "license" and "licensee" as found in ss. 456.001(5) and (6), F.S., are amended to include a "provisional license." These terms are used throughout chapter 456, F.S., and more particularly in the ss. 456.073(2), (4), and (10) and 456.076(3)(e) and (5)(a), F.S., which provide public records

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

and meetings exemptions. The amendments to the definitions clarify that provisional licensees are covered by the existing exemptions in chapter 456, F.S.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

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:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Barbara Peterson, of the First Amendment Foundation, supports the repeal of ss. 490.00515 and 491.0047, F.S., due to the fact that these are duplicative exemptions found in chapter 456, F.S. In addition, Barbara Peterson supports the inclusion of "provisional licensee" in the definition of "license" and "licensee."¹⁶

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

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

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:

Heather A. Williamson, M.S.W.

Staff Director:

Don Rubottom

¹⁶ Barbara Peterson, First Amendment Foundation, telephone conversation, August 15, 2001.