

# 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: CS/CS/SB 638

SPONSOR: Governmental Oversight and Productivity Committee, Health, Aging and Long-Term Care Committee and Senator Burt

SUBJECT: Public Records Exemption; Health Care Records Relating to Health Care Practitioners or Pharmacists

DATE: February 12, 2002 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.	Forgas	Johnson	JU	Favorable
3.	Rhea	Wilson	GO	Favorable/CS
4.			RC	
5.				
6.				

## I. Summary:

The bill creates a public records exemption for the identity of a patient contained in information or records reported to the Department of Legal Affairs as part of the proposed prescription program for certain controlled substances established pursuant to s. 893.065, F.S., or the electronic system for monitoring the prescribing of controlled substances established in Senate Bill 636. The bill makes the public records exemption subject to the Open Government Sunset Review Act of 1995 and provides for a future repeal and review of the exemption in accordance with that act. The bill provides a statement of public necessity for the public records exemption.

This bill creates four undesignated sections of law.

## 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, Florida Constitution, 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, Florida Constitution, provides

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

### **Ownership and Control of Patient Records**

Subsection (4) of section 456.057, F.S., requires health care practitioners licensed by the Department of Health who generate a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person, upon request, to furnish, in a timely manner, to that person or that person's legal representative, without delays for legal review, a copy of all reports and records relating to that examination or treatment, including X-rays and insurance information. When a patient's psychiatric, psychological or psychotherapeutic records are requested by the patient or the patient's legal representative, the health care practitioner may provide a report in lieu of copies of the record. The furnishing of such report or copies may not be conditioned upon payment of a fee for services rendered.

Except as provided in s. 456.057, F.S., patient records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. Such records may be disclosed: to any person, firm or corporation that has procured or furnished such examination or treatment with the patient's consent; when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff; in any civil or administrative action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking the records; or for statistical and scientific research, if the information is abstracted to protect the patient's identity or if written permission is received from the patient or the patient's legal representative.

Section 456.001, F.S., defines a health care practitioner as any person licensed under any of the following chapters of the Florida Statutes: ch. 457 (acupuncturists), ch. 458 (medical physicians), ch. 459 (osteopathic physicians), ch. 460 (chiropractic physicians), ch. 461 (podiatric physicians), ch. 462 (naturopaths), ch. 463 (optometrists), ch. 464 (nurses), ch. 465 (pharmacists), ch. 466 (dentists), ch. 467 (midwives), ch. 468 (audiologists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians/nutritionists, athletic trainers, orthotists, pedorthists, prosthetists), ch. 478 (electrologists), ch. 480 (massage therapists), ch. 483 (clinical laboratory personnel and medical physicists), ch. 484 (opticians and hearing aid specialists), ch. 486 (physical therapists), ch. 490 (psychologists), and ch. 491 (clinical social workers, marriage and family therapists, and mental health counselors).

As used in s. 456.057, F.S., "records owner" is defined to mean any health care practitioner who generates a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person; any health care practitioner to whom records are transferred by a previous records owner; or to any health care practitioner's employer, if the contract or agreement between the employer and the health care practitioner

designates the employer as the records owner. The following persons or entities are not authorized to acquire or own medical records, but are authorized under the confidentiality and disclosure requirements of s. 456.057, F.S., to maintain those documents required by regulations under which they are regulated: certified nursing assistants, *pharmacists and pharmacies*, nursing home administrators, respiratory therapists, athletic trainers, electrologists, clinical laboratory personnel, medical physicists, opticians and optical establishments, persons or entities making physical examinations for an injured person as part of personal injury protection claim, or hospitals and ambulatory surgical centers.

Licensed health care practitioners who violate the requirements of s. 456.057, F.S., are subject to discipline by the appropriate licensing authority. The Attorney General is authorized to enforce the provisions of s. 456.057, F.S., against any record owner who is not otherwise licensed in Florida, through injunctive relief and fines not to exceed \$5,000 per violation.

Chapter 465, F.S., provides for the regulation of pharmacy. Section 465.017(2), F.S., specifies that except as permitted by law, specifically: ch. 465, F.S., relating to pharmacy; ch. 406, F.S., relating to the Medical Examiners Act; ch. 409, F.S., relating to the Medicaid program; ch. 456, F.S., relating to the general regulatory provisions for professions; ch. 499, F.S., relating to drugs, devices and household products; and ch. 893, F.S., relating to controlled substances records maintained in a pharmacy relating to the filling of prescriptions and the dispensing of medicinal drugs may not be furnished to any person other than to the patient for whom the drugs were dispensed, or his or her legal representative, or to the Department of Health pursuant to existing law, or, in the event that the patient is incapacitated or unable to request the records, his or her spouse, except upon written authorization of such patient. Section 465.017(2), F.S., also provides that the records may be furnished in any civil or criminal proceeding upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or his or her legal representative by the party seeking such records.

### **Controlled Substances**

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act. The chapter classifies controlled substances into five schedules in order to regulate the manufacture, distribution, preparation, and dispensing of the substances. Substances in Schedule I have a high potential for abuse and have no currently accepted medical use in the United States. Schedule II drugs have a high potential for abuse and a severely restricted medical use. Cocaine and morphine are examples of Schedule II drugs. Schedule III controlled substances have less potential for abuse than Schedule I or Schedule II substances and have some accepted medical use. Substances listed in Schedule III include anabolic steroids, codeine, and derivatives of barbituric acid. Schedule IV and Schedule V substances have a low potential for abuse, compared to substances in Schedules I, II, and III, and currently have accepted medical use. Substances in Schedule IV include phenobarbital, librium, and valium. Substances in Schedule V include certain stimulants and narcotic compounds. The chapter defines practitioner to mean a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a podiatrist, if such practitioner holds a valid federal controlled substance registry number. The chapter provides that every record required by the chapter, including prescription records be kept and made available for at least two years for inspection and copying by law enforcement officers whose duty it is to enforce the

laws of the state relating to controlled substances.<sup>1</sup>

### **Health Insurance Portability and Accountability Act of 1996**

On December 20, 2000, President Clinton issued landmark rules to protect the privacy of peoples' medical records. The 1996 Health Insurance Portability and Accountability Act (HIPAA)<sup>2</sup> required the Administration to issue regulations protecting the privacy of health information. The United States Department of Health and Human Services issued Standards for Privacy of Individually Identifiable Health Information on December 28, 2000, which were originally scheduled to go into effect on February 26, 2001. The effective date for the regulations was delayed for a 30-day public comment period. The regulations took effect on April 14, 2001. The regulations only apply to health plans, health care clearinghouses and certain health care providers. The regulations permit states to afford greater privacy protections to health information.<sup>3</sup>

### **III. Effect of Proposed Changes:**

The bill makes personal identifying information regarding a patient contained in a public record as defined in s. 119.011, F.S., held by the Department of Legal Affairs reported under the prescription program for certain controlled substances established pursuant to s. 893.065, F.S. confidential and exempt from the requirements of the Public Records Law. The bill makes the public records exemption subject to the Open Government Sunset Review Act of 1995 and provides for a future repeal and review of the exemption in accordance with that act.

The bill authorizes the Department of Legal Affairs to disclose a patient's identity, whose identity is otherwise confidential and exempt from the Public Records Law, to: a practitioner who requests information and certifies that the information is necessary to provide medical treatment in accordance with s. 893.05, F.S., to a current patient;<sup>4</sup> a Florida-licensed pharmacist who requests information and certifies that the requested information is to be used to dispense controlled substances in accordance with s. 893.04, F.S., to a current patient;<sup>5</sup> a criminal justice agency defined under s. 119.011, F.S., which enforces the laws of Florida or the United States relating to drugs and which is engaged in a specific investigation involving a violation of law;<sup>6</sup> or an employee or agent of the Department of Health who is involved in a specific investigation

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<sup>1</sup> The Second District Court of Appeal upheld a warrantless search and seizure of prescription records pursuant to s. 893.07, F.S. *Gettel v. State* 449 So.2d 413 (2<sup>nd</sup> DCA 1984).

<sup>2</sup> Section 262 of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, enacted on August 21, 1996, directed the United States Department of Health and Human Services to develop standards to protect the security, including the confidentiality and integrity, of health information.

<sup>3</sup> Sections 160.201, 160.203, 160.204, and 160.205, C.F.R.

<sup>4</sup> Section 893.05, F.S., allows a practitioner, in good faith and in the course of his or her professional practice only to prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may direct the administration of a controlled substance by a licensed nurse or an intern practitioner under his or her direction and supervision.

<sup>5</sup> Section 893.04, F.S., authorizes a pharmacist, in good faith and in the course of professional practice only to dispense controlled substances upon a written or oral prescription under specified conditions.

<sup>6</sup> Section 119.011, F.S., defines criminal justice agency to mean any law enforcement agency, court, or prosecutor and includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence or investigative information for assisting in the conduct of active criminal investigation or prosecution. The term also includes the Department of Corrections.

involving a violation of the chapter regulating the alleged violator, the rules of the Department of Health, or the rules of a board regulating the alleged violator.

The bill requires a practitioner, pharmacist, criminal justice agency, or employee or agent of the Department of Health who obtains this confidential or exempt information to maintain the confidentiality of that information.

A person who violates the section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, F.S. Upon a second or third violation, the penalty is raised to a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

The bill provides the required legislative findings of the public necessity for the creation of the public records law exemption.

The bill provides that it will take effect on the effective date of legislation (SB 636) creating the prescription program for certain controlled substances established pursuant to s. 893.065, F.S., or the electronic system for monitoring the prescribing of controlled substances.

#### **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 a public records exemption for the identity of a patient contained in information or records reported to the Department of Legal Affairs as part the of proposed prescription program for certain controlled substances established pursuant to s. 893.065, F.S., or the electronic system for monitoring the prescribing of controlled substances. The bill provides a statement of public necessity for the public records exemption.

The public records exemption for a patient's identity in the information and records reported to the Department of Legal Affairs as part the of proposed prescription program for certain controlled substances established pursuant to s. 893.065, F.S., or the electronic system for monitoring the prescribing of controlled substances takes effect on the effective date of SB 636 or similar legislation. The Department of Legal Affairs will not possess the records covered by the public records exemption until after the exemption has been created, therefore, there is no need for the Legislature to clarify that the public record exemption should apply retroactively to such records.<sup>7</sup>

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<sup>7</sup> The Florida Supreme Court has opined that the access to public records is a substantive right and has held that a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *Memorial Hospital-West Volusia, Inc., v. News-Journal Corp.* 784 So.2d 438 (Fla. 2001). In that case, the court held that a statute providing an exemption for public records and meetings of private corporations leasing hospitals from public taxing authorities did not apply to records created and meetings held prior to the effective date of the statute. *Id.*

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Under a 1977 United State Supreme Court decision, *Whalen v. Roe* 429 U.S. 589, the right of privacy does not prevent the state from accumulating and computerizing information about people, such as names and addresses of patients for whom dangerous drugs are prescribed.

**VIII. Amendments:**

None.