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DATE: February 12, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 699
RELATING TO: Public Records / Health Care Records
SPONSOR(S): Representative(s) Crow
TIED BILL(S): HB 701

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) HEALTH REGULATION
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
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I. SUMMARY:

This bill creates a public records exemption for all information and records reported under a new section of law, or contained in the Department of Legal Affairs' electronic system for monitoring the prescription of controlled substances. Both the new reporting requirements and the establishment of the electronic database system will occur if HB 701 passes. This public records exemption bill is (or should be) linked to the passage of HB 701. This bill allows for exceptions to the exemption. Any person who obtains the confidential and exempt information may not use such information to his or her own personal advantage and may not reveal such information. Penalty provisions are provided.

This bill provides a public necessity statement, as required by the Florida Constitution, which states that the exemption is necessary in order to facilitate the Department of Legal Affairs' "efforts to maintain compliance with the state's drug laws by the accurate and timely reporting by health care practitioners of potential drug diversion without compromising a patient's privacy". The exemption facilitates the sharing of information between health care practitioners so that the practitioners may appropriately identify and evaluate a patient's risk for drug diversion and the resulting abuse of controlled substances without compromising a patient's privacy.

The effective date of this bill is linked to the passage of "Senate Bill ____ or similar legislation". The effective date needs to be amended to provide the correct bill number. This bill does not provide for future review and repeal of the public records exemption.

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

On February 12, 2002, the Committee on State Administration reported HB 699 favorably with one strike-all amendment. That amendment is traveling with the bill. See "Amendments or Committee Substitute Changes" section for further details.

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes No N/A

Section 24, Art. I of the State Constitution provides that “[e]very 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”. This bill limits a person’s right of access to records.

2. Lower Taxes Yes No N/A
3. Individual Freedom Yes No N/A
4. Personal Responsibility Yes No N/A
5. Family Empowerment Yes No N/A

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

B. PRESENT SITUATION:

Section 893.065

Section 893.065, created in PCS/HB 701 by the Committee on State Administration and Representative Crow, provides that on or after July 1, 2002, a person may not issue a prescription for a Schedule II controlled substance¹; codeine, hydrocodone, dihydrocodeine, ethylmorphine, or morphine²; or any drug included as a drug of abuse under the prescription-monitoring system³, unless the prescription meets certain requirements.

Also, the Department of Legal Affairs must develop a “counterfeit-proof prescription blank”⁴ for use by practitioners who prescribe the previously listed controlled substances. The department must cover all costs.

The original prescription form must be delivered to the pharmacist filling the prescription. The proprietor of the pharmacy must retain the original prescription form on file for two years. A copy of such form must be available for inspection by the Department of Legal Affairs.

PCS/HB 701 also requires the Department of Legal Affairs to design and establish an electronic monitoring system for prescriptions by July 1, 2003. This system will monitor the prescribing of Schedule II controlled substances; other drugs designated by the Attorney General; and codeine, hydrocodone, dihydrocodeine, ethylmorphine, and morphine, as scheduled in Schedule II and

¹ A Schedule II controlled substance “has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence.” Section 893.03(2), F.S.

² As scheduled in Schedule II and Schedule III.

³ The Attorney General has designated those drugs in rule.

⁴ The Department of Legal Affairs will issue the prescription blanks. Such blanks will be printed on distinctive paper and will bear the preprinted full name, address, category of professional licensure of the practitioner to whom the blanks are issued, and that practitioner’s federal registry number for controlled substances.

Schedule III, by health care practitioners within Florida. Specified data⁵ regarding controlled substances or drugs subject to the requirements of the monitoring system must be reported to the department within 30 days after the date that such controlled substance or drug is dispensed. The dispenser must transmit the specified data, in an electronic format, to the department.

Public Records Law

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.

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

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.

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

⁵ The specified data includes the patient's name and address; national drug code number of the substance dispensed; date the substance is dispensed; quantity dispensed; dispenser's National Association of Board's of Pharmacy number; and the prescriber's United States Drug Enforcement Administration Number.

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.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a public records exemption for all information and records reported under s. 893.065⁶, or contained in the Department of Legal Affairs' electronic system for monitoring the prescription of controlled substances. It is unclear as to who the information pertains or what is contained in the records made confidential and exempt by this bill. Furthermore, it is unclear as to who is the custodian of such information and records. This public records exemption appears overly broad in that it creates an exemption for *all* records created pursuant to s. 893.065. It is unclear as to why the entire record needs to be made confidential and exempt. Additionally, the public records exemption is created in an unnumbered section of law.

This bill allows for exceptions to the public records exemption. The Department of Legal Affairs may disclose a patient's identity in the information or records reported under s. 893.065 or reported in the Department of Legal Affairs' electronic monitoring system to the following:

- A practitioner⁷ who requests the information and certifies that the requested information is necessary in order to provide medical treatment to a current patient;
- A pharmacist⁸ who requests the information and certifies that the requested information will be used to dispense a controlled substance to a current patient;
- A criminal justice agency⁹, which is involved in a specific investigation involving a violation of law.

⁶ PCS/HB 701 creates s. 893.065.

⁷ Section 893.02(19), F.S., defines "practitioner" as "a physician licensed pursuant to chapter 458, a dentist licensed pursuant to chapter 466, a veterinarian licensed pursuant to chapter 474, an osteopathic physician licensed pursuant to chapter 459, a naturopath licensed pursuant to chapter 462, or a podiatric physician licensed pursuant to chapter 461, provided such practitioner holds a valid federal controlled substance registry number."

⁸ The pharmacist must be licensed in this state.

⁹ Section 119.011(4), F.S., defines "criminal justice agency" as "any law enforcement agency, court, or prosecutor. The term also includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt

- A Department of Health (DOH) employee or agent involved in a specific investigation involving a violation of the chapter regulating the alleged violator, the rules of DOH, or the rules of a board regulating the alleged violator.

A practitioner, pharmacist, or other agency that obtains information reported under s. 893.065 or contained in the Department of Legal Affairs' electronic monitoring system must maintain the confidential and exempt status of the information. Any person who obtains such information may not use that information to his or her own personal advantage and may not reveal such information. The bill then repeats the exceptions to the exemption. Repeating the exceptions to the exemption is superfluous.

The bill provides penalties for violating the bill's provisions. A person violating the bill's provisions commits a misdemeanor of the first degree, punishable by a term of imprisonment not to exceed one year¹⁰ and a \$1000 fine¹¹. It is a felony of the third degree for any person who commits a second or subsequent violation of the bill's provisions, punishable by a term of imprisonment not to exceed five years¹² and a \$5000 fine¹³.

This bill provides a public necessity statement, as required by s. 24, Art. I of the State Constitution, which states that the exemption is necessary in order to facilitate the Department of Legal Affairs' "efforts to maintain compliance with the state's drug laws by the accurate and timely reporting by health care practitioners of potential drug diversion without compromising a patient's privacy". The exemption facilitates the sharing of information between health care practitioners so that the practitioners may appropriately identify and evaluate a patient's risk for drug diversion and the resulting abuse of controlled substances without compromising a patient's privacy.

The effective date of this bill is linked to the passage of "Senate Bill_____ or similar legislation". The Senate Bill number is not listed in the effective date, so it is unclear as to which bill this public records exemption is linked.

This exemption is *not* made subject to the Open Government Sunset Review Act of 1995.¹⁴ The Open Government Sunset Review Act of 1995 established a review and repeal process for public records and meetings exemptions created after 1995. That process requires that in the fifth year after enactment of a new exemption, the exemption will repeal unless the Legislature reviews and reenacts it.¹⁵

The Committee on State Administration adopted a strike-all amendment that addresses the above-described issues.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes".

Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The term also includes the Department of Corrections."

¹⁰ Section 775.082(4)(a), F.S.

¹¹ Section 775.083(1)(d), F.S.

¹² Section 775.082(3)(d), F.S.

¹³ Section 775.083(1)(c), F.S.

¹⁴ Section 119.15, F.S.

¹⁵ The review and repeal date for this exemption should be October 2, 2007.

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:

This bill may raise a constitutional concern. The public records exemption appears overly broad in that it creates an exemption for *all* records created pursuant to s. 893.065. It is unclear as to why the entire record needs to be made confidential and exempt. *The Committee on State Administration, however, adopted an amendment that addresses this issue.*

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B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on State Administration reported HB 699 favorably with one strike-all amendment. That amendment is traveling with the bill.

The strike-all amendment narrows the public records exemption found in the bill by only exempting a patient's personal identifying information contained in public records held by the Department of Legal Affairs instead of all patient records and information. The amendment retains the exceptions to the exemption for a practitioner, pharmacist, criminal justice agency, and employee or agent of the Department of Health and retains the penalty provisions found in the bill. The amendment provides for future review and repeal of the public records exemption and it makes editorial and technical changes.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

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