

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1591 (PCB SA 03-01) Public Records Exemption/State Employee Assistance Programs
SPONSOR(S): State Administration and Mack
TIED BILLS: None **IDEN./SIM. BILLS:** SB 288

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration</u>	<u>5 Y, 0 N</u>	<u>Williamson</u>	<u>Everhart</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Open Government Sunset Review Act of 1995 in essence requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it is automatically repealed on October 2nd of the fifth year after enactment.

This bill reenacts and narrows the public records exemption for state employee assistance program (EAP) records, which will repeal on October 2, 2003, if this bill does not become law.

Florida law authorizes a state agency to establish an EAP in order to provide counseling, therapy, or other professional treatment to an employee who has a behavior or medical disorder, or substance abuse problem, or who has emotional difficulties which affect that employee's job performance. Florida law also provides a public records exemption for all records relating to a state employee's participation in an EAP.

This bill reenacts and narrows that exemption by no longer exempting the entire EAP record, only the employee's personal identifying information contained in such record. Additionally, this bill removes superfluous language regarding communication between a state employee and personnel or service providers of an EAP, and removes language regarding routine monitoring of telephone calls in order to conform to the Florida Security of Communications Act.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1591.sa.doc
DATE: March 7, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | 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. EFFECT OF PROPOSED CHANGES:

Background

Florida law authorizes a state agency to establish an employee assistance program (EAP) to provide counseling, therapy, or other professional treatment to a state employee who has a behavior disorder, medical disorder, or substance abuse problem or who has emotional difficulties which affect that employee’s job performance. A state agency may designate community diagnostic and referral resources as necessary to implement its EAP.¹

Florida law provides a public records exemption for all records relating to a state employee’s participation in an EAP. In addition, the law creating the public records exemption provides that “[a]ny communication between a state employee and personnel or service providers of a state employee assistance program relative to the employee’s participation in the program shall be a confidential communication.”²

Public records exemptions cannot make verbal communications confidential or exempt from public disclosure. Therefore, the provision regarding “confidential communication” leads one to believe that an evidentiary privilege has been created and that an employer or service provider cannot be compelled to testify in court regarding verbal communications between such persons and the employee. Evidentiary privileges are created in chapter 90, F.S., and that chapter does not provide a privilege for such communications. Furthermore, if a public records exemption exists, an agency employee cannot otherwise reveal the contents of a confidential or exempt record, for example, by simply reading aloud such record.

Finally, the law provides that routine monitoring of telephone calls does not violate the “confidential communication” provision. Florida law generally makes it unlawful for a person to willfully intercept, endeavor to intercept, or procure any person to intercept or endeavor to intercept any wire or oral communication. In 1981, the Florida Supreme Court found that “[t]he Legislature has determined as a matter of state public policy that the right of any caller to the privacy of his conversation is of greater societal value than the interest served by permitting eavesdropping or wiretapping.”³ Furthermore, it is a felony of the third degree for a person found guilty of violating such communication provisions. Because the scope of telephone monitoring is unclear, it is uncertain whether such monitoring is in compliance or violation of the Security of Communications Act.

¹ Section 110.1091, F.S.

² *Id.*

³ Florida Attorney General Opinion 2002-05, January 11, 2002.

Current law provides for future review and repeal of the public records exemption for records relating to a state employee's participation in an EAP. Pursuant to the Open Government Sunset Review Act of 1995 (Act), s. 110.1091, F.S., will repeal on October 2, 2003, unless otherwise reenacted by the Legislature. Pursuant to the Act, the Florida House of Representatives Committee on State Administration sent an Open Government Sunset Review Questionnaire to state agencies regarding the public records exemption for EAP records.

Effect of Bill

As a result of those questionnaire responses, this bill reenacts and narrows the current exemption. This bill narrows the current exemption by no longer making confidential and exempt⁴ the entire EAP record, but rather just the employee's personal identifying information contained in such record. The record will now be available for public inspection so long as the employee's personal identifying information has been redacted prior to public inspection.

This bill removes the language which provides that communication between a state employee and personnel or service providers of an EAP is a "confidential communication". It also removes language which provides that routine monitoring of telephone calls does not violate the "confidential communication" provision. Finally, this bill amends the catch line, makes editorial changes, and removes the sentence that requires the repeal of the public records exemption.

C. SECTION DIRECTORY:

Section 1. Amends s. 110.1091, F.S., by reenacting and narrowing the public records exemption for state EAP records.

Section 2. Provides that the act shall take effect October 1, 2003.

II. 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.

⁴ There is a difference between information and records that the Legislature has made *exempt* from public disclosure versus those that have been made *confidential and exempt*. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not affect municipal or county government.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act of 1995

The Open Government Sunset Review Act of 1995⁵ provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

Section 119.15, F.S., also sets forth a Legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Art. 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (*e.g.*, allowing another agency access to the confidential or exempt records), then a public necessity statement is not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

⁵ Section 119.15, F.S.