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 6-B

SPONSOR: Senators Jones and Saunders

SUBJECT: Public Records

DATE: June 14, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson		Favorable
2.				
3.				
4.				
5.				
6.				

I. Summary:

The bill re-enacts and narrows the exemption from ch. 119, F.S., the Public Records Law, and Section 24(a), Article I of the State Constitution, for the information that is contained in a notification of an adverse incident submitted to the Agency for Health Care Administration by a hospital, ambulatory surgical center or mobile surgical facility. The public records exemption for the notification of an adverse incident required under s. 395.0197(7), F.S., is narrowed to include only information that identifies the facility involved in the incident, the person reporting the incident on behalf of the facility, the patient involved in the incident, the health care practitioner involved in the incident, and the medical examiner.

The information that is made exempt in this bill is not discoverable or admissible in a civil or administrative action unless the action is a disciplinary proceeding by the Agency for Health Care Administration, the Department of Health, or the appropriate regulatory board.

This bill re-enacts and amends s. 395.0198, F.S.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, ch. 119, F.S., specifies the conditions under which public access must be provided to governmental records. While the state constitution provides that records 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. Art. 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. Art. 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. This Act provides for the repeal and prior review of any public records exemptions that are created or substantially amended in 1996 and subsequently. The review cycle began 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.

Requirements for Reports of Adverse Incidents for Facilities Licensed under Ch. 395, F.S.

As a licensure requirement, each hospital, ambulatory surgical center, and mobile surgical facility is required, at a minimum, under s. 395.0197, F.S., to establish an internal risk management program. Such a program is considered to be part of what is known as the quality assurance process that hospitals, ambulatory surgical centers, and mobile surgical facilities use in their day-to-day operations to ensure that "adverse incidents," are conscientiously examined on a continuous basis. The statute defines adverse incident to be an event over which health care personnel could exercise control, which is associated with the medical intervention rather than the condition for which the intervention was performed, and which resulted in one of the following:

- Death;
- Brain or spinal damage;
- Permanent disfigurement;
- Fracture or dislocation of bones or joints;
- Limitation of neurological, physical, or sensory functioning;
- Any condition that required specialized medical attention or surgical intervention;
- Any condition that required transfer of the patient to another facility or a unit providing a more acute level of care;
- Performance of a surgical procedure on the wrong patient, a wrong surgical procedure, or a surgical procedure otherwise unrelated to the patient's diagnosis or medical condition;
- Required surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage was not a recognized specific risk; or
- A procedure to remove unplanned foreign objects remaining from a surgical procedure.

At a minimum, an internal risk management program must provide for: 1) the investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients; 2) the development of appropriate measures to minimize the risk of injuries and adverse incidents to patients, including specifying the circumstances under which staff may have access to patients in a recovery room subject to alternative surveillance measures; 3) the analysis of patient grievances that relate to patient care and the quality of medical services; and 4) the development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and all agents and employees of the licensed facility to report adverse incidents.

The facility's governing board is responsible for the internal risk management program. The board is required to engage a risk manager to implement and oversee the program. Risk managers are exempted from liability and legal action for activities they undertake in implementing an internal risk management program that is in conformity with law as long as they are not intentionally fraudulent in their conduct. The qualifications of a risk manager, procedures for licensure, and fees are established in s. 395.10974, F.S.

Reports of Adverse Incidents

The statute requires facilities licensed under ch. 395, F.S., to provide the Agency for Health Care Administration with the following reports concerning adverse incidents:

A *notification of certain adverse incidents* to be issued within one business day after the risk manager receives an adverse incident report and determines that any of the following occurred:

- The death of a patient;
- Brain or spinal damage to a patient;
- The performance of a surgical procedure on the wrong patient;
- The performance of a wrong-site surgical procedure; or
- The performance of a wrong surgical procedure.

The written notification must be delivered by facsimile or by overnight mail and must include the identity of the affected patient; the type of adverse incident; the initiation of an investigation by the facility; and whether the events causing the adverse incident pose a potential risk to other patients.

An *adverse incident report* must be issued within 15 calendar days after the occurrence of any of the following adverse incidents:

- The death of a patient;
- Brain or spinal damage to a patient;
- The performance of a surgical procedure on the wrong patient;
- The performance of a wrong-site surgical procedure;
- The performance of a wrong surgical procedure;
- The performance of a surgical procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or condition;

- The surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage is not a recognized specific risk; or,
- The performance of procedures to remove unplanned foreign objects remaining from a surgical procedure.

An *annual report* summarizing the incident reports that have been filed in the facility for the year. The annual report must include:

- The total number of adverse incidents;
- A listing of the types of operations or diagnostic or treatment procedures that resulted in injury and the number of incidents;
- A listing of the types of injuries caused and the number of incidents;
- A code number using the health care professional's license number and a separate code number identifying all other individuals directly involved in the adverse incident; and,
- A description of all malpractice claims against the facility.

Exemptions from Public Records Requirements

Section 395.0197, F.S., provides three adverse incident reporting schedules: the 24-hour notification, the 15-day report and the annual report. Public records exemptions for the 15-day report and the annual report were implemented prior to the Florida Constitution's requirement of a five-year renewal cycle for their continued effect. Thus, the public records exemption for the 24-hour notification is the only exemption subject to repeal.

Under s. 395.0197(8), F.S., the entire 15-day report is exempt from the public records law and is not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board. However, the agency must make available to a health care professional against whom probable cause has been found any records which form the basis of the determination of probable cause.

Under s. 395.0197(6), F.S., the annual report is confidential and exempt from the public records law and is not discoverable or admissible in any civil or administrative action. As with the 15-day report, the agency must make the records available to a health care professional against whom probable cause has been found.

Section 395.0198, F.S., provides an exemption from the disclosure requirements of ch. 119, F.S., relating to public records and s. 24(a) and (b), Art. I of the State Constitution, for information contained in the notification of an adverse incident that a licensed hospital, ambulatory surgical center, or mobile surgical facility must report to the Agency for Health Care Administration within one business day after the facility determines that the event occurred. The information is also made confidential. The exemption is scheduled for repeal on October 2, 2003, unless it is reviewed and saved from repeal by the Legislature.

Publication of Summary and Trend Analyses of Adverse Incident Reports

Section 395.0197(9), F.S., requires the Agency for Health Care Administration to publish on its website, at least quarterly, a summary and trend analysis of adverse incident reports the agency

has received. The agency also must publish an annual summary of all adverse incident reports and malpractice claim information provided by the facilities in their annual reports. The quarterly and annual summaries must not include information that would identify the patient, the reporting facility, or the health care practitioners involved.

Public Records Exemption Review

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that, with modification, the exemption meets the requirements for reenactment. (See Senate Interim Project Report 2003-219) As a result of the review, staff recommended that the exemption be narrowed to exempt: information that could be used to identify the facility, the person reporting on behalf of the facility, the patient, and the health care practitioner; the name and contact number for the medical examiner if the incident involved death; and descriptions of the circumstances of the incident and the actions taken to implement an investigation. Other information contained in the 24-hour notification, such as the outcome, the potential risk to other patients, the date and time of the incident, and the location of the incident within the facility, does not meet the requirements for a public records exemption and therefore should be available to the public.

Statutory Construction

The principle of in pari materia is a rule of construction in which different texts relating to the same subject are construed together. In legislation, the application of the principle means that amendments to the same section, subsection or paragraph, passed in the same session of the Legislature are treated as if they were enacted at the same time, and the reader is supposed to give effect to both amendments. The Florida Statutes establish the rule of in pari materia for bills passed in the same session in s. 1.04, F.S., which states:

> Acts passed during the same legislative session and amending the same statutory provision are in pari materia, and full effect should be given to each, if that is possible…Amendments enacted during the same session are in conflict with each other only to the extent that they cannot be given effect simultaneously.

When bills passed in a Special Session address issues that were also addressed in the regular Session, the bills in the Special Session sometimes direct the reader to read those bills in pari materia with bills passed in the regular Session.

III. Effect of Proposed Changes:

This bill reenacts and amends s. 395.0198, F.S., which provides an exemption from public records requirements for the information contained in the notification of an adverse incident provided to the Agency for Health Care Administration by a facility licensed under ch. 395, F.S. The public records exemption for the notification of an adverse incident report required under s. 395.0197(7), F.S., is narrowed to include only the following:

- Information that identifies the facility involved in the incident,

- The name or other information that identifies the person reporting the incident on behalf of the facility,
- The name or other information that identifies the patient involved in the incident,
- The name or other information that identifies the health care practitioner involved in the incident, and
- The name of, or the contact number for, the medical examiner.

The information that is made confidential and exempt in this bill is not discoverable or admissible in a civil or administrative action unless the action is a disciplinary proceeding by the Agency for Health Care Administration, the Department of Health, or the appropriate regulatory board.

This bill provides that if any law amended by this bill was also amended by a law enacted in the 2003 Regular Session or in 2003 Special Session A, the laws must be construed as if they had been enacted during the same session of the Legislature and full effect should be given to each if that is possible.

The bill provides an effective date of October 1, 2003.

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 Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

Public records exemptions are required to be drawn narrowly in order to ensure that they do not capture a greater amount of information than what is necessary under the stated public necessity. The current exemption exempts all information contained in a notification of an adverse incident which is required by s. 395.0197(7), F.S. The bill reenacts the existing public records exemption, but identifies with more specificity the information that is made confidential and exempt.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 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:

The 24-hour Adverse Incident Report form published by the Agency for Health Care Administration has not been adopted by rule. Pursuant to s. 120.52(15), F.S., a rule is defined to mean:

> ". . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and *includes any form* which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."

As of June, 2003, AHCA has begun the process of rule development for the 24-hour Adverse Incident Report form.

VIII. Amendments:

None.