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.)

Prepared By: Children and Families Committee

BILL: SB 1828

SPONSOR: Senator Wilson

SUBJECT: Access by legislators to confidential or exempt information

DATE: April 6, 2005 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sanford	Whiddon	CF	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

Senate Bill 1828 requires the Department of Children and Families (DCF) to share confidential and exempt information regarding any individual who is or has been "the subject of a program" within the jurisdiction of the agency with any member of the Legislature when such information is reasonably necessary for the performance of the legislator's official duties, notwithstanding any other provision of law to the contrary. The bill provides that such information remains confidential and exempt in the hands of the legislator.

The bill establishes a procedure for legislators to request the information and requires that the request include the office of the department at which the legislator wishes to review the information. It requires DCF to make the information available for review at the office chosen by the legislator within 10 working days of receipt of the request.

The bill requires legislators to sign a confidentiality form before reviewing the information and sets forth the contents of the form.

The bill directs DCF to adopt rules to facilitate the accessibility of information to members of the Legislature under this section.

The bill provides for an effective date of July 1, 2005.

This bill creates section 402.117, Florida Statutes:

II. Present Situation:

Legislative access to the records of executive agencies is governed by the provisions of ss. 11.0431, F.S., and 11.143, F.S.

Section 11.043(2), F.S., provides as follows:

> (2) In order to carry out its duties,[1] each such committee[2] is empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in this state, including any confidential information.

Section 11.0431(2), F.S. designates such records and information as exempt from disclosure when the records would be confidential or exempt from public disclosure if held by an agency.

Following a series of discussions among the general counsels of the Senate, the House of Representatives, and the Department of Health and Rehabilitative Services (DCF's predecessor agency), on March 20, 1995, the general counsel for HRS issued a memorandum recording the shared understanding that:

- Committees of the Senate and House of Representatives, and their duly authorized staff, have the right to inspect and investigate confidential records of the department;
- This right is reserved to legislative committees and authorized staff, and does not extend under the law to members of the Senate and House of Representatives making requests, as individual member, to inspect and investigate such records.
- In order to permit distinctions to be made between individual member requests and those of a committee, all committee requests are to be made through the committee chair or staff director.

Both DCF and legislative bodies have used this memorandum as a guideline for legislative requests for information since the time of its issuance.

Like those of other executive agencies, DCF records contain material which is sensitive, personal, and confidential. Also as in other executive agencies, much of this information is protected by both state and federal law. Many of the restrictions on sharing information are set by Congress and are not susceptible to modification by state legislatures. Examples include the Adoptions and Safe Families Act (ASFA),[3] the Child Abuse Prevention and Treatment Act (CAPTA),[4] the Family Educational Rights and Privacy Act (FERPA),[5] the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[6] the Ryan White

[1] Among the duties of Legislative committees set forth in statute are maintaining a continuous review of the work of the state agencies concerned with their subject areas and the performance of the functions of government within each such subject area, s. 11.143(1), F.S.
[2] Standing or select committee or subcommittee of the Legislature, s. 11.143(1), F.S.
[3] 42 USC 620-632, 670-679; 45 CFR 1355, 1356, 1357.
[4] 42 USC .5106 a(b)(2)(A)(v), (vi), and (viii); 5106a(b)(3), 5106(b)(4).
[5] 20 USC 1232g, 34 CFR Part 99 (also known as the Buckley Amendment).
[6] 42 USC 602(a)(1)(A)(iv); 42 USC 654. These provisions affect the Temporary Assistance to Needy Families (TANF) program and child support programs.

Comprehensive AIDS Resources Emergency (CARE) Act[7] and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[8] Other federal laws restrict access to information about persons receiving assistance from programs providing alcohol and drug treatment programs,[9] about persons who are applicants for or recipients of Medicaid,[10] and about information contained in the national history background check system maintained by the Federal Bureau of Investigation.[11]

Under CAPTA, for example, reports and records in child abuse and neglect cases shall only be disclosed to:

- Individuals who are the subject of the report;
- Federal, state, and local government entities that need the information to carry out their legal responsibilities to protect children from abuse or neglect;
- Child abuse citizen review panels;
- Child fatality review panels';
- A grand jury or a court, if necessary for determining an issue before the grand jury or court; and
- Other entities or classes of individuals as statutorily authorized by a state to receive the information to further a state purpose.[12]

Federal authorities have interpreted the CAPTA restrictions to require that any person obtaining information regarding records of child abuse or neglect be bound by the same restrictions as the child protective services agency (in Florida, DCF). "Thus, recipients of such information must use the information only for activities related to the prevention and treatment of child abuse and neglect."[13] This same policy interpretation provides that the violation of federal confidentiality provisions is a state plan compliance issue under all three programs (CAPTA, Title IV-B, and Title IV-E).[14]

Current state law not only protects child abuse and neglect records held by DCF,[15] but also requires that the clerks of court keep the records separate from other records of the circuit court and protect these records from public inspection.[16]

According to the National Clearinghouse on Child Abuse and Neglect Information, National Adoption Information Clearinghouse (NAIC), nine states have legislatively provided for individual legislators to have some sort of access to child abuse records.[17] These states are

[7] 42 USC 300ff-61(a) and 300ff-63.
[8] PL 104-191, 45 CFR Parts 160, 162, and 164.
[9] 42 USC s. 290dd-2, 42 CFR Part 2.
[10] 42 USC 1396a(a)(7); 42 USC 1320b-7; 42 CFR 431.300-431.306; 431.940-431.965.
[11] 42 USC 5119-5118c; 28 CFR 20.1-20.38.
[12] Bussiere, English, and Teare, *Sharing Information: A Guide to Federal Laws on Confidentiality and Disclosure of Information for Child Welfare Agencies*, National Center for Youth Law, ABA Center on Children and the Law, 1997, p. 8.
[13] *Policy Interpretation Question*, U.S. Department of Health and Human Services (June 29, 1998) (obtained from DCF General Counsel's Office, March 22, 2005).
[14] Florida is slated to receive $216,467,310 under a combination of funds for these three programs in FFY 2004-05.
[15] Section 39.202, F.S.
[16] Section 39.0132(3), F.S.
[17] *Disclosure of Confidential Records, 2003 Child Abuse and Neglect State Statute Series Statute-at-a Glance,* nccanch.acf.hhs.gov .

Arizona, Arkansas, Connecticut,[18] Idaho (elected state officials), Kansas, Louisiana, Montana, Nevada, and North Dakota (public officials). Generally, the authorization for legislative access has been subject to conditions: Arizona, for example, requires that the request be made through the presiding officer of the body of which the legislator is a member.[19] Kansas restricts access to closed or executive meetings and provides that unauthorized disclosure subjects the member to discipline or censure by the House of Representatives or Senate. [20] Nevada requires written consent of the parent and restricts the access to incidents when the legislator or a family member of the legislator is not the person alleged to have committed the abuse.[21] Montana allows access to "the news media, a member of the United States Congress, or a state legislator, if disclosure is limited to confirmation of factual information regarding how the case was handled and if disclosure does not violate the privacy rights of the child or the child's parent or guardian, as determined by the department" (DCF equivalent).[22]

According to the Agency for Health Care Administration, federal statutes and regulations which protect information about individuals who are or have been subject to a program within DCF's jurisdiction would preclude DCF from disclosing such information, regardless of the provisions of state law. This information includes, among other information, Medicaid recipient information[23] and protected health information.[24]

While Florida law does not define the official duties of individual state legislators, the responsibility to respond to constituent complaints, including complaints involving state agencies, is generally considered to be among their responsibilities.

III. Effect of Proposed Changes:

Senate Bill 1828 requires DCF to share confidential and exempt information regarding any individual who is or has been "the subject of a program" within the jurisdiction of the agency with any member of the Legislature when such information is reasonably necessary for the performance of the legislator's official duties, notwithstanding any other provision of law to the contrary. The bill provides that such information remains confidential and exempt in the hands of the legislator.

The bill establishes a procedure for legislators to request the information, including that the request be made in writing, the name of the person about whom the request is being made, the reason for the request, and any other information that will assist the department in locating the requested information. It also requires that the request include the office of the department at which the legislator wishes to review the information.

Senate Bill 1828 requires DCF to make the information available for review at the office chosen by the legislator within 10 working days of receipt of the request.

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[18] Staff was unable to locate in the reference to Connecticut law provided by NAIC the access provision for legislators.
[19] Section 8-807H(4), Arizona Statutes.
[20] Section 38-1507(d)(1), Kansas Code.
[21] Section 432B.290(p), Nevada Revised Statutes.
[22] Section 41-3-205(3)(p), Montana Code 2003.
[23] 42 CFR 431 Subpart F.
[24] 42 CFR Parts 160 and 164.

The bill requires legislators to sign a confidentiality form before reviewing the information and sets forth the contents of the form.

The bill directs DCF to adopt rules to facilitate the accessibility of information to members of the Legislature under this section.

The bill provides for an effective date of July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, Section 23 of the Florida Constitution provides for a right of privacy for Florida citizens. Since the DCF records contain personal information about a range of people, not all of whom may have requested to or even consented to the release of their information, this provision of the Constitution may be of concern.

Article II, Section 3 of the Florida Constitution provides for the division of state government into the legislative, executive, and judicial branches. This Article further provides that "(n)o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The separation of powers doctrine prohibits any branch of state government from encroaching upon powers of another, *Chiles v. Children A.B.C.D.E.&F*, 589 So.2d 260 (Fla. 1991). The doctrine is designed to keep each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, *SEC v. Warner*, 652 F. Supp. 647 (U.S. District Court S.D. Fl 1987), quoting from *Humphrey's Executor v. United States*, 295 U.S. 602, 630, 55 S.Ct 869, 874, 79 L.Ed. 1611 (1935). Again from the *Warner* opinion: "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts," quoting from *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 3187, 92 L.Ed.2d 583 (1986). If the purpose of the grant of access to executive branch records is not a clearly defined legislative purpose, this grant may be problematic under the separation of powers clause.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Department of Children and Families predicts that community-based care agencies providing child protective services will incur expenses in implementing the provisions of this bill.

C. Government Sector Impact:

According to DCF, implementation of this bill statewide would require two staff positions, for a total recurring cost of $113,475 annually.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The lack of definition of "official duties" of a state legislator may lead to confusion as to when the release of the information to the legislator is appropriate.

While the bill provides that the confidential information is to be provided to legislators upon request "notwithstanding any other provision of law to the contrary," it is not clear that state law can override the federal protections placed on information. The effect of the bill may therefore be to require extensive redaction of federally-protected information from files prior to release to legislators.

The logistics of providing records to legislators from any part of a state agency at any office requested by the legislator within a 10-day time period may be problematic, particularly if redaction of the records is required.

VIII. Summary of Amendments:

None.