# 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: Criminal Justice Committee

BILL: CS/SB 176

INTRODUCER: Criminal Justice Committee and Senator Saunders

SUBJECT: Public Records Exemption/Prescription of Controlled Substances

DATE: February 15, 2006 REVISED:

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Wilson | HE | **Fav/4 amendments** |
| 2. | Erickson | Cannon | CJ | **Fav/CS** |
| 3. | | | GO | |
| 4. | | | HA | |
| 5. | | | RC | |
| 6. | | | | |

## I. Summary:


Senate Bill 178, the companion bill to the CS/SB 176, creates s. 893.055, F.S., to establish an electronic system in the Department of Health (DOH) to monitor the prescribing and dispensing of controlled substances listed in Schedules II, III, and IV. The bill makes confidential and exempt from the Public Records Act identifying information of a patient, patient's agent, health care practitioner, pharmacist's agent, or pharmacy, which is contained in records held by the Department of Health or other specified agencies under s. 893.055, F.S., the electronic-monitoring system for prescription of controlled substances (created by SB 178). The department is required to give specific entities or person's access to the confidential and exempt information in particular instances.

The bill establishes criminal penalties for violating the provisions of the bill and subjects the exemption to future repeal and review under the Open Government Sunset Review Act. The bill provides a statement of the public necessity for the exemption.

This exemption is being newly-created and is subject to a two-thirds vote of each house of the Legislature as required by Art. I, s. 24 of the State Constitution.

This bill creates s. 893.056, F.S., and one undesignated section of law.


## II. Present Situation:

### Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution, provides every person with the right to inspect or copy any public record 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. The section specifically

includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution.

The term "public records" has been defined by the Legislature in s. 119.011(11), F.S., to include: . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.[1] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[2]

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption must state with specificity the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose of the law, relate to one subject, and contain only exemptions to public records or meetings requirements. The law enacting an exemption may contain provisions governing enforcement.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government.[3] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[4]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for their release such that their confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[5] If a record is not made confidential, but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[6]

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[1] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[2] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[3] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).
[4] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).
[5] Attorney General Opinion 85-625.
[6] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. Section 119.10, F.S., also provides a first-degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[7] For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.[8] The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records.[9]

**The Open Government Sunset Review Act**

Section 119.15, F.S., the Open Government Sunset Review Act, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(4)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature acts to reenact the exemption.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year, which meets the criteria of an exemption as defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;

[7] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).
[8] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).
[9] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.,* 570 So.2d 1322 (Fla. 2d DCA 1990).

- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(6)(a), F.S., requires the consideration of the following specific questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- 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; or
- 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves.[10] In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

[10] *Memorial Hospital–West Volusia, Inc. v. News-Journal Corporation,* 2002WL 390687 (Fla. Cir. Ct.).

**Ownership and Control of Patient Records**
Subsection (4) of s. 456.057, F.S., requires health care practitioners licensed by DOH 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 (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 DOH 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 2 years for inspection and copying by law enforcement officers whose duty it is to enforce the laws of the state relating to controlled substances.[11]

[11] 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 (2nd DCA 1984).

**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)[12] 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 was originally scheduled to go into effect on February 26, 2001. The effective date for the regulations was delayed and the regulations took effect on April 14, 2003. 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.[13] Exceptions for state law are provided for public health (authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention) and state regulatory reporting (the ability of a state to require a health plan to report, or to provide access to, information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification).[14]

**Senate Bill 178**

Senate Bill 178 requires DOH, by June 30, 2007, to design and establish an electronic system to monitor the prescribing and dispensing of controlled substances listed in Schedules II, III, and IV by health care practitioners within Florida and the dispensing of such controlled substances to an individual at a specific address within Florida by a pharmacy permitted or registered by the Board of Pharmacy. Data regarding controlled substances subject to the requirements of the monitoring system must be reported to DOH as soon as possible, but not more than 35 days after the date the controlled substance is dispensed, each time that such controlled substance is dispensed. The bill provides that a pharmacy may meet the reporting requirements by providing DOH in written or any electronic or magnetic format, including but not limited to, electronic submission via the Internet or magnetic disc or tape of each controlled substance listed in Schedule II, Schedule III, or Schedule IV which it dispenses.

Senate Bill 178 provides exemptions from the data reporting requirements for controlled substances that are administered, dispensed, or ordered in specified settings or for specified categories of patients. The department must determine by rule the data required to be reported under the prescription monitoring system, and such data may include any data required under s. 893.04, F.S. Any person who knowingly fails to report the dispensing of a controlled substance listed in Schedule II, Schedule III, or Schedule IV commits a first-degree misdemeanor.

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[12] 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.

[13] Sections 160.201, 160.203, 160.204, and 160.205, C.F.R.

[14] The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) generally preempts state health information privacy laws, unless they provide a higher level of protection than the act. (Pub. L. No.104-191, s. 262, 110 Stat. 1936, 2029.) However, these state privacy provisions may not be preempted if the Secretary of Health and Human Services determines that the state law has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. s. 802), or that is deemed a controlled substance by state law. (45 C.F.R. s. 160.203 (a)(2)). See also, 42 U.S.C.A. s. 1320d-7.

## III. Effect of Proposed Changes:

The bill creates s. 893.056, F.S., to make confidential and exempt from the Public Records Law identifying information, including, but not limited to, the name, address, phone number, insurance plan number, social security number or government-issued identification number, provider number, Drug Enforcement Administration number, or any other unique identifying number of a patient, patient's agent, health care practitioner, pharmacist, pharmacist's agent, or pharmacy which is contained in records held by the Department of Health or held by any other agency, as defined in s. 119.011(2), F.S., in the electronic prescription drug monitoring system created in Senate Bill 178.

The bill requires DOH to disclose a patient or practitioner's identity, whose identity is otherwise confidential and exempt from the Public Records Law to:

- The Agency for Health Care Administration (AHCA) when it has initiated a review of specific identifiers of Medicaid fraud and abuse.
- A criminal justice agency as defined in s. 119.011, F.S., which enforces the laws of this state or the United States relating to controlled substances and which has initiated an active investigation involving a specific violation of law.
- A practitioner as defined in s. 893.02, F.S., and an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, who requests such information and certifies that the information is necessary to provide medical treatment to a current patient in accordance with s. 893.05, F.S.
- A pharmacist as defined in s. 465.003, F.S., or a pharmacy intern or pharmacy technician who is acting on behalf of and at the direction of the pharmacist, who requests such information and certifies that the requested information is to be used to dispense controlled substances to a current patient in accordance with s. 893.04, F.S.
- To the patient who is identified in the record upon a written request, for the purpose of verifying that information.

The bill requires an agency that obtains information under this section to maintain the confidential and exempt status of that information. The bill, however, permits AHCA and a criminal justice agency with lawful access to such information to disclose confidential and exempt information received from DOH to a criminal justice agency as part of an active investigation of a specific violation of law.

A person who willfully and knowingly violates the restrictions on the use of personal identifying information about a patient, practitioner, or pharmacist commits 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 and the authorized disclosures. The bill makes the exemption subject to a future review and repeal on October 2, 2011, in accordance with the Open Government Sunset Review Act.

The bill provides a contingent effective date of July 1, 2006, if Senate Bill 178 or similar legislation establishing an electronic system to monitor the prescribing of controlled substances, is adopted in the same legislative session or an extension thereof and becomes law.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

### B. Public Records/Open Meetings Issues:

The bill creates a new exemption and is, therefore, subject to a two-thirds vote of each house of the Legislature as required by Art. I, s. 24 of the State Constitution.

The Department of Health 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 records exemption should apply retroactively to such records.[15]

### C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. 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.

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[15] 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*.

## VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

## VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.