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: Governmental Oversight and Productivity Committee

BILL:	CS/SB 510
SPONSOR:	Governmental Oversight and Productivity Committee and Health Care Committee
SUBJECT:	Review of Public Records and Public Meetings Exemptions for Nursing Home and Assisted Living Facility Risk Management and Quality Assurance Committee Meetings, Records, and Reports
DATE:	April 19, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wilson	Wilson	HE	**Favorable**
2.	Rhea	Wilson	GO	**Fav/CS**
3.			RC	
4.				
5.				
6.				

I. Summary:

Nursing homes are required to implement an internal risk management and quality assurance program to investigate and analyze the frequency and causes of specific types of adverse incidents. Assisted living facilities ("ALFs") are authorized, but not required, to establish a risk management and quality assurance program. Both nursing homes and ALFs are required to report adverse incidents to the Agency for Health Care Administration (AHCA). Records of meetings of the risk management and quality assurance committees such as long-term care facilities are confidential and exempt. Further, meetings of an internal risk management and quality assurance committee of a long-term care facility are exempt. Meeting records of those committees are confidential and exempt.

The bill reenacts, reorganizes, and clarifies exemptions to the public meetings and public records laws for meetings of nursing home and ALF internal risk management and quality assurance committees; for records pertaining to those meetings; and for adverse incident reports filed with the risk manager and administrator of such facilities and with the (AHCA).

This bill amends section 400.119, F.S.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] has 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency[5] records are available for public inspection. The term "public record" is broadly defined to mean:

> 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.[6]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "… any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

> 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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation

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[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53, *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So.2d 203 (Fla. 1998).
[21] 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

> or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" (emphasis added). Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act[23] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

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

[22] *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So.2d at 1137) (second emphasis added by *Ragsdale* court).
[23] Section 119.15, F.S.

- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[24]

The act also requires consideration of the following:

- 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 by readily obtained by alternative means? If yes, 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[25] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Nursing Home and Assisted Living Facility Risk Management and Quality Assurance Committee Meetings, Records, and Reports

The 2001 Legislature required nursing homes to implement an internal risk management and quality assurance program to investigate and analyze the frequency and causes of specific types of adverse incidents. In that same year, the Legislature authorized assisted living facilities ("ALFs") to establish voluntarily a risk management and quality assurance program. Both nursing homes and ALFs are required to report adverse incidents to AHCA.

[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

The 2001 Legislature also enacted public records and public meetings exemptions for nursing home and ALF risk management and quality assurance committees' meetings and records related to their work. Under s. 400.119, F.S., records of committee meetings, incident reports filed with the facility's risk manager, notifications to AHCA of the occurrence of an adverse incident, and adverse incident reports submitted to AHCA from the facility are confidential and exempt from the provisions of s. 119.07, F.S., and s. 24(a), Art. I of the State Constitution. The meetings of an internal risk management and quality assurance committee are exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

The public necessity for the exemptions, when they were enacted, was stated as follows:

> …*The Legislature finds that it is in the interests of the health and safety of the public to require long-term care facilities to operate internal risk-management programs and for the Agency for Health Care Administration to review the operation of these programs. The Legislature finds that these programs are effective in reducing risk to residents and improving quality when facility staff have frank and open internal communication regarding potential resident risks and quality-assurance problems and that public access to these discussions or agency records of these discussions will inhibit this frank and open internal communication.*

Nursing Home Reporting Requirements

Under s. 400.147, F.S., every nursing home must establish an internal risk management and quality assurance program to assess resident care practices; review facility quality indicators, facility incident reports, deficiencies cited by AHCA, and resident grievances; and develop plans of action to correct and respond quickly to identified quality deficiencies.

The nursing home administrator is responsible for the internal risk management and quality assurance program. Each program must include the use of incident reports to be filed with the risk manager and the facility administrator. The risk manager must have free access to all resident records of the nursing home. As a part of each internal risk management and quality assurance program, the incident reports must be used to develop categories of incidents, which identify problem areas. Once identified, procedures must be adjusted to correct the problem areas.

For purposes of a nursing home reporting to AHCA, the term "adverse incident" means:

- An event over which facility personnel could exercise control and which is associated in whole or in part with the facility's intervention, rather than the condition for which such intervention occurred, and which results in one of the following:
    - Death;
    - Brain or spinal damage;
    - Permanent disfigurement;
    - Fracture or dislocation of bones or joints;
    - A limitation of neurological, physical, or sensory function;

  - Any condition that required medical attention to which the resident has not given his or her informed consent, including failure to honor advanced directives; or
  - Any condition that required the transfer of the resident, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the resident's condition prior to the adverse incident;

- Abuse, neglect, or exploitation as defined in s. 415.102, F.S.;
- Abuse, neglect and harm as defined in s. 39.01, F.S.;
- Resident elopement; or
- An event that is reported to law enforcement.

Assisted Living Facility Reporting Requirements

Under s. 400.423, F.S., ALFs are authorized to establish a risk management and quality assurance program to assess resident care practices, facility incident reports, deficiencies cited by AHCA, adverse incident reports, and resident grievances and to develop plans of action. Every ALF must maintain adverse incident reports. The definition of adverse incident is the same as that for a nursing home with one exception: abuse, neglect and harm, as defined in s. 39.01, F.S., is not included in the definition.

Senate Interim Project Report 2006-220

Section 400.119(5), F.S., specifies that the public meetings and public records exemptions for nursing home and ALF risk management and quality assurance committee meetings, records, and reports are subject to the Open Government Sunset Review Act of 1995, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Senate Health Care Committee staff reviewed the provisions and applicable law pursuant to the criteria specified in the Open Government Sunset Review Act of 1995 (2004), to determine if the exemptions for meetings and specified records of nursing home and ALF internal risk management and quality assurance programs should be continued or modified. Staff sent questionnaires to AHCA, the Department of Veterans Affairs, and public nursing homes and ALFs. Staff consulted with representatives of nursing home and ALF providers and other interested parties in conducting the Open Government Sunset Review of s. 400.119, F.S. The state agencies and the representatives of nursing homes and ALFs said that the exemptions are necessary. The exemptions allow AHCA to oversee the quality of care provided by the nursing homes and ALFs it licenses, and they allow the Department of Veteran's Affairs effectively to administer the five nursing homes and one ALF it operates. The exemptions also protect information of a sensitive personal nature concerning residents and practitioners who may be involved in an adverse incident.

Accordingly, staff recommended that the exemptions in s. 400.119, F.S., be reenacted and thereby saved from repeal.

III. Effect of Proposed Changes:

Section 1. Amends s. 400.119, F.S., to reenact, reorganize, and clarify the exemptions to the public meetings and public records laws to exempt the following:

- Incident reports filed with the risk manager and administrator of a nursing home or ALF,
- Notifications and adverse incident reports filed with AHCA,
- The meetings of an internal risk management and quality assurance committee of a nursing home or ALF, and
- Records of the meetings of an internal risk management and quality assurance committee of a nursing home or ALF.

Records disclosed to a law enforcement agency remain confidential and exempt until criminal charges are filed.

The bill deletes the provision that repeals the exemptions effective October 2, 2006.

Section 2. Provides that the bill will take effect October 1, 2006.

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 Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

In accordance with a review pursuant to the Open Government Sunset Review Act, this bill amends s. 400.119, F.S., and preserves the public meetings and records exemptions in that section. The bill does not expand the exemptions.

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.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.