The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Operations Committee

BILL:	CS/SB 1090
INTRODUCER:	Governmental Operations Committee and Health Policy Committee
SUBJECT:	Review of Public Records Exemption/Florida Kidcare Program
DATE:	April 17, 2008 REVISED:

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

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Pursuant to a review under the Open Government Sunset Review Act, this bill revives and readopts the public records exemption for any information identifying a Florida Kidcare program applicant or enrollee held by the Agency for Health Care Administration (AHCA), the Department of Children and Family Services (DCF), the Department of Health (DOH), or the Florida Healthy Kids Corporation (FHKC). The bill amends the current exemption to: improve the statutory structure of the exemption; to permit access to confidential and exempt information by another governmental entity in the performance of its official duties and responsibilities; to include a "willful and knowing" standard to determine whether a violation of the section has occurred; and to remove the phrase "notwithstanding any other law to the contrary" to simplify the administration of the exemption. The proposed committee substitute also clarifies that an enrollee's legal guardian, who is not a program applicant, is authorized to obtain confirmation of Kidcare coverage, dates of coverage, name of the child's health plan, and the amount of premium being paid.

The bill also repeals the sunset requirement pertaining to this public records exemption in chapter law and repeals a conflicting public records exemption relating to information maintained by the FHKC.

This bill amends s. 409.821, F.S., and repeals section 2 of ch. 2003-204, Laws of Florida, and s. 624.91(8), 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 Florida Legislature enacted the first public records law in1892.[1] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[2] 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. Article I, s. 24 of the State Constitution 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 contain a statement of the public necessity that justifies the exemption. Article I, s. 24 of the State Constitution provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

In addition to the State Constitution, the Public Records Act[3] specifies conditions under which public access must be provided to records of agencies.[4] 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."

Unless specifically exempted, all agency 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."[5]

[1] Section 1390, 1391 F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.
[3] Chapter 119, F.S.
[4] Section 119.011(2), F.S., defines "agency" 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." The term does not include the courts (*see, Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995)) or the Legislature (*see, Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), though both of these branches must comply with Article I, s. 24 of the State Constitution.
[5] Section 119.011(11), F.S.

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.[6] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[7]

Only the Legislature is authorized to create exemptions to open government requirements. 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 accomplish the stated purpose of the law.[8] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. 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.[9] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[10]

The Open Government Sunset Review Act[11] provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.

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, which administration would be significantly impaired without the exemption;
- Protects 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
- Protects 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

[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[7] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[8] *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).
[9] Attorney General Opinion 85-62.
[10] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[11] Section 119.15, F.S.

know or use it, the disclosure of which would injure the affected entity in the marketplace.[12]

The Florida Kidcare Program

The Florida Kidcare program provides health care coverage to approximately 1.4 million children in Florida. Florida Kidcare was established in 1998 as a combination of Medicaid expansions and public/private partnerships, with a wrap-around delivery system serving children with special health care needs. Family income level, age of the child, and whether the child has a serious health condition are the eligibility criteria that determine which component serves a particular child.

The Florida Kidcare program is an "umbrella" program, the components of which include Medicaid for children, the Florida Healthy Kids program, Medikids, and the Children's Medical Services Network (CMSN). The program is jointly administered by the AHCA, the FHKC, the DOH, and the DCF. When the Kidcare program was established, this structure allowed the state to link existing public and private programs to implement provisions of the new federal State Children's Health Insurance Program (SCHIP) and to begin receiving federal funds under Title XXI of the Social Security Act.

Senate Interim Project 2008-214

In Interim Project 2008-214, professional staff reviewed the existing public records exemption in s. 409.821, F.S., which specifies that, notwithstanding any other law to the contrary, any information identifying a Florida Kidcare program applicant or enrollee held by the AHCA, the DCF, the DOH, or the FHKC is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. Such information may be disclosed to another governmental entity only if disclosure is necessary for the entity to perform its duties and responsibilities under the Florida Kidcare program and shall be disclosed to the Department of Revenue for purposes of administering the state Title IV-D (Child Support) program. Such information may not be released to any person without the written consent of the program applicant. A violation of this section is a misdemeanor of the second-degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S.

The Florida Senate Committee on Health Policy professional staff worked in consultation with the professional staff of the Senate Committee on Governmental Operations and the Florida House of Representatives Committee on State Affairs to determine whether the provisions of s. 409.821, F.S., should be continued or modified. Professional staff obtained information through written surveys and follow-up interviews with Florida Kidcare program administrators to identify the records affected by the exemption and to determine the administrators' justification for reenacting the exemption. Professional staff also interviewed representatives of the Florida First Amendment Foundation to identify any concerns or suggested changes.

Based on the information obtained during the review, it was determined that the public records exemption in s. 409.821, F.S., protects identifying information of a sensitive, personal nature

[12] Section 119.15(6)(b), F.S.

concerning individuals, and allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the Florida Kidcare program. The exemption allows Florida Kidcare program administrators to effectively and efficiently process eligibility applications and enrollment information to ensure families can obtain health coverage for their children without fear that their personal information could be used against them.

Accordingly, professional staff recommended that the exemption in s. 409.821, F.S., be revived and readopted, and amended to: improve the statutory structure; include a "willful and knowing" standard to determine whether a violation of the section has occurred; and remove the phrase "notwithstanding any other law to the contrary" to simplify the administration of the public records exemption.

Professional staff further recommended repealing the public records exemption in s. 624.91, F.S., as it pertains to information maintained by the FHKC, because this exemption may be contrary to the exemption in s. 409.821, F.S.

III. Effect of Proposed Changes:

Section 1. Amends s. 409.821, F.S., removing the phrase "notwithstanding any other law to the contrary," clarifying to whom the information may be disclosed, and adding a "willful and knowing" standard to the exemption in order to determine whether a violation of the section has occurred. Additionally, the bill permits access to confidential and exempt information by any other governmental entity in the performance of its official duties and responsibilities. Further, the bill clarifies the types of information that can be disclosed to a legal guardian, other than the program applicant, in order to verify coverage, dates of coverage, name of the child's health plan, and the amount of premium being paid.

Section 2. Repeals section 2 of chapter 2003-104, Laws of Florida, pertaining to the sunset review requirement for this exemption.

Section 3. Repeals s. 624.91(8), F.S., which provides a public records exemption for information held by the FHKC.

Section 4. Provides that the act take effect October 1, 2008.

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:

The provisions of this bill continue and modify an existing public records exemption, but do not expand the types of records included under the exemption. The provisions of the bill meet the public necessity criteria related to the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

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. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Operations on April 17, 2008:
The committee substitute clarifies that the exemption does not prohibit an enrollee's legal guardian, who is not a program applicant, from obtaining confirmation of Kidcare coverage, dates of coverage, name of the child's health plan, and the amount of premium paid. Further, the committee substitute requires a custodian to provide access to confidential and exempt information to any governmental entity in the performance of its official duties and responsibilities.

B. Amendments:

None.