

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS: The bill decreases access to certain public records.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

House Bill 1401 provides transfer and discharge protections currently extended to residents of state nursing home facilities to residents of assisted living facilities. The bill creates a new section of law, Section 429.285, Florida Statutes patterned after similar resident discharge and transfer protection provisions contained in Part II of chapter 400, F.S., relating to state nursing homes. The bill provides that assisted living facilities are required to permit residents to remain in the facility they reside in, except under certain enumerated conditions. The bill broadens the transfer and discharge notice protections to assisted living facility residents, and directs the Agency for Health Care Administration to develop a standard notice document. The notice must include the discharge or transfer reason, a description of the resident's right to appeal, a means for the resident to request assistance from the local long-term care ombudsmen council in reviewing and initiating a fair hearing.

The bill further specifies that an assisted living facility resident is entitled to a fair hearing to challenge a facility's proposed discharge or transfer anytime within 90 days of receipt of notice, and provides that a resident fair hearing request within the initial 30 days of receipt of notice stays the transfer or discharge pending a final hearing decision. Finally, the bill directs the Department of Children and Family Services' Office of Appeals Hearings to conduct fair hearings regarding resident transfer or discharge disputes.

The bill establishes a public records exemption for the names, addresses, social and economic circumstances and medical information for individuals that request hearings related to an action by an assisted living facility to discharge or transfer an individual.

Public Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ 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 Article I, s. 24 of the State constitution provides that:

- (a) Every person has the right to inspect or copy any public records 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each

¹ S. 1390, 1391, F.S., (Rev.1892).

² Article I, s. 24 of the Florida Constitution.

constitutional officer, board, and commission, or entity created pursuant to law or this constitution.

In addition to the State Constitution, the Public Records Act,³ which predates the State Constitution, specifies conditions under which public access must be provided to records of an agency.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 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.

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

The Supreme Court of Florida 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.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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 persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ provides for the systematic review, through a 5-year cycle

³ Ch. 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “any state, county, district, authority, or municipal officer, 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 Florida constitution also establishes a right of access to 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 those records exempted by law or the State constitution.

⁵ S. 119.011(11), F.S.

⁶ *Shaven v. Byron, Hairless, 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 Article I, s. 24(c) of the Florida Constitution

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24 9(c) of the Florida Constitution.

¹² Attorney General Opinion 85-62

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ S. 119.15, F.S.

ending October 2nd 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.

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 three specific 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 exemption meets the three statutory criteria if it:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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 know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) 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.¹⁵ The Legislature is only limited in its review process by constitutional requirements.

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

...notwithstanding s. 768.28, F.S., 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.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.s., relating to the

¹⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Additionally, any person who willfully and knowingly violates 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.

Effect of Proposed Changes

House Bill 1401 contains public record protections for the names, addresses, social and economic circumstances and medical information that might be presented at a fair hearing regarding a resident-challenges discharge or transfer from an assisted living facility.

The bill specifies that this exemption is subject to the open government and Sunset Review Act in accordance with s. 119.15, F.S., and provides that such exemption will stand repealed on October 2, 2013, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity for the exemption.

The bill creates a new public records exemption and, as a result, is subject to Article I, s. 24(a) of the Florida Constitution, which requires that two-thirds of the members present and voting in each house shall pass the bill.

C. SECTION DIRECTORY:

Section 1. Amends s. 429.285, F.S., as created by HB 1401, Regular Session; relating to resident transfer or discharge; creating a public records exemption.

Section 2. Provides a statement of public necessity for the exemption.

Section 3. Provides an effective date that is contingent upon HB 1401 taking effect and becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

There may be minimal costs of complying with the confidentiality and exemption requirements; however, these costs are indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This legislation does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES