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 Judiciary Committee

BILL: CS/SB's 1540 and 2782

INTRODUCER: Health Regulation Committee and Senators Saunders and Atwater

SUBJECT: Public Records/Patients' Medication History Website

DATE: April 20, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HR	**Fav/Combined CS**
2.	Maclure	Maclure	JU	**Pre-meeting**
3.			GO	
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:

The bill makes confidential and exempt from Florida's 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 any agency having access to or operating the privacy-protected website for patients' medication histories, which is created in CS/SB's 1550 and 2724. The bill authorizes disclosure of the confidential and exempt information to certain entities for specified purposes.

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 bill creates section 893.056, Florida Statutes. This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

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

The term "public records" has been defined by the Legislature in s. 119.011(11), F.S., 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."

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 Florida Constitution authorizes exemptions to the public records requirements and establishes the means by which these exemptions are to be established. Under art. I, s. 24(c) of the Florida 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 such information may not be released by an agency to anyone other than to the

---

[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); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986); *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

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]

Pursuant to s. 119.10, F.S., any public officer violating a provision of ch. 119, F.S., 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 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.

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 has also 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

The Open Government Sunset Review Act[10] 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 five 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.

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

---

[5] Attorney General Opinion 85-625.
[6] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA).
[7] *Dep't of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985).
[8] *B.B. v. Dep't of Children and Family Servs.*, 731 So. 2d 30 (Fla. 4th DCA 1999).
[9] *Dep't of Highway Safety and Motor Vehicles v. Krejci Co. Inc.,* 570 So. 2d 1322 (Fla. 2d DCA 1990).
[10] Section 119.15, F.S.

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 two 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]

Health Insurance Portability and Accountability Act of 1996

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 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 and state regulatory reporting.[14]

Committee Substitute for Senate Bills 1550 and 2724

Committee Substitute for Senate Bills 1550 and 2724 requires the Agency for Health Care Administration (AHCA), by June 30, 2009, to contract with a vendor to design and operate a secure, privacy-protected website that provides a health care practitioner, pharmacy, or pharmacist access to a comprehensive patient medication history. In order to provide a comprehensive patient medication history, AHCA must require the contracted vendor to

---

[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 (Fla. 2d DCA 1984).

[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. s. 1320d-7.

subcontract with private-sector organizations that currently operate electronic prescribing networks that provide such medication histories.

The bill provides definitions, requirements, limitations on vendors who are contracted to design and operate the website that provides a health care practitioner, pharmacy, or pharmacist access to a comprehensive patient medication history. The bill provides an effective date of July 1, 2008, if CS/SB's 1540 and 2782, or similar legislation, is adopted in the same legislative session or an extension thereof and becomes law.

III. Effect of Proposed Changes:

Section 893.056, F.S., is created to provide a public records exemption for certain identifying information contained in records held by any agency, as defined in s. 119.011(2), F.S., having access to or operating the privacy-protected website for patients' medication histories under s. 893.055, F.S. The identifying information includes, but is 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.

The bill requires any agency, as defined in s. 119.01, F.S., which has access to or operates the privacy-protected website for patients' medication histories under s. 893.055, F.S., to disclose the confidential and exempt information to:

- The Agency for Health Care Administration 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.
- A patient who is identified in the record upon a written request, for the purpose of verifying that information.

The bill requires any 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 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.[15]

The bill provides the required statement of public necessity for the creation of the public records law exemption and the authorized disclosures. The bill makes the exemption subject to future review and repeal on October 2, 2013, unless saved from repeal through reenactment by the Legislature, in accordance with the Open Government Sunset Review Act.

The bill provides a contingent effective date of July 1, 2008, if CS/SB's 1550 and 2724, 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:

None.

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 Florida Constitution.

Any agency, as defined in s. 119.01, F.S., which has access to or operates the privacy-protected website for patients' medication histories under s. 893.055, F.S., will not possess the records covered by the public records exemption until after the exemption has been created, accordingly, there is no need for the Legislature to clarify that the public records exemption should apply retroactively to such records.[16]

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[15] The maximum penalty for a third-degree felony is five years in state prison and a fine of up to $5,000 may also be imposed. Sections 775.082 and 775.083, F.S.

[16] 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*.

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 Health Regulation on April 2, 2008:

The committee substitute combines Senate Bills 1540 and 2782, but contains the substantive provisions that originally were in Senate Bill 1540. Senate Bill 2782 would have created 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 (DOH) or any other agency, as defined in s. 119.011(2), F.S., under s. 893.055, F.S. Senate Bill 2724, the companion bill to SB 2782, would have created s. 893.055, F.S., to establish an electronic system in the DOH to monitor the prescribing and dispensing of controlled substances listed in Schedules II, III, and IV. The DOH is required to give specific entities or person's access to the confidential and exempt information in particular instances.

B. Amendments:

None.

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