

**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 Oversight and Accountability Committee

BILL: CS/CS/SB 440

INTRODUCER: Governmental Oversight and Accountability Committee, Health Regulation Committee and Senator Fasano

SUBJECT: Public Records

DATE: April 2, 2009 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HR	Fav/CS
2.	Naf	Wilson	GO	Fav/CS
3.			RC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

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

**I. Summary:**

This bill makes confidential and exempt from the Public Records Law and s. 24(a), Art. I of the State Constitution identifying information, including, but not limited to, the name, address, telephone number, insurance plan number, 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 or practitioner as defined in s. 893.066, or an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, a pharmacist, or a pharmacy, which is contained in records held by the Department of Health (DOH) under s. 893.055. Senate Bill 462, the companion bill to SB 440, creates s. 893.055, F.S., to establish an electronic system in the DOH for tracking controlled substance prescriptions. The DOH is required to give specified entities or persons access to the confidential and exempt information in particular instances.

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

This bill creates section 893.0551, Florida Statutes, 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(12), 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.<sup>1</sup> Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.<sup>2</sup>

The State Constitution authorizes exemptions to the public records 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.<sup>3</sup> 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.<sup>4</sup>

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

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<sup>1</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>2</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>3</sup> *Christy v. Palm Beach County Sheriff’s Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

<sup>4</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> 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).

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.<sup>5</sup> 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.<sup>6</sup>

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 1 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### **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.

### **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

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<sup>5</sup> Attorney General Opinion 85-625.

<sup>6</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>7</sup> *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1<sup>st</sup> DCA 1985).

<sup>8</sup> *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4<sup>th</sup> DCA 1999).

<sup>9</sup> *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

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, dentist, veterinarian, osteopathic physician, naturopathic physician, or 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, must 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.<sup>10</sup>

### **Health Insurance Portability and Accountability Act of 1996**

The 1996 Health Insurance Portability and Accountability Act (HIPAA)<sup>11</sup> 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.<sup>12</sup> Exceptions for state law are provided for public health and state regulatory reporting.<sup>13</sup>

### **III. Effect of Proposed Changes:**

The bill creates s. 893.0551, F.S., to make confidential and exempt from the Public Records Law and s. 24(a), Art. 1 of the State Constitution identifying information, including, but not limited to, the name, address, telephone number, insurance plan number, 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 or practitioner as

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<sup>10</sup> 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).

<sup>11</sup> 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.

<sup>12</sup> Sections 160.201, 160.203, 160.204, and 160.205, C.F.R.

<sup>13</sup> 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.

defined in s. 893.055, or an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, a pharmacist, or a pharmacy, which is contained in the electronic system for controlled substance prescriptions created under s. 893.055, F.S., by SB 462.

The bill requires the DOH to disclose the confidential and exempt information to the following entities after verifying that entity's request for the information is legitimate:

- The Attorney General or his or her designee when working on Medicaid fraud cases involving prescription drugs or when the Attorney General has initiated a review of specific identifiers of Medicaid fraud regarding prescription drugs.
- Any relevant health care regulatory board within the DOH which is responsible for the licensure, regulation, or discipline of a practitioner, pharmacist, or other person who is authorized to prescribe, administer, or dispense controlled substances and is involved in a specific controlled substances investigation for prescription drugs involving a designated person.
- A law enforcement agency as defined in s. 119.011(4)(a), F.S., which enforces the laws of this state or the United States relating to controlled substances and which has initiated an ongoing and active investigation, as defined in ss. 119.011 and 893.07, F.S., involving a specific violation of law regarding prescription drug abuse or diversion of prescribed controlled substances.
- A health care practitioner who certifies that the information is necessary to provide medical treatment to a current patient in accordance with ss. 893.05 and 893.055, F.S.
- A pharmacist, as defined in s. 465.003, F.S., who certifies that the requested information is to be used to dispense controlled substances to a current patient in accordance with ss. 893.04 and 893.055, F.S.
- A patient or the legal guardian or designated health care surrogate for an incapacitated patient, if applicable making a request as provided in s. 893.055(7)(c), F.S.
- The patient's pharmacy, prescriber, or dispenser, as defined in s. 893.055, who certifies that the information is necessary to provide medical treatment to his or her current patient in accordance with s. 893.055, F.S.
- The program manager of the electronic prescription drug monitoring program, the program and support staff, and individuals designated by the program manager as necessary to process validated requests for information or to perform database administrative tasks necessary to support the monitoring program.

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 a law enforcement agency with lawful access to such information to disclose confidential and exempt information received from the 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 the confidential and exempt information commits a felony of the third-degree, punishable as provided in s. 775.082, s. 775.803, or s. 775.084, 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, 2014, in accordance with the Open Government Sunset Review Act.

The bill provides a contingent effective date of July 1, 2009, SB 462, 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 municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

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

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

The DOH or any other agency as defined in s. 119.011(2), F.S., 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.<sup>14</sup>

##### **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.

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<sup>14</sup> 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.*

**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 Oversight and Accountability on March 31, 2009:**

Revises the entities to whom and circumstances under which confidential and exempt information can be disclosed by the custodian agency. Requires that an authorized entity's request for confidential and exempt information be verified as legitimate. Makes editorial changes. Changes the section of law from s. 893.056, F.S. to s. 893.0551, F.S. and changes the title of the section.

**CS by Health Regulation on March 4, 2009:**

Revises the custodian agency from the Agency for Health Care Administration to the Department of Health and renames the electronic prescription tracking system to the prescription drug validation program. Revises the entities to whom and circumstances under which confidential and exempt information can be disclosed by the custodian agency.

**B. Amendments:**

None.