

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 Health Policy Committee

BILL: SB 60

INTRODUCER: Senator Hays

SUBJECT: Public Records

DATE: February 14, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McElheney	Stovall	HP	Pre-meeting
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates a public-records exemption for certain personal indentifying information of current or former personnel of the Department of Health (DOH) whose duties include or support the investigation and prosecution of complaints against health care practitioners or the inspection of practitioners or facilities licensed by the DOH. The bill also exempts certain personal identifying information related to spouses and children of those persons.

This bill substantially amends section 119.071 of the Florida Statutes.

II. Present Situation:

Florida’s Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.¹ In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.² Section 24(a), Art. I, of the State Constitution, provides that:

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

¹ Section 1390, 1391 F.S. (Rev. 1892)

² Article I, s. 24 of the State Constitution

or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “public record” 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. 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 “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

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 then an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹¹ provides for the systematic review of an exemption from the Public Records Law in the fifth year after its enactment. The act states that

³ *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Article I, s. 24 (c), Fla. Constitution.

⁶ *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. 1979)

⁷ Under s. 119.15, F.S. an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Art. I, s.24 (c), Fla. Constitution.

⁹ Attorney General Opinion 85-62

¹⁰ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d289 (Fla. 1991).

¹¹ Section 119.15, F.S.

an exemption may be created, revised, or maintained 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 exemption meets the statutory criteria if it:

- 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 the safety of such individuals; 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 which 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.¹²

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.

Current Exemptions in Section 119.071(4)(d)(2), F.S, Pertaining to Agency Personnel

Section 119.071(4)(d), F.S., currently provides public-records exemptions for specified personal identifying and locating information of the following current and former agency personnel, as well as for specified personal identifying and locating information of their spouses and children: law enforcement personnel; personnel within the Department of Children and Family Services who investigate criminal activities; the Department of Health personnel who support those investigations; the Department of Revenue or local government whose responsibilities include revenue collection and enforcement or child support enforcement; certified firefighters; justices and judges; local and statewide prosecuting attorneys; magistrates, administrative law judges, and child support hearing officers; local government agency and water management district human resources administrators; code enforcement officers; guardians ad litem; specified Department of Juvenile Justice personnel; public defenders; criminal conflict and civil regional counsel; investigators or inspectors of the Department of Business and Professional Regulation; and tax collectors.

Department of Health Regulated Professions

The DOH is established under s. 20.43, F.S. Section 20.43, F.S., creates several divisions under the DOH, including the Division of Medical Quality Assurance (MQA), which is responsible for the following boards and professions established within the division:

¹² Section 1119.15(4)(b), F.S.

- The Board of Acupuncture, created under ch. 457, F.S.
- The Board of Medicine, created under ch. 458, F.S.
- The Board of Osteopathic Medicine, created under ch. 459, F.S.
- The Board of Chiropractic Medicine, created under ch. 460, F.S.
- The Board of Podiatric Medicine, created under ch. 461, F.S.
- The Board of Optometry, created under ch. 463, F.S.
- The Board of Nursing, created under part I of ch. 464, F.S.
- The Board of Pharmacy, created under ch. 465, F.S.
- The Board of Dentistry, created under ch. 466, F.S.
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.
- The Board of Athletic Training, created under part XIII of ch. 468, F.S.
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.
- The Board of Massage Therapy, created under ch. 480, F.S.
- The Board of Clinical Laboratory Personnel, created under part III of ch. 483, F.S.
- The Board of Opticianry, created under part I of ch. 484, F.S.
- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.
- The Board of Physical Therapy Practice, created under ch. 486, F.S.
- The Board of Psychology, created under ch. 490, F.S.
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.

In addition to the professions regulated by the various aforementioned boards, the MQA also regulates the following professions: emergency medical technicians and paramedics, as provided under ch. 401, F.S.; naturopathy, as provided under ch. 462, F.S.; nursing assistants, as provided under part II of ch. 464, F.S.; midwifery, as provided under ch. 467, F.S.; respiratory therapy, as provided under part V of ch. 468, F.S.; dietetics and nutrition practice, as provided under part X of ch. 468, F.S.; electrolysis, as provided under ch. 478, F.S.; medical physicists, as provided under part IV of ch. 483, F.S.; and school psychologists, as provided under ch. 490, F.S. All professions regulated by the MQA are subject to the general licensing provisions in s. 456.013, F.S.

The DOH also regulates and certifies radiological personnel under part IV of ch. 468, F.S. Certification provisions for radiological personnel are found in s. 468.304, F.S.

Agency Personnel Information

Department inspectors and investigators are required to investigate any complaint that is received in writing to determine if it is legally sufficient, to review whether it is signed by the complainant or, if not signed, to determine if it is believed to be true after an initial inquiry by the department. In addition, department inspectors and investigators are required to complete other routine inspections by the department. Department inspectors are also required to hand serve department orders, emergency actions, subpoenas and other legal documents.

Presently, the DOH investigative staff and their spouse's and children's personal information are not exempt from public disclosure.

In recent years, the DOH investigators have forged strong relationships with law enforcement. With the proliferation of pill mills and the controlled substance abuse epidemic in Florida, the DOH investigators have had to be involved in more investigations that involve criminal elements. The DOH investigators who inspect massage establishments are identifying and reporting to law enforcement potential criminal activities associated with unlicensed practice of health care professions and other practice violations that are set forth in law as criminal violations. As the DOH investigators are exposed to more and more potentially dangerous criminal situations, the investigators and their supervisors have become concerned about the release of personal information that may be used by criminals, or individuals under investigation by the DOH, to target investigative staff and their families. Under this bill, personal identifying information of approximately 240 DOH employees would be exempt.¹³

III. Effect of Proposed Changes:

Section 1 amends s. 119.071, F.S., to create a public records exemption for the home address, telephone numbers,¹⁴ and photographs of current or former DOH personnel who investigate and prosecute complaints filed against health care practitioners or inspect practitioners or facilities licensed by the DOH, as well as personnel who support these functions. The same information plus place of employment of spouses and children of such personnel, and names and locations of schools and day care facilities attended by children of such personnel are also made exempt.

The bill requires legislative review under the Open Government Sunset Review Act. The exemptions will sunset on October 2, 2018, unless reenacted by the Legislature.

Section 2 provides a statement of public necessity for the exemptions. The Legislature finds that release of the personal identifying and location information might place these persons in danger of physical and emotional harm from disgruntled individuals who have contentious reactions to actions carried out by personnel of the DOH, or whose business or professional practices have come under the scrutiny of investigators and inspectors of the DOH. The Legislature further finds that the harm in a release of the information outweighs any public benefit that may derive from the disclosure of the information.

This act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹³ See Department of Health Bill Analysis for SB 60 (dated November 26, 2012)– on file with the Senate Health Policy Committee.

¹⁴ Under s. 119.071(4)d.1., F.S., the term “telephone numbers” includes home telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communication devices.

B. Public Records/Open Meetings Issues:**Vote Requirement:**

Section 24(c), art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly-created or expanded public-records or public-meetings exemption. Because this bill creates a new public-records exemption, it requires a two-thirds vote for passage.

Subject Requirement:

Section 24(c), art. I of the State Constitution requires the Legislature to create or expand public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement:

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly-created or expanded public-records or public-meetings exemption. This bill complies with that requirement.

C. Trust Funds Restrictions:

None.

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:

The bill includes personnel whose duties “support” those who investigate, prosecute or inspect, which is vague and may be overly broad.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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