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 Committee on Health Policy

BILL:	SB 866
INTRODUCER:	Health Policy Committee
SUBJECT:	OGSR/Department of Health
DATE:	January 10, 2014
REVISED:	02/5/14

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall		**HP SPB 7014 as introduced**

I. Summary:

SB 866 amends section 893.0551 of the Florida Statutes relating to the public records exemption for the prescription drug monitoring program (PDMP).

The bill strengthens the security of personal identifying information in the database by:

- Requiring law enforcement agencies to obtain a court order prior to receiving confidential information from the PDMP,
- Requiring recipients of PDMP confidential information to take steps to ensure the continued confidentiality of the information received, and
- Restricting the information the Department of Health (DOH or department) sends to a law enforcement agency when the DOH determines a pattern exists that is consistent with indicators of controlled substance abuse to non-identifying information.

The proposed bill also allows health care practitioners to share a patient's PDMP information with that patient and, upon the patient's written consent, include that information in the patient's medical record.

The proposed bill saves the exemption from the public records law for the personal identifying information in the PDMP from repeal on October 2, 2014.

II. Present Situation:

Florida's Prescription Drug Monitoring Program

Chapter 2009-197, Laws of Florida, established the PDMP in s. 893.055, F.S. The PDMP uses a comprehensive electronic system/database to monitor the prescribing and dispensing of certain controlled substances.[1] Dispensers of certain controlled substances must report specified

[1] S. 893.055(2)(a), F.S.

information to the PDMP database, including the name of the prescriber, the date the prescription was filled and dispensed, and the name, address, and date of birth of the person to whom the controlled substance is dispensed.[2]

The PDMP became operational on September 1, 2011, when it began receiving prescription data from pharmacies and dispensing practitioners.[3] Dispensers have reported over 87 million controlled substance prescriptions to the PDMP since its inception.[4] Health care practitioners began accessing the PDMP on October 17, 2011.[5] Law enforcement began requesting data from the PDMP in support of active criminal investigations on November 14, 2011.[6]

Accessing the PDMP database

Section 893.0551, F.S., makes certain identifying information[7] of a patient or patient's agent, a health care practitioner, a dispenser, an employee of the practitioner who is acting on behalf of and at the direction of the practitioner, a pharmacist, or a pharmacy that is contained in records held by the department under s. 893.055, F.S., confidential and exempt from the public records laws in s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.[8]

Direct access to the PDMP database is presently limited to medical doctors, osteopathic physicians, dentists, podiatric physicians, advanced registered nurse practitioners, physician assistants, and pharmacists.[9] Currently, prescribers are not required to consult the PDMP database prior to prescribing a controlled substance for a patient however physicians and pharmacists queried the database more than 3.7 million times during fiscal year 2012-2013.[10]

Indirect access to the PDMP database is provided to:

- The DOH or its relevant health care regulatory boards;
- The Attorney General for Medicaid fraud cases;
- Law enforcement agencies during active investigations[11] involving potential criminal activity, fraud, or theft regarding prescribed controlled substances; and
- Patients, or the legal guardians or designated health care surrogates of incapacitated patients.[12]

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[2] S. 893.055(3)(a)-(c), F.S.
[3] 2012-2013 PDMP Annual Report, available at http://www.floridahealth.gov/reports-and-data/e-forcse/news-reports/_documents/2012-2013pdmp-annual-report.pdf, last visited on Jan. 9, 2014.
[4] Id.
[5] Id.
[6] Id.
[7] Such information includes name, address, telephone number, insurance plan number, government-issued identification number, provider number, and Drug Enforcement Administration number, or any other unique identifying information or number.
[8] S. 893.0551(2)(a)-(h), F.S.
[9] S. 893.055(7)(b), F.S.
[10] Supra at n. 3
[11] S. 893.055(1)(h), F.S., defines an "active investigation" as an investigation that is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings, or that is ongoing and continuing and for which there is a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.
[12] S. 893.055(7)(c)1.-4., F.S.

Law enforcement agencies may receive information from the PDMP database through the procedures outlined in the DOH's "Training Guide for Law Enforcement and Investigative Agencies."[13] Agencies that wish to gain access to the PDMP database must first appoint a sworn law enforcement officer as an administrator who verifies and credentials other law enforcement officers' within the same agency.[14] The administrator may then register individual law enforcement officers with the DOH.

Registered law enforcement officers may not directly access the PDMP, instead when they wish to obtain information from the PDMP database, they must submit a query to the DOH.[15] These queries may be for a patient's history, a prescriber's history, or a pharmacy's dispensing history.[16] The registered law enforcement officer must fill out a form indicating what type of search they want to perform, what parameters (name, date, time period, etc.) they want to include, and some details of the active investigation they are pursuing including a case number. This form is submitted to the DOH and, in most instances, the requested information is made available to the requesting officer. In some cases a request is denied. Generally, a request is denied due to lack of sufficient identifying information (incorrect spelling of a name, wrong social security number, etc.) or, alternatively, a request may return no results. The DOH may also deny a request that it finds not to be authentic or authorized.[17]

Prescription Drug Monitoring Programs in Other States

As of December 2013, every state except Missouri has passed PDMP legislation and only New Hampshire and Washington D.C. have yet to bring their PDMP to operation status.[18] The Legislature's Office of Program Policy Analysis and Government Accountability (OPPAGA) examined the PDMPs of 26 of those states, including Florida.[19] All PDMPs examined are either run by the states in-house or by contract with private vendors. Most states do not require prescribers to register in order to use the PDMP and primarily encourage prescribers to use the database through education and outreach programs.[20] Only three of the 26 states require prescribers to access the database prior to prescribing most or all controlled substances.[21] In 17 of

[13] This training guide may be found at http://www.hidinc.com/assets/files/flpdms/FL%20PDMP_Training%20Guide%20for%20Enforcement%20and%20Investigative%20Agencies.pdf, last viewed on Jan. 9, 2014.
[14] See the DOH's "Law enforcement administrator appointment form," available at http://www.floridahealth.gov/reports-and-data/e-forcse/law-enforcement-information/_documents/admin-appoint-form.pdf, last visited on Jan. 9, 2014.
[15] During FY 2012-2013 a total of 487 authorized law enforcement users queried the PDMP database 32,839 times. Id. at note 3.
[16] Id. at note 11.
[17] S. 893.055(7)(c), F.S., requires the DOH to verify a request as being "authentic and authorized" before releasing information from the PDMP.
[18] National Alliance for Model State Drug Laws. *Compilation of State Prescription Monitoring Programs Maps*, can be found at http://www.namsdl.org/library/6D4C4D9F-65BE-F4BB-A428B392538E0663/, last visited on Jan. 10, 2014.
[19] *OPPAGA Review of State Prescription Drug Monitoring Programs*, Jan. 31, 2013, on file with the Senate Health Policy Committee.
[20] Id., p. 8
[21] Kentucky, New Mexico, and New York. Id., p. 4

23 states, including Florida, accessing the database is strictly voluntary and in the remaining six states accessing the database is only required under limited circumstances.[22]

All states reviewed have the authority to take punitive action against dispensers of prescription drugs that do not comply with their state's respective laws and rules on their state's PDMP. These punitive actions can come in the form of fines, licensure disciplinary action, and / or criminal charges, however, states rarely use these punitive measures when dispensers do not comply with PDMP requirements.

As of December 5, 2013, 18 states require law enforcement to obtain a search warrant, subpoena, court order, or other type of judicial process in order to access the information in their state's PDMP.[23]

Unauthorized Release of PDMP Data

In the early summer of 2013, the PDMP information of approximately 3,300 individuals was improperly shared with a person or persons who were not authorized to obtain such information.[24] The original information was released from the PDMP by the DOH during a Drug Enforcement Administration (DEA) investigation of a ring of individuals who used four doctor's information to conduct prescription fraud. Although as a result of the investigation only six individuals were ultimately charged, the information of approximately 3,300 individuals was released to the DEA because the DEA searched the PDMP for the records of all the patients of the four doctors who had been the victims of the prescription drug fraud.[25] During the conduct of the investigation and the resulting prosecution, the DEA shared the full file with the prosecutor who, in turn, shared the full file with the defense attorney during discovery. The improper release of information occurred when a defense attorney associated with the case shared the file with a colleague who was not associated with the case.[26]

Reasonable Suspicion v. Probable Cause

The terms reasonable suspicion and probable cause are legal terms of art that refer to the level of proof which must be proffered before a certain action, generally a police action, may be taken. Reasonable suspicion is the lesser standard which is applied to actions such as Terry stops[27] and to searches in areas where there is a lesser expectation of privacy, such as in a school.[28] Probable

[22] These circumstances typically revolve around how often a drug is prescribed, if the drug is in a specific class or schedule, if there is a reasonable suspicion that the patient it abusing drugs, or if the prescription was written in a pain clinic. Id.
[23] These states are: Alaska, Arkansas, Colorado, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, and Wisconsin. See the National Alliance for Model State Drug Laws, *Law Enforcement Access to State PMP Data*, available at http://www.namsdl.org/library/C4AA9EA3-65BE-F4BB-AAFBAB1F5736F070/, last visited on Jan 10, 2014.
[24] See John Woodrow Cox, *Did Florida's prescription pill database really spring a leak?*, Tampa Bay Times, July 5, 2013. Available at http://www.tampabay.com/news/politics/did-floridas-prescription-pill-database-really-spring-a-leak/2130108, Last visited on Jan. 9, 2014, and see the DOH presentation to the Senate Health Policy Committee on the PDMP, Sep. 24, 2013, on file with Health Policy Committee staff.
[25] Id.
[26] Id.
[27] Terry v. Ohio, 392 U.S. 1
[28] See R.M. v. State, 2014 WL 20628

cause is the greater of the two standards and is the one the police must meet when arresting a suspect.[29]

In order to meet the standard for reasonable suspicion, a police officer must be able to show a "well-founded, articulable suspicion of criminal activity."[30] In contrast, in order to meet the standard for probable cause, an officer must be able to show that the "facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[31] The key difference between the standards lies in the knowledge of the officer. With reasonable suspicion, the officer must only suspect that a crime has been committed, while with probable cause, the officer must have enough evidence to convince a "prudent man" that a crime has been committed.

Public Records

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.[32] 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.[33] Article I, s. 24 of the State Constitution, provides that:

> Every person has 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, 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 constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,[34] which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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.

[29] Popple v. State, 626 So. 2d 185, p. 3
[30] Id.
[31] Henry v. U.S., 31 U.S. 98, p. 102
[32] Section 1390, 1391 Florida Statutes. (Rev. 1892).
[33] Article I, s. 24 of the State Constitution.
[34] Chapter 119, F.S.

Unless specifically exempted, all agency[35] 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.[36]

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.[37] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[38]

Only the Legislature is authorized to create exemptions to open government requirements.[39] An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.[40] A bill enacting an exemption[41] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[42]

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.[43] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[44]

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act)[45] 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 Sunshine Law.

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[35] The word "agency" is defined in s. 119.011(2), F.S., 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."
[36] S. 119.011(12), F.S.
[37] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[38] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[39] Article I, s. 24(c) of the State Constitution.
[40] *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).
[41] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[42] Article I, s. 24(c) of the State Constitution.
[43] Attorney General Opinion 85-62.
[44] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[45] S. 119.15, F.S.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is 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. The three statutory criteria are that 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 know or use it, the disclosure of which would injure the affected entity in the marketplace.[46]

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the 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.[47] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

> … notwithstanding s. 778.28 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.

[46] S. 119.15(6)(b), F.S.
[47] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Senate Review of s. 893.0551, F.S.

In the course of conducting the Open Government Sunset Review of s. 893.0551, F.S., Senate Health Policy Committee staff invited input from various stake holders. Staff met with representatives from various agencies and groups including the DOH, the Florida Department of Law Enforcement, the DEA, Florida Sheriffs Association, Florida Police Chiefs Association, the Attorney General's office, and various advocacy groups representing pharmacists and pain management physicians. Staff also observed several meetings held by the DOH on proposed rule amendments for the PDMP.

III. Effect of Proposed Changes:

The bill saves the public records exemption for personal identifying information in the PDMP from repeal and enhances the security pertaining to information that is released from the PDMP. Specifically the proposed bill:

- Requires a law enforcement agency to obtain a court order from a court of competent jurisdiction showing a finding of reasonable suspicion of potential criminal activity, fraud, or theft regarding prescribed controlled substances before information within the PDMP database may be released to that agency. A court order must be issued by a judge.
- Requires the Attorney General, the DOH's regulatory boards, and law enforcement agencies to maintain the confidentiality of any PDMP information that they disclose to a criminal justice or law enforcement agency. To maintain the confidentiality of the information those entities must, at a minimum, redact or delete any information which is not relevant to their investigation.
- Allows a health care practitioner to share a patient's PDMP information with that patient or the patient's legal representative and, upon the patient's or patient's legal representative's written consent, include that information in the patient's medical record. Information placed in a patient's medical record may be disclosed subject to the requirements of s. 456.057, F.S.
- Allows the DOH to send only relevant information which is not personal identifying information to a law enforcement agency when the DOH determines a pattern consistent with indicators of controlled substance abuse exists.
- Clarifies that any agency or person who obtains confidential and exempt information from the PDMP may not share that information unless specifically authorized to do so by this section of law.
- Strikes the Open Government Sunset Review language that automatically repeals this section of law on October 2, 2014.

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Law enforcement agencies may incur a cost associated with obtaining a court order prior to accessing information in the PDMP. The Attorney General's office, the DOH's regulatory boards, and law enforcement agencies may incur minor costs associated with redacting or deleting non-relevant PDMP information before sharing such information with a criminal justice agency.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.0551 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.