The Florida Senate

Interim Project Report 2007-132 *October 2006*

Committee on Health Policy

REVIEW OF MEDICAL RECORDS AND HEALTH INFORMATION HELD BY AGENCIES

SUMMARY

The Open Government Sunset Review Act (s. 119.15, F.S.) provides for the repeal and prior review of any public records or meetings exemptions that are created or substantially amended in 1996 and subsequently. The law was amended by ch. 2005-251, Laws of Florida, to modify the review process under the Open Government Sunset Review Act so that consideration will be given to reducing the number of exemptions by merging multiple similar exemptions during the review of an exemption subject to sunset review. In this interim project, staff reviewed existing exemptions for medical records and health information held by agencies to determine whether these exemptions could appropriately be merged.

With regard to the exemptions for medical records, staff found that it would be appropriate to create a single Public Records Law exemption in ch. 119, F.S., for individual patient's medical records held by agencies. The exemption should define "medical records" so that the exemption applies only to individual patient medical records that are created by a licensed health care practitioner to document the diagnosis, treatment, and prescription of a human ill. The exemption should make medical records both confidential and exempt. The law should also clarify that the new exemption does not supersede any other applicable public records exemptions for medical records and health information existing prior to the effective date of the exemption, or created thereafter.

With regard to other health information held by agencies, staff found that it would be inappropriate to create a single Public Records Law exemption in ch. 119, F.S. There are numerous public records exemptions for a wide variety of types of health information. Each exemption specifies the agency's use and disclosure of the health information. An advantage that agency-specific exemptions have over a single Public Records Law exemption in ch. 119, F.S., is that they give the custodian of the record specific direction on the use and disclosure of the records within the context of other legal and substantive issues affecting the records. Such uses and disclosure often have countervailing purposes when an attempt is made to combine them into a single exemption. In some records which contain health information, the personal identifying information is redacted when disclosed as a public record, but the rest of the record is available. For other records, in contrast, the entire record may be confidential and exempt and may not be disclosed.

BACKGROUND

Constitutional Access to Public Records and Meetings

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[1] Over the following decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967.[2] These statutes have been amended numerous times since their enactment. In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment, which guaranteed and expanded the practice.

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

[1] Section 1, ch. 5945, 1909; RGS 424; CGL 490.
[2] Chapters 67-125 and 67-356, L.O.F.

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 of government 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. All meetings of any collegial public body must be open and noticed to the public.

The term "public records" has been defined by the Legislature in s. 119.011(11), 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.[3] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[4]

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

- Must state with specificity the public necessity justifying the exemption;
- Must be no broader than necessary to accomplish the stated purpose of the law;
- Must relate to one subject;
- Must contain only exemptions to public records or meetings requirements; and
- May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida's citizens to discover the actions of their government.[5] 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.[6]

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 a record confidential, with no provision for its release such that its 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.[7] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances.[8]

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[9] 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.[10] 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.[11]

---

[3] *Shevin v. Bryon, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[4] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[5] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).
[6] *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), 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).
[7] Attorney General Opinion 85-62.
[8] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[9] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).
[10] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).
[11] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA

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.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year, which meets the criteria of an exemption as, defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(6)(a), F.S., requires the consideration of the following specific questions:

- 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?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals 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 information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves.[12] In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Open Government Sunset Review of s. 119.07(6)(cc), F.S., (2004), Personal Health Information Held by the Department of Health

Section 119.07(6)(cc), F.S. (2004), makes all personal identifying information; bank account numbers; and

1990).

[12] *Memorial Hospital–West Volusia, Inc. v. News-Journal Corporation,* 2002WL 390687 (Fla. Cir. Ct.).

debit, charge, and credit card numbers contained in records relating to an individual's personal health or eligibility for health related services made or received by the Department of Health confidential and exempt from the Public Records Law, with specified exceptions. Section 119.07(6)(cc), F.S., was transferred to s. 119.0712, F.S., and was subject to repeal and review under the Open Government Sunset Review Act. The Open Government Sunset Review Act was amended in 2005 so that consideration would be given to reducing the number of exemptions by merging multiple similar exemptions during the review of an exemption subject to sunset review.

As part of its Open Government Sunset review of s. 119.0712, F.S., in 2006, the House of Representatives, in HB 7223 (2006), revised the agency-specific public records exemption applicable only to the Department of Health and created a broad public records exemption that was applicable to all agencies for medical records and health records. House Bill 7223 (2006) was an attempt to merge multiple similar exemptions for medical records and health records so that a single exemption would apply to all agencies. In part, because the effects of HB 7223 (2006) on similar existing exemptions was not completely known, the Legislature reenacted the agency-specific public records exemption for the Department of Health for personal identifying information in records relating to an individual's personal health or eligibility for health related services held by the Department of Health with minor substantive changes.

This interim project is a review of existing exemptions for medical records and health information held by agencies to determine whether these exemptions could appropriately be merged.

Constitutional Amendment 7, 2004

Amendment 7, codified as Art. X, s. 25, of the Florida Constitution provides patients with a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse incident and in providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

The Florida Legislature enacted s. 381.028, F.S., to implement Amendment 7. The Fifth District Court of Appeal and the First District Court of Appeal have both held that the amendment is self-executing.[13] The Fifth District Court of Appeal held that Art. X, s. 25, of the Florida Constitution was not intended to be applied retroactively.[14] The First District Court of Appeal held that s. 381.028, F.S., was unconstitutional; Art. X, s. 25 of the Florida Constitution was self-executing and was intended to apply to records created prior to passage of Art. X, s. 25 of the Florida Constitution.[15] The First District Court of Appeal recognized that its holding regarding the retroactive application of the constitutional amendment to records created prior to the amendment's effective date was in direct conflict with the holding in an earlier decision by the Fifth District Court of Appeal. The First District Court of Appeal certified the conflict to the Florida Supreme Court.[16]

METHODOLOGY

Staff analyzed statutes and case law in the following areas:

- Privacy rights of individuals relating to personal health information;
- Confidential privilege given to health-related records;
- Public records exemptions for medical and health information held by agencies;
- Health-related information held by agencies that is not exempt from public disclosure;
- Distinction between personal medical records and other health-related records; and
- Limitations placed on agencies for the use and disclosure of health-related records.

Staff researched relevant statutory provisions and case law, and contacted state agencies and other interested stakeholders. Although staff reviewed over 300 statutes providing public records exemptions for medical records and health information, health information may be held by agencies in unrelated documents. It would

[13] *Florida Hospital Waterman v. Buster*, 932 So.2d 344 (Fla.5th DCA 2006) and *Notami Hospital of Florida v. Bowen*, 927 So.2d 139 (Fla. 1st DCA 2006).

[14] *Waterman* at 356, the Fifth District Court of Appeal certified several questions to the Florida Supreme Court as matters of great public importance, including: Is Amendment 7 self-executing and should Amendment 7 be applied retroactively? The Florida Supreme Court accepted jurisdiction in Case Number SC06-688.

[15] *Notami* at 141-142.

[16] The Florida Supreme Court accepted jurisdiction in Case Number SC06-912

be difficult, without specific expertise in each agency's mission and their use of health information, to find all of the existing uses and disclosures of health information held by agencies. The examples of the uses and disclosures of medical records and health information outlined in this report illustrate staff's findings and are an indication of the range of medical records and health information held by agencies.

FINDINGS

Privacy of Health-related Records

The United States Supreme Court has recognized an individual's interest in avoiding the disclosure of personal matters within the context of medical information.[17] Although federal court decisions have recognized the privacy of medical information, they have not articulated specific safeguards that may be used by custodians of medical records. Both federal and state laws impose confidentiality standards that may protect sensitive individual personal medical records and health information.

Section 456.057(7)(a), F.S., provides a broad and express privilege of confidentiality to medical records and the medical condition of a patient. The privilege is applicable to records created by specified licensed health care practitioners. It provides that such records may not be furnished to, and the medical condition discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. Section 456.057(7), F.S., specifies various statutory exceptions to the confidentiality it provides for medical records and the medical condition of a patient.

Section 456.057, F.S., was amended by ch. 2006-271, Laws of Florida, to define the term "records custodian" as any person or entity that maintains certain documents authorized under the section or obtains medical records from a records owner. Documents authorized under s. 456.057, F.S., include records or reports of licensed health care practitioners, with specified exceptions, who make a physical or mental examination of, or administer treatment or dispense legend drugs to any person. The records custodian and any health care practitioner's employer who is a records owner under s. 456.057, F.S., are subject to the same statutory confidentiality and disclosure requirements for the records as the licensed or regulated health care practitioner who created the records.

Other state and federal laws protect the confidentiality of an individual's health information. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects the privacy rights of individuals over their health information, and serves as a floor of privacy rights for certain health information. HIPAA regulations only apply to covered entities (health providers who engage in certain electronic transactions, health plans, and health care clearinghouses). Under HIPAA, state law that provides greater confidentiality to protected health information is not preempted or invalidated by HIPAA.

The protection of confidentiality under HIPAA is not as comprehensive as the protection given under applicable Florida statutory law, because HIPAA would not preempt state public records laws. HIPAA permits a covered entity to use and disclose protected health information as required by other law, including state law.[18] If a state public records law mandates that a covered entity disclose protected health information, the disclosure would be authorized under HIPAA if the disclosure complies with and is limited to the relevant requirements of the public records law.

Amendment 7, codified as Art. X, s. 25, of the Florida Constitution provides patients with a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse incident. Art. X, s. 25 of the Florida Constitution also states that in providing such access, the *identity of patients* involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

Public Records Exemptions in Chapter 119, F.S., for Specialized Health-related Information

There is no single Public Records Law exemption in ch. 119, F.S. that applies to all agencies and entities subject to the Public Records Law for medical records or health information. Florida law provides numerous agency-specific public records exemptions for medical and health information. Statutory exemptions for medical records and health information include personal health care records, such as an individual patient's medical records and proprietary business records relating to health care business activities, such as antitrust documents. State agencies collect records which in their entirety may be characterized as an

[17] See *Whalen v. Roe*, 429 U.S. 589 (1977).

[18] See 45 CFR 164.512(a).

individual patient's medical records. These records are entirely created by a licensed health care practitioner to document the diagnosis, treatment, and prescription of a human ill.

The Public Records Law exemptions reviewed by staff may be characterized as relating to:

- Agency-specific uses or disclosures of health information; or
- Protection of the identity of the subject of the personal health information covered by the exemption.

Although ch. 119, F.S., contains several exemptions to the Public Records Law for health-related information, an exemption for individual medical records that is applicable to all agencies does not exist:

- Section 119.071(4)(b), F.S., provides that medical information pertaining to a prospective, current, or former officer or employee of an agency, which if disclosed, would *identify that officer or employee* is exempt from the Public Records Law. An agency that holds medical information pertaining to an officer, employee, or prospective employee, has discretion to release the information, if it would not identify that officer or employee.
- Section 119.071(5)(f), F.S., protects medical history records and information related to health or property insurance provided to the Department of Community Affairs, the Housing Finance Corporation, a county, a municipality, or a local housing finance agency by *an applicant for or a participant in a federal, state, or local housing assistance program*. The records are made confidential and exempt under the Public Records Law.
- Section 119.0712, F.S., makes all personal identifying information contained in records *relating to an individual's personal health or eligibility for health related services* held by the Department of Health confidential and exempt from the Public Records Law. Section 119.0712, F.S., specifies circumstances under which the exempt records may be disclosed.[19]

It would be difficult to track and account for all agency uses and disclosures of health-related information in a single Public Records Law exemption in ch. 119, F.S. Agency-specific exemptions give the custodian of the record specific direction on the use and disclosure of the records within the context of other legal and substantive issues affecting the records. The detail on the use of patient records that is contained within s. 456.057(10), F.S., illustrates this issue. The Public Records Law exemption in s. 456.057(10), F.S., applies only to patient records held by the Department of Health and any other documents maintained by the Department of Health which identify a patient by name. The exemption also limits the use of the records to the Department of Health's and board's investigation, prosecution, and appeal of any disciplinary proceedings for licensed health care practitioners.

Lack of Public Records Exemptions for Certain Health-related Information Held by State Agencies

An agency may hold sensitive personal health information and there is no Public Records Law exemption to prevent the disclosure of the information. State agencies hold records relating to an individual's personal health which may be compiled from other sources, including declarations by the subject of such information, and medical records that document treatment, diagnosis, or prescription actually created by a licensed health care practitioner. Limitations on the use and disclosure of the information may vary.

The Florida Commission for the Transportation Disadvantaged administers the Florida Disabled Toll Permit Program to assist disabled drivers who have severe and permanent upper limb mobility or dexterity impairments that substantially impair the driver's from tossing coins into toll baskets.[20] As part of the eligibility for the disabled toll permit program, applicants must both make a self-declaration of their disability and obtain certification from a Florida-licensed physician that the disabled driver is severely physically disabled and has permanent upper limb mobility or dexterity impairments which substantially impairs the driver's ability to deposit coins in toll baskets.[21] The commission staff have indicated that there is no Public Records Law exemption for the declaration of disability submitted by drivers seeking the disabled toll permit.

The Department of Highway Safety and Motor Vehicles or its authorized agents issue a disabled parking permit for a period of up to 4 years to any

[19] See Senate Interim Report 2006-221, for a detailed discussion of specialized health information held by the Department of Health.

[20] See s. 338.155, F.S.

[21] In the alternative, the driver may have the Adjudication Office of the U.S. Dept. of Veterans Affairs certify that the driver has the impairment described in s. 338.155, F.S.

person who has long-term mobility impairment, or a temporary disabled parking permit not to exceed 6 months to any person who has temporary mobility impairment.[22] Disabled parking permits are issued to a person who makes a self-declaration of the required disability and who is currently certified as being legally blind or having specified disabilities that render him or her unable to walk 200 feet without stopping to rest. The certification of disability required to obtain the permanent or temporary disabled parking permit, must be provided by a Florida-licensed medical physician, osteopathic physician, podiatric physician, optometrist, advanced registered nurse practitioner, physician assistant or a similarly licensed physician in another state, with appropriate documentation. According to the Department of Highway Safety and Motor Vehicles, there is no Public Records Law exemption for the certification of disability to obtain a disabled parking permit.

Definition of "Medical Record"

The terms "health record," "medical record," or "health information" are not defined for purposes of the Public Records Law. The lack of definition of the term may give some discretion to the custodian of the record as to what records may be characterized as a "health record," "medical record," or "health information." As long as the agency does not enlarge, modify, or contravene a statutory definition it has some discretion to interpret it.[23] The Florida Constitution requires state agencies that are subject to the requirements of the Public Records Law under Art. I, s. 24, to interpret the laws providing the public access to records broadly rather than narrowly. The Public Records Law is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.[24]

Section 624.23, F.S., provides, in part, that *all* personal financial and health information of a consumer held by the Department of Financial Services or the Office of Insurance Regulation or their service providers or agents relating to a consumer's complaint or inquiry regarding an activity regulated under the Florida Insurance Code is confidential and exempt from the Public Records Law. The Department of Financial Services and the Office of Insurance Regulation have adopted an identical administrative rule which defines the phrase "personal financial and health information" as used in the public records exemption contained in s. 624.23, F.S., in part, to mean any information which if disclosed would reveal *any individual's* personal health condition, disease, or injury; and a history of *any individual's* personal medical diagnosis or treatment.[25] In effect, the rules interpreted the scope of the public records exemption in s. 624.23, F.S., to limit it to information that would reveal an individual's personal health condition, disease, or injury and any history of an individual's personal medical diagnosis or treatment.

Care should be taken in defining "medical record" in a single Public Records Law exemption in ch. 119, F.S., since the term will be interpreted by applicable agencies subject to ch. 119, F.S. If any administrative rule adopted by the agency interprets a term within a statute in which a duty is conferred on the agency and a court finds that the interpretation conflicts with the enabling act of the Legislature, then the statute controls.[26]

Any definition of "medical record" created for a single Public Records Law exemption in ch. 119, F.S., should limit the records to those records that licensed health care practitioners have created to document the diagnosis, treatment, and prescription of a *human* ill. Agencies subject to the Public Records Law, such as the Department of Business and Professional Regulation or the Department of Agriculture and Consumer Services hold "medical records" created by licensed veterinarians and such records are not protected by an exemption to the Public Records Law.[27] Section 828.30, F.S., exempts an animal owner's name, street address, phone number, and animal tag number in a rabies vaccination certificate provided to an animal control authority, from public disclosure.

For records that contain personal health-related information, but for which a public records exemption only exempts personal identifying information in the record, the redacted record should remain available to the public. The information that is health-related may

[22] See s. 320.0848, F.S.

[23] See s. 120.52(8), F.S., and *Board of Podiatric Medicine v. Florida Medical Assoc*., 779 So.2d 658 (Fla.1st DCA 2001) and *Campus Communications v. Dept. of Revenue*, 473 So.2d 1290 (Fla. 1985).

[24] See *Kirscher v. D'Amato*, 674 So.2d 909, 911 (Fla.4thDCA 1996).

[25] See Rule 69J-128.025 and Rule 69O-128.025, Florida Administrative Code.

[26] See *Campus Communications v. Dept. of Revenue*, 473 So.2d 1290, 1291 (Fla. 1985) quoting *Nicholas v. Wainwright*, 152 So.2d 458, 460 (Fla. 1963).

[27] See ss. 767.12(2), 767.16, and 828.29, F.S.

also be available as data with the personal identifiers redacted.

Uses and Disclosures of Health-related Information
Statutes make exempt from the Public Records Law personal identifying information contained in certain health-related records, such as the professional liability reports held by the Office of Insurance Regulation under s. 627.912, F.S.; state employee assistance records held by agencies under s. 110.1091, F.S.; and medical information pertaining to employees and officers under s. 119.071(4)(b), F.S. In such records, the personal identifying information is redacted when disclosed as a public record, but the rest of the record is available.

In contrast, an entire record may be made confidential and exempt. If the Legislature makes a record confidential, with no provision for its release such that its 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 statute. Various health-related records fall within the ambit of this category, such as birth certificates and individual student health services records. The entire birth certificate may only be released to individuals designated in statute. Health information in a student's record can only be released under specified statutory requirements.[28] Student records and reports under s. 1002.22, F.S., are *confidential and exempt* and are accorded a unique status regarding their disclosure.

The Fifth District Court of Appeal has held that a school board may not disclose student records, even with personally identifying information redacted.[29] The Fifth District Court of Appeal certified a question of great public importance to the Florida Supreme Court on whether s. 228.093(3)(d), F.S. (2002),[30] creates an exemption from the Public Records Law for the entire contents of a student's record within which there is a student's personally identifiable information or does it create an exemption only for such personally identifiable information within that record so that upon a proper request, the custodian must redact the personally identifiable information and produce the balance of the record for inspection under the Public Records Law? The Florida Supreme Court denied to review the case.[31]

For purposes of a single Public Records Law exemption for medical records, the law should clarify that the new exemption does not supersede any other applicable public records exemptions for medical records and health information existing prior to the effective date of the exemption, or created thereafter.

The Department of Health's use and disclosure of medical records and health information illustrate the need for the clarification. One use of health information involves the Department of Health's use and disclosure of confidential and exempt medical records for public health uses. The Department of Health routinely shares confidential and exempt medical records in a medical emergency or to prevent the spread of disease. The clarification that the new exemption does not supersede any other applicable public records exemptions will facilitate the current use and disclosure of medical records under any agency-specific Public Records Law exemptions for medical records.

RECOMMENDATIONS

Consistent with the findings in this report, staff recommends that a new Public Records Law exemption be created in ch. 119, F.S., for an individual patient's medical records held by agencies. The exemption should define "medical records" so that the exemption applies only to individual patient medical records that are created by a licensed health care practitioner to document the diagnosis, treatment, and prescription of a human ill. The exemption should clarify that the new exemption does not supersede any other applicable public records exemptions for medical records and health information existing prior to the effective date of the exemption, or created thereafter.

Staff also recommends that the Legislature not merge the exemptions for "health information" held by agencies into a new exemption in ch. 119, F.S.

[28] See s. 1002.22, F.S.
[29] See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48 (5th DCA 2004), review denied, 892 So.2d 1015 (Fla. 2004).
[30] Section 1058, ch. 2002-387, Laws of Florida, repealed s. 228.093, F.S., effective January 7, 2003.
Section 228.093, F.S., was recodified as s. 1002.22, F.S. The recodification of the law did not amend the provisions of s. 228.093, F.S.

[31] See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48 (5th DCA 2004), review denied, 892 So.2d 1015 (Fla. 2004), supra.