

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB SAC 14-05 OGSR Prescription Drug Monitoring Program

**SPONSOR(S):** State Affairs Committee

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 866

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: State Affairs Committee		Williamson	Camechis

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

In 2009, the Legislature established the Prescription Drug Monitoring Program (PDMP) within the Department of Health (department). The PDMP uses a comprehensive electronic database system to monitor the prescribing and dispensing of certain controlled substances. Dispensers of controlled substances listed in Schedule II, III, or IV must report certain information to the PDMP database.

Direct access to the PDMP database is limited to medical doctors, osteopathic physicians, dentists, podiatric physicians, advanced registered nurse practitioners, physician assistants, and pharmacists. Indirect access to the PDMP database is provided to the department or its relevant health care regulatory boards, the Attorney General for Medicaid fraud cases involving prescribed controlled substances, a law enforcement agency during active investigations regarding prescribed controlled substances, and a patient or the legal guardian or designated health care surrogate of an incapacitated patient.

Current law provides a public record exemption for certain information 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 held by the department under the PDMP. After using a verification process, the department must disclose the confidential and exempt information to the above mentioned persons or entities. Certain persons and entities are authorized to further release the confidential and exempt information to a law enforcement agency or criminal justice agency.

The bill reenacts the public record exemption for certain information held by the department pursuant to the PDMP, which will repeal on October 2, 2014, if this bill does not become law.

The bill clarifies that the Attorney General, law enforcement agency, or health care regulatory board may only disclose to a criminal justice agency or law enforcement agency information that is relevant to a specific investigation or an identified active investigation that prompted the request for the confidential and exempt information. Before disclosing the confidential and exempt information to a criminal justice agency or a law enforcement agency, the disclosing person or entity must take steps to ensure the continued confidentiality of all confidential and exempt information.

The bill authorizes, but no longer requires, the department to disclose confidential and exempt information to the applicable law enforcement agency if the department determines that there exists a pattern of controlled substance abuse consistent with department rules.

The bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>2</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>3</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Prescription Drug Monitoring Program

In 2009, the Legislature established the Prescription Drug Monitoring Program (PDMP) within the Department of Health (department).<sup>4</sup> The PDMP uses a comprehensive electronic database system to monitor the prescribing and dispensing of certain controlled substances.<sup>5</sup>

Dispensers of controlled substances listed in Schedule II, III, or IV must report certain information to the PDMP database. Information that must be reported includes 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.<sup>6</sup> Dispensers must report the dispensing of the controlled substance to the PDMP database within seven days of dispensing it.<sup>7</sup>

Direct access to the PDMP database is limited to medical doctors, osteopathic physicians, dentists, podiatric physicians, advanced registered nurse practitioners, physician assistants, and pharmacists.<sup>8</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 24(c), Art. I of the State Constitution.

<sup>3</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

<sup>4</sup> Chapter 2009-197, L.O.F.; codified as s. 893.055, F.S.

<sup>5</sup> Section 893.055(2)(a), F.S.

<sup>6</sup> Section 893.055(3), F.S.

<sup>7</sup> Section 893.055(4), F.S.

<sup>8</sup> Section 893.055(7)(b), F.S.

Indirect access to the PDMP database is provided to:

- The department or its relevant health care regulatory boards.
- The Attorney General for Medicaid fraud cases involving prescribed controlled substances.
- A law enforcement agency during active investigations regarding potential criminal activity, fraud, or theft regarding prescribed controlled substances.
- A patient or the legal guardian or designated health care surrogate of an incapacitated patient for the purpose of verifying the accuracy of the database information.

Persons or entities with indirect access to the database may submit a request to the department for information in the PDMP database; however, the request must be verified as authentic and authorized with the requesting organization by the program manager or the manager's staff.<sup>9</sup>

#### Public Record Exemption under Review

In 2009, the Legislature created a public record exemption for certain information held by the department under the PDMP.<sup>10</sup> The following information 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 is confidential and exempt<sup>11</sup> from public record requirements:<sup>12</sup>

- Name.
- Address.
- Telephone number.
- Insurance plan number.
- Government-issued identification number.
- Provider number.
- Drug Enforcement Administration number.
- Any other unique identifying information or number.

After using a verification process, the department is required to disclose the confidential and exempt information to the above mentioned persons or entities who have indirect access to information in the database.<sup>13</sup> Certain persons and entities are authorized to further release the confidential and exempt information as follows:

- The Attorney General or a law enforcement agency may disclose the information to a criminal justice agency as part of an active investigation that is specific to a violation of prescription drug abuse or prescription drug diversion law as it relates to controlled substances.<sup>14</sup>
- A health care regulatory board may provide confidential and exempt information to a law enforcement agency pursuant to ss. 456.066 and 456.073, F.S.<sup>15</sup>

The department must disclose confidential and exempt information to the applicable law enforcement agency if the department determines that there exists a pattern of controlled substance abuse consistent with department rules. The law enforcement agency may further disclose the confidential and exempt information to a criminal justice agency as part of an active investigation that is specific to a violation of s. 893.13(7)(a)8., s. 893.13(8)(a), or s. 893.13(8)(b), F.S.<sup>16</sup>

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<sup>9</sup> Section 893.055(7)(c), F.S.

<sup>10</sup> Chapter 2009-197, L.O.F.; codified as s. 893.0551, F.S.

<sup>11</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>12</sup> Section 893.0551(2), F.S.

<sup>13</sup> Section 893.0551(3), F.S.

<sup>14</sup> Section 893.0551(3)(a) and (c), F.S.

<sup>15</sup> Section 893.0551(3)(b), F.S.

<sup>16</sup> Sections 893.13(7)(a)8., 893.13(8)(a), and 893.13(8)(b), F.S., pertain to certain prohibited acts regarding controlled substances.

For purposes of the public record exemption, the term:

- “Active investigation” means 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.<sup>17</sup>
- “Criminal justice agency” means any law enforcement agency, court, or prosecutor; any other agency charged by law with criminal law enforcement duties; any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties; or the Department of Corrections.<sup>18</sup>
- “Law enforcement agency” means the Department of Law Enforcement, a Florida sheriff’s department, a Florida police department, or a law enforcement agency of the Federal Government which enforces the laws of this state or the United States relating to controlled substances, and which its agents and officers are empowered by law to conduct criminal investigations and make arrests.<sup>19</sup>

Any agency or person who obtains the confidential and exempt information must maintain the confidential and exempt status of the information received.<sup>20</sup>

Any person who willfully and knowingly violates the provisions of the act commits a felony of the third degree.<sup>21</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2014, unless reenacted by the Legislature.<sup>22</sup>

As part of the Open Government Sunset Review process, subcommittee staff met with the following during the 2013 interim:

- Staff of the department and the Attorney General’s office;
- Representatives from the Florida Department of Law Enforcement, Drug Enforcement Administration, Florida Sheriffs Association, and Florida Police Chiefs Association;
- Pharmacists; and
- Pain management physicians.

### **Effect of the Bill**

The bill removes the repeal date, thereby reenacting the public record exemption for certain information held by the department pursuant to the PDMP.

The bill no longer defines specific terms for purposes of the public record exemption. Instead, it provides that terms have the same meaning as defined in s. 893.055, F.S., which establishes and governs the PDMP.

The bill clarifies that the Attorney General, law enforcement agency, or health care regulatory board may only disclose to a criminal justice agency or law enforcement agency confidential and exempt information that is relevant to a specific investigation or an identified active investigation that prompted the request for the confidential and exempt information. Before disclosing the confidential and exempt

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<sup>17</sup> Section 893.055(1)(h), F.S.

<sup>18</sup> Section 119.011(4), F.S.

<sup>19</sup> Section 893.055(1)(i), F.S.

<sup>20</sup> Section 893.0551(5), F.S.

<sup>21</sup> Section 893.0551(6), F.S. A felony of the third degree is punishable by a term of imprisonment not to exceed five years and a fine not to exceed \$5,000.

<sup>22</sup> Section 893.0551(7), F.S.

information to a criminal justice agency or a law enforcement agency, the disclosing person or entity must take steps to ensure the continued confidentiality of all confidential and exempt information. At a minimum, the disclosing person or entity must redact any nonrelevant information prior to release.

The bill authorizes, but no longer requires, the department to disclose confidential and exempt information to the applicable law enforcement agency if the department determines that there exists a pattern of controlled substance abuse consistent with department rules.

**B. SECTION DIRECTORY:**

Section 1 amends s. 893.0551, F.S., to save from repeal the public record exemption for certain information held by the department pursuant to the PDMP.

Section 2 provides an effective date of October 1, 2014.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on state government expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.