



The Florida Senate

Interim Project Report 2002-218

September 2001

Committee on Health, Aging and Long-Term Care

Senator Burt L. Saunders, Chairman

REVIEW OF PUBLIC RECORDS EXEMPTION IN S. 456.046, F. S., RELATING TO PRACTITIONER PROFILES

SUMMARY

Section 456.046, F.S., provides exemptions from the disclosure requirements of ch. 119, F.S., relating to public records, and s. 24(a), Art. I of the State Constitution for patient records maintained by the Department of Health or its agent for purposes of compiling a health care practitioner profile and for other data received by the department or its agent for purposes of creating a profile until the profile is made public under s. 456.041 (7), F.S. Section 456.046, F.S., also provides that any information or record that the Department of Health obtains from the Agency for Health Care Administration or any other governmental entity for the purpose of compiling a practitioner profile or substantiating other information or records submitted for that purpose that was exempt from the provisions of ch. 119, F.S., and s. 24(a), Art. I of the State Constitution shall remain exempt. Section 456.046, F.S., is subject to the Open Government Sunset Review Act of 1995, and expires on October 2, 2002, unless reviewed and saved from repeal by reenactment of the Legislature.

Section 119.15(2), F.S., provides that 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. The Open Government Sunset Review Act of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law.

Staff has reviewed the exemptions in s. 456.046, F.S., pursuant to the Open Government Sunset Review Act of 1995 and finds that the exemptions meet the requirements for reenactment. The exemptions, viewed against the open government sunset review criteria, do protect information of a sensitive personal nature as

documented in data submitted to be compiled into practitioner profiles. Additionally, the exemption allows the Department of Health to effectively and efficiently administer the practitioner profiling requirements of s. 456.041, F.S., by preventing the release of information submitted before it is verified or corrected for inaccuracies by the practitioner who is the subject of the profile.

Accordingly, staff recommends that the exemptions in s. 456.046, F.S., be revived and readopted with minor technical amendments to clarify statutory references, the exemption from public disclosure of information submitted to the Department of Health which remains exempt in its possession as otherwise provided by law, and to delete unnecessary language referencing future review of the section.

BACKGROUND

The Open Government Sunset Review Act of 1995
Section 119.15, F.S., the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meeting requirements. 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. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption to state that the exemption is repealed at the end of 5 years and 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 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.

Section 119.15(2), F.S., states that an exemption is to be maintained only if :

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

Further, s. 119.15(4)(a), F.S., requires consideration of the following specific questions as part of the review:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so how?

Additionally, under s. 119.15(4)(b), F.S., an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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.

- (a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which

administration would be significantly impaired without the exemption?

- (b) Does the exemption protect 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? (However, in exemptions under this paragraph, only information that would identify the individuals may be exempted.)
- (c) Does the exemption protect 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?

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made a party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment.

Practitioner Profiles

Section 456.039, F.S., requires each licensed physician, osteopathic physician, chiropractic physician, and podiatric physician to submit specified information which, beginning July 1, 1999, has been compiled into practitioner profiles to be made available to the public. The information must include: graduate medical education; hospitals at which the physician has privileges; the address at which the physician will primarily conduct his or her practice; specialty certification; year the physician began practice; faculty appointments; a description of any criminal offense committed; a description of any final disciplinary action taken within the most recent 10 years; and professional liability closed claims reported to the Department of Insurance within the most recent 10 years exceeding \$5,000. In addition the physician may submit: professional awards and publications; languages, other than English, used by the physician to communicate with patients; and an indication of whether the physician participates in the Medicaid program. Each person who applies for initial licensure as a medical physician, osteopathic physician, chiropractic physician, or podiatric physician must, at

the time of application, and each medical physician, osteopathic physician, chiropractic physician, or podiatric physician must, in conjunction with the renewal of the license, submit the information required for practitioner profiles.

Section 456.039, F.S., requires medical physicians, osteopathic physicians, chiropractic physicians, and podiatric physicians to submit fingerprints for a national criminal history check as part of initial licensure. The section also requires already licensed medical physicians, osteopathic physicians, chiropractic physicians, and podiatric physicians to submit, on a one-time-basis, a set of fingerprints for the initial renewal of their licenses after January 1, 2000, to the Department of Health. The Department of Health must submit the fingerprints of licensure renewal applicants to the Florida Department of Law Enforcement (FDLE) and FDLE then must forward the fingerprints to the Federal Bureau of Investigation for a national criminal history check for the initial renewal of the applicant's license after January 1, 2000. For any subsequent renewal of the applicant's license, the Department of Health must submit the required information for a statewide criminal history check of the applicant.

Section 456.0391, F.S., requires advanced registered nurse practitioners to comply with the practitioner profiling requirements and submit fingerprints and specified information for compilation into a practitioner profile. The Department of Health began compiling profiles for advanced registered nurse practitioners on July 1, 2001.

Section 456.041, F.S., requires the Department of Health to indicate if the criminal history information reported by a medical physician, osteopathic physician, chiropractic physician, podiatric physician or advanced registered nurse practitioner is not corroborated by a criminal history check. The Department of Health or the board having regulatory authority over the practitioner must investigate any information it receives when it has reasonable grounds to believe that the practitioner has violated any law that relates to the practitioner's practice. Each practitioner's profile must include the following statement: "The criminal history information, if any exists, may be incomplete; federal criminal history information is not available to the public."

Medical physicians, osteopathic physicians, chiropractic physicians, podiatric physicians and advanced registered nurse practitioners applying for

licensure renewal must submit the information required for the practitioner profiles, however, an applicant who has submitted fingerprints to the Department of Health for a national criminal history check upon initial licensure and is renewing his or her license for the first time, only needs to submit the information and fee required for a statewide criminal history check.

Section 456.043, F.S., requires the Department of Health to develop or contract for a computer system to accommodate the new data collection and storage requirements for practitioner profiles. The department is authorized to contract with and negotiate any interagency agreement necessary to develop and implement the practitioner profiles. The Department of Health shall have access to any information or record maintained by the Agency for Health Care Administration, including any information or record that is otherwise confidential and exempt from ch. 119, F.S., and s. 24(a), Art. I of the State Constitution, so that the department may corroborate any information that practitioners are required to report under s. 456.039 or s. 456.0391, F.S.

Section 456.014(1), F.S., Public inspection of information required from applicants

Section 456.014(1), F.S., establishes public access to information obtained by the department regarding licensure applicants, with specified exceptions.

- (1) All information required by the department of any applicant shall be a public record and shall be open to public inspection pursuant to s. 119.07, except financial information, medical information, school transcripts, examination questions, answers, papers, grades, and grading keys, which are confidential and exempt from s. 119.07(1) and shall not be discussed with or made accessible to anyone except members of the board, the department, and staff thereof, who have a bona fide need to know such information. Any information supplied to the department by any other agency which is exempt from the provisions of chapter 119 or is confidential shall remain exempt or confidential pursuant to applicable law while in the custody of the department or the agency.

METHODOLOGY

Staff has reviewed s. 456.046, F.S., and applicable law pursuant to the Open Government Sunset Review Act of 1995. Staff sought the input of the Department of Health, professional associations and other interested stakeholders, through the development and distribution of a questionnaire, to determine if any aspects of s. 456.046, F.S., should be revised.

FINDINGS

In 1997, the Legislature enacted s. 455.5656, F.S., (currently codified at s. 456.046, F.S.) to provide exemptions from the disclosure requirements of ch. 119, F.S., relating to public records, and s. 24(a), Art. I of the State Constitution for patient records and other data maintained by the Department of Health or its agent for purposes of compiling a health care practitioner profile. Section 456.046, F.S., also specifies that any information or record that the Department of Health obtains from the Agency for Health Care Administration or any governmental entity for the purpose of compiling a practitioner profile or substantiating other information or records submitted for that purpose that was exempt from the provisions of ch. 119, F.S., and s. 24 (a) Art. I of the State Constitution shall remain exempt. In 2000, the general regulatory provisions for health care professions in part II, ch. 455, F.S., were transferred to ch. 456, F.S.

The Department of Health has indicated that any patient name or other information that identifies a patient which is in a record obtained by the Department of Health or its agent for the purpose of compiling a practitioner profile is confidential and exempt. Additionally, other data received by the department or its agent as a result of its duty to compile the practitioner profiles are kept confidential until the profile into which the data are incorporated or with respect to which the data are submitted is made public. Such data includes records that are confidential in the hands of other state or federal agencies that are submitted to the Department of Health.

The Department of Health has indicated that it compiles the practitioner profiles from information that is obtained from health care practitioners in conjunction with their initial licensure or licensure renewal. The applicant's licensure application is the *primary source* of data for compilation into the practitioner profiles according to the department. According to the department, information gathered for

compilation by the department into a profile is no longer gathered on a separate questionnaire mailed to the practitioner. Questions have been incorporated into the individual board initial licensure applications, the data is entered into the computer system (PRAES) and then the profile is pulled from the data base. With the initial profiling of 56,000 existing physician licenses, the department had developed a separate application. The initial application is a public document, other than information specifically exempted such as social security number, financial information, medical information, and grades. The department noted that it does not receive information from the Agency for Health Care Administration for the purposes of compiling the profile; information for the profiles is self-reported by the practitioner.

The Department of Health may verify information submitted for compilation into the practitioner profiles with other governmental entities. The department or board having regulatory authority over the practitioner must investigate any information received when it has reasonable grounds to believe that the practitioner has violated any law that relates to the practitioner's practice. The department may not include disciplinary action taken by a licensed hospital or an ambulatory surgical center in the practitioner profile. The department may include in the practitioner's profile any other information that is a public record of any governmental entity and that relates to the practitioner's ability to competently practice her or his profession. Before doing so, the department must consult with the regulatory board having jurisdiction over the practitioner before including such information in her or his profile.

The Department of Health completes a "draft" practitioner profile and must furnish the practitioner who is the subject of the profile a copy of the profile before it is released to the public and allow the practitioner a period of 30 days to correct any factual inaccuracies. The department must then make the profiles available through the World Wide Web and other commonly used means of distribution.

Section 456.046, F.S., provides an exemption from public disclosure for any information or record that the Department of Health obtains from the Agency for Health Care Administration or any other governmental entity for the purpose of compiling a practitioner profile or substantiating other information or records submitted for that purpose and that record was exempt from the public records law. Such records remain exempt from public disclosure when they come into the

possession of the Department of Health. According to officials at the Department of Health, any records submitted to the department that are exempt from public disclosure under applicable state or federal law retain their confidentiality when they come into the possession of the Department of Health. Social security numbers (s. 456.013, F.S.); licensure applicant's financial information, medical information, school transcripts, examination questions and answers, grades and grading keys (s. 456.014, F.S.); and criminal background information obtained as part of the fingerprinting requirements for health care practitioners (28 C.F.R 20; ch. 943, F.S.) are exempt from public disclosure under federal and state law. However, information may be merely exempt from the public records law and may not be confidential and exempt.

Agencies have discretion to release documents that are merely exempt but may not release documents that are confidential and exempt. Although courts may look at the underlying policy asserted for an exemption, an agency claiming an exemption from disclosure bears the burden of proving the right to an exemption. See, *Woolling v. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000); *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012, 1015 (Fla. 4th DCA), review denied, 649 So. 2d 869 (Fla. 1994). And see, *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998) ("the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands"). In the absence of the exemption in s. 456.046, F.S., the Department of Health would have the burden of proving the right of an exemption for records submitted for other purposes and then compiled into the practitioner profile without a specific exemption for such information within the ambit of the department's administration of the profiling requirement.

Without the exemption under review, it is unclear how the Department of Health may prevent disclosure of any inaccurate information contained in a "draft" practitioner profile during the 30-day period for review by each practitioner who is the subject of the profile. The subject of each profile is given 30 days to make corrections of any factual inaccuracies in the profile before it is published or given to the public. Once an agency has gone public with information which could have been previously protected from disclosure under the public records law, no further purpose is served by preventing full access to the desired information. *Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988). However, in *City of Riviera Beach v. Barfield*,

642 So. 2d 1135 (Fla. 4th DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995), the court held that when a criminal justice agency transfers exempt criminal investigative information to another criminal justice agency, the information retains its exempt status. Release of the profiling information before the 30-day review period defeats the purpose of the review to prevent publication of inaccurate information.

When the Department of Health comes into possession of records for purposes of compiling a practitioner profile, the records are stored in locked file cabinets and such records are only released to authorized personnel within the department. Section 456.082, F.S., specifies a penalty for the wrongful release of confidential information by Department of Health employees or agents, including persons under contract with the department. It is a first degree misdemeanor to willfully release confidential information to a person who is not lawfully entitled to it. The department has adopted written policies and procedures for handling records that are exempt from the public records law.

Public records and meeting law exemptions that are of a generic-type allow some flexibility so that the class of covered entities may expand as defined. Such exemptions are designed to apply prospectively. The exemption under review in s. 456.046, F.S., is a generic-type exemption to the extent it exempts other data submitted to the Department of Health. The disclosure of such data prior to the profile into which the data are incorporated being made public disrupts the effective and efficient administration of the practitioner profiling program. The Department of Health has indicated that the practitioner profile data that is sent to the practitioner who is the subject of the profile for a 30-day review of any inaccuracies is not made available to the public until it is published on the World Wide Web.

Section 119.07(2)(a), F.S., requires the custodian of a public record that contains some information that is exempt from disclosure to delete or excise only that portion of the record for which an exemption is asserted and to provide the remainder of the document for inspection or examination. Without the exemption in s. 456.046, F.S., the department would have to provide redacted "draft" profiles to the public before the information submitted by the practitioner who is the subject of the profile has been verified or corrected for factual inaccuracies.

Respondents to the staff questionnaire have indicated that the exempted information is of a personal,

sensitive nature, the release of which could cause unwarranted damage to the good name or reputation of the licensee. If unverified information were not afforded confidential status pending a review by the subject of the profile, practitioners subject to the profiling requirements would unfairly be exposed to potential damage to their names and reputations based on factual inaccuracies. Thus, the public records exemptions in s. 456.046, F.S., appear to meet the requirements of the Open Government Sunset Review Act of 1995 for reenactment.

Repeal of the exemption for patient records or other data submitted for compilation into the practitioner profile may impair the effective and efficient administration of the practitioner profiling requirements under ch. 456, F.S. The exemption for patient records in s. 456.057, F.S., exempts from public disclosure all patient records and other documents identifying patients by name when used by the Department of Health in its investigation, prosecution, and appeal of disciplinary proceedings, but the prohibition on disclosure does not expressly extend to other purposes for or uses of such information when it comes into the department's possession. Although medical information regarding the subject of the profile may be confidential as part of her or his licensure application, other patient information or identifiers are not. Practitioners subject to profiling requirements must submit professional liability claims and may inadvertently identify patients. The confidentiality of such patient records and other documents identifying a patient by name obtained by the Department of Health is necessary to prevent the public disclosure of sensitive, personal information concerning individuals.

Accordingly, staff recommends that the exemptions in s. 456.046, F.S., be revived and readopted with minor technical amendments to clarify statutory references, the exemption from public disclosure of information submitted to the Department of Health which remains exempt in its possession as otherwise provided by law, and to delete unnecessary language referencing future review of the section.

RECOMMENDATIONS

Staff has reviewed the exemptions in s. 456.046, F.S., pursuant to the Open Government Sunset Review Act of 1995 and finds that the exemptions contained in that section meet the requirements for reenactment. The exemptions, viewed against the open government sunset review criteria, do protect information of a sensitive personal nature as documented in data submitted to be compiled into practitioner profiles. Additionally, the exemptions allow the Department of Health to effectively and efficiently administer the practitioner profiling requirements of s. 456.041, F.S., by preventing the release of information submitted before it is verified or corrected for inaccuracies by the practitioner who is the subject of the profile.