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Committee on Health, Aging and Long-Term Care

Senator Burt L. Saunders, Chairman

## REVIEW OF PUBLIC RECORDS AND MEETINGS EXEMPTIONS FOR PSYCHOTHERAPY REGULATION

### SUMMARY

Sections 490.00515 and 491.0047, F.S., provide exemptions from the disclosure requirements of ch. 119, F.S., relating to public records, s. 286.011, F.S., relating to public meetings, and s. 24(a) and (b), Art. I of the State Constitution for information concerning a person's participation in the impaired practitioner treatment program, disciplinary complaints and related information, and the proceedings of the probable cause panel for certain health care professionals under the regulatory jurisdiction of the Department of Health. The exemptions apply to provisionally licensed psychologists or psychotherapists, or registered psychotherapist interns. These sections of law are subject to the Open Government Sunset Review Act of 1995, and expire 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 pursuant to the Open Government Sunset Review Act of 1995 and finds that, although the exemptions meet the requirements for reenactment, they are redundant with existing broader exemptions applicable to all health care professions regulated by the Department of Health under ch. 456, F.S. Staff recommends that the exemptions under review be repealed in favor of the existing exemptions in ch. 456, F.S. Staff recommends that s. 456.001, F.S., be amended to clarify that the

terms "licensee" and "license" as used in ch. 456, F.S., include a person or entity that is provisionally licensed.

### 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.

### ***Regulation of Psychology and Psychotherapy***

Chapter 490, F.S., provides for the regulation of psychologists by the Board of Psychology and school psychologists by the Department of Health. Since 1997, provisional psychologist licensees have been regulated by the Board of Psychology. The chapter provides definitions of practice. Section 490.003, F.S., defines “provisional psychologist licensee” to mean a person provisionally licensed under the psychology practice act who may provide psychological services under supervision. The Department of Health may issue a provisional psychology license to any person who pays an application fee no greater than \$250, has earned a doctoral degree from an accredited psychology program and has met any other additional requirements that the board may specify by rule. A provisional licensee must work under the supervision of a licensed psychologist. The provisional license expires 24 months after issuance and may not be renewed or reissued. Provisional psychology licensees are subject to disciplinary action if they fail to display their licenses or use the words “provisional psychologist licensee” on all promotional materials.

Chapter 491, F.S., provides for the regulation of clinical social workers, marriage and family therapists, and mental health counselors by the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling. “Psychotherapist” is defined by s. 491.003, F.S., to mean a licensed clinical social worker, marriage and family therapist, or a mental health counselor.

Section 491.0045, F.S., was created in 1997, to establish requirements for intern registration, effective January 1, 1998. The registration process allows an intern who is completing her or his postgraduate or post-master’s level experience to become informed as to whether the intern has met the requisite licensure educational requirements before commencing the

experience. Any person who intends to satisfy the postgraduate or post-master's level experience requirement must register with the Department of Health and the board must certify that he or she has completed the application and paid the application fee, met specified educational requirements for clinical social work, marriage and family therapy, and mental health counseling, and identified a qualified supervisor. A registered intern must remain under supervision until she or he is in receipt of a license or a letter from the department stating that she or he is licensed to practice the profession for which she or he has applied.

Section 491.0046, F.S., provides provisional licensing requirements for psychotherapists. A person who wishes to provide clinical social work, marriage and family therapy or mental health counseling services to satisfy the course work or examination requirements for licensure must be provisionally licensed. The holder of a provisional license may practice under supervision until she or he is fully licensed by completing the application form and remitting a nonrefundable fee no greater than \$100 and provided that the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling certifies that the applicant has earned the requisite degree or has been approved for the licensure examination as an endorsement candidate. A provisional license candidate must work under the supervision of a licensed mental health professional. The provisional license is nonrenewable and expires 24 months after its issuance.

#### ***Regulatory Provisions for Health Care Professions in the Division of Medical Quality Assurance***

Chapter 456, F.S., provides the general regulatory provisions for professions regulated by the Division of Medical Quality Assurance within the Department of Health. Section 456.001, F.S., defines "license" to mean any permit, registration, certificate, or license issued by the department and "licensee" to mean any person or entity issued a permit, registration, certificate, or license by the Department of Health. "Profession" is defined to mean any activity, occupation, profession, or vocation regulated by the Department of Health in the Division of Medical Quality Assurance.

#### ***Disciplinary Procedures for Health Care Practitioners***

Section 456.073, F.S., sets forth procedures the Department of Health must follow in conducting disciplinary proceedings against practitioners under its jurisdiction. The department, for the boards under its jurisdiction, must investigate all written complaints filed with it that are legally sufficient. Complaints are

legally sufficient if they contain facts, which, if true, show that a licensee has violated any applicable regulations governing the licensee's profession or occupation.

When investigations of licensees within the department's jurisdiction are determined to be complete and legally sufficient, the department is required to prepare, and submit to a probable cause panel of the appropriate board, if there is a board, an investigative report along with a recommendation of the department regarding the existence of probable cause. A board has discretion over whether to delegate the responsibility of determining probable cause to the department or to retain the responsibility to do so by appointing a probable cause panel for the board. The determination as to whether probable cause exists must be made by majority vote of a probable cause panel of the appropriate board or by the department, if there is no board or if the board has delegated the probable cause determination to the department.

If the subject of the complaint makes a written request and agrees to maintain the confidentiality of the information, the subject may review the department's complete investigative file. The licensee may respond within 20 days of the licensee's review of the investigative file to information in the file before it is considered by the probable cause panel. Section 456.073(10), F.S., provides that complaints and information obtained by the department during its investigations are exempt from the public records law until 10 days after probable cause has been found to exist by the probable cause panel or the department, or until the subject of the investigation waives confidentiality. If the case is dismissed prior to a finding of probable cause, the complaints and information remain confidential in perpetuity under s. 456.073(2), F.S. Under s. 456.073(4), F.S., all proceedings of a probable cause panel are exempt from the open meetings requirements of ch. 286, F.S., until 10 days after probable cause has been found to exist or until the subject of an investigation of a disciplinary complaint waives confidentiality.

The Department of Health contracts with the Agency for Health Care Administration to investigate and prosecute disciplinary complaints. The Department of Health's clerk is the custodian designated for orders and related information regarding the discipline of a licensed health care practitioner under s. 456.073, F.S. The Department of Health and its agents may share information with law enforcement agencies or other regulatory agencies that are investigating an individual

for activity within such agency's regulatory jurisdiction which may be related to activities being investigated by the department. The information provided by the department retains its confidential status in the hands of those other agencies.

### ***Impaired Practitioner Treatment Program***

Disciplinary action may be taken against a licensed health care practitioner who is unable to practice her or his profession with reasonable skill and safety due to illness or use of alcohol, drugs, narcotics, chemicals or any other type of material or as a result of any mental or physical condition. Section 456.076, F.S., specifies the requirements for an impaired practitioner treatment program, which was created to help treat licensed health care practitioners who are impaired due to substance abuse or other condition. By entering and successfully completing the program, a licensee may avoid formal disciplinary action by the board or the Department of Health, if there is no board, if her or his only violation of the licensing statute is the impairment. No disciplinary action will be taken if the licensee: (1) acknowledges her or his impairment problem; (2) voluntarily enrolls in an approved treatment program; (3) voluntarily withdraws from her or his practice or limits the scope of her or his practice as determined by the panel, or the Department of Health, if there is no board, until such time as the panel or the department is satisfied that she or he has successfully completed the treatment program; and (4) executes releases for medical records, and authorizes the release of all records of evaluations, diagnosis and treatment to the impaired practitioner consultant retained by the department.

If the medical records relating to a licensee's participation in the impaired practitioner treatment program are solely in the possession of the consultant, then he or she will be the custodian for such records. The consultant is a physician familiar with the requirements for the confidentiality of the records. If the Department of Health comes into possession of the records, the department clerk is the designated custodian of these records and such records are only released within the department and to members of the appropriate regulatory board on a need to know basis. 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.

Section 456.076(3)(e), F.S., provides that all information relating to a licensee's participation in the impaired practitioner treatment program obtained by the appropriate probable cause panel or the Department of Health from the consultant remains confidential if the licensee successfully completes the program, subject to disclosure under s. 456.076(5), F.S. However, if an impaired licensee fails to successfully complete the impaired practitioner's treatment program, all information relating to her or his participation in the impaired practitioner treatment program may be disclosed to the Department of Health and the disclosure constitutes a disciplinary complaint under s. 456.073, F.S.

A federal prohibition against releasing certain medical records may also apply in some situations. The Federal Drug Abuse, Prevention, Treatment and Rehabilitation Act (21 USC 1175) initially kept confidential the medical records of facilities which are federally funded and provide treatment for substance abuse. This confidentiality provision is now contained in other federal provisions, with the caveat that no state law may either authorize or compel any disclosure prohibited by federal law (42 CFR 290). The federal exemption only applies to medical records maintained by the federally funded facility and not to the records in the possession of the consultant or the Department of Health.

## **METHODOLOGY**

Staff has reviewed ss. 490.00515 and 491.0047, F.S., and applicable law pursuant to the Open Government Sunset Review Act of 1995. Staff developed and distributed a questionnaire to seek the input of the Department of Health, professional associations and other interested stakeholders to determine if any aspects of ss. 490.00515 and 491.0047, F.S., should be revised.

## **FINDINGS**

In 1997, the Legislature enacted ss. 490.00515 and 491.0047, F.S., to provide exemptions from the disclosure requirements of ch. 119, F.S., relating to public records, s. 286.011, F.S., relating to public meetings, and s. 24(a) and (b), Art. I of the State Constitution for information concerning a person's participation in the impaired practitioner treatment program, disciplinary complaints and related information, and the proceedings of the probable cause panel for certain health care professionals under the

regulatory jurisdiction of the Department of Health. The exemptions were applicable to: provisionally licensed psychologists under ch. 490, F.S.; provisionally licensed (psychotherapists) clinical social workers, marriage and family therapists, and mental health counselors under ch. 491, F.S.; and registered clinical social worker interns, registered marriage and family therapist interns, registered mental health social worker interns, registered marriage and family therapy interns, and registered mental health counselors under ch. 491, F.S. These exemptions were narrowly crafted to duplicate specified broader exemptions that existed in the general regulatory provisions for health care professions, to the extent the existing public records and meetings law exemptions for disciplinary actions in ch. 455, F.S., did not apply to persons newly regulated under the 1997 legislation. In 2000, the general regulatory provisions for health care professions in part II, ch. 455, F.S., were transferred to ch. 456, F.S.

A number of public records and meetings exemptions are contained within ch. 456, F.S., that apply to persons regulated by the Department of Health's Medical Quality Assurance Division. The exemptions limit disclosure under the Public Records and Meetings Laws of information concerning a person's participation in the impaired practitioner treatment program, disciplinary complaints and related information, and the proceedings of the probable cause panel for licensees. Specifically, the exemptions relate to: investigative reports in disciplinary cases dismissed prior to a finding of probable cause (s. 456.073(2), F.S.); proceedings of a probable cause panel until 10 days after probable cause has been found to exist or until the subject of an investigation of a disciplinary complaint waives confidentiality (s. 456.073(4), F.S.); complaints and information obtained by the Department of Health during its investigations (s. 456.073(10), F.S.); and information relating to a licensee's participation in the impaired practitioner treatment program obtained by the appropriate probable cause panel or the Department of Health from the impaired practitioner consultant, which remains confidential if the licensee successfully completes the program subject to specified disclosures (s. 456.076(3)(e), F.S.).

The Open Government Sunset Review Act of 1995 defines the term "substantial amendment" for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption, under the Act, is not substantially amended if an

amendment limits or narrows the scope of an existing exemption. The Act is silent regarding the expansion of existing exemptions to include similar kinds of records from a larger group of similarly situated individuals.

Public records and meeting law exemptions that are of a generic-type allow some flexibility so that the class of covered entities may expand over time. Such exemptions are designed to apply prospectively. It was unclear whether the 1997 legislation creating the newly regulated psychology or psychotherapy provisional licensure and registration categories, in effect, expanded the existing exemptions for health care professionals under ch. 455, F.S. The 1997 legislation creating the newly regulated psychology or psychotherapy provisional licensure and registration categories could be characterized as an expansion of the existing exemptions for health care professions regulated under ch. 455, F.S., because the exemptions were expanded to include more records or information or to include meetings as well as records since provisional licensees were not expressly within the definition of "licensee" under ch. 455, F.S.

Although an argument could be made that the existing exemptions were broad enough in 1997 to cover the provisionally licensed psychologists and psychotherapists, it was and remains unclear whether the terms "license" or "licensee" are broad enough to include a "provisionally licensed" person or entity. "Licensee" is defined under ch. 456, F.S., to mean any person or entity issued a permit, registration, certificate, or license by the Department of Health. "License" is defined under ch. 456, F.S., to mean any permit, registration, certificate, or license issued by the department. Provisional licensees were not expressly included in the class defined for the existing exemptions to the Public Records and Meetings Laws because the definition of "licensee" or "license" did not expressly include a person holding a "provisional license." In response to a staff questionnaire, the Department of Health has indicated that the exemptions in ch. 456, F.S., would automatically apply to its regulatory activities for a newly regulated profession, if the enabling legislation that permitted the new regulation brought the profession within the ambit of ch. 456, F.S.

The records covered by the exemptions in ss. 490.00515 and 491.0047, F.S., relating to a provisionally licensed psychologist or psychotherapist or registered intern include: reports prepared prior to dismissal of a disciplinary case; administrative complaints or closing orders for disciplinary cases;

investigative reports; information obtained by and from the impaired practitioner consultant; and meetings and records of probable cause panels. The Department of Health has noted that there have not been any psychologists or psychotherapists who are provisionally licensed or registered as interns who have participated in the impaired practitioner treatment program. A total of eight disciplinary complaints have been filed in which probable cause has been found against a provisionally licensed psychotherapist or intern.

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. The impaired practitioner treatment program allows “impaired” practitioners to seek rehabilitation outside the disciplinary process. It is a voluntary, alternate approach to treatment that allows practitioners to focus on the rehabilitation of their impairment in a nonregulatory forum. It encourages practitioners to choose treatment to avoid disciplinary action. If complaints and related information were not afforded confidential status, pending a determination that probable cause that a violation occurred exists, licensees would unfairly be exposed to potential damage to their names and reputations based on false allegations of wrongdoing. Thus, the Public Records and Meetings Law exemptions within ss. 490.00515 and 491.0047, F.S., appear to meet the requirements of the Open Government Sunset Act of 1995 for reenactment.

Other existing exemptions in ch. 456, F.S., apply to licensees to limit disclosure under the Public Records and Meetings Laws. Such exemptions are for: social security numbers for child support enforcement purposes (s. 456.013, F.S.); and licensure applicant’s financial information, medical information, school transcripts, examination questions and answers, grades and grading keys (s. 456.014, F.S.). If ss. 490.00515 and 491.0047, F.S., were reenacted, they would also need to be amended to include these other exemptions for health care professions under ch. 456, F.S.

## RECOMMENDATIONS

Staff has reviewed the exemptions in ss. 490.00515 and 491.0047, F.S., pursuant to the Open Government Sunset Review Act of 1995 and finds that the exemptions meet the requirements for reenactment. If reenacted, the exemptions should be modified to duplicate language in the existing broad exemptions for health care professions in ch. 456, F.S.

An alternative to the reenactment of ss. 490.00515 and 491.0047, F.S., is to allow these exemptions to repeal. Under this option, the Legislature would not have to create or modify existing Public Records or Meetings Law exemptions already covered by the existing broad exemptions applicable to persons or entities regulated under ch. 456, F.S. Chapter 456, F.S., would need to be amended to clarify that provisionally licensed persons or entities are within the ambit of the chapter. The existing broad exemptions in ch. 456, F.S., would automatically apply to provisionally licensed psychologists and psychotherapists, if ch. 456, F.S., was amended to clarify that the terms “license” and “licensee” include provisionally licensed persons or entities.

Accordingly, staff recommends that the exemptions in ss. 490.00515 and 491.0047, F.S., be allowed to repeal and that s. 456.001, F.S., be amended to clarify that the definitions for the terms “license” and “licensee” include a “provisionally licensed” person or entity.