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Committee on Health, Aging, and Long-Term Care

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OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR MEDICAL AND OTHER PERSONAL INFORMATION ABOUT PATIENTS OF HOME MEDICAL EQUIPMENT PROVIDERS THAT IS OBTAINED BY THE LICENSING AGENCY (S. 400.945, F.S.)

SUMMARY

Section 400.945, F.S., makes confidential and exempt from the disclosure requirements of the Public Records Law certain personal information about patients of home medical equipment providers. This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S., provides that an exemption is to be maintained only if the exempted record 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.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption meets the requirements for reenactment.

enactment of a law that guaranteed access to the records of public agencies (s. 1, ch. 5945, 1909; RGS 424; CGL 490). Over the following nine 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 (Chs. 67-125 and 67-356, L.O.F.). 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 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(1), 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.

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

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. (*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. (*Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)).

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. (*Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997)). 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. (*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)).

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. (Attorney General Opinion 85-62.) 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. (*Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991)).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. (*Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985)). 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. (*B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999)). 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. (*Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990)).

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 meetings requirements. Under s. 119.15(3)(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 2nd, 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 of 1995, 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(4)(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?

Further, under the Open Government Sunset Review Act of 1995, 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 (*Memorial Hospital –West Volusia, Inc. v. News-Journal Corporation*, 2002WL 390687 (Fla.Cir.Ct)). 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.

Home Medical Equipment Providers

Part X of ch. 400, F.S., requires home medical equipment providers to be licensed by the Agency for Health Care Administration. Section 400.94, F.S., requires each home medical equipment provider to maintain a record for each patient that must include any physician's order or certificate of medical necessity, signed and dated delivery slips, notes reflecting all services and maintenance performed, and the date on which rental equipment was retrieved. These records are considered patient records under s. 456.057, F.S., and must be maintained for 5 years following termination of services. Under s. 400.945, F.S., medical and other personal information of a home medical equipment provider which is received by the licensing agency through inspections or reports is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The legislation that created this exemption provided the following statement of public necessity:

The Legislature finds that exempting medical and other personal information related to patients of home medical equipment providers from public records law requirements is a public necessity, in that the harm caused by the release of such personal and sensitive information outweighs any public benefit derived from releasing such information. The patients of home medical equipment providers need assurances that the medical and other information of a sensitive personal nature they share with the providers will be held in confidence by the licensing agency in order for the patients to provide essential, accurate information about themselves related to home medical equipment. The public disclosure of such information would lead to a reluctance on the part of patients to provide accurate information which would result in an adverse impact on their health.

METHODOLOGY

Staff reviewed the provisions and applicable law according to the criteria specified in the Open Government Sunset Review Act of 1995. Staff sought input from the Agency for Health Care Administration to determine if any aspects of s. 400.945, F.S., should be revised and saved from repeal through reenactment.

FINDINGS

Section 119.15(4)(a), F.S., requires that certain questions be answered as part of the review process for a public records exemption. The review must address the nature of the records, the affected individuals, the public purpose for the exemption, and the availability of the records by alternative means.

What Specific Records Are Affected by the Exemption?

When a patient files a complaint against a home medical equipment provider, the complaint typically would contain the name, address and phone number of the patient and perhaps of a relative or guardian. The complaint would contain information concerning the patient's specific complaints against the provider, which might include information about the patient's medical condition. When investigations are completed, the Agency maintains the patient complaint files that would be affected by the exemption in locked files to safeguard the confidentiality of the records.

Whom Does the Exemption Uniquely Affect, as Opposed to the General Public?

The exemption uniquely affects patients of the state's 1,882 licensed home medical equipment providers, specifically those patients who complain about the equipment or service they receive from the provider. The Agency reports that it has 40 complaint inspection files containing information subject to the exemption.

What Is the Identifiable Public Purpose or Goal of the Exemption?

The goal of the exemption is to keep personal medical records and information of patients from being disclosed to the public. Consumers of medical equipment might be reluctant to complain if they knew that their health information and location would be publicized, making them potentially vulnerable to retaliation by a provider. In addition, making public the address of a patient with a temporary or permanent disability could leave the individual vulnerable to harm from a nefarious individual. If the personal information were made public, patients of home medical equipment providers might be reluctant to file complaints, and the Agency would be less effective in regulating the providers.

Can the Information Contained in the Records Be Readily Obtained by Alternative Means?

The information cannot be obtained from another source. The federal Health Insurance Portability and Accountability Act (HIPAA) limits the use and disclosure of patient health information.

Continued Necessity for the Exemption

The public necessity for the exemption is to assist the Agency to effectively and efficiently regulate home medical equipment providers by protecting personal information of patients who file a complaint regarding equipment or service they have received.

RECOMMENDATIONS

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption accomplishes the public purpose of protecting home medical equipment patient's private information. The exemption should be saved from repeal and should be reenacted.