

STORAGE NAME: h1561.ge.doc
DATE: April 1, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GENERAL EDUCATION
ANALYSIS**

BILL #: HB 1561
RELATING TO: Public records
SPONSOR(S): Representative Harrell
TIED BILL(S): HB 1015

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) GENERAL EDUCATION
 - (2) STATE ADMINISTRATION
 - (3) COUNCIL FOR LIFELONG LEARNING
 - (4)
 - (5)
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I. SUMMARY:

This bill creates a public records exemption for records of children in a Learning Gateway Program. The Learning Gateway Program is established in HB 1015, which is linked to this bill.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Constitutional Access to Public Records and Meetings

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, as well as 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.

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.

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. Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.

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

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

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."

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.

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 certain records 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. If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a non-criminal 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. 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. 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.

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 of the 5th year, unless the Legislature acts to reenact the exemption.

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(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, 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. 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.

HB 1015

This bill implements recommendations of the Commission on the Study of Children with Developmental Delays. The bill authorizes pilot programs in Broward, Manatee, and St. Lucie Counties to identify and address learning problems in children from birth to age 9 earlier and more efficiently than currently happens. Each pilot program will develop a Learning Gateway to provide a single point of access for parents who suspect that their child has a potential learning problem. The Learning Gateway will inform parents, pediatricians, and teachers of the early warning signs of learning problems according to the best current research.

The bill also creates a steering committee of university researchers, parents, practitioners, and agency representatives to support and oversee the pilot program. The steering committee will work with the state universities and the Department of Education to ensure that every teacher has the ability to identify and respond to children with learning disabilities. By January 2003, the steering committee will make recommendations to the Governor, the Legislature, and the Commissioner of Education regarding the merits of expanding the pilot projects.

C. EFFECT OF PROPOSED CHANGES:

The bill creates an exemption for individual records of children enrolled in a Learning Gateway program when that record is held in the possession of the program or the Learning Gateway Steering Committee. "Records" are defined to include assessment data, health data, records of teacher observations, and identifying data, including the child's name, address, and social security number. A parent, guardian, or individual acting as a parent in the absence of a parent or guardian may inspect and review the individual program records of his or her child and may obtain a copy of that record.

The bill authorizes the release of program records to the Department of Education, the Department of Health, and the Department of Children and Family Services. Additionally, individuals or organizations conducting studies for institutions to develop, validate, or administer assessments or improve instruction; to appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the child or other individuals; to the Auditor General in connection with his or her official functions; to a court of competent jurisdiction in compliance with an order of that court; and to parties to an interagency agreement among Learning Gateway programs, local governmental agencies, providers of Learning Gateway programs, state agencies, and the Learning Gateway Steering Committee to implement the program.

The bill also contains a statement of public necessity to make confidential and exempt information that would result in the identification of a participant in a Learning Gateway program, including the child's name, address, or social security number. Further, the Legislature finds that a participant's assessment data, health data, or teacher observations of a participant must be protected. These types of records are necessary to be protected because if children are identifiable after having been in a program, they may be labeled and stigmatized and, as a result, their parents may not permit them to participate in a Learning Gateway program. Addressing learning and other developmental problems in children of an early age is an issue of great public importance that affects the health, safety and welfare of the children of Florida, as well as the future of the State. As a result, learning and other developmental problems must be identified at an early age and addressed.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates an exemption for individual records of children enrolled in a Learning Gateway program when that record is held in the possession of the program or the Learning Gateway Steering Committee. "Records" are defined to include assessment data, health data, records of teacher observations, and identifying data, including the child's name, address, and social security number. A parent, guardian, or individual acting as a parent in the absence of a parent or guardian may inspect and review the individual program records of his or her child and may obtain a copy of that record. Also, authorizes the release of program records to the Department of Education, the Department of Health, and the Department of Children and Family Services. Additionally, individuals or organizations conducting studies for institutions to develop, validate, or administer assessments or improve instruction; to appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the child or other individuals; to the Auditor General in connection with his or her official functions; to a court of competent jurisdiction in compliance with an order of that court; and to parties to an interagency agreement among Learning Gateway programs, local governmental agencies, providers of Learning Gateway programs, state agencies, and the Learning Gateway Steering Committee to implement the program.

Section 2. Establishes a statement of public necessity to make confidential and exempt information that would result in the identification of a participant in a Learning Gateway program, including the child's name, address, or social security number. Further, the Legislature finds that a participant's assessment data, health data, or teacher observations of a participant must be protected. These types of records are necessary to be protected because if children are identifiable after having been in a program, they may be labeled and stigmatized and, as a result, their parents may not permit them to participate in a Learning Gateway program. Addressing learning and other developmental problems in children of an early age is an issue of great public importance that affects the health, safety and welfare of the children of Florida, as well as the future of the State. As a result, learning and other developmental problems must be identified at an early age and addressed.

Section 3. Provides that the bill shall take effect "on the date Senate Bill 1018 or similar legislation" becomes a law," and shall not take effect if such legislation does not become law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The bill exempts and makes confidential the entire assessment and screening records of persons served by the Learning Gateways. The Florida Constitution states that an exemption "shall be no broader than necessary to accomplish the stated purpose of the law." Therefore, making the entire record exempt and confidential may be unconstitutional. All that is necessary to accomplish the

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reasonable purpose of the law is to make personal identifying information exempt and confidential. An amendment has been prepared to do just that.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Also, the bill has unusual language, in that its effective date provision makes reference to the need for the passage of the appropriate substantive *Senate* bill (SB 1018), rather than its counterpart, the appropriate substantive *House* bill (HB 1015). While this is unusual (and, in fact -- probably *unintended*), it does not appear to create a problem, because the provision goes on to include the phrase "...or other similar legislation."

The effect of that phrase is that HB 1561 will take effect if *either* SB 1018 or HB 1015 are passed.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON GENERAL EDUCATION:

Prepared by:

Staff Director:

Gip Arthur

Ouida Ashworth