HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	HB 1203	**FINAL HOUSE FLOOR ACTION:**			
SUBJECT/SHORT TITLE	Pub. Rec./DOC/Health Information	115	**Y's**	0	**N's**
SPONSOR(S):	Gonzalez	**GOVERNOR'S ACTION:**	Approved		
COMPANION BILLS:	CS/CS/HB 1201; CS/SB 1526; CS/CS/SB 1604				

SUMMARY ANALYSIS

HB 1203 passed the House on April 26, 2017, and subsequently passed the Senate on May 3, 2017.

Federal law provides a right to privacy for health and medical records under the Health Insurance Portability and Accountability Act ("HIPAA"). The HIPPA Privacy Rule sets national standards for the use and disclosure of individuals' health information, called protected health information ("PHI"), by covered entities. Although an individual's health and medical records are generally private under HIPPA, there are exceptions which allow disclosure for purposes of promoting health and safety, protecting law enforcement, and assisting in criminal and other types of investigations. The HIPPA Privacy Rule establishes a floor of privacy protections for PHI, not a ceiling. Where state laws are more protective of privacy than HIPPA, the state requirements will remain in effect.

The bill, which is linked to the passage of HB 1201, expands the types of inmate health information held by the Florida Department of Corrections ("FDC"), which are confidential and exempt from disclosure. It also, in alignment with HIPPA, expands the entities to which FDC may disclose such information. Under the bill, state attorneys, law enforcement agencies, the Executive Office of the Governor, the Correctional Medical Authority, the Division of Risk Management of the Department of Financial Services, the Department of Legal Affairs, the Department of Children and Families, and other entities may receive such confidential and exempt information if specified requirements are met. The bill also provides for disclosure of a deceased inmate's PHI and other health records under specified circumstances.

The bill does not appear to have a fiscal impact on local government. The bill has an insignificant fiscal impact on the FDC.

The bill provides for repeal of the public records exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill was approved by the Governor on June 14, 2017, ch. 2017-114, L.O.F., and will become effective on July 1, 2017.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Public Records Law

Article I, s. 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.[1] The Legislature, however, may exempt records from the requirements of Article I, s. 24 of the Florida Constitution, provided the exemption is passed by two-thirds vote of each chamber and:

- States with specificity the public necessity justifying the exemption (public necessity statement); and
- Is no broader than necessary to meet that public purpose.[2]

The Florida Statutes also address the public policy regarding access to government records through a variety of statutes in ch. 119, F.S. Currently, s. 119.07, F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act[3] provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose *and* the "[l]egislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."[4] However, the exemption 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; or
- Protects trade or business secrets.[5]

The Open Government Sunset Review Act requires the automatic repeal of a public record exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.[6] The Act also requires specified questions to be considered during the review process.[7]

[1] FLA. CONST. art 1, s. 24(a).
[2] FLA. CONST. art 1, s. 24(c).
[3] s. 119.15, F.S.
[4] *Id*.
[5] *Id*.
[6] s. 119.15(3), F.S.
[7] Section 119.15(6)(a), F.S., states that the specified questions are:

- 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 information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Medical Privacy under Federal Law

Federal law provides a right to privacy for health and medical records. In 1996, Congress passed the Health Insurance Portability and Accountability Act ("HIPAA").[8] Among its purposes are the following:

- To provide the ability to transfer and continue health insurance coverage for workers and their families when they change or lose their jobs;
- To reduce health care fraud and abuse;
- To mandate industry-wide standards for health care information on electronic billing and other processes; and
- To require the protection and confidential handling of protected health information.

Under HIPPA, the Secretary of Health and Human Services ("HHS") is required to publicize national standards for the electronic exchange, privacy, and security of health information. These standards are collectively known as the Administrative Simplification provisions. HIPPA also required the Secretary of HHS to issue privacy regulations governing individually identifiable health information if Congress did not enact privacy legislation within three years of the Act's passage.[9]

As Congress did not enact the privacy legislation within three years of HIPPA's passage, the Secretary of HHS developed the HIPPA Privacy Rule, which was first published in 2000 and modified in 2002.[10] The Privacy Rule sets national standards for the use and disclosure of individuals' health information, called protected health information ("PHI"), by three types of covered entities: health plans, health care clearinghouses, and health care providers who conduct the standard health care transactions electronically.[11] A state agency or department which performs functions that make it a "covered entity," must comply with the HIPPA Privacy Rule.

The HIPPA Privacy Rule defines PHI as individually identifiable health information,[12] held or maintained by a covered entity or its business associates acting for the covered entity, which is transmitted or maintained in any form or medium. This includes identifiable demographic and other information relating to the past, present, or future physical or mental health or condition of an individual, or the provision or payment of health care to an individual that is created or received by a health care provider, health plan, employer, or health care clearinghouse.

Although many disclosures about an individual's health and medical records are private under HIPPA, there are also exceptions which are applicable to health and safety. This includes things such as the protection of the public and members of law enforcement, as well as the furtherance of investigative functions, judicial proceedings, food safety investigation, crime prevention, disease prevention, child abuse, neglect, and domestic violence investigations, school-related health and safety concerns, medical examinations, research, and national security.[13] These exceptions also specifically include

[8] Pub. L. 104-91, 110 Stat. 1936 (1996).

[9] *Summary of HIPPA Privacy Rule*, United States Department of Health and Human Services, May 2003, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html (Last viewed May 3, 2017); *see also HIPPA for Professionals*, United States Department of Health and Human Services, *available at* https://www.hhs.gov/hipaa/for-professionals/ (Last viewed May 3, 2017).

[10] *See* 45 C.F.R. Parts 160 and 164, Subparts A and E.

[11] As defined in 45 C.F.R. 160.103, a "[h]ealth plan means an individual or group plan that provides, or pays the cost of, medical care..." *Id*. "Healthcare clearinghouse means a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and 'value-added' networks and switches, that [performs one or another function described in the rule]." *Id*. "Health care provider means a provider of services..., a provider of medical or health services..., and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." *Id*.

[12] "Personal health information" or "PHI" is defined in 45 CFR 160.103, along with the related definitions of "individually identifiable health information" and "health information."

[13] *See generally* 45 C.F.R. 164.512.

correctional facilities,[14] where disclosure of PHI for inmates and other covered individuals is permitted if it is necessary for:

- The provision of health care to such individuals;
- The health and safety of such individual or other inmates;
- The health and safety of the officers or employees of or others at the correctional institution;
- The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another;
- Law enforcement on the premises of the correctional institution; or
- The administration and maintenance of the safety, security, and good order of the correctional institution.

Under HIPPA, a covered entity that is a correctional institution may use the PHI of individuals who are inmates for any purpose for which such information may be disclosed.[15]

If a state law is contrary to HIPPA, then the latter preempts it and is controlling. However, where state laws are more protective of privacy than HIPPA, the state requirements will remain in effect. HIPPA sets a floor, not a ceiling.[16]

Right to Privacy in Medical Records in Florida

In Florida, citizens have a fundamental right to privacy, as provided in the Florida Constitution.[17] This includes information about a patient's medical records, health condition, treatment, and care, and imposes a high burden on a member of the public or a government agency to obtain this information or permit it to be disclosed.[18]

Along with the constitutional right to privacy, there are also specific statutory provisions which protect an individual's health and medical records. For example, s. 456.057, F.S., involves the confidentiality of both medical records and communications between a person and his doctor, who is the "record owner."[19] Consistent with the constitutional right of privacy, s. 456.057, F.S., indicates that medical records may not be furnished, and discussions about a patient's medical condition may not be disclosed, to any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient, and subject to limited exceptions.[20]

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[14] 45 C.F.R. 164.512(k)(5)(i)(A)-(F).
[15] 45 C.F.R. 164.512(k)(5)(ii).
[16] 45 C.F.R. 160.201-05.
[17] FLA. CONST., art. I, s. 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life. . .").
[18] *State v. Johnson*, 814 So. 2d 390, 393 (Fla. 2002) (noting, "[a] patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster."); *Fla. Dep't of Corrs. v. Abril*, 969 So. 2d 201, 205-06 (Fla. 2007); *State v. Strickling*, 164 So. 3d 727, 731 (Fla. 3d DCA 2015); *Johnson*, 814 So. 2d 393 (noting, "The right to privacy is not absolute and will yield to compelling governmental interests.").
[19] Chapter 456, F.S., generally governs health professions and occupations, while s. 456.057, F.S., pertains to ownership and control of patient records; reports or copies of records to be furnished; and disclosure of information. Section 456.057(1), F.S., defines a "record owner" as "any health care practitioner who generates a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person; any health care practitioner to whom records are transferred by a previous records owner; or any health care practitioner's employer, including, but not limited to, group practices and staff-model health maintenance organizations, provided the employment contract or agreement between the employer and the health care practitioner designates the employer as the records owner." *Id.*
[20] s. 456.057(7)(a), F.S. (providing a list of exceptions where records can be furnished, including a patient's consent for care or treatment; compulsory physical examination in a civil case where records are furnished to both the plaintiff and defendant; issuance of

Likewise, there is a statutory right to privacy in medical records held by the Florida Department of Corrections ("FDC"). Section 945.10(1), F.S., states that mental, medical, and substance abuse records of inmates and offenders held by FDC are confidential and exempt.[21] Section 945.10, F.S., also requires FDC to adopt rules to prevent disclosure of such records or information to unauthorized persons.[22] Presently, s. 945.10(2)(g), F.S., only allows record sharing of an inmate or offender's mental, medical, and substance abuse information in one circumstance – to the Department of Health and the county health department where an inmate plans to reside if he or she has tested positive for the presence of the antibody or antigen to human immunodeficiency virus infection ("HIV").[23] The definition of an HIV test is set forth in the public health chapter of the Florida Statutes, s. 381.004, F.S.[24]

FDC is a "covered entity" for purposes of the HIPPA Privacy Rule.[25] Further, because FDC creates and maintains hospital records through its licensed hospital, the Reception Medical Center, FDC is a "record owner" subject to ss. 456.057 and 945.10, F.S. Section 945.10, F.S., provides greater privacy protection than, and is more restrictive than, the HIPPA Privacy Rule.

Effect of the Bill

The bill amends s. 945.10(1), F.S., so that the following information held by FDC is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- PHI of an inmate or an offender; and
- The identity of an inmate or offender upon whom an HIV test has been performed and the inmate or offender's test results.

The bill provides the following definitions:

- PHI has the same meaning as provided in 45 C.F.R. 160.103, the HIPPA Privacy Rule.
- HIV test has the same meaning as provided in s. 381.004, F.S.

The bill provides for the repeal of each of these exemptions on October 2, 2022, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill also amends s. 945.10(2), F.S., so that PHI and mental health, medical, or substance abuse records of an inmate or offender may be released to the following persons or groups unless expressly prohibited by federal law:

- To the Executive Office of the Governor, the Correctional Medical Authority, and the Department of Health for health care oversight activities authorized by state or federal law, including:
    - Audits;
    - Civil, Administrative, or Criminal Investigations; or

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a subpoena in a civil action or criminal proceeding; statistical and scientific research; or treatment of poison control). *See also State v. Sun*, 82 So. 3d 866 (Fla. 4th DCA 2011).

[21] s. 945.10(1)(a), F.S. (noting, "Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution: Mental health, medical, or substance abuse records of an inmate or an offender.").

[22] Section 945.10(4), F.S., requires FDC to "adopt rules to prevent disclosure of confidential records or information to unauthorized persons." *Id*. The corresponding provisions of the Florida Administrative Code are Rule 33.601.901, F.A.C. (Confidential Records) and Rule 33-401.701, F.A.C. (Medical and Substance Abuse Clinical Files).

[23] *See* s. 945.10(2)(g), F.S., which involves an exception for positive testing of the Human Immunodeficiency Virus ("HIV"). This is consistent with HIV testing under s. 381.004(2), F.S., providing exceptions for disclosure due to risk of exposure, health, and treatment.

[24] s. 381.004(1)(b), F.S. (indicating that an "HIV test" means "a test ordered after July 6, 1988, to determine the presence of the antibody or antigen to human immunodeficiency virus or the presence of human immunodeficiency virus infection.").

[25] *See Christie v. Dep't of Corr.*, Case No. 09-2312RP, at 9, 2009 WL 3663682, at *4 (Fla. DOAH, Nov. 2, 2009).

- Inspections relating to the provision of health services, in accordance with 45 C.F.R. part 164, subpart E.

- To a state attorney, a state court, or a law enforcement agency ("LEA") conducting an ongoing criminal investigation if:
  - The inmate agrees to the disclosure and provides written consent; or
  - The inmate refuses to provide written consent, in response to:
    - An order of a court of competent jurisdiction;
    - A subpoena, including a grand jury, investigative, or administrative subpoena;
    - A court-ordered warrant; or
    - A statutorily authorized investigative demand or other process as authorized by law in accordance with 45 C.F.R. part 164, subpart E, provided that:
      - The PHI and records sought are relevant and material to a legitimate law enforcement inquiry;
      - There is a clear connection between the investigated incident and the inmate whose PHI and records are sought;
      - The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information or records are sought; and
      - De-identified information could not reasonably be used.
- To a state attorney or LEA, regarding an inmate who is suspected of being the victim of a crime, if:
  - The inmate agrees to the disclosure and provides written consent; or
  - The inmate is unable to agree because of incapacity or other emergency circumstance in accordance with 45 C.F.R. part 164, subpart E, provided that:
    - The PHI and records are needed to determine whether a violation of law by a person other than the inmate victim has occurred;
    - The PHI or records are not intended to be used against the inmate victim;
    - The immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the inmate is able to agree with the disclosure; and
    - The disclosure is in the best interests of the inmate victim, as determined by FDC.
- To a state attorney or LEA if FDC believes in good faith that the information and records constitute evidence of criminal conduct that occurred in a correctional institution or facility, in accordance with 45 C.F.R. part 164, subpart E, provided that:
  - The PHI and records disclosed are specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information or records are sought;
  - There is a clear connection between the criminal conduct and the inmate whose PHI and records are sought; and
  - De-identified information could not reasonably be used.
- To the Division of Risk Management ("DRM") of the Department of Financial Services, in accordance with 45 C.F.R. part 164, subpart E, upon certification by DRM that such information and records are necessary to investigate and provide legal representation for a claim against FDC.
- To the Department of Legal Affairs or to an attorney retained to represent FDC in a legal proceeding, by an inmate who is bringing a legal action against FDC, in accordance with 45 C.F.R. part 164, subpart E.
- To another correctional institution or facility or law enforcement official having lawful custody of the inmate, in accordance with 45 C.F.R. part 164, subpart E, if the PHI or records are necessary for:
  - The provision of health care to the inmate;
  - The health and safety of the inmate or other inmates;

    - The health and safety of the officers, employees, or others at the correctional institution or facility;
    - The health and safety of the individuals or officers responsible for transporting the inmate from one correctional institution, facility, or setting to another;
    - Law enforcement on the premises of the correctional institution or facility; or
    - The administration and maintenance of the safety, security, and good order of the correctional institution or facility.
- To the Department of Children and Families and the Florida Commission on Offender Review, in accordance with 45 C.F.R. part 164, subpart E, if the inmate received mental health treatment while in the custody of FDC and becomes eligible for release under supervision or upon the end of his or her sentence.

The bill also permits persons who have authority to act on behalf of a deceased inmate, upon request, to have access to the deceased inmate's PHI, mental health, medical, or substance abuse records. This request applies notwithstanding s. 456.057, F.S., and in accordance with 45 C.F.R. Part 164, subpart E. The bill provides that the following individuals have authority to make such requests:

- A person appointed by a court to act as the personal representative, executor, administrator, curator, or temporary administrator of the deceased inmate's or offender's estate;
- If a judicial appointment has not been made by the court, then a person designated by the inmate or offender to act as his or her personal representative in a last will that is self-proved; or
- If a judicial appointment has not been made, or if a person has not been designated in a last will, then the section would apply to:
    - A surviving spouse;
    - If there is no surviving spouse, to a surviving adult child of the inmate or offender; or
    - If there is no surviving spouse or adult child, to a parent of the inmate or offender.

The bill provides that all requests for access to a deceased inmate or offender's PHI or mental health, medical, or substance abuse records must be in writing and must include the following:

- If there was an appointment by the court, the requestor must provide a copy of the letter of administration and a copy of the court order appointing such person as the representative of the inmate or offender's estate; or
- If there was a designation in a self-proved will, the requestor must provide a copy of the self-proved last will designating the person as the inmate or offender's representative; or
- If there was no judicial appointment or designation in a will, the requestor must provide a letter from the person's attorney verifying the person's relationship to the inmate or offender and the absence of a court-appointed representative and self-proved last will.

The bill also provides that it does not limit any rights to obtain records by subpoena or other court process.

In the bill's public necessity statement, it provides legislative findings relating to PHI and HIV testing information held by FDC. Specifically, the bill finds:

- It is a public necessity that an inmate or offender's PHI and HIV testing information held by FDC pursuant to s. 945.10, F.S., remain confidential and exempt from public disclosure "as envisioned by the Legislature in this statute and as provided in department rules."
- Allowing PHI to be publicly disclosed would in some cases cause a conflict with existing federal law and would be a violation of an inmate or offender's privacy under the state constitution.
- Maintaining the confidentiality of an inmate or offender's HIV testing information is essential to his or her participation in such testing. Thus, the harm from disclosure would outweigh the public benefit.
- Appropriate records and PHI are made available by the bill to various governmental entities in order for the entities to perform their duties.
- It is mandatory that prisons function as effectively, efficiently, and nonviolently as possible and

to release such information to the public would severely impede that function and would jeopardize the health and safety of those within and outside the prison system.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: This bill does not appear to have an impact on state government revenues.

2. Expenditures: *See* Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: This bill does not appear to have an impact on local government revenues.

2. Expenditures: This bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: The bill may create a minimal fiscal impact on the FDC because staff responsible for complying with public record requests could require training related to the expansion of the public record exemption. In addition, the FDC could incur costs associated with redacting the exempt information prior to the releasing the record.