The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL:	SB 1526
INTRODUCER:	Senator Bracy
SUBJECT:	Public Records/Health Information/Department of Corrections
DATE:	March 31, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Hrdlicka	CJ	**Favorable**
2.	Kim	Ferrin	GO	**Favorable**
3.			RC	

I. Summary:

SB 1526 amends s. 945.10, F.S., to include protected health information of inmates and information related to HIV testing held by the Department of Corrections as records that are confidential and exempt from public disclosure in accordance with the federal Health Insurance Portability and Accountability Act (HIPAA).

The bill aligns Florida law with the exemptions established in the HIPAA Privacy Rule by authorizing the release of protected health information and mental health, medical, and substance abuse records to other agencies, including law enforcement agencies, for legitimate state purposes.

The bill provides that the exemptions for protected health information of an inmate and identity of an inmate upon whom an HIV test has been performed are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity as required by the Florida Constitution.

The Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.[3] Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.[4] The Public Records Act states that

> it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[5]

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."[7] A violation of the Public Records Act may result in civil or criminal liability.[8]

The Legislature may create an exemption to public records requirements.[9] An exemption must pass by a two-thirds vote of the House and the Senate.[10] In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.[11] A statutory

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.
[4] Public records laws are found throughout the Florida Statutes.
[5] Section 119.01(1), F.S.
[6] Section 119.011(12), F.S., defines "public record" to mean "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." Section 119.011(2), F.S., defines "agency" to mean as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[8] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[9] FLA. CONST., art. I, s. 24(c).
[10] *Id.*
[11] *Id.*

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.[12]

When creating a public records exemption, the Legislature may provide that a record is "confidential and exempt" or "exempt."[13] Records designated as "confidential and exempt" may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as "exempt" are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.[14]

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.[15] The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.[16]

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.[17] An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[18]
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[19] or
- It protects trade or business secrets.[20]

The OGSR also requires specified questions to be considered during the review process.[21] In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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[12] *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

[13] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[14] *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

[15] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

[16] Section 119.15(3), F.S.

[17] Section 119.15(6)(b), F.S.

[18] Section 119.15(6)(b)1., F.S.

[19] Section 119.15(6)(b)2., F.S.

[20] Section 119.15(6)(b)3., F.S.

[21] Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[22] If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.[23]

The Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Rule

HIPAA was enacted on August 21, 1996, to publicize standards for the electronic exchange, privacy, and security of health information.[24] The Privacy Rule (rule) adopted by the U.S. Department of Health and Human Services (HHS) was required by the HIPAA[25] to address the use and disclosure of personal health information. The requirements of the rule apply to individual and group health plans that provide or pay the cost of medical care, every health care provider that electronically transmits health information in connection with certain transactions, and health care clearinghouses that process nonstandard information received from another entity into a standard format or that process standard information into a nonstandard format. Under the rule, all "individually identifiable health information" is protected. Such information includes demographic data such as an individual's name, address, date of birth, and social security number; the individual's past, present, or future physical or mental health condition; the provision of health care to such individual; and payments made or to be made for the provision of health care to the individual. Unless for the purposes authorized by the rule, protected health information may not be disclosed without the written authorization of the protected individual.

Department of Corrections and HIPAA

The Florida Department of Corrections (department) is a covered entity for purposes of the rule. The department provides comprehensive health care for inmates, including medical, nursing, pharmacy, mental health, and dental.[26]

"Within [a correctional] system, inmates' health information may originate from or reside in many locations, including booking notes (e.g., infectious or chronic disease status), sick-call triage systems, physician notes, and other departments such as housing and work details (e.g., mobility or injury status)."[27] The rule protects the health information of inmates, but also recognizes that correctional facilities have legitimate needs to use and share the information

3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

[22] FLA. CONST. art. I, s. 24(c).
[23] Section 119.15(7), F.S.
[24] United States Department of Health and Human Services, *Summary of the HIPAA Privacy Rule*, Last Revised May 2003.
[25] 45 CFR Parts 160, 162, and 164.
[26] Department of Corrections, *Health Care Facts*, available at http://www.dc.state.fl.us/oth/hlthfact.html (last visited March 16, 2017).
[27] Melissa M. Goldstein, JD, *Health Information Privacy and Health Information Technology in the US Correctional Setting*, AM J Public Health, 2014 May, 104(5): 803-809, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3987588/ (last visited March 16, 2017).

without authorization by the inmate. Thus, the rule includes provisions regarding permissible uses and disclosures of inmates' health information in the correctional context.

> Covered entities may disclose the PHI [personal health information] of inmates without their authorization to correctional institutions or law enforcement officials who have lawful custody of an inmate for the purpose of providing health care to the inmate or for the health and safety of the inmate, other inmates, the officers and employees of the institution and others at the facility, and those responsible for inmate transfer. Covered entities may also disclose the PHI of inmates without authorization for law enforcement purposes on the premises of an institution and for the administration and maintenance of the safety, security, and good order of the institution. These provisions apply only to the release of the PHI of current inmates. When inmates are released, they have the same privacy rights under HIPAA as all other individuals.[28]

The department states that it is "unable to share inmate or offender protected health information and medical and mental health records for legitimate governmental functions in the absence of consent, a subpoena, or other court involvement."[29]

Confidential Information

Section 945.10, F.S., makes confidential and exempts from Florida public record laws the following department records:

- Mental health, medical, or substance abuse records of an inmate or an offender;
- Preplea, pretrial intervention, and presentence or postsentence investigative records;
- Information regarding a person in the federal witness protection program;
- Florida Commission on Offender Review records which are confidential or exempt from public disclosure by law;
- Information which if released would jeopardize a person's safety;
- Information concerning a victim's statement and identity;
- Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection; and
- Records that are otherwise confidential or exempt from public disclosure by law.

Currently, the only permitted statutory disclosure of mental health, medical, or substance abuse records of an inmate or offender is 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).[30] The identity of a person upon whom a test has been performed and the test results are generally confidential and exempt from public records pursuant to s. 381.004(2), F.S.

[28] *Id*.
[29] Department of Corrections, *Agency Bill Analysis: SB 1526*, (March 10, 2017) (on file with the Senate Committee on Criminal Justice).
[30] Section 945.10(1)(a), F.S.

Section 456.057, F.S., which also governs medical and mental health records maintained by the department, also contains limited record sharing. Most of the allowed disclosures deal with issues such as insurance, billing, investigations of medical malpractice, or medical research, which do not "contemplate the unique needs" of the department.[31]

III. Effect of Proposed Changes:

Confidential Information

The bill amends s. 945.10(1), F.S., to classify the following department records and information as confidential and exempt from Florida's public record law:

- "Protected health information"[32] of an inmate or an offender;
- HIV tests[33] of an inmate or offender; and
- HIV test results[34] received on an inmate or offender.

The identity of a person upon whom a test has been performed and the test results are also currently confidential and exempt from public records pursuant to s. 381.004(2), F.S.

These additions to the department's confidential and exempt information are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

Release of protected health information and mental health, medical, or substance abuse records

The bill aligns Florida law with the exemptions established in the HIPAA Privacy Rule by authorizing the release of protected health information and mental health, medical, and substance abuse records. The bill allows the department's protected health information and mental health, medical, or substance abuse records of an inmate[35] to be released 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 inspections relating to the provision of health services;[36]

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[31] Department of Corrections, *Agency Bill Analysis: SB 1526*, (March 10, 2017).
[32] "Protected health information" means individually identifiable health information that is: transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium. (45 C.F.R. s. 160.103). It excludes identifiable health information: in education records covered by the Family Educational Rights and Privacy Act; in records described at 20 U.S.C. 1232g(a)(4)(B)(iv)(education records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by physician, psychiatrist, psychologist); in employment records held by a covered entity in its role as employer; and regarding a person who has been deceased for more than 50 years.
[33] "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. (Section 381.004, F.S.).
[34] "HIV test result" means a laboratory report of a human immunodeficiency virus test result entered into a medical record on or after July 6, 1988, or any report or notation in a medical record of a laboratory report of a human immunodeficiency virus test. The term does not include test results reported to a health care provider by a patient. (Section 381.004, F.S.).
[35] Section 945.10(1)(a), F.S.
[36] 45 C.F.R. 164.512(d).

- A state attorney, a state court, or a law enforcement agency conducting an ongoing criminal investigation if the inmate agrees to the disclosure and provides written consent. If the inmate refuses to provide written consent, in response to a court order, a subpoena, investigative, or administrative subpoena, a court-ordered warrant, or a statutorily authorized investigative demand or other process[37] the records can be released to such persons provided that:
  - The protected health information 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's protected health information;
  - The request is specific and limited in scope to the extent reasonably practicable; and
  - De-identified information could not be reasonably used.[38]
- A state attorney or a law enforcement agency if an inmate is or is suspected of being a victim of a crime if the inmate agrees to the disclosure and provides written consent. If the inmate is unable to agree because of incapacity or other emergency circumstances[39] provided that:
  - The information is needed to determine whether a violation of law by a person other than the inmate has occurred;
  - The information is not intended to be used against the inmate victim;
  - The immediate law enforcement activity would be materially and adversely affected by waiting until the inmate victim is able to agree to the disclosure; and
  - The disclosure is in the best interests of the inmate victim, as determined by the department.[40]
- A state attorney or a law enforcement agency if the department believes in good faith that the information and records constitute evidence of criminal conduct that occurred in a correctional institution or facility provided that:
  - The protected information and records 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 protected health information and records are sought; and
  - De-identified information could not reasonably be used.[41]
- The Division of Risk Management of the Department of Financial Services upon certification by the Division that the information is necessary to investigate and provide legal representation for a claim against the department.[42]
- The Department of Legal Affairs or an attorney retained to represent the department if the inmate is bringing a legal action against the department.[43]
- Another correctional institution or law enforcement official having lawful custody of the inmate if the protected health information or records are necessary for:
  - The provision of health care to the inmate;
  - The health and safety of the inmate or other inmates;

[37] All orders, subpoenas, warrants, or other statutorily authorized demand must be in accordance with 45 C.F.R 164, part E, governing security and privacy of health information.
[38] 45 C.F.R. 164.512(f)(1).
[39] The circumstances must be in accordance with 45 C.F.R. 164, part E, governing security and privacy of health information.
[40] 45 C.F.R. 164.512(f)(3).
[41] 45 C.F.R. 164.512(f)(5).
[42] 45 C.F.R. 164.508(a)(2)(C).
[43] *Id*.

  - 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.[44]
- The Department of Children and Families and the Florida Commission on Offender Review if the inmate received mental health treatment while in the custody of the department and becomes eligible for release under supervision or upon the end of his or her sentence.[45]

The bill also allows the department's protected health information and mental health, medical, or substance abuse records of an inmate be released to persons acting on behalf of a deceased inmate or offender only for the purpose of requesting access to the information if:[46]

- The person is 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;
- A court has not made a judicial appointment, but the person was designated as a personal representative in a last will and testament; or
- A court has not made a judicial appointment and the inmate or offender has not designated a person in a self-proved last will. In such case, persons include surviving spouses, adult children, and parents of the inmate or offender.

All requests for access to a deceased inmate or offender's protected health information are required to be in writing and accompanied by the following:

- If a person appointed by the court is acting as a personal representative, a copy of the letter of administration and a copy of the court order appointing the personal representative.
- If made by a person designated by the inmate as the personal representative in a last will and testament, a copy of the self-proved last will designating the person as the inmate's or offender's representative.
- If made by a surviving spouses, adult children, and parents of the inmate or offender, 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.

Public Necessity

The bill provides that the Legislature finds that it is a public necessity that an inmate's or offender's protected health information and HIV testing information held by the department remain confidential and exempt from public disclosure.

The bill is effective July 1, 2017.

[44] 45 C.F.R. 164.512(f)(5).
[45] 45 C.F.R. 164.512(d)(2) or (6).
[46] 45 C.F.R. 164.512(g).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption and includes a public necessity statement.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, the bill does not appear to be in conflict with this constitutional requirement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

SB 1604 (2017) amends s. 943.04, F.S., to authorize the Florida Department of Law Enforcement, when conducting an investigation or assisting in the investigation of an injury to or death of an inmate under the custody or control of the DOC, to serve a demand for production of the inmate's protected health information, medical records, or mental health records on the DOC. The records disclosed remain confidential and exempt from public records laws.

VIII. Statutes Affected:

This bill substantially amends section 945.10 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.