SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 5, 1998 Revised: _____ _____ _____ _____

Subject: Confidentiality of Health, Medical, Patient, Health Insurance, and Research Records

	Analyst	Staff Director	Reference	Action
1.	Carter	Wilson	HC	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 260 articulates a statutory confidentiality standard for health care-related information. The terms “confidential,” “health record,” “health insurance record,” “medical record,” “patient record,” “record,” and “research record” are defined. The bill declares such records confidential and protected under the state constitutional right of privacy. It provides for access to such records and disclosure of identifying data or information in such records, or details in such records about individuals only after written consent has been given by the person who is the subject of the record or to whom the information pertains or the legal representative of the person, by subpoena, or by order of a court of competent jurisdiction. Insurers, managed care organizations, and certain researchers are authorized to make use of confidential information subject to compliance with certain guidelines. Additionally, the bill requires administrative rules providing procedures for the disposal of medical records or records of psychological care held by certain specified health care professionals after the mandatory retention period to specify that disposal must be accomplished only by delivery to the patient, shredding, or burning in accordance with regulatory standards, except that appropriate alternatives may be provided for the disposal of electronic records.

This bill substantially amends s. 455.677, Florida Statutes (F.S.) and creates an undesignated provision of law.

II. Present Situation:

Section 23, Art. I of the *State Constitution* recognizes a right to privacy in all natural persons. Confidentiality is considered under the law to have among its characteristics privacy and secrecy. However, though the concept of and word “confidential” are a part of a number of Florida's

statutory provisions, nowhere in the *Florida Statutes* is the meaning of confidentiality articulated. Many statutory references to confidentiality are contained in numerous health care-related provisions. The health care industry is experiencing a technology-driven "metamorphosis." Technological changes present difficult challenges for records custodians in limiting access to personal health care records exempted from unauthorized disclosure and protecting the confidentiality of such information, whether in the possession of a public agency or a private company.

The right of privacy, as enunciated in s. 23, Art. I of the *State Constitution*, is stated as follows:

> **Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein [in the *State Constitution*]. This section shall not be construed to limit the public's right of access to public records and meetings as provided in law.**

Requirements Needed for Confidentiality

Black's Law Dictionary defines the term "confidential" as "intrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret; done in confidence." It defines "confidence" as "trust, reliance, relation of trust; reliance on discretion of another." It defines "confidentiality" as the "[s]tate or quality of being confidential; treated as private and not for publication."

The term "confidential" is defined in the *Florida Statutes* in the context of "privilege with respect to communications to clergy" in paragraph 90.505(1)(b), F.S.:

> A communication between a member of the clergy and a person is 'confidential' if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication.

Paragraph 90.5055(1)(c), F.S., relating to the accountant-client privilege, and paragraph 473.316(1)(c), F.S., relating to public accountancy, also define the term "confidential."

As recognized in statute under paragraph 90.5035(1)(d), F.S., the sexual assault counselor-victim privilege is based on the following definition of "confidential:"

> A communication between a sexual assault counselor and a victim is 'confidential' if it is not intended to be disclosed to third persons other than:
>
> 1. Those persons present to further the interest of the victim in the consultation, examination, or interview.
>
> 2. Those persons necessary for the transmission of the communication.

3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor is consulted.

The term is similarly defined for purposes of domestic violence advocate-victim privilege, in paragraph 90.5036(1)(d), F.S. However, the term “confidential” and “confidentiality” are not defined in any state statutory provision providing for the regulation of health care facilities or health care professionals.

There is a need for clarity as to what elements are required in order to elevate health, medical, patient, or insurance records (collectively referred to as “personal health care records” or “personal health care information” throughout this analysis) to the level of sensitivity as to merit a designation of “confidential.” For example, is a personal health care record “personal enough” to require special legal restrictions to access when a patient's name is not associated with the contents of the record, for instance when included in statistically aggregated data or narrative compilation of details without name association. Various governmental and private-sector entities, such as managed care companies, conduct research using this type of information. Generally, the law requires that researchers obtain a subject's written informed consent. Given the evolving applications of computer technology in health care, personal health care information is readily obtainable.

Without clear guidelines for the conduct of government business and without clear notice of the responsibilities that must be adhered to in maintaining the confidential status of certain information, the right of privacy recognized in the *State Constitution* will suffer diminished meaning and patients, as well as health care professionals and health care providers, will be less certain of how best to conduct their affairs which could result in increased litigation and liability. The World Wide Web and the broader Information Age technologies are transforming social relationships and expectations of privacy and confidentiality. Limited only by one's skills of manipulating technology and information, theoretically, any information that is stored in a computer is accessible to anyone in the world. With the ease and rapidity of information transfer that is currently possible, private and secret information held in personal health care records can be compromised by unauthorized disclosure resulting in irreparable consequences.

Standards of Professional Conduct

Apparently, Florida law relating to confidentiality relies on professional canons of ethics and the case law that has developed around such professional conduct codes. Confidentiality is certainly

a cornerstone of most professional guidelines, in particular, among health care professions.

> *It is true to say that if you know a person's history of health problems, then you know more about that person than you would with other data [and with genetic information] . . . not just health histories, but health futures.*

Lawrence O. Gostin, Chairman
National Privacy Project for the Centers for Disease Control and Prevention

The Hippocratic Oath, the American Medical Association's Principles of Medical Ethics, the American Hospital Association's Bill of Patient's Rights, the American Dental Association's Principles of Ethics and Code of Professional Conduct, and the American Nurses Association Code for Nurses with Interpretative Statements, as well as the guidelines adopted by other health-related professional associations, all provide for the confidential treatment by health care providers of information obtained directly, or indirectly, about a patient, except for when prohibited by law, such as in instances where there is evidence of abuse. Although ethical principles are not law, the courts have held them to be legal duties requiring health care professionals to preserve the confidentiality of patient information obtained during the delivery of care and treatment. [Kenneth J. Metzger and James C. Sawran, *Confidentiality of Medical Records*, Lorman Educational Services, 1997]

Federal Legislation

The Kassebaum-Kennedy Health Insurance Portability and Accountability Act of 1996 requires the Secretary of the Department of Health and Human Services (HHS) to adopt uniform national standards for the electronic processing of insurance claims and related transactions within 18 months of its enactment (by February 1998). However, as of the first week of March 1998, drafted proposed standards were still going through the federal inter-departmental review process with no stated projected availability date given. This process is required for federal regulations that will affect or be implemented by more than one federal agency to develop consensus for proposed rules prior to publication in the *Federal Register*. The Administrative Simplification website, http://aspe.os.dhhs.gov/admnsimp, explains:

> The goal is simplification, but the process is far from simple. It is a deliberate process designed to achieve consensus within HHS and across other Federal departments. The process is important because the final rules will have the force of Federal law.
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> HHS Implementation Teams have drafted Notices of Proposed Rule Making (NPRMs) for the:
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> 1.Administrative and Financial Transaction Standards and Code Sets;
> 2.National Provider Identifier for health care providers;
> 3.Identifier for Health Plans;
> 4.Identifier for Employers;
> 5.Security Standards to protect health care information.
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> Before an NPRM can be published in the Federal Register, it must be reviewed and approved within the Federal government. Questions and concerns from within the government must be answered and resolved before the NPRMs can be published for public comment.

The standards are to address safeguarding the confidentiality of information processed as provided under the "Administrative Simplification Act," the moniker given the claims processing provisions in the bill. Health plans, health care providers, and insurers would then have 24 months to implement the standards. This time frame is based on an assumption that standards already developed by the health care industry will be used as a starting point. It also assumes that the Secretary of HHS will consult with industry representatives and representatives of state and local government. (The law does not preempt the ability of the states to enact legislation in this area.) The Secretary is to rely upon the recommendations of the National Committee on Vital and Health Statistics, HHS's public advisory committee on health data, standards, privacy, and health information policy, in adopting these standards. The law does not require the collection or electronic transmission of any health information, but it does require that any electronic transmission of certain administrative and financial transactions be done using the adopted standards.

To ensure protection of privacy, the Act provides for confidentiality protections of information processed in accordance with the new standards. It requires the Secretary to make recommendations for health record privacy legislation to Congress. If Congress does not enact such legislation, health care providers, health plans, and health care clearinghouses using the new standards will be required to follow confidentiality regulations adopted by HHS for transactions covered by the electronic transmission standards.

III. Effect of Proposed Changes:

Section 1. Defines the terms "confidential," "health record," "health insurance record," "medical record," "patient record," "record," and "research record;" declares such records confidential and protected under the state constitutional right of privacy; provides for access to records containing confidential information and disclosure of data and information from such records, identifying information in such records, or details in such records about individuals only after written consent has been given by the person who is the subject of the record or to whom the information pertains or the legal representative of the person, by subpoena, upon demonstration of compelling relevance, or by order of a court of competent jurisdiction. An insurer or a managed care organization is authorized to use or disclose confidential health, patient, medical, or insurance records, information, or data to: its employees; persons acting on behalf of or at the direction of the insurer or managed care organization in carrying out legitimate business functions; and federal or state governmental authorities for certain specified purposes. However, such use or disclosure must be as narrowly authorized as is necessary to accomplish the legitimate business function or which use or disclosure is determined to be necessary. The *legitimate business functions* for which confidential information may be used or disclosed include: fraud investigation, risk management, quality assurance, utilization review, peer review, patient care, surveys for purposes of accreditation, and processing insurance or managed care organization benefits, claims, and disputes or grievances.

Subsection (3) of this section clarifies that data or information made confidential under this section that is made a part of a research record always retains its confidential and privileged

status, and its authorized use is limited to medical and pharmacological research. The data and information is not discoverable, as a part of legal proceedings, or admissible in a court or administrative proceeding without the written consent of the individual to whom the record pertains or the individual's legal representative; pursuant to subpoena, upon demonstration of compelling relevance; or pursuant to a court order. It is further clarified that confidential information obtained, compiled, or maintained as a research record may be disclosed, provided that the identity of any individual who participates as a research subject, about whom product safety or efficacy data or information is reported or about whom anonymous data or information is provided as a part of post-marketing surveillance is not disclosed in any release of research results or publication of research findings. Researchers are required to pay the actual costs incurred in the provision of copies of confidential data or information.

Section 2. Amends s. 455.677, F.S., relating to disposition of records of deceased practitioners or practitioners relocating or terminating practice, to require the Department of Health in its administrative rules to provide procedures for the disposal of medical records or records of psychological care. Such disposal procedures may provide for delivery to the patient, shredding, or burning in accordance with the department's standards. Also, the department's rules must address appropriate alternatives for the disposal of electronic records, including perpetual archival. Such procedures apply to such records held by the estates of deceased health care practitioners or practitioners relocating or terminating their practices after the mandatory retention period.

Section 3. Provides for this bill to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Section 24(a) of Article I of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Section 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Researchers requesting confidential information must pay the *actual* cost of processing such requests. The aggregate cost is indeterminable.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VIII. Amendments:

None.