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 Governmental Operations Committee

BILL:	CS/CS/SB 1998
INTRODUCER:	Governmental Operations Committee, Health Regulation Committee and Senator Ring
SUBJECT:	Electronic Health Records
DATE:	April 22, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Wilson	HR	**Fav/CS**
2.	Knudson	Deffenbaugh	BI	**Fav/1 amendment**
3.	Rhea	Wilson	GO	**Fav/CS**
4.			HA	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill adds to the list of persons who may receive confidential patient records without patient consent a health information exchange. A health information exchange, however, may only receive such information without patient consent for the sole purpose of processing and transmitting electronic medical records among persons or entities authorized to have access to those records for purposes of medical treatment only and not for sale or brokering for marketing purposes.

The bill also creates the "Florida eHealth Initiative Act" to promote and coordinate the establishment of a secure, privacy-protected, and interconnected statewide health information exchange. It establishes a matching grants program for eligible health information organizations and a loan program for eligible physicians and faculty practice plans for the initial costs of implementing an electronic medical records system. It creates the Florida Health Information Exchange Advisory Council to promote regional and statewide health information exchanges and to educate and guide stakeholders regarding the benefits of using a health information exchange and standards for protecting the privacy and security of electronic medical records.

The Agency for Health Care Administration (agency) is required to develop and maintain information related to health information exchanges on its website.

By July 1, 2009, the Office of Program Policy Analysis and Government Accountability (OPPAGA) is required to evaluate and report on the grant programs, with an assessment of the development of a statewide health information exchange, including recommendations for other programs that may accomplish the same goal.

The bill also authorizes licensed hospitals, ambulatory surgical centers, and mobile surgical facilities to release patient records without the consent of the patient or his or her legal representative to health care practitioners and providers currently involved in the care or treatment of the patient. Clinical laboratories are authorized to disclose a patient's test results, without the patient's consent, to a health care practitioner or provider involved in the care or treatment of the patient for use in connection with that treatment, who was not the one requesting that the test be performed.

This bill substantially amends the following sections of the Florida Statutes: 395.3025, 408.05, 408.062, and 483.181. The bill creates section 408.051, F.S.

II. Present Situation:

Organizational Structure of the Executive Branch of State Government
Chapter 20, F.S., provides for the organizational structure of the executive branch of state government. The chapter defines many of the entities authorized in law to provide a uniform nomenclature throughout the structure of the executive branch, and to avoid potential conflicts with any state constitutional requirements.

Under the chapter, a "department" is the principal administrative unit within the executive branch.[1] For their internal structure, except for certain exemptions, all departments must adhere to the following standard terms:

- The principal unit of the department is the "division." Each division is headed by a "director."
- The principal unit of the division is the bureau." Each bureau is headed by a "chief."
- The principal unit of the bureau is the "section." Each section is headed by an "administrator."
- The principal unit of the section, if necessary for subdivision, is the subsection. Each subsection is headed by "supervisors."[2]

Section 20.03, F.S., also provides definitions for "council" or "advisory council" and "coordinating council," among other units of government. A "council" or "advisory council" is defined to mean

[1] Sections 20.03(2) and 20.04(1), F.S.
[2] Section 20.04(3), F.S.

> . . . an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives.[3]

Section 20.03(9), F.S., defines "coordinating council" to mean

> . . . an interdepartmental advisory body created by law to coordinate programs and activities for which one department has primary responsibility but in which one or more other departments have an interest.

Section 20.052, F.S., provides that each advisory body, commission, board of trustees or any other collegial body created by specific statutory enactment as an adjunct to an executive agency must be established, evaluated, or maintained in accordance with the following provisions:

- It may be created only when it is found to be necessary and beneficial to the furtherance of a public purpose.
- It must be terminated by the Legislature when it is no longer necessary and beneficial to the furtherance of a public purpose.
- The Legislature and the public must be kept informed of the numbers, purposes, memberships, activities, and expenses of advisory bodies, commissions, boards of trustees, and other collegial bodies established as adjuncts.
- It may not be created or reestablished unless it meets a statutorily defined purpose; its powers and responsibilities conform with the definitions for governmental units in s. 20.03; F.S., its members, unless expressly provided otherwise in the State Constitution, are appointed for 4-year staggered terms; and its members, unless expressly provided otherwise by specific statutory enactment, serve without additional compensation or honorarium, and are authorized to receive only per diem and reimbursement for travel expenses as provided in s. 112.061, F.S.

Additionally, under the section, the private citizen members of an advisory body that is adjunct to an executive agency must be appointed by the Governor, the head of the department, the executive director of the department, or a Cabinet officer. Further, such private citizen members must be confirmed by the Senate, and must be subject to the dual-office-holding prohibition of s. 5(a), Art. II of the State Constitution.

Further, unless an exemption is otherwise specifically provided by law, all meetings of an advisory body, commission, board of trustees, or other collegial body adjunct to an executive agency are public meetings under s. 286.011, F.S. Minutes, including a record of al votes cast, must be maintained for all meetings.

Records of an abolished advisory body, commission, board of trustees, or other collegial body must be appropriately stored by the executive agency to which it was made adjunct.

[3] Section 20.03(7), F.S.

The Agency for Health Care Administration is created in s. 20.42, F.S., as a department, notwithstanding the requirements of s. 20.04(1), F.S. The head of the department is a secretary appointed by the Governor, subject to confirmation by the Senate. The department is the chief health policy and planning entity for the state. It is responsible for health facility licensure, inspection, and regulatory enforcement; investigation of consumer complaints related to health care facilities and managed care plans; the implementation of the certificate of need program; the operation of the Florida Center for Health Information and Policy Analysis; the administration of the Medicaid program; the administration of the contracts with the Florida Healthy Kids Corporation; the certification of health maintenance organizations and prepaid health clinics as set forth in part III of chapter 641, F.S. The department is also responsible for developing and implementing a strategy for the adoption and use of electronic health records, including the development of an electronic health information network for the sharing of electronic health records among health care facilities, health care providers, and health insurers.[4]

Federal Impetus

On April 27, 2004, President George W. Bush issued an Executive Order[5] to encourage the development of a nationwide interoperable health information technology infrastructure. The Executive Order directed the Secretary of Health and Human Services to establish within the Office of the Secretary the position of National Health Information Technology Coordinator. The Office of the National Coordinator (ONC) is tasked with developing, maintaining, and implementing a strategic plan to guide the nationwide implementation of interoperable health information technology in both the public and private health care sectors in order to reduce medical errors, improve quality, and produce greater value for health care expenditures. Also in 2004, President Bush set the goal for most Americans to have access to an interoperable electronic medical record by the year 2014.

The federal government has also created a program aimed at increasing the adoption of electronic health records (EHR) among physician practices. The five-year project, which will begin in the spring of 2008, will provide annual bonuses to physician groups using nationally certified EHR systems to meet clinically qualified measures. During the five year project, it is estimated that 3.6 million consumers will be directly affected as their primary care physicians adopt certified EHRs in their practices.[6]

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[4] Section 408.062(5), Florida Statutes.

[5] *Executive Order: Incentives for the Use of Health Information Technology and Establishing the Position of the National Health Information Technology Coordinator*, available at: <http://www.whitehouse.gov/news/releases/2004/04/20040427-4.html> (Last visited on March 31, 2008).

[6] U.S. Department of Health and Human Services, "HHS Announces Project to Help 3.6 million Consumers Reap Benefits of Electronic Health Records," October 30, 2007 available at: <http://www.hhs.gov/news/press/2007pres/10/pr20071030a.html.> (Last visited on March 31, 2008).

Florida's Efforts

In Florida, the development of a statewide health information exchange began on May 4, 2004, when Governor Jeb Bush created the Governor's Health Information Infrastructure Advisory Board (board) by executive order. [7] The executive order required the board to advise and support the agency as it develops and implements a strategy for the adoption and use of electronic health records and creates a plan to promote the development and implementation of a Florida health information infrastructure. Complementing the Governor's Executive Order was the passage of the 2004 Affordable Health Care for Floridians Act, which directed the agency to "develop and implement a strategy for the adoption and use of electronic health records."[8]

The board issued an interim report to Governor Bush in 2005 that called for, among other recommendations, the immediate development of the Florida Health Information Network (FHIN) in order to encourage the adoption of electronic health records.[9] The vision for the FHIN is outlined in the Board's white paper, "Florida Health Information Network, Architectural Considerations for State Infrastructure".[10] The model outlined by the Board relies heavily on the regional health information organization (RHIO) as the vehicle for statewide health information exchange. The FHIN acts as the conductor of health information among healthcare providers and has two main components: regional health information exchange (through RHIOs) and a statewide infrastructure that will connect the RHIOs to enable statewide health information exchange.[11] The report also recognized two main obstacles facing the development of the FHIN: the low number of healthcare providers who have adopted electronic health record systems, and the lack of an infrastructure to share health information effectively.

Over the course of three years, the board and the agency worked together to implement recommendations related to advancing the adoption and utilization of electronic health records and establishing RHIOs and regional health information exchanges.[12] The board ceased to operate on June 30, 2007, upon expiration of the executive order.

The board published its final report to Governor Charlie Crist on July 6, 2007.[13] The report said that the foundation for a statewide network is in place and recommended the following actions to Governor Crist to implement the FHIN:

- Promote and support the continuing development of the state's local health information exchanges.

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[7] Executive Order Number 04-93 (2004), available at http://www.fdhc.state.fl.us/dhit/Board/executive_order.pdf. (Last visited March 31, 2008).
[8] Chapter 2004-297, Laws of Florida, s. 408.062(5), F.S.
[9] Governor's Health Information Infrastructure Advisory Board, "First Interim Report to Governor Jeb Bush," http://ahca.myflorida.com/dhit/Board/interim_rept_gov.pdf (Last visited March 31, 2008).
[10] Governor's Health Information Infrastructure Advisory Board, "Florida Health Information Network, Architectural Considerations for State Infrastructure," Version 6.2, April 19, 2007.
[11] Florida Health Policy Center, "Florida's Health Information Network: What will it cost to develop?," February 2007, <http://www.floridahealthpolicycenter.org/research/pdfs/FHIN%20brief.pdf> (Last visited March 31, 2008).
[12] Florida Center for Health Information and Policy Analysis, "Privacy and Security Solutions for Interoperable Health Information Exchange, Florida Implementation and Impact Report," December 3, 2007, 4.
[13] Governor's Health Information Infrastructure Advisory Board, "Final Report of the Governor's Health Information Infrastructure Advisory Board," July 6, 2007,< http://ahca.myflorida.com/dhit/Board/Brdmtg63007.pdf> (Last visited March 31, 2008).

- Establish a new advisory board as soon as possible to guide the direction and development of the FHIN.
- Require action on specific steps to assist in developing the network from Florida Medicaid, the Department of Health, and the Department of Management Services, and possibly other state agencies.
- Insist on a "bias in favor of action" on this initiative by members of the administration, placing an emphasis on data exchange operations over the occasional government tendency to conduct further studies before taking substantive action.

In January 2008, the agency's Secretary, Andrew Agwunobi, appointed a 14-member Health Information Exchange Coordinating Committee. The committee is organized "to advise and support the agency in developing and implementing a strategy to establish a privacy-protected, secure and integrated statewide network for the exchange of electronic health records among authorized physicians."[14]

Florida Health Information Network Grants Program

The Florida Health Information Network grants program was initiated in FY 2005-06 with an appropriation of $1.5 million. The agency began soliciting applications under that grant program in late 2005 from not-for-profit organization and units of state or local governments. The agency received $2 million in each subsequent fiscal year to continue the grants program. Applications for planning grants may not exceed $150,000, implementation grants may not exceed $500,000, and training grants may not exceed $200,000. Grant funding required a 50/50 match of funds from the applicant.

Currently the agency is funding nine projects that include seven implementation grants, one planning grant and one training grant. For grants awarded from fiscal year 2007-08 funding, the agency required that applicants for implementation grants propose certain operational metrics and also describe how project objectives will lead to or support sustainable health information exchange operations. The operational metrics are designed to provide comparable information about the number of providers using the system, the number of providers agreeing to share data or actually sharing data, the size of the health information exchange, and the amount of transactions. Grantees must report the operational metrics quarterly to the agency.

Additional Activity

Florida Medicaid is piloting an electronic health record system based on claims data that would enable health information exchange among practitioners participating in the Medicaid program. Currently the Florida Medicaid pharmacy claims data are used within the health information exchange operated by the Tampa Bay Regional Health Information Organization and in 2007, the agency provided hospitalization patient data to the Palm Beach County Community Health Alliance to study the feasibility of using the data within their health information exchange.

In November 2007, the Federal Communication Commission awarded $9.6 million to the Big Bend Regional Healthcare Information Organization. The award provides funding for the

[14] Agency for Health Care Administration, <http://ahca.myflorida.com/dhit/Governance/HIECCIndex.shtml> (Last visited March 31, 2008).

construction of a gigabit optical fiber network over the Florida LambdaRail to connect nine rural hospitals in the Florida panhandle.

Medical Records Privacy

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established baseline health care privacy requirements for protected health information and established security requirements for electronic protected health information.[15] A covered entity, for purposes of this analysis includes health care practitioners and providers, is permitted to use and disclose protected health information without an individual's authorization for, among other reasons, treatment. Treatment is defined as the provision, coordination, or management of health care and related services for an individual by one or more health care providers, including consultation between providers regarding a patient and referral of a patient by one provider to another.[16] Similarly, a covered entity does not have to account to a patient for disclosures made for treatment to a patient.

In Florida, patients have a constitutional right to privacy under Article I, Section 23 of the State Constitution, and judicial decisions. Although Florida courts have recognized patients' rights to secure the confidentiality of their health information (medical records) under the right to privacy under the State Constitution, that right must be balanced with and yields to any compelling state interest. Several statutes authorize the release of patient records without consent of the person to whom they pertain. Specifically, s. 456.057, F.S., deals with the confidentiality of medical records created by specified health care practitioners, including medical physicians. Subsection (5) allows patient records, which are otherwise confidential, to be furnished without written authorization to other health care practitioners and providers involved in the care or treatment of the patient.

Section 395.3025, F.S., provides requirements for the confidentiality of patient records held by hospitals in Florida and outlines uses and disclosures of such records. Patient records that are otherwise confidential may be disclosed to licensed facility personnel and attending physicians for use in connection with the treatment of the patient without the consent of the person to whom they pertain. This provision does not appear to authorize the release of patient records to health care practitioners and providers outside of the licensed facility as needed for the care and treatment of the patient without obtaining consent of the patient.

Section 395.3025(7)(a), F.S., provides that if the content of any record of patient treatment is provided under s. 395.3025, F.S., to a recipient other than the patient or the patient's representative, the recipient may use such information only for the purpose provided and may not further disclose any information to any other person or entity, unless expressly permitted by the written consent of the patient. A general authorization for the release of medical information is not sufficient for this purpose. The content of the patient treatment record is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

[15] United States Department of Health and Human Services, Office of Civil Rights *Summary of the HIPPA Privacy Rule*, found at <http://www.hhs.gov/ocr/privacysummary.pdf> (Last visited on March 31, 2008)
[16] 45 Code of Federal Regulations §164.501.

Under s. 483.181, F.S., a clinical laboratory may examine human specimens at the request only of a licensed practitioner or other person authorized by law to use the findings of clinical laboratory examination. The clinical lab is restricted to reporting the results of a test directly to the licensed practitioner or other authorized person who requested it. A violation of this requirement subjects a clinical laboratory to an administrative fine, not to exceed $1,000 per violation, and any person who violates this requirement may be subject to criminal penalty as a misdemeanor of the second degree.[17]

In 2006 and 2007, the agency was awarded a contract by RTI International, Inc., to participate in a nationwide Health Information Security and Privacy Collaboration Project to analyze state laws relevant to information exchange. The agency's Privacy and Security Project Legal Work Group, convened as a part of this study, identified several barriers to health information exchange in statutory law, including:

- Inconsistent language regarding the disclosure of patient records without consent in the hospital and physician patient records sections.[18]
- Lack of authority for treating physicians to access lab results directly from the clinical lab under chapter 483, F.S.[19]

Faculty Practice Plans

The J. Hillis Miller Health Center at the University of Florida, the Health Services Center at the University of South Florida, The Florida State University College of Medicine, and the Florida International University College of Medicine provide educationally oriented clinical practice settings and opportunities, through which faculty members provide health, medical and dental care and treatment to patients, including patients at independent hospitals, other institutions, and various clinical sites as an integral part of their academic activities and their employment as faculty. Colleges are authorized to form corporate entities to achieve the objectives of these Faculty Practice Plans. The Faculty Practice Plan and subsequent changes therein, must be approved by the dean of the college, the vice president of the health center, as applicable, and the president of the university prior to filing for approval of the Chancellor.[20] Faculty Practice Plans are funded from patient fees for physician services. In addition to medical services that might be provided in the hospital setting, there are independent clinics where services are performed and medical records are prepared and maintained.

III. Effect of Proposed Changes:

Section 1. Amends s. 395.3025, F.S., to authorize licensed facilities (hospitals, ambulatory surgical centers, and mobile surgical facilities) to disclose patient medical records without consent of the patient or his or her legal representative to health care practitioners and providers that are currently involved in the care or treatment of the patient for use only in connection with the treatment of the patient when the practitioners or providers are not licensed facility personnel or attending physicians. It also adds to the list of persons who may receive confidential patient records without patient consent a health information exchange. A health information exchange,

[17] Section 483023, F.S.
[18] Sections 395.3025 and 456.057, F.S., respectively.
[19] Section 483.181, F.S.
[20] Regulations, State University System Board of Governors, Chapter 9.017.

however, may only receive such information without patient consent for the sole purpose of processing and transmitting electronic medical records among persons or entities authorized to have access to those records for purposes of medical treatment only and not for sale or brokering for marketing purposes. Technical corrections are made to reference the Department of Health rather than the agency to conform to current statutory responsibilities.

Section 2. Amends s. 408.05, F.S., related to responsibilities of the Florida Center for Health Information and Policy Analysis within the agency to delete responsibilities associated with a state health information network since a new section of law is created with the Florida eHealth Initiative Act.

Section 3. Creates s. 408.051, F.S., the "Florida eHealth Initiative Act" to promote and coordinate the establishment of a secure, privacy-protected, and interconnected statewide health information exchange.

Subsection (1). Provides a title.

Subsection (2). Provides legislative intent.

Subsection (3). The following terms are defined:

- "Electronic medical record" means a record of a person's medical treatment created by a licensed health care provider and stored in an interoperable and accessible digital format. "Electronic medical record system" means an application environment composed of at least two of the following systems: a clinical data repository; clinical decision support; controlled medical vocabulary; computerized provider order entry; pharmacy; or clinical documentation. The application must be used by health care practitioners to document, monitor, and manage health care delivery within a health care delivery system and must be capable of interoperability within a health information exchange.
- "Health information exchange" means an electronic system used to process, and transmit electronic medical records that can be shared in real time among authorized health care providers, health care facilities, health insurers, and other recipients, as authorized by law, to facilitate the provision of health care services.
- "Health information organization" means an entity with a formal structure and established policies and procedures that serves as a neutral convener of local stakeholders to enable the secure and reliable exchange of electronic medical records among authorized health care stakeholders within a defined geographic region to facilitate improvements in health care quality, safety, and coordination.

Subsection (4). Contingent upon a specific appropriation, the Agency is required to award, in consultation with the Florida Health Information Exchange Advisory Council, and monitor matching grants to health information organizations that advance the development of a statewide health information exchange. One dollar of state funds must be matched with $1 of local or private funds of cash or in-kind support or services. The agency may not award grants for more than 6 aggregate years of funding. There are three categories of grants with specific criteria, to be adopted by rule, as follows:

- Development Grants
  - The proposed organizational structure;
  - The level of community support, including a list of key participants;
  - A demonstration of available local or private matching funds;
  - A timeline for development of the health information exchange; and
  - Proposed goals and metrics;
- Operation grants
  - A demonstration of available local or private matching funds;
  - A detailed business plan, which includes a timeline for implementation of the health information exchange;
  - Policies and procedures to protect the privacy and security of electronic medical records; and
  - Proposed goals and metrics;
- Collaboration grants
  - A demonstration of available local or private matching funds;
  - Memoranda of understanding between at least two health information organizations for the exchange of electronic medical records;
  - A demonstration of consistent utilization of the health information exchange by members within each participating health information organization;
  - A detailed business plan, which includes a timeline for the implementation of the exchange of electronic medical records between participating health information organizations;
  - Policies and procedures to protect the privacy and security of electronic medical records; and
  - Proposed goals and metrics.

Subsection (5). Contingent upon a specific appropriation, the agency is required to develop a one-time, no-interest loan program for eligible medical physicians or osteopathic physicians, eligible business entities whose shareholders are medical or osteopathic physicians, or an eligible faculty practice plan of a state university for the initial costs of implementing an electronic medical records system. The loan may be provided in a lump-sum amount to pay for the costs of purchasing hardware and software, subscription services, professional consultation, and staff training. In order to be eligible for the loan, the physician, business entity, or faculty practice plan must:

- Demonstrate that he or she has practiced continuously within the state for the previous 3 years, or that a faculty practice plan has been established;
- Not have been found guilty or disciplined for violating the general or specific licensing chapter's disciplinary provisions in the previous 5 years;
- Not have been found guilty of or have entered a plea of guilty or nolo contendere to a violation of the Medicaid fraud provisions of ss. 409.920 or 409.9201, F.S.; or
- Not have been sanctioned under the Medicaid program pursuant to s. 409.913, F.S., for fraud or abuse.

The Agency must develop rules providing for standard terms and conditions for the loan program, which at a minimum provide for:

- Loan repayment within a reasonable period of time, not to exceed 72 months;
- Equal periodic payments to begin within 3 months after funding the loan;
- Execution of a promissory note and a security agreement in favor of the state. The security agreement must be a purchase-money security interest pledging as collateral for the loan the specific hardware and software purchased with the loan proceeds. The agency must record a financing statement in accordance with the provisions of the Uniform Commercial Code. The physician or business entity is required to pay the cost of recording the financing statement. There is no requirement that the faculty practice plan pay for recording the financing statement. In addition, the security agreement must require the physician or business entity to pay all collection costs and attorneys fees;
- Additional security from the physician or business entity in one of the following forms:
  - An irrevocable letter of credit in an amount equal to the amount of the loan;
  - An escrow account of cash or assets eligible for deposit in accordance with s. 625.52, F.S., which describes deposits of insurers and agents required for authority to transact insurance in the state, in an amount equal to the amount of the loan. This escrow balance may be diminished by the amount of the periodic payments made on the loan if the escrow agent is responsible for making those payments; or
  - A pledge of accounts receivables of the physician or business entity. This pledge must be reflected on the financial statement.

The agency has additional protections if a physician, business entity, or faculty practice plan that has received a loan ceases to provide care or services or upon a default on the loan for 30 days:

- The entire loan balance is immediately due and payable, and will bear an interest rate of 18 percent annually from that point forward;
- The agency may offset any amounts owed to the physician, business entity, or faculty practice plan from the state and apply the offset against the outstanding balance; and
- A default constitutes grounds for disciplinary action under the general or specific professional licensing statutes.

The agency must deposit payments received under this loan program from physicians or business entities into the agency's Administrative Trust Fund to fund new loans under the program. The committee substitute is silent on the disposition of loan repayments from a faculty practice plan.

Subsection (6). The Florida Health Information Exchange Advisory Council (council), an advisory council as defined in s. 20.03, F.S., is created as an adjunct to the Agency to:

- Promote participation in regional and statewide health information exchanges;
- Promote adoption of health information technology to support the infrastructure capacity for regional and statewide health information exchanges;
- Conduct outreach and convene forums to educate stakeholders on the benefits of utilizing a health information exchange;
- Provide guidance to stakeholders regarding the effective use of health information exchanges; and

- Provide guidance to stakeholders regarding the standards for protecting the privacy and security of electronic medical records.

The council consists of 12 members, each subject to a 4-year appointment and vacancies must be filled for the remainder of the term. The council must meet at least quarterly and is subject to the requirements of s. 20.052, F.S., which sets out the criteria for advisory bodies. The bill provides that a member who is a representative of an operating health information organization in the state must recuse himself or herself during discussion, evaluation, or recommendation of a grant application. The council is authorized to establish ad hoc workgroups as needed to make recommendations to the council.

The council is to develop recommendations to:

- Establish standards, such as policies and procedures to protect the privacy and security of electronic medical records for all state-funded health information exchange efforts;
- Remove barriers, such as technological, regulatory, and financial, that limit participation by health care providers, facilities, and insurers in a health information exchange;
- Remove barriers that prevent consumers from having access to their electronic medical records;
- Provide incentives to promote participation by health care providers, facilities, and insurers in health information exchanges;
- Identify health care data held by state agencies and remove barriers to making that data available through health information exchanges in a private and secure manner;
- Increase state agency participation in health information exchanges;
- Enter into partnerships with other state, regional, and federal entities to promote and coordinate health information exchange efforts;
- Create a long-term plan for an interoperable statewide network of health information organizations; and
- Consult with experts regarding the use of health information in medical research to ensure that all recommendations take into account the legitimate uses of health care information for biomedical research, drug development, clinical trials, post-approval surveillance, and public health and public agency reporting requirements.

Beginning July 1, 2009, the council must report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the appropriate substantive committees of the Senate and the House of Representatives on the recommendations regarding the council's duties and responsibilities. By July 1, 2010, the council must recommend to the same persons, a long-term plan to create an interoperable statewide network of health information organizations.

This subsection is repealed and the council is abolished July 1, 2012, unless reviewed and saved from repeal through reenactment.

Section 7. The agency, in consultation with the council, the Boards of Medicine and Osteopathic Medicine, and organizations representing those practitioners, must implement a plan that promotes participation in regional and statewide health information exchanges and the adoption

of electronic medical record systems. The agency must also maintain on its Internet website the following information related to health information exchanges:

- Federal and private sector funding programs, including analysis of successful and unsuccessful local and state efforts; and
- A clearinghouse of state and national legislative, regulatory, and public awareness activities;

The OPPAGA is required to evaluate the grants program and report by July 1, 2009, to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the appropriate substantive committees of the Senate and the House of Representatives. The evaluation and report must address:

- An assessment of the grant evaluation and distribution process;
- The way in which grant dollars are spent;
- The level of participation by entities within each grantee's project;
- The extent of clinical data exchange among entities within each grantee's project;
- The sources of funding for each grantee;
- The feasibility of each grantee achieving long-term sustainability without state grant funding;
- An assessment of the level at which the current grant program is advancing the development of a statewide health information exchange and recommend other programs that may accomplish the same goal.

Section 4. Amends s. 408.062, F.S., to delete the existing requirement for the agency to develop and implement a strategy for the adoption and use of electronic heath records and an electronic health information network and reporting to the Governor, Speaker of the House of Representatives, and the President of the Senate on legislative recommendations to protect the confidentiality of electronic health records. Rulemaking authority for rules to facilitate the functionality and protect the confidentiality of electronic health records is retained.

Section 5. Amends s. 483.181, F.S., to authorize a clinical laboratory to release, without patient consent, test results that have been ordered by another practitioner to other health care practitioners and providers involved in the care or treatment of the patient for use in connection with the treatment of that patient.

Section 6. Provides that the act takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides grant funding, subject to appropriation for health information organizations and private physicians. The bill is intended to serve as a catalyst for the electronic exchange of health information, which is predominantly in the private sector.

C. Government Sector Impact:

The agency estimates a fiscal impact of $2,380,981 the first year and $2,282,861 the second year. Two million of this is estimated for the loan program each year. Continuation funding for the matching grant program is $2 million. However, the impact on the agency will depend on the amount of money specifically appropriated to fund the program, if any.

Additionally, the agency will incur some costs for promulgating rules.

D. Other Constitutional Issues:

In Florida, patients have a constitutional right to privacy under Article I, Section 23 of the State Constitution, and judicial decisions. Although Florida courts have recognized patients' rights to secure the confidentiality of their health information (medical records) under the right to privacy under the State Constitution, that right must be balanced with, and yields to, any compelling state interest.[21] Since 1951, Florida law has granted a patient access to his or her own medical records and has required the health care practitioner who created the records to maintain the confidentiality of the records.[22] Two primary sections of Florida law address medical records and grant patients access to their health information. Section 456.057, F.S., deals with the confidentiality of, and patient's access to, medical records created by specified health care practitioners, including medical physicians. Section 395.3025, F.S., addresses the confidentiality of, and patient's access to, medical records held by a Florida hospital. In addition to ss. 456.057 and 395.3025, F.S., a number of statutory provisions and administrative agency rules provide

[21] *See*, *State v. Johnson*, 814 So.2d 390 (Fla.2002) distinguished in *Limbaugh v. State of Florida* 2004 WL 2238978 (4th DCA October 6, 2004); and *Rasmussen v. S. Fla. Blood Serv. Inc.*, 500 So.2d 533 (Fla.1987) (privacy interests of blood donors defeated AIDS victims claim to obtain via subpoena names and addresses of blood donors who may have contributed the tainted blood).

[22] Chapter 26684, Laws of Florida.

additional confidentiality and patient access for specialized individual health information.[23]

Section 395.3025(4), F.S., provides that patient records are confidential and must not be disclosed without patient consent, with exceptions. The specified exceptions include: (a) *licensed facility personnel, attending physicians, other health care practitioners and providers currently involved in the care or treatment* of the patient *for use only in connection with patient treatment*; (b) licensed facility personnel *only for administrative purposes or risk management and quality assurance functions*; (c) the agency *for purposes of health care cost containment*; (d) in any civil or criminal action, unless otherwise prohibited by law, *upon issuance of a subpoena and proper notice* to the patient; (e) the department upon subpoena; (f) the department *or its agent, for the purpose of establishing and maintaining a trauma registry*; (g) the DCF *or its agent for the purpose of investigations* of cases of abuse; (h) the State Long-Term Care Ombudsman Council; (i) a local trauma agency or a regional trauma agency; (j) organ procurement organizations, tissue banks, and eye banks; (k) the Medicaid Fraud Control Unit; (l) the DFS, or an *agency, employee, or independent contractor* who is *auditing for unclaimed property*; (m) regional poison control centers *to treat a poison episode or collect data*.

Given the constitutional right of privacy in confidential patient records as discussed *supra*, and given that a review of s. 395.3025(4), F.S., shows that current law expressly identifies those cases in which "agents" acting on behalf of entities are authorized access to such records without patient consent and for what limited purposes, the ability of health information organizations to obtain access to such records without patient consent, even as a transmitter or conduit for the information, could be challenged. Further, if such access were given to health information organizations without express statutory authority, questions could be raised regarding whether such access could be interpreted to be an invasion of the right to privacy under Article I, s. 23 of the State Constitution. The bill amends s. 395.3025(4), F.S., to expressly list health information organizations among the entities that may access confidential patient records without patient consent. This access is limited to processing and transmission of patient records to persons who are authorized access for medical treatment purposes only, and not for sale or brokering of the information for marketing purposes. Without such an express statement, the authority of attending physicians and others to release confidential patient information without patient consent to a health information organization, as well as the ability of a health information organization to receive such information, could be questioned.

VI. Technical Deficiencies:

None.

[23] See other provisions of Florida statutes providing confidentiality of health information: HIV/AIDS information (ss. 381.004, 627.429, and 641.3007, F.S.); Cancer registry (s. 385.202, F.S.); Mental Health (ss. 394.451 and 394.4615, F.S.); Substance Abuse (s. 397.501, F.S.); Florida Patient's Bill of Rights and Responsibilities (s. 381.026, F.S.); Diseases Reported to DOH (ss. 119.07 and 384.29, F.S.); Genetic Tests (s. 760.40, F.S.); Employers providing health insurance (s. 760.50(5), F.S.); Insurers and HMOs for psychotherapeutic services (ss. 627.4195 and 641.59, F.S.); Medical records held by nursing homes (s. 400.022).

VII. Related Issues:

The definition of "health information organization" on lines 209-215 is an

> . . . entity that has a formal structure and established policies and procedures and that serves as a neutral convener of local stakeholders to enable the secure and reliable exchange of electronic medical records among authorized health care stakeholders within a defined geographic region to facilitate improvements in health care quality, safety, and coordination of care.

An "entity" may be defined as ". . . something that exists as a particular and discrete unit: *Persons and corporations are equivalent entities under the law*."[24] The definition appears to contemplate a wide variety of individuals or organizations to be a health information organization.

Further, the definition of "health information organization" does not require a health information organization to be a corporation and, as such, there is no limitation on whether such an entity is required to be either for profit or not-for-profit.

The bill makes numerous references to "stakeholders" but the term itself is not defined in the bill. A "stakeholder" may be defined as, "one that has a stake in an enterprise."[25] It is unclear whether persons whose medical records are being transmitted would fall within the definition of "stakeholder" or whether only the entities that may be "health information organizations" would be included.

The physician or business entity is to pay the cost of recording the financing statement. There is no requirement that the faculty practice plan pay for recording the financing statement.

The agency must deposit payments received under this loan program from physicians or business entities into the agency's Administrative Trust Fund to fund new loans under the program. The committee substitute is silent on the disposition of loan repayments from a faculty practice plan.

The bill authorizes the Florida Health Information Exchange Advisory Council to make recommendations to "establish standards for all state-funded health information exchange efforts. Such standards shall include, but are not limited to, policies and procedures to protect the privacy and security of electronic medical records." Pursuant to s. 120.52(15), F.S., a "rule" is defined as

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. . . .

[24] *The American Heritage Dictionary*, Houghton Mifflin Company (1982, 1985).
[25] http://www.merriam-webster.com/dictionary/stakeholder

It appears that establishment of "standards for all state-funded health information exchange efforts" meets the definition of a "rule" under s. 120.52(15), F.S.

VIII. Additional Information:

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

CS by Governmental Operation on April 23, 2008:
Adds to the list of persons who may receive confidential patient records without patient consent a health information exchange. Provides that a health information exchange may only receive such information without patient consent for the sole purpose of processing and transmitting electronic medical records among persons or entities authorized to have access to those records for purposes of medical treatment only and not for sale or brokering for marketing purposes.

Eliminates the word "acquire" from the definition of "health information exchange" to clarify that such entity does not own records processed by or transmitted through it.

Clarifies that the council is an advisory council as defined in s. 20.03, F.S., to ensure that the council functions only to provide advice and recommendations.

Restores rulemaking authority of the agency to facilitate functionality and protect the confidentiality of health records.

CS by Health Regulation on April 1, 2008
Modifies the authorization for release of patient medical records without consent to require that the other health care practitioners and providers must currently be involved in the care or treatment of the patient and that the records may only be used in connection with the treatment of the patient;

- Reinstates the agency's responsibilities related to the integration of health care data from state agencies and making that information available to health care practitioners through a statewide health information exchange;
- Allows a health information organization to receive up to an aggregate of 6 years of funding in any matching grant category instead of limiting grant awards to no more than two years in any category;
- Adds a faculty practice plan of a state university as an eligible recipient under the electronic medical records system adoption loan program;
- Modifies the composition of the Florida Health Information Exchange Advisory Council to include a member from any type of hospital as opposed to requiring the member come from a public hospital;
- Adds a duty to the council to consult with experts regarding the use of health information in medical research; and

Changes the delivery date from July 1, 2012 to July 1, 2010 for the council's recommended long-term plan to create an interoperable statewide network of health information organizations.

B. Amendments:

None.