

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 Oversight and Accountability Committee

BILL: CS/CS/SB 1456

INTRODUCER: Governmental Oversight and Accountability Committee; Children, Families, and Elder Affairs Committee; and Senator Garcia

SUBJECT: Public Records/Florida Health Choices Program

DATE: April 14, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Stovall</u>	<u>HR</u>	Favorable
2.	<u>Daniell</u>	<u>Walsh</u>	<u>CF</u>	Fav/CS
3.	<u>Naf</u>	<u>Roberts</u>	<u>GO</u>	Fav/CS
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill creates public-records exemptions for:

- Any personal, identifying information of an enrollee or participant in the Florida Health Choices program (FHC);
- Client and customer lists of a buyer’s representative; and
- Proprietary confidential business information of a vendor.

The bill provides definitions and exceptions under which the information may be disclosed. The bill applies retroactively to any of the exempt information held by Florida Health Choices, Inc. The bill provides for repeal of the public-records exemptions on October 2, 2016, unless they are saved from repeal by the Open Government Sunset Review process and reenacted by the Legislature. The bill also provides a statement of public necessity for the public-records exemptions, as required by the State Constitution.

This bill substantially amends section 408.910, Florida Statutes.

II. Present Situation:

Florida's Public Records Laws

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁴ records are available for public inspection. Section 119.011(12), F.S., defines the term “public records” very broadly to include “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The Florida Supreme Court has interpreted the definition of public records to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formulize knowledge.”⁵ Unless made exempt, all such materials are open for public inspection at the moment they become records.⁶

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁸ If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.⁹

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

³ Chapter 119, F.S.

⁴ An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.

⁵ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁷ FLA. CONST. art. I, s. 24(c).

⁸ *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

⁹ *Id.* at 54.

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁰ provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹¹ An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be greatly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.¹²

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?¹³

If an exemption is expanded during reenactment (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.¹⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the

¹⁰ Section 119.15, F.S.

¹¹ Section 119.15(6)(b), F.S.

¹² *Id.*

¹³ Section 119.15(6)(a), F.S.

¹⁴ FLA. CONST. art. I, s. 24(c).

exemption is narrowed, or if an exception to the exemption is created,¹⁵ then a public necessity statement and a two-thirds vote for passage are not required.¹⁶

The Florida Health Choices Program

In 2008, the Legislature created the Florida Health Choices (FHC) program in s. 408.910, F.S., as a single, centralized “marketplace” for the sale and purchase of various products that enable individuals to pay for health care coverage. The Florida Health Choices Corporation (Corporation) was created to administer the program.¹⁷

The FHC program defines “marketplace” as follows: “Florida’s Insurance Marketplace is a web-based shopping experience that allows easy access and side-by-side comparison of health care options for individuals, families, and businesses.”¹⁸

The following types of employers are eligible to use FHC for choosing their employer-sponsored health plan:

- Employers with 1-50 employees;
- Fiscally constrained counties;
- Municipalities with populations less than 50,000; and,
- School districts in fiscally constrained counties.¹⁹

The Corporation is charged with establishing procedures for employer participation, including compliance with Section 125 of the Internal Revenue Code regarding cafeteria plans and enabling the employers’ contributions and the employees’ contributions to be made using pre-tax dollars.²⁰ Employers must also designate the Corporation as the third-party administrator for the employer’s health plan, establish payroll deduction, and arrange for employer contribution payments.

The following types of individuals are eligible to purchase FHC health care products and coverage:

- Employees of employers choosing FHC as the employer-sponsored health plan;
- State government employees not eligible for state employee health benefits;
- State government retirees;
- Medicaid Reform participants who select the opt-out provision of Reform,²¹ and,

¹⁵ An example of an exception to a public records exemption would be allowing another agency access to confidential or exempt records.

¹⁶ *Cf.*, *State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).

¹⁷ See s. 4, ch. 2008-32, Laws of Fla.

¹⁸ Florida Health Choices, *How Does the Marketplace Work?*, <http://myfloridachoice.org/faq/> (last visited Mar. 30, 2011).

¹⁹ Section 408.910(4)(a), F.S.

²⁰ Section 125 allows employers to offer employees a choice between cash salary and a variety of nontaxable (qualified) benefits. A qualified benefit is one that does not defer compensation and is excludable from an employee’s gross income under a specific provision of the IRS Code, without being subject to the principles of constructive receipt. Qualified benefits include health care, vision and dental care, group-term life insurance, disability, adoption assistance and certain other benefits.

²¹ The “Medicaid Reform” pilot program authorized under s. 409.91211, F.S., allows Medicaid recipients to “opt-out” of the state-run Medicaid program and use a Medicaid-funded subsidy to pay their share of the premium for employer-sponsored health coverage, if available.

- Employees of statutory rural hospitals.²²

The FHC program establishes portability of products by allowing individuals to voluntarily continue participation in the program regardless of changes in job status. The program establishes procedures for portable participation by individuals, who must make arrangement for payment (such as changing payroll deduction with a change in employer, or arranging for the contribution formerly made by an employer to be made by the individual).

The FHC model encourages diversity of price and benefit packages and allows for many types of products provided by many types of vendors, such as:

- Licensed insurers may sell health insurance policies, limited benefit policies, other risk-bearing coverage, and other products or services.
- Licensed health maintenance organizations (HMOs) may sell health coverage policies, limited benefit policies, other risk-bearing products, and other products or services.
- Licensed prepaid clinic service providers may sell prepaid service contracts and other arrangements for a specified amount and type of health services or treatments.
- Out-of-state insurers may sell health insurance policies, limited benefit policies, other risk-bearing products, and other products or services.
- Health care providers, including hospitals and other licensed health facilities, health care clinics, licensed health professionals, pharmacies, and other licensed health care providers, may sell non-risk-bearing service contracts and other arrangements for a specified amount and type of health services or treatments.
- Provider organizations including provider service networks, group practices, professional associations, and other incorporated organizations of providers, may sell non-risk-bearing service contracts and arrangements for a specified amount and type of health services or treatments.
- Corporate entities providing specific health services in accordance with applicable state laws may sell service contracts and arrangements for a specified amount and type of health services or treatments.²³

These products within the FHC program are not subject to the licensing requirements or mandated coverage or offering requirements of ch. 641 or part VI of ch. 627. However, only licensed vendors may offer risk-bearing products.

The program provides for the exclusion of vendors for deceptive or predatory practices, financial insolvency, and failure to comply with program standards set by the Corporation.²⁴ The program establishes procedures for participation by vendors, which must submit complete descriptions of the products offered, including information on the provider network, set product prices based on the basic risk-adjustment factors of age, gender, and location of the individual participant, participate in ongoing reporting as required by the Corporation, and establish grievance procedures.²⁵ In addition, vendors must agree to make all the products they offer available to all individual participants in the program.

²² Section 408.910(4)b), F.S.

²³ Section 408.910(4)(d), F.S.

²⁴ *Id.*

²⁵ Section 408.910(4)(f), F.S.

The program provides that licensed health insurance agents may voluntarily participate as buyers' representatives to act on behalf of individual purchasers and provide information about the products and services sold.²⁶ Such agents would receive compensation from the Corporation for performing this function. The program requires such agents to receive training and disclose relationships with vendors.

As additional tools for helping consumers make informed decisions, the program is required to enable purchasing through an interactive website and make information about the products and services available on the website and through other means.²⁷ The program requires that consumers are made aware of any benefit limitations and can make informed choices.

The Corporation is charged with establishing the marketplace and performing several functions to administer it. The Corporation is required to establish procedures to determine the eligibility of employers, vendors, individuals and agents, and develop criteria for the exclusion of vendors. The Corporation must collect individual and employer contributions and pay them out to vendors. The Corporation must establish procedures for application, enrollment, risk assessment, risk adjustment, plan administration, performance monitoring, and consumer education. The Corporation has authority to establish qualifying criteria and certification procedures for vendors, including requiring performance bonds, monitoring vendor performance, and enforcing the terms of agreements with vendors.²⁸

To avoid selection bias in the distribution of consumers among available products, the Corporation must employ a variety of risk-pooling techniques. Most notably, these measures include the ability to re-allocate a portion of the premium paid for risk-bearing products through a post-enrollment risk adjustment. This adjustment process will be applied monthly based on data reported by the vendors about their enrollees.²⁹

The Corporation is charged with coordinating with the Department of Revenue to develop a plan to establish tax credits or refunds for employers that participate in the program.³⁰

Launching Florida Health Choices³¹

The FHC program has scheduled a phased-in launch of the marketplace for 2011 and 2012. Phase One, known as "Quick Start," will support the application and enrollment of eligible employers, employees, and insurance agents in the summer of 2011. The initial web-based portal will support up to nine medical coverage plans and permit side-by-side comparison of benefits and costs.

²⁶ Section 408.910(4)(g), F.S.

²⁷ Section 408.910(8), F.S.

²⁸ See s. 408.910(11)(i), F.S.

²⁹ Section 408.910(9), F.S.

³⁰ Section 408.910(11)(i)10., F.S.

³¹ Information contained in this portion of the Present Situation of this bill analysis is from Florida Health Choices, *Florida Health Choices 2010 Annual Report*, 3 (Feb. 1, 2011), available at http://myfloridachoice.org/wp-content/uploads/2011/02/FHC-AnnualReport_v2a.pdf (last visited Mar. 30, 2011).

An online calculator will display member premium costs after taking into account any employer contributions. A statewide customer contact center will open in St. Petersburg, Florida, and the ability to accept payroll deducted premiums will also be included.

The Mid-Term phase is designed to expand the portal functionality for both employers and insurance agents. Supporting up to 20 vendors, the Mid-Term portal offerings can include dental, vision, and prepaid plans.

With the Long-Term phase expected in 2012, the marketplace is expected to offer life insurance and other non-medical products to enrolled participants and employers.

Information Collected and Utilized in the Florida Health Choices Program

In the administration of the program and the execution of the functions described above, the FHC program may collect and utilize various pieces of personal, identifying information about applicants, enrollees, and participants. When applying for the program, insurance agents, employers, and eligible employees will provide a variety of personal and financial information. Information could include a participating insurance agent's client list, an employer's business and accounting records, human resource records, or other proprietary business or personal identification information.³²

III. Effect of Proposed Changes:

This bill creates public-records exemptions, making the following information confidential and exempt from s. 119.07(1), F.S., and article I, section 24(a) of the Florida Constitution:

- Any personal, identifying information of an enrollee or participant in the Florida Health Choices program (FHC);
- Client and customer lists of a buyer's representative held by Florida Health Choices, Inc. (corporation); and
- Proprietary confidential business information of a vendor held by the corporation.

The bill defines the following terms:

- "Buyer's representative" means a participating health insurance agent as described in s. 408.910(4), F.S.
- "Enrollee" means an employer who is eligible to enroll in the FHC program.
- "Participant" means an individual who is eligible to participate in the FHC program.
- "Proprietary confidential business information" means information, regardless of its form or characteristics, which relates to business plans, internal auditing controls, reports of internal auditors, reports of external auditors of privately held companies, potentially patentable material, or trade secrets, and such information:
 - Is owned or controlled by a vendor requesting confidentiality;
 - Is intended to be and is treated by the vendor as private in that the disclosure of the information would cause harm to the business operations of the vendor; and

³² E-mail from Florida Health Choices to professional staff of the Florida Senate Committee on Health Regulation, Mar. 18, 2011, 1:40 pm EDT (on file with the Senate Committee on Health Regulation).

- Has not been disclosed except pursuant to a statutory provision, court or administrative order, or private agreement.
- “Vendor” means a participating insurer or other provider or services.

The bill creates the following exceptions by requiring that such information be disclosed to:

- Another governmental entity in the performance of its official duties and responsibilities;
- Any person who has the written consent of the program’s applicant; and,
- The Florida KidCare program for the purpose of administering the program.³³

The public-records exemption does not prohibit a participant’s legal guardian from obtaining confirmation of coverage, dates of coverage, the name of the enrollee’s health plan, and the amount of premium being paid.

The bill provides that the exemption applies to any information held by the corporation before, on, or after October 1, 2011, and any person who knowingly and willfully violates the exemption commits a misdemeanor of the second degree.³⁴

The public-records exemption is subject to the Open Government Sunset Review Act and will expire on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also provides justification for the public necessity of the exemption. Specifically, the bill states that the information identifying an enrollee or participant in the FHC program must be confidential and exempt because the harm in releasing such personal and sensitive information outweighs any public benefit in releasing it. Additionally, the bill provides that if such information was made available to the public, the administration of the program would be significantly impaired because businesses and individuals would be less inclined to apply, participate, or enroll in the program. The bill also provides that a vendor’s proprietary business information and customer and client lists must be confidential and exempt because disclosure of such information could cause injury in the marketplace by providing competitors with detailed insights into confidential business information, strategies, methodologies, plans, or client lists which would diminish the advantage that the vendor or buyer’s representative maintains. The bill provides that without the public-records exemption, private-sector vendors or buyer’s representatives, whose business records generally are not required to be open to the public, may refrain from participating in the FHC program.

The bill provides an effective date of October 1, 2011.

³³ Under certain circumstances in federal law, health insurance exchanges similar to the marketplace created under the FHC program could be required to exchange information with the state Medicaid program. In Florida, the state Medicaid program also exchanges data with the Florida KidCare program. The bill provides these exceptions to the FHC program’s public records exemption to allow FHC data to be exchanged with those programs as necessary.

³⁴ A misdemeanor of the second degree is punishable by up to 60 days imprisonment and a fine up to \$500 may be imposed. See ss. 775.082 and 775.083, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill creates new public-records exemptions for all personal, identifying information of an enrollee or participant in the Florida Health Choices program, client and customer lists of a buyer's representatives, and proprietary confidential business information of a vendor. This bill appears to comply with the requirements of article I, section 24 of the Florida Constitution that public-records exemptions state the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose, and be addressed in legislation separate from substantive law changes.

Additionally, because this bill is creating a new public-records exemption, it is subject to a two-thirds vote of each house of the Legislature for enactment as required by article I, section 24 of the Florida Constitution.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

D. Other Constitutional Issues:

This bill provides that the public-records exemption created applies to any information identifying an applicant, enrollee, or participant in the Florida Health Choices Program *before*, on, or after the effective date of the bill.

Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the

enactment is so clear it will admit of no other construction.”³⁵ The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was [a person’s] right vested or inchoate?
- Is the application of [the statute] to these facts unconstitutionally retroactive?³⁶

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.³⁷

Additionally, the bill makes it clear that it is the Legislature’s intent to apply the law retroactively. “Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively.”³⁸ A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.³⁹ This bill does not appear to do any of these things.

VI. Technical Deficiencies:

The bill creates subsection (14), titled Exemptions, in s. 408.910, F.S.; however, s. 408.910(10), F.S., is also titled Exemptions. In order to avoid confusion, the Legislature may wish to change the title of subsection (14) to Exemptions from Public-Records Requirements.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS/CS by Governmental Oversight and Accountability on April 14, 2011:

The CS/CS corrected a grammatical error in line 55 of CS/SB 1456 by replacing “is” with “are.”

CS by Children, Families, and Elder Affairs on April 4, 2011:

The CS:

³⁵ Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

³⁶ *Weingrad v. Miles*, 2010 WL 711801, *2 (Fla. 3d DCA 2010) (internal citations omitted).

³⁷ See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

³⁸ *Weingrad*, 2010 WL 711801 at *3.

³⁹ *Id.* at *4.

- Creates a public-records exemption for client and customer lists of a buyer's representative and for proprietary confidential business information of a vendor;
- Provides definitions for the terms "buyer's representative," "enrollee," "participant," "proprietary confidential business information," and "vendor";
- Removes the term "applicants" from persons whose personal, identifying information is confidential and exempt from disclosure (information received during the application process is still considered exempt); and
- Provides justification for the necessity of the public-records exemptions for client and customer lists and proprietary confidential business information.

B. Amendments:

None.