

**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.)

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Prepared By: The Professional Staff of the Health Regulation Committee

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BILL: SB 1456

INTRODUCER: Senator Garcia

SUBJECT: Public Records/Florida Health Choices Program

DATE: March 17, 2011

REVISED: 3/21/2011

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	<b>Pre-meeting</b>
2.			CF	
3.			GO	
4.				
5.				
6.				

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**I. Summary:**

The bill creates confidentiality and an exemption from the public records requirements of s. 119.07(1), F.S., and s. 24(a), Article I of the Florida Constitution, for any personal, identifying information of an applicant, enrollee, or participant in the Florida Health Choices program (FHC). The bill provides exceptions under which the information may be disclosed. The bill provides retroactivity for the information to which the confidentiality and exemption apply. The bill provides that the confidentiality and exemption are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a Legislative finding of public necessity for the confidentiality and exemption.

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

This bill substantially amends the following sections of the Florida Statutes: 408.910.

**II. Present Situation:**

**Florida's Public Records Laws**

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.<sup>1</sup> In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

Section 24(a), Art. I, of the Florida Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Act is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record<sup>2</sup> must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency<sup>3</sup> records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of “public record” to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”<sup>4</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>5</sup>

Only the Legislature is authorized to create exemptions from open government requirements.<sup>6</sup> 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.<sup>7</sup> A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.<sup>8</sup>

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be

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<sup>2</sup> Section 119.011(12), F.S., defines “public records” to include “all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

<sup>3</sup> Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>4</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>5</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>6</sup> FLA. CONST. art. I, s. 24(c) (1992).

<sup>7</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

<sup>8</sup> *Supra* fn. 6.

maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.<sup>9</sup> If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>10</sup>

Access to public records is a substantive right; therefore, a statute affecting that right is presumptively prospective in its application.<sup>11</sup> There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.<sup>12</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>13</sup> provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment.<sup>14</sup> 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.<sup>15</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and 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.<sup>16</sup> An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory 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 compilation 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 would injure the affected entity in the marketplace.<sup>17</sup>

The act also requires the Legislature to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:<sup>18</sup>

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

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<sup>9</sup> Attorney General Opinion 85-62, August 1, 1985.

<sup>10</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>11</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).

<sup>12</sup> *Id.*

<sup>13</sup> Section 119.15, F.S.

<sup>14</sup> Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the 5-year review.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Section 119.15(6)(a), F.S.

- 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?

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>19</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,<sup>20</sup> then a public necessity statement and a two-thirds vote for passage are not required.<sup>21</sup>

### **The Florida Health Choices Program**

In 2008, the Legislature created the 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 (the Corporation) was created to administer the program.<sup>22</sup>

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.”<sup>23</sup>

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
- School districts in fiscally constrained counties.

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.<sup>24</sup> 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.

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<sup>19</sup> *Supra* fn. 6.

<sup>20</sup> An example of an exception to a public records exemption would be allowing another agency access to confidential or exempt records.

<sup>21</sup> *Cf.*, *State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).

<sup>22</sup> See s. 4, ch. 2008-32, Laws of Florida.

<sup>23</sup> *Florida Health Choices: How Does the Marketplace Work?*, available at <http://myfloridachchoices.org/faq/> (last visited March 18, 2011).

<sup>24</sup> 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.

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<sup>25</sup>
- Employees of statutory rural hospitals.

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:

- 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.

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. The program establishes procedures for participation by vendors, which must submit complete descriptions of

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<sup>25</sup> 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.

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. In addition, vendors must agree to make all the products they offer available to all individual participants in the program.

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. 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. 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.

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.

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.

### ***Launching Florida Health Choices***

The FHC program has scheduled a phased-in launch of the marketplace for 2011 and 2012.<sup>26</sup> 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.

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<sup>26</sup> *Florida Health Choices 2010 Annual Report*, February 1, 2011, p. 3, available at [http://myfloridachoice.org/wp-content/uploads/2011/02/FHC-AnnualReport\\_v2a.pdf](http://myfloridachoice.org/wp-content/uploads/2011/02/FHC-AnnualReport_v2a.pdf)

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.<sup>27</sup>

### **III. Effect of Proposed Changes:**

**Section 1** creates section (14) of s. 408.910, F.S., to provide that any personal, identifying information of an applicant, enrollee, or participant in the FHC program is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.

The bill creates the following exceptions by requiring that such information must 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 applicant; and
- The Florida Kidcare program for the purpose of administering the program.<sup>28</sup>

The bill provides that the confidentiality and exemption do not prohibit an enrollee'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 confidentiality and exemption apply to any pertinent information in the FHC program before, on, or after the bill's effective date.

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<sup>27</sup> Email from Florida Health Choices to staff in the Florida Senate Committee on Health Regulation, March 18, 2011, 1:40 pm EDT (on file with committee staff).

<sup>28</sup> 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.

The bill provides that a person who knowingly and willfully violates the confidentiality or exemption commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

The bill provides that the confidentiality and exemption are subject to the Open Government Sunset Review Act and are repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** provides a Legislative finding of public necessity for the confidentiality and exemption.

**Section 3** provides an effective date for the bill of October 1, 2011.

#### **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 bill creates a new public records exemption in s. 408.910, F.S. and contains a constitutionally required statement of public necessity for the exemption. This bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by s. 24(c), Art. 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, Subsection 19(f) of the Florida Constitution.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

None.

#### **VI. Technical Deficiencies:**

None.



**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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