

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1473 Pub. Rec./Florida Health Choices Program

**SPONSOR(S):** Corcoran

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1456

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	11 Y, 0 N, As CS	Williamson	Williamson
2) Health & Human Services Committee	16 Y, 0 N	Poche	Gormley

### SUMMARY ANALYSIS

The Florida Health Choices Program (program) is a single, centralized market for the sale and purchase of health care products including, but not limited to, health insurance plans, health maintenance organization (HMO) plans, prepaid services, service contracts, and flexible spending accounts. Policies sold as part of the program are exempt from regulation under the Florida Insurance Code and laws governing HMOs. Current law specifies those entities eligible to purchase products through, and participate in, the program; those vendors eligible to participate in the program; and those individuals eligible to enroll in the program.

The bill creates a public record exemption for the following information held by the program:

- Personal identifying information of an enrollee or participant who has applied for or participates in the program.
- Client and customer lists of a buyer's representative.
- Proprietary confidential business information.

The bill provides for retroactive application of the public record exemptions. It provides exceptions to the exemptions, and provides criminal penalties for violation of the public record exemptions.

The bill provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

**Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates new public record exemptions; thus, it requires a two-thirds vote for final passage.**

The bill does not appear to have a fiscal impact on state or local government.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

##### Florida Health Choices Program

In 2008, the Florida Legislature created the Florida Health Choices Program (program).<sup>3</sup> The program includes a single, centralized market for the sale and purchase of health care products including, but not limited to, health insurance plans, health maintenance organization (HMO) plans, prepaid services, service contracts, and flexible spending accounts.<sup>4</sup> Policies sold as part of the program are exempt from regulation under the Florida Insurance Code<sup>5</sup> and laws governing HMOs.<sup>6</sup>

Current law also establishes the Florida Health Choices, Inc., (corporation) as a not-for-profit corporation under chapter 617, F.S.<sup>7</sup> The corporation is responsible for administering the program and may function as a third-party administrator for employers participating in the program.<sup>8</sup> In its capacity as a third-party administrator, the corporation is not subject to the licensing requirements for insurance administrators under part VII of chapter 626, F.S. The corporation is authorized to collect premiums and other payments from employers. In addition, the corporation is not required to maintain any level of bonding. The corporation is responsible for certifying vendors and ensuring the validity of their

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> Section 119.15, F.S.

<sup>3</sup> Section 4, chapter 2008-32, L.O.F. (2008); *see also* s. 408.910, F.S.

<sup>4</sup> Section 408.910(5), F.S.

<sup>5</sup> Chapters 624-632, 634, 635, 636, 641, 642, 648 and 651, F.S., constitute the Florida Insurance Code.

<sup>6</sup> Part I of chapter 641, F.S.; *see also* s. 408.910(10)(a), F.S.

<sup>7</sup> Section 408.910(11), F.S.

<sup>8</sup> Section 408.910(10)(b), F.S.

offerings. Lastly, the corporation is not subject to the provisions of the Unfair Insurance Trade Practices Act.<sup>9</sup>

The corporation is governed by a 15-member board of directors (board).<sup>10</sup> The board members are protected from liability created by any member of the board or its employees or agents for any action taken by them in the performance of the powers and duties under this act.<sup>11</sup> No cause of action may rise against a board member in that circumstance.<sup>12</sup>

Current law specifies those entities eligible to purchase products through, and participate in, the program. Employees of the following employers are eligible to purchase coverage through the program, if their employers participate in the program:

- Employers with one to 50 employees;
- Cities with a population less than 50,000 residents;
- Fiscally constrained counties; and
- School districts located in fiscally constrained counties.<sup>13</sup>

The following vendors are eligible to participate in the program:

- Insurers licensed under chapter 624, F.S.;
- HMOs licensed under part I of chapter 641, F.S.;
- Prepaid health clinic providers licensed under part II of chapter 641, F.S.;
- Health care providers;
- Provider organizations; and
- Corporate entities providing specific services via service contracts.<sup>14</sup>

The following individuals are eligible to enroll in the program:

- Individual employees of enrolled employers;
- State employees ineligible for the state group insurance plan;
- State retirees;
- Medicaid reform participants who opt out of the reform program; and
- Statutory rural hospitals.<sup>15</sup>

Employers are required to establish section 125 plans in order to participate in, and allow their employees to enroll in, the program.<sup>16</sup> This allows both employers and employees to purchase insurance coverage through the program using pre-tax dollars.

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<sup>9</sup> Part IX, chapter 626, F.S.

<sup>10</sup> The board is composed of five members appointed by the Governor, five members appointed by the President of the Senate, and five members appointed by the Speaker of the House of Representatives; *see* section 408.910(11)(a), F.S.

<sup>11</sup> Section 408.910(11)(e), F.S.

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

<sup>13</sup> Section 408.910(4)(a), F.S.

<sup>14</sup> Section 408.910(4)(d), F.S.

<sup>15</sup> Section 408.910(4)(b), F.S.

<sup>16</sup> Section 125 of the Internal Revenue Code allows employers to offer a cafeteria plan to employees for payment of qualified benefits. A cafeteria plan is a separate written plan maintained by an employer for employees that meets the specific requirements of and regulations of section 125. It provides participants an opportunity to receive certain benefits on a pretax basis. Participants in a cafeteria plan must be permitted to choose among at least one taxable benefit (such as cash) and one qualified benefit. A qualified benefit is a benefit that does not defer compensation and is excludable from an employee's gross income under a specific provision of the Code, without being subject to the principles of constructive receipt. Qualified benefits include:

- Accident and health benefits (but not Archer medical savings accounts or long-term care insurance);
- Adoption assistance;
- Dependent care assistance;
- Group-term life insurance coverage;
- Health savings accounts, including distributions to pay long-term care services.

## Effect of Bill

The bill creates public record exemptions for the Florida Health Choices Program (program). The following information is confidential and exempt<sup>17</sup> from public records requirements:

- Personal identifying information of an enrollee<sup>18</sup> or participant<sup>19</sup> who has applied for or participates in the program.
- Client and customer lists of a buyer's representative.<sup>20</sup>
- Proprietary confidential business information.

The bill defines "proprietary confidential business information" to mean information, regardless of form or characteristics that is owned or controlled by a vendor<sup>21</sup> requesting confidentiality; that 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; that has not been disclosed unless disclosed pursuant to a

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The written plan must specifically describe all benefits and establish rules for eligibility and elections. A section 125 plan is the only means by which an employer can offer employees a choice between taxable and nontaxable benefits without the choice causing the benefits to become taxable. A plan offering only a choice between taxable benefits is not a section 125 plan. *See* <http://www.irs.gov/govt/fslg/article/0,,id=112720,00.html>. (last viewed March 28, 2011).

<sup>17</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

<sup>18</sup> The bill defines "enrollee" to mean an employer who is eligible to enroll in the program pursuant to paragraph (4)(a). Paragraph (4)(a) provides that employer eligible to enroll in the program include: employers that have 1 to 50 employees; fiscally constrained counties described in s. 218.67, F.S.; municipalities having populations of fewer than 50,000 residents; and school districts in fiscally constrained counties.

<sup>19</sup> The bill defines "participant" to mean an individual who is eligible to participate in the program pursuant to paragraph (4)(b). Paragraph (4)(b) provides that individuals eligible to participate in the program include: individual employees of enrolled employers; state employees not eligible for state employee health benefits; state retirees; Medicaid reform participants who select the opt-out provision of reform; and statutory rural hospitals.

<sup>20</sup> The bill defines "buyer's representative" to mean a participating insurance agent as described in paragraph (4)(g). Paragraph (4)(g) provides that health insurance agents licensed under part IV of chapter 626, F.S., are eligible to voluntarily participate as buyers' representatives. A buyer's representative acts on behalf of an individual purchasing health insurance and health services through the program by providing information about products and services available through the program and assisting the individual with both the decision and the procedure of selecting specific products. In order to participate, a health insurance agent must comply with the procedures established by the corporation, including: completion of training requirements; execution of a participation agreement specifying the terms and conditions of participation; disclosure of any appointments to solicit insurance or procure applications for vendors participating in the program; and arrangements to receive payment from the corporation for services as a buyer's representative.

<sup>21</sup> The bill defines "vendor" to mean a participating insurer or other provider of services as described in paragraph (4)(d). Paragraph (4)(d) provides that eligible vendors and the products and services that the vendors are permitted to sell are as follows: insurers licensed under chapter 624, F.S., may sell health insurance policies, limited benefit policies, other risk-bearing coverage, and other products or services; HMOs licensed under part I of chapter 641, F.S., may sell health insurance policies, limited benefit policies, other risk-bearing products, and other products or services; prepaid health clinic service providers licensed under part II of chapter 641, F.S., may sell prepaid service contracts and other arrangements for a specified amount and type of health services or treatments; 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 service contracts and arrangements for a specified amount and type of health services or treatments; provider organizations, including service networks, group practices, professional associations, and other incorporated organizations of providers, may sell service contracts and arrangements for a specified amount and type of health services or treatments; and corporate entities providing specific health services in accordance with applicable state law may sell service contracts and arrangements for a specified amount and type of health services or treatments.

statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public; and that is information concerning:

- Business plans.
- Internal auditing controls and reports of internal auditors.
- Reports of external auditors for privately held companies.
- Client and customer lists.
- Potentially patentable material.
- Trade secret as defined in the Uniform Trade Secrets Act.<sup>22</sup>

The bill provides for retroactive application of the public record exemptions.<sup>23</sup>

Upon request, confidential and exempt 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.
- The Florida Kidcare program for the purpose of administering the program.

The public record exemptions 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.

A person who knowingly and willfully violates the public record exemptions commits a misdemeanor of the second degree.<sup>24</sup>

The bill provides for repeal of the exemptions on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.<sup>25</sup>

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 408.910, F.S., relating to the Florida Health Choices Program.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date of October 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

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<sup>22</sup> Chapter 688, F.S.

<sup>23</sup> The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).

<sup>24</sup> A misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days and a fine not to exceed \$500.

<sup>25</sup> See ss. 775.082(4)(b) and 775.083(1)(e), F.S.

<sup>25</sup> Section 24(c), Art. I of the State Constitution.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

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

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new public record exemptions; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 29, 2011, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably with committee substitute.

The committee substitute clarifies that the public record exemption for personal identifying information that was provided in the bill applies only to an enrollee or participant in the Florida Health Choices Program. In addition, it creates public record exemptions for client and customer lists of a buyer's representative and for proprietary confidential business information of a vendor. Finally, the committee substitute provides definitions of the terms "buyer's representative," "enrollee," "participant," "proprietary confidential business information," and "vendor."