

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 Health Regulation Committee

BILL: CS/SB 432

INTRODUCER: Criminal Justice Committee and Senator Evers

SUBJECT: Privacy of Firearm Owners

DATE: March 11, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	O'Callaghan	Stovall	HR	Pre-meeting
3.	_____	_____	JU	_____
4.	_____	_____	BC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill creates a noncriminal violation in circumstances where a public or private physician, nurse, or other medical staff person conditions receipt of medical treatment or care on a person's willingness or refusal to disclose "personal and private information unrelated to medical treatment" in violation of the privacy right created by the bill regarding ownership or possession of firearms.

The bill also creates a noncriminal violation where a public or private physician, nurse, or other medical staff person enters information concerning firearms into any record or otherwise discloses such information to any other source, whether intentionally, inadvertently, or accidentally.

The bill states that an inquiry of a patient or his or her family regarding the ownership or possession of firearms in the home by a public or private physician, nurse, or other medical staff person constitutes an invasion of privacy.

The state attorney is given responsibility for investigating and prosecuting the noncriminal violations.

The defendant may be assessed up to a \$100,000 fine, on a third offense, if the court finds the violation is knowing and willful. The Attorney General is charged with filing suit to collect any fine that remains unpaid after 90 days.

Certain mental health care professionals as statutorily defined, and physicians, nurses, and other medical personnel are exempted from the provisions in the bill in cases where inquiries are reasonably necessary under emergency circumstances such as where the patient is exhibiting conduct that indicates the patient could pose an imminent threat to himself, herself, or others. The patient's response is private and shall not be disclosed to a third party, other than law enforcement conducting an active investigation, under the provisions of the bill.

The bill further exempts medical records created on or before the effective date of the bill from the prohibitions created by the bill.

This bill creates a new section of the Florida Statutes: 790.338.

II. Present Situation:

Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, an Ocala pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.¹ The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.² He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.³ This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.⁴

¹ Fred Hiers, *Family and pediatrician tangle over gun question*, available at: <http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg> (last accessed March 9, 2011).

² *Id.*

³ *Id.*

⁴ American Medical Association, *H-145.990 Prevention of Firearm Accidents in Children*, available at: <https://ssl3.ama-assn.org/apps/ecommm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM> (last accessed March 9, 2011).

Additionally, the American Academy of Pediatrics (AAP) recommends that pediatricians incorporate questions about guns into their patient history taking.⁵

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.⁶ However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

Florida Firearms Safety Regulations Concerning Minors

Section 790.001, F.S., defines the term "firearm" to mean any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

Section 790.174, F.S., requires a person who stores or leaves, on a premise under his or her control, a loaded firearm and who knows (or reasonably should know) that a minor⁷ is likely to gain access to the firearm without the lawful permission of the minor's parent or the person having charge of the minor, or without the supervision required by law, to keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure. Otherwise the person shall secure the firearm with a trigger lock, except when the person is carrying the firearm on his or her body or within such close proximity thereto that he or she can retrieve and use it as easily and quickly as if he or she carried it on his or her body.

It is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, if a person fails to store or leave a firearm in the manner required by law and as a result thereof a minor gains access to the firearm, without the lawful permission of the minor's parent or the person having charge of the minor, and possesses or exhibits it, without the supervision required by law in a public place; or in a rude, careless, angry, or threatening manner in violation of s. 790.10. However, a person is not guilty of such an act if the minor obtains the firearm as a result of an unlawful entry by any person.

Section 790.175, F.S., requires that upon the retail commercial sale or retail transfer of any firearm, the seller or transferor is required to deliver a written warning to the purchaser or transferee, which must state, in block letters not less than 1/4 inch in height:

It is unlawful, and punishable by imprisonment and fine, for any adult to store or leave a firearm in any place within the reach or easy access of a minor under 18

⁵ American Academy of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, Pediatrics Vol. 105 No. 4 April 2000, pp. 888-895, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888> (last accessed March 9, 2011). See also American Academy of Pediatrics, Committee on Injury, Violence, and Poison Prevention, TIPP (The Injury Prevention Program), *A Guide to Safety Counseling in Office Practice*, 1994, available at: <http://www.aap.org/family/TIPPGuide.pdf> (last accessed March 9, 2011).

⁶ See, e.g., chs. 456, 458, and 790, F.S., respectively.

⁷ A minor is any person under the age of 16. See 790.174(3), F.S.

years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Additionally, any retail or wholesale store, shop, or sales outlet which sells firearms must conspicuously post at each purchase counter the following warning in block letters not less than 1 inch in height:

It is unlawful to store or leave a firearm in any place within the reach or easy access of a minor under 18 years of age or to knowingly sell or otherwise transfer ownership or possession of a firearm to a minor or a person of unsound mind.

Any person or business knowingly violating a requirement to provide warning under this s. 790.175, F.S., commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Terminating the Doctor - Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.⁸ Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.⁹ Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another physician.¹⁰ Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). PHI is defined as all "individually identifiable health information" which includes information relating to:

⁸ American Medical Association, Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml> (last accessed March 9, 2011). However, doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

⁹ American Medical Association, Code of Medical Ethics, Opinion 9.06, *Free Choice*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml> (last accessed March 9, 2011).

¹⁰ A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: 1) they are no longer needed by the patient; 2) the relationship is ended with the consent of or at the request of the patient; or 3) the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper, available at: <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml> (last accessed March 9, 2011); American Medical Association, Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml> (last accessed March 9, 2011).

- The individual's past, present, or future physical or mental health or condition;
- The provision of health care to the individual; or
- The past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.¹¹

Covered entities¹² may only use and disclose PHI as permitted by the HIPAA or more protective state rules.¹³ The HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of the HIPAA.¹⁴

Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.
- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and

¹¹ 45 C.F.R. s. 160.103

¹² A "covered entity" is a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered under the HIPAA. *See id.*

¹³ In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. Yale University, *Health Insurance Portability and Accountability Act*, available at: <http://hipaa.yale.edu/overview/index.html> (last accessed March 9, 2011).

¹⁴ Yale University, *Health Insurance Portability and Accountability Act*, available at: <http://hipaa.yale.edu/overview/index.html> (last accessed March 9, 2011). Fines range from \$100 to \$50,000 per violation with specified annual caps. Criminal penalties include fines ranging from \$50,000 to \$250,000 and imprisonment of up to 10 years. *See American Medical Association, HIPAA Violations and Enforcement*, available at: <http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml> (last accessed March 9, 2011).

reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

III. Effect of Proposed Changes:

The bill creates s. 790.338, F.S., entitled “Medical privacy concerning firearms.” The bill specifies that a verbal or written inquiry by a public or private physician, nurse, or other medical staff person regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a private home or other domicile of a patient or the family of a patient violates the privacy of the patient or the patient’s family members.¹⁵

The bill creates a noncriminal violation if a public or private physician, nurse, or other medical staff :

- Conditions receipt of medical treatment or care on a person’s willingness or refusal to disclose personal and private information unrelated to medical treatment in violation of an individual’s privacy, as specified in the bill.
- Enters any intentionally, accidentally, or inadvertently disclosed information concerning firearms into any record, whether written or electronic, or discloses such information to any other source.

The bill also provides that a person who violates s. 790.338, F.S., may be assessed a fine of no less than \$10,000 for a first violation, \$25,000 for a second violation, and \$100,000 for a third violation if the court determines that the violation was knowing and willful or that, while in the exercise of ordinary care, the person should have known that the act was a violation.

The bill requires the state attorney with jurisdiction to investigate complaints of criminal violations of s. 790.338, F.S., and, if there is probable cause to indicate that a person may have committed a violation, to prosecute the violator and notify the Attorney General of the prosecution. The bill requires the Attorney General to bring a civil action to enforce any fine assessed if such fine is not paid after 90 days.

Certain mental health care professionals as statutorily defined, and physicians, nurses, and other medical personnel are exempted from the provisions in the bill in cases where inquiries are reasonably necessary under emergency circumstances such as where the patient is exhibiting conduct that indicates the patient could pose an imminent threat to himself, herself, or others.

¹⁵ Invading someone’s privacy is not a criminal act. However, there is a common law tort claim of invasion of privacy. *See Allstate Insurance Company v. Ginsberg*, 863 So.2d 156 (Fla. 2003) where the Florida Supreme Court reaffirms the four types of claims of invasion of privacy recognized by Florida courts: “As recognized in *Agency for Health Care Administration v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1252 n. 20 (Fla.1996) (hereinafter *AHCA*), the four categories are: (1) appropriation-the unauthorized use of a person’s name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one’s private quarters; (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye-publication of facts which place a person in a false light even though the facts themselves may not be defamatory.” As the dissenting opinion notes, the common law tort of invasion of privacy, or any common law tort is an area of the law that is subject to evolution. It would appear that this bill creates a new statutory category in the area of invasion of privacy torts.

The patient's response is private and shall not be disclosed to a third party, other than law enforcement conducting an active investigation, under the provisions of the bill.

The bill further exempts medical records created on or before the effective date of the bill from the prohibitions created by the bill. The bill provides that it shall take 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.

D. Other Constitutional Issues:

Although this bill states that inquiries by certain medical professionals about the ownership of a firearm or presence of a firearm in the home of a patient or his or her family violates the patient's or the family's privacy, it should be noted that the individual's right to exercise free speech is only regulated in the most egregious of circumstances.

The First Amendment to the United States Constitution provides that "Congress shall make no law ...abridging the freedom of speech."¹⁶ The Florida Constitution similarly provides that "[n]o law shall be passed to restrain or abridge the liberty of speech..."¹⁷ Florida courts have equated the scope of the Florida Constitution with that of the Federal Constitution in terms of the guarantees of freedom of speech.¹⁸

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.¹⁹ However, the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.²⁰

It should also be noted that any civil action that might ensue will likely raise issues surrounding personal, professional, and contractual obligations between the parties, and

¹⁶ U.S. CONST. amend. I.

¹⁷ FLA. CONST. art. I, s. 4.

¹⁸ See, *Florida Cannery Ass'n v. State, Dep't of Citrus*, 371 So.2d 503 (Fla.1979).

¹⁹ See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001).

²⁰ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

the weight given to a constitutionally-protected right (free speech) versus a right to privacy created by general law, as between the two parties.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A public or private physician, nurse, or other medical staff person who is found to have violated the law created by the bill could be assessed up to a \$100,000 fine for a third violation.

C. Government Sector Impact:

To the extent the violations of this bill are prosecuted, the state government may incur costs associated with such prosecutions.

VI. Technical Deficiencies:

The bill creates s. 790.338, F.S., to make it a noncriminal violation for a *public or private physician, nurse, or other medical staff* to do certain acts. The bill does not define these terms, nor are they defined in ch. 790, F.S. Defining these terms, or using a term already defined in Florida law such as “healthcare practitioner,” would clarify to whom the penalties apply.

Also, the term “unrelated to medical treatment” on line 39 of the bill may create a loophole to prosecution in that the term invites challenge and argument as to what is or is not “unrelated.”

VII. Related Issues:

Lines 42 through 46 of the bill prohibits a public or private physician, nurse, or other medical staff person from intentionally, accidentally, or inadvertently entering any disclosed information concerning firearms into any record, whether written or electronic, or disclose such information to any other source. Because the bill does not include an exception to this provision to allow for disclosure of information concerning a firearm if it relates to medical diagnosis or medical treatment, a public or private physician, nurse, or other medical staff person who simply records that the patient suffered a gunshot wound or the patient has scar tissue from a gunshot wound may be subject to the penalties for a noncriminal violation, as provided for in the bill.

Line 46 of the bill prohibits disclosure of information concerning firearms to another source. If “information concerning firearms” qualifies as PHI, it would appear that the HIPAA already prohibits and penalizes for such disclosure.

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 Criminal Justice on February 22, 2011:

- Removes the criminal penalties from the bill and instead provides for noncriminal violations which could result in graduated fines for each successive violation of the prohibitions in the bill.
- Provides limited exemptions from the prohibitions in the bill in the course of emergency treatment, including mental health emergencies, and where certain mental health professionals believe it is necessary to inquire about firearm possession. The patient's response is only to be disclosed to others participating in the patient's treatment or to law enforcement conducting an active investigation of the events giving rise to a medical emergency.
- Provides an exemption for medical records created on or before the effective date of the bill.

- B. **Amendments:**

None.