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 Committee on Health Policy

BILL:	CS/SB 476
INTRODUCER:	Health Policy Committee and Senator Brandes
SUBJECT:	Public Records/Compassionate and Palliative Care Plans/Agency for Health Care Administration
DATE:	January 16, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	**Fav/CS**
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 476 creates a public records exemption for personal identifying information in the Compassionate and Palliative Care Plans Clearinghouse (clearinghouse) managed by the Agency for Health Care Administration (AHCA) or its designee under s. 408.604, F.S. Specifically, the bill makes the information confidential and exempt from the public records law.

The bill also provides a process by which, upon request and after verification of the legitimacy of the request, the AHCA may disclose such confidential and exempt information to:

- A health care provider as defined in s. 408.07, F.S., to provide medical treatment to a patient with a terminal illness;
- A patient or the legal guardian or designated health care surrogate of a patient with a terminal illness; or
- A health care facility to treat a patient with a terminal illness.

The bill provides an open government sunset review date of October 2, 2023, and includes the constitutionally required public necessity statement.

The bill requires a two-thirds vote from each chamber for passage.

The bill has no impact on state revenues or expenditures.

This bill is effective on the same date that SB 474 (2018), or similar legislation, takes effect.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.[3] Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.[4] The Public Records Act states that:

> It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[5]

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."[7] A violation of the Public Records Act may result in civil or criminal liability.[8]

The Legislature may create an exemption to public records requirements.[9] An exemption must pass by a two-thirds vote of the House and the Senate.[10] In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.[11] A statutory

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[1] FLA. CONST., art. I, s. 24(a).
[2] *Id*.
[3] The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.
[4] Public records laws are found throughout the Florida Statutes.
[5] Section 119.01(1), F.S.
[6] Section 119.011(12), F.S., defines "public record" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, 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." Section 119.011(2), F.S., defines "agency" to mean 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."
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).
[8] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.
[9] FLA. CONST., art. I, s. 24(c).
[10] *Id.*
[11] *Id.*

exemption that does not meet these criteria may be unconstitutional and may not be judicially saved.[12]

When creating a public records exemption, the Legislature may provide that a record is "confidential and exempt" or "exempt."[13] Records designated as "confidential and exempt" may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as "exempt" are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.[14]

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.[15] The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.[16]

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.[17] An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[18]
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[19] or
- It protects trade or business secrets.[20]

The OGSR also requires specified questions to be considered during the review process.[21] In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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[12] *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

[13] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[14] *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

[15] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

[16] Section 119.15(3), F.S.

[17] Section 119.15(6)(b), F.S.

[18] Section 119.15(6)(b)1., F.S.

[19] Section 119.15(6)(b)2., F.S.

[20] Section 119.15(6)(b)3., F.S.

[21] Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?

If enacting a new exemption then a public necessity statement written with specificity justifying the exemption and a two-thirds vote of each chamber are required for passage.[22] If an existing exemption is reenacted without substantive changes or if an existing exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records remain exempt unless provided for by law.[23]

End of Life Decision-Making Options in Florida

Individuals may express their end of life health care decisions through one or more different mechanisms such as formal or informal discussions with a health care provider or a loved one or through one of several recognized legal documents. Sometimes, the conversation may be the result of a recent hospitalization and the health care provider seeks guidance from the patient or the patient's caregiver about how to treat the individual's condition next, such as when and if to change to comfort (palliative or hospice) care rather than care that is aimed at a cure for the patient's illness.[24] Florida law defines an advance directive as any witnessed, oral statements or written instructions that express a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.[25] Designation of a health care surrogate, a living will, or an anatomical gift each serve different purposes and have their own unique requirements and specifications under the law.

One type of advance directive not currently available in Florida, a Physician Order for Life-Sustaining Treatment (POLST), documents a patient's health care wishes in the form of a physician order for a variety of end of life measures, including cardiopulmonary resuscitation (CPR).[26] The POLST form can only be completed by a physician and is then provided to the patient to be kept secured in a visible location for emergency personnel.[27] It is suggested that the form be completed when an individual has a serious illness or frailty, regardless of age, as the POLST serves as a medical order for a current, life-threatening illness where the patient has a life expectancy of a year or less.[28] The POLST is intended to express the patient's treatment wishes when the patient is unable to speak for himself or herself during a medical crises.

3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

[22] FLA. CONST. art. I, s. 24(c).
[23] Section 119.15(7), F.S.
[24] American Family Physician, *Information from Your Family Doctor: End of Life Choices for Families* (August 14, 2004); 70(4): 725-726, https://www.aafp.org/afp/2004/0815/p725.html (last visited: Jan. 9, 2018).
[25] *See* s. 765.101, F.S.
[26] POLST.ORG, *About the National POLST Paradigm*, http://www.polst.org/about-the-national-polst-paradigm/ (last visited Jan. 9, 2018).
[27] POLST.ORG, *FAQ*, http://www.polst.org/advance-care-planning/faq/ (last visited Jan. 8, 2018).
[28] POLST.ORG, *POLST v. Advance Directives*, http://www.polst.org/advance-care-planning/polst-and-advance-directives/ (last visited Jan. 8, 2018).

Physician Orders for Life-Sustaining Treatment (POLST) Program

SB 474 creates s. 401.451, F.S., the Physician Order for Life-Sustaining Treatment (POLST) program, within the DOH. The bill requires the DOH to implement and administer the POLST program (program) and to collaborate with the AHCA on the implementation and operation of the Clearinghouse for Compassionate and Palliative Care plans (clearinghouse) which would electronically store the forms.

A POLST provides directives for the patient's medical care and treatment under certain conditions. The contents of the POLST form is also prescribed by SB 474. It must be voluntarily executed by the patient, or if the patient is incapacitated or the patient is a minor, by the patient's legal representative with all directives included in the form at the time of the signing.

Any licensee, physician, medical director, emergency medical technician, or paramedic who in good faith complies with a POLST form is not subject to criminal prosecution or civil liability, and has not engaged in negligent or unprofessional conduct as a result of carrying out the directives of a POLST form. A person, acting in good faith as a legal representative, is not subject to civil liability or criminal prosecution for executing a POLST form pursuant to this law.

SB 474 further requires that when a patient who has executed a valid POLST form is transferred from one health care facility to another, the health care facility initiating the transfer must communicate the existence of the POLST form to the receiving facility before the transfer. Upon the patient's transfer, the receiving facility's treating physician must review the POLST form with the patient or if the patient is incapacitated or a minor, the patient's legal representative.

Clearinghouse for Compassionate and Palliative Care Plans

SB 474 also creates s. 408.064, F.S., which establishes the Clearinghouse for Compassionate and Palliative Care Plans (clearinghouse) within the AHCA. The clearinghouse serves as a warehouse for POLST plans and other advance directives. Under SB 474, the AHCA is responsible for establishing and maintaining the clearinghouse directly or through a designee. The clearinghouse is required to be a reliable and secure database that will allow Florida residents to electronically submit their individual plans for compassionate and palliative care. The deadline for completion of the clearinghouse is January 1, 2019.

The secure database shall consist of compassionate and palliative care plans submitted by state residents and must be accessible to health care providers, facilities, and other authorized individuals through a secure portal. The database must allow for electronic submission, storage, indexing, and retrieval of plans. The AHCA must also develop and maintain an identity validation system that confirms the identity of the facility, health care provider, or other authorized individual seeking retrieval of plans while protecting the privacy of patient's personal and medical information. The system must meet all applicable state and federal privacy and security standards.

The AHCA may subscribe to or participate in a national or private clearinghouse that will accomplish the same goals in lieu of establishing an independent clearinghouse. Once clearinghouse information is available, the AHCA is required to publish and disseminate

information regarding the availability of the clearinghouse to Floridians. The AHCA must also provide training to health care providers and health care facilities on how to access plans.

Health Insurance Portability and Accountability Act (HIPAA)

Federal law provides a right to privacy for health and medical records under the Health Insurance Portability and Accountability Act (HIPAA) of 1996,[29] the law required the federal Health and Human Services Secretary to develop privacy regulations by 1999 if Congress did not enact federal legislation on the same subject matter. The final regulation, the Privacy Rule, was published December 28, 2000.[30] The main goal of the federal Privacy Rule is the protection of individual health information while allowing for the flow of necessary health data for the promotion and provision of quality health care. The other objective was to inform individuals about how their health information was to be used and to allow individuals more control over the use of their health information.[31]

The Privacy Rule covers health plans, health care providers, and health care clearinghouses[32] which are collectively known as "covered entities." The rule protects all individually identifiable health information[33] or protects health information held or transmitted by a covered entity or its business associates.[34] A covered entity is permitted, but not required, to use and disclose protected information, without an individual's authorization for the following purposes or situations:

- To the individual;
- For treatment, payment, and health care operations;
- In an opportunity to agree or object (example: patient listings in hospital directory);
- For public interest and benefit activities (example: when required by law); and
- In a limited data set for purposes of research, public health, or health care operations.[35]

A HIPAA-covered health care provider or health care plan may share a patient's protected health information if it has a court order. A subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case is different from a court order. However, a HIPAA-covered provider may disclose HIPAA-covered provider or plan information to a party issuing a

[29] Health Insurance Portability and Accountability, Act, Pub. L. 104-191, (Aug. 21, 1996).
[30] Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 29, 2000) (codified at 45 CFR 160 and 45 CFR 164; effective Feb. 26, 2001).
[31] U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, p 1, https://www.hhs.gov/sites/default/files/privacysummary.pdf (last visited Jan. 9, 2018).
[32] A health care clearinghouse is an entity that processes nonstandard information that they receive from another entity into a standard (i.e.: standard format or data content) or vice versa.
[33] Individually identifiable health information is information that relates to the individuals past, present or future physical or mental health 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 that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.
[34] A business associate is defined as a person or organization, other than a member of a covered entity's workforce, that performs certain functions or activities on behalf of, or provides certain functions or activities on behalf of, or provides certain services to, a covered entity that involve the use or disclosure of individual identifiable health information. Functions include claims processing, data analysis, utilization, and billing. *See also* 45 CFR 160.103.
[35] *Supra* note 31, at 4-9.

subpoena only if the notification requirements of the Privacy Rule are met. Those notification requirements require the provider or plan to:

- Notify the person who is the subject of the information about the request, so the person has the opportunity to object to the disclosure; or
- Seek a qualified protective order for the information from the court.[36]

In general, the HIPAA privacy provisions shall preempt any state law that is contrary to its provisions.[37] However, if a state law with regard to its privacy provisions is more stringent, the state can apply to the Secretary of HHS for an exception under certain circumstances.[38]

III. Effect of Proposed Changes:

Section 1 of the bill:

- Creates s. 408.0641, F.S., establishing an exemption from public records for personal identifying information filed under and held in the Clearinghouse for Compassionate and Palliative Care Plans. Such information held and managed by the AHCA or its designee in the clearinghouse is confidential and exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution.
- The AHCA or its designee may disclose confidential and exempt information to the following persons or entities upon request using a verification process to ensure legitimacy of the request and the requestor's identity for patients with a terminal illness and a plan in the clearinghouse:
  - A health care provider as defined in s. 408.07, F.S., who certifies that the information is necessary to provide medical treatment;
  - A patient or legal guardian or designated health care surrogate of a patient; or
  - A health care facility that certifies that the information is necessary to provide medical treatment.

This section of the bill is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

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[36] U.S. Department of Health and Human Services, *HIPAA for Individuals*, Court Orders and Subpoenas, https://www.hhs.gov/hipaa/for-individuals/court-orders-subpoenas/index.html (last visited Jan. 9, 2018).

[37] *Supra* note 29, at §1178. *See also* 45 CFR §§160.201-205 (January 2018).

[38] *See* 45 CFR §160.202- A standard, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met. (a) A determination is made by the Secretary under §160.204 that the provision of State law: (1) Is necessary: (i) To prevent fraud and abuse related to the provision of or payment of health care; (ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation; (iii) To ensure appropriate State reporting on health care delivery or costs; or (iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served, or (2) Has as its principal purpose the regulation or manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law. (b) The provision of state law, including any state procedures established under that state law, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention. (d) The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

Section 2 of the bill provides legislative findings. The bill finds that it is a public necessity to make confidential and exempt from disclosure information held in the clearinghouse which would identify a patient, his or her terminal illness, or the patient's family members. If made publicly available, such personal information would invade the personal privacy of the patient and his or her family. Family medical decisions are a private matter. The Legislature also finds that public disclosure of such information could hinder the efficient administration of the clearinghouse and could reduce participation. Finally, information could be used to solicit, harass, stalk, or intimidate terminally ill patients or their families.

Section 3 of the bill provides that the bill takes effect on the same date that SB 474, or a similar bill, takes effect.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Voting Requirement

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

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. The bill creates a new public records exemption and includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts certain identifying information of patients, the patient's terminal illness, and the patient's family members that is held by the AHCA within the clearinghouse. The public necessity for the exemption provides that it is necessary to protect patient and caregiver information from disclosure to protect their privacy and to protect them from potential harassment and for the efficient and effective administration of the clearinghouse. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

In general, the federal HIPAA privacy provisions shall preempt any state law that is contrary to its provisions. However, if a state law with regard to its privacy provisions is more stringent, the state can apply to the Secretary of HHS for an exception under certain circumstances.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector already has a duty under federal law and regulation to maintain personal identifiable information that would be contained in this clearinghouse as private; however, individuals and entities are permitted to release that information under certain circumstances to specified individuals.

If the AHCA decides to contract for the clearinghouse, there may be ongoing costs responding to requests from third parties for data.

C. Government Sector Impact:

The AHCA reports that CS/SB 476 has no fiscal impact.[39]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 408.0641 of the Florida Statutes.

[39] E-Mail from Tony Guzzo, Legislative Affairs, Agency for Health Care Administration (Jan. 9, 2018) (on file with the Senate Committee on Health Policy).

IX. Additional Information:

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

CS by Health Policy on January 16, 2018:
The CS aligns the public records language with the substantive bill as to who may request information from the clearinghouse for medical treatment to reflect health care providers and adds the substantive bill number.

B. Amendments:

None.