

**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 Committee on Rules

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BILL: SB 7030

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Health Information of an Inmate or an Offender

DATE: February 1, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Siples</u>	<u>Jones</u>		<b>CJ Submitted as Comm. Bill/Fav</b>
1.	<u>Siples</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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## I. Summary:

SB 7030 amends s. 945.10, F.S., to save from repeal the current exemptions from public records disclosure of an inmate's or offender's protected health information and HIV testing information held by the Department of Corrections (DOC).

The original public necessity statement provides that it is a public necessity that an inmate's or offender's protected health information and HIV testing held by the DOC remain confidential and exempt from public disclosure. Allowing such information to be publicly disclosed would, in some cases, conflict with federal law and would be a violation of the inmate's or prisoner's privacy under the Florida Constitution. Additionally, maintaining the confidentiality of HIV testing information is essential to an inmate's or prisoner's participation in such testing.

These exemptions, relating to protected health information and HIV testing information of an inmate or offender held by the DOC, are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature. This bill removes the scheduled repeal of the exemptions.

The bill is not expected to impact state or local revenues or expenditures.

The bill is effective October 1, 2022.

## 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.<sup>1</sup> This applies to the official business

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

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.<sup>2</sup>

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.<sup>3</sup> The Public Records Act states that

[i]t 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.<sup>4</sup>

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.<sup>5</sup> Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

Section 119.011(12), F.S., defines “public records” to include:

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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to “perpetuate, communicate, or formalize knowledge of some type.”<sup>6</sup>

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

Only the Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must be created by general law and must specifically state the public necessity justifying the

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<sup>2</sup> *Id.*

<sup>3</sup> Public records laws are found throughout the Florida Statutes.

<sup>4</sup> Section 119.01(1), F.S.

<sup>5</sup> *Locke v. Hawkes*, 595 So. 2d 32, 34 (Fla. 1992); *see also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> Section 119.07(1)(a), F.S.

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

exemption.<sup>10</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>11</sup> and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act *and confidential*.<sup>13</sup> Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.<sup>14</sup> Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>15</sup>

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

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act (the Act), prescribe a legislative review process for newly created or substantially amended public records or open meetings exemptions,<sup>16</sup> with specified exceptions.<sup>17</sup> The Act requires the repeal of such exemption 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 or repeal the sunset date.<sup>18</sup> In practice, many exemptions are continued by repealing the sunset date, rather than reenacting the exemption.

The Act 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.<sup>19</sup> 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;<sup>20</sup>
- 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;<sup>21</sup> or

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<sup>10</sup> *Id.*

<sup>11</sup> The bill may, however, contain multiple exemptions that relate to one subject.

<sup>12</sup> FLA. CONST., art. I, s. 24(c)

<sup>13</sup> *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>16</sup> 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 records or information or to include meetings.

<sup>17</sup> Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>18</sup> Section 119.15(3), F.S.

<sup>19</sup> Section 119.15(6)(b), F.S.

<sup>20</sup> Section 119.15(6)(b)1., F.S.

<sup>21</sup> Section 119.15(6)(b)2., F.S.

- It protects trade or business secrets.<sup>22</sup>

The Act also requires specified questions to be considered during the review process.<sup>23</sup> In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>24</sup> If the exemption is reenacted or saved from repeal without substantive changes or if the 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.<sup>25</sup>

### **Provision of Health by DOC**

The DOC is responsible for the inmates of the state correctional system and has supervisory and protective care, custody, and control of the inmates within its facilities.<sup>26</sup> The DOC has the constitutional and statutory imperative to provide adequate health services to state prison inmates directly related to this responsibility.<sup>27</sup> This medical care includes comprehensive medical, mental health, and dental services, and all associated ancillary services.<sup>28</sup> The DOC's Office of Health Service (OHS) oversees the delivery of health care services and handles statewide functions for such delivery. The OHS is led by the Director of Health Services, who reports to the Secretary.<sup>29</sup>

The DOC contracts with the Centurion of Florida, LLC (Centurion) to provide comprehensive statewide medical, mental health, dental services, and operates the DOC's reception medical center. The care provided is under a managed care model. All inmates are screened at a DOC reception center upon arrival from the county jail. The purpose of this intake process is to determine the inmate's current medical, dental, and mental health care needs, which is achieved through assessments, in part, for auditory, mobility and vision disabilities, and the need for specialized mental health treatment.<sup>30</sup>

<sup>22</sup> Section 119.15(6)(b)3., F.S.

<sup>23</sup> Section 119.15(6)(a), F.S. The specified questions are:

- 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?
- 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?

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

<sup>25</sup> Section 119.15(7), F.S.

<sup>26</sup> Sections 945.04(1) and 945.025(1), F.S.

<sup>27</sup> *Crews v. Florida Public Employers Council 79, AFSCME*, 113 So. 3d 1063 (Fla. 1st DCA 2013); *See also* s. 945.025(2), F.S.

<sup>28</sup> The DOC, Office of Health Services, available at <http://www.dc.state.fl.us/org/health.html> (last visited January 4, 2022).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* *See also* the DOC Annual Report, p. 19.

After the intake process is completed, inmates are assigned to an institution based on their medical and mental health needs and security requirements. Centurion provides primary care using a staff of clinicians, nurses, mental health, and dental professionals and administrators within each major correctional institution. The health services team provides health care services in the dorms for inmates who are in confinement.<sup>31</sup>

### **The Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Rule**

HIPAA was enacted on August 21, 1996, to publicize standards for the electronic exchange, privacy, and security of health information.<sup>32</sup> The Privacy Rule (rule) adopted by the U.S. Department of Health and Human Services (HHS) was required by the HIPAA<sup>33</sup> to address the use and disclosure of personal health information. The requirements of the rule apply to individual and group health plans that provide or pay the cost of medical care, every health care provider that electronically transmits health information in connection with certain transactions, and health care clearinghouses that process nonstandard information received from another entity into a standard format or that process standard information into a nonstandard format. Under the rule, all “individually identifiable health information” is protected. Such information includes demographic data such as an individual’s name, address, date of birth, and social security number; the individual’s past, present, or future physical or mental health condition; the provision of health care to such individual; and payments made or to be made for the provision of health care to the individual. Unless for the purposes authorized by the rule, protected health information may not be disclosed without the written authorization of the protected individual.<sup>34</sup>

### ***Department of Corrections and HIPAA***

The DOC is a covered entity for purposes of the rule. The DOC provides comprehensive health care for inmates, including medical, mental health, dental services and all associated ancillary services.<sup>35</sup>

“Within [a correctional] system, inmates’ health information may originate from or reside in many locations, including booking notes (e.g., infectious or chronic disease status), sick-call triage systems, physician notes, and other departments such as housing and work details (e.g., mobility or injury status).”<sup>36</sup> The rule protects the health information of inmates, but also recognizes that correctional facilities have legitimate needs to use and share the information without authorization by the inmate. Thus, the rule includes provisions regarding permissible uses and disclosures of inmates’ health information in the correctional context.

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<sup>31</sup> *Id.*

<sup>32</sup> U.S. Dep’t of Health and Human Services, *Summary of the HIPAA Privacy Rule*, available at <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> (last visited January 4, 2022).

<sup>33</sup> 45 CFR Parts 160, 162, and 164.

<sup>34</sup> *Id.*

<sup>35</sup> *Supra* note 28.

<sup>36</sup> Melissa M. Goldstein, JD, *Health Information Privacy and Health Information Technology in the US Correctional Setting*, *AM J Public Health*, 2014 May, 104(5): 803-809, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3987588/> (last visited January 4, 2022).

Covered entities may disclose the PHI [personal health information] of inmates without their authorization to correctional institutions or law enforcement officials who have lawful custody of an inmate for the purpose of providing health care to the inmate or for the health and safety of the inmate, other inmates, the officers and employees of the institution and others at the facility, and those responsible for inmate transfer. Covered entities may also disclose the PHI of inmates without authorization for law enforcement purposes on the premises of an institution and for the administration and maintenance of the safety, security, and good order of the institution. These provisions apply only to the release of the PHI of current inmates. When inmates are released, they have the same privacy rights under HIPAA as all other individuals.<sup>37</sup>

### **Public Records Exemption for Personal Health Information and HIV Testing Information**

In 2017, the Legislature amended s. 945.10, F.S., to classify the following records held by the DOC as confidential and exempt from Florida’s public record law:

- “Protected health information”<sup>38</sup> of an inmate or an offender;
- HIV tests<sup>39</sup> of an inmate or offender; and
- HIV test results<sup>40</sup> received on an inmate or offender.

Section 945.10(2), F.S., provides that protected health information, as well as mental health, medical, and substance abuse records, may be released to:

- The Executive Office of the Governor, the Correctional Medical Authority, and the Department of Health for health care oversight activities authorized by state or federal law, including audits; civil, administrative, or criminal investigations; or inspections relating to the provision of health services;<sup>41</sup>
- A state attorney, a state court, or a law enforcement agency conducting an ongoing criminal investigation if the inmate agrees to the disclosure and provides written consent. If the inmate refuses to provide written consent, in response to a court order, a subpoena, investigative, or

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<sup>37</sup> *Id.*

<sup>38</sup> 45 C.F.R. s. 160.103, defines “protected health information” to mean individually identifiable health information that is: transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium. Protected health information excludes individually identifiable health information: in education records covered by the Family Educational Rights and Privacy Act; in records described at 20 U.S.C. 1232g(a)(4)(B)(iv)(education records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by physician, psychiatrist, psychologist); in employment records held by a covered entity in its role as employer; and regarding a person who has been deceased for more than 50 years.

<sup>39</sup> “HIV test” means a test ordered after July 6, 1988, to determine the presence of the antibody or antigen to human immunodeficiency virus or the presence of human immunodeficiency virus infection. (Section 381.004, F.S.).

<sup>40</sup> “HIV test result” means a laboratory report of a human immunodeficiency virus test result entered into a medical record on or after July 6, 1988, or any report or notation in a medical record of a laboratory report of a human immunodeficiency virus test. The term does not include test results reported to a health care provider by a patient. (Section 381.004, F.S.).

<sup>41</sup> 45 C.F.R. 164.512(d).

administrative subpoena, a court-ordered warrant, or a statutorily authorized investigative demand or other process<sup>42</sup> the records can be released to such persons provided that:

- The protected health information and records sought are relevant and material to a legitimate law enforcement inquiry;
- There is a clear connection between the investigated incident and the inmate's protected health information;
- The request is specific and limited in scope to the extent reasonably practicable; and
- De-identified information could not be reasonably used.<sup>43</sup>
- A state attorney or a law enforcement agency if an inmate is or is suspected of being a victim of a crime if the inmate agrees to the disclosure and provides written consent. If the inmate is unable to agree because of incapacity or other emergency circumstances<sup>44</sup> provided that:
  - The information is needed to determine whether a violation of law by a person other than the inmate has occurred;
  - The information is not intended to be used against the inmate victim;
  - The immediate law enforcement activity would be materially and adversely affected by waiting until the inmate victim is able to agree to the disclosure; and
  - The disclosure is in the best interests of the inmate victim, as determined by the department.<sup>45</sup>
- A state attorney or a law enforcement agency if the department believes in good faith that the information and records constitute evidence of criminal conduct that occurred in a correctional institution or facility provided that:
  - The protected information and records are specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information or records are sought;
  - There is a clear connection between the criminal conduct and the inmate whose protected health information and records are sought; and
  - De-identified information could not reasonably be used.<sup>46</sup>
- The Division of Risk Management of the Department of Financial Services upon certification by the Division that the information is necessary to investigate and provide legal representation for a claim against the DOC.<sup>47</sup>
- The Department of Legal Affairs or an attorney retained to represent the DOC if the inmate is bringing a legal action against the department.<sup>48</sup>
- Another correctional institution or law enforcement official having lawful custody of the inmate if the protected health information or records are necessary for:
  - The provision of health care to the inmate;
  - The health and safety of the inmate or other inmates;
  - The health and safety of the officers, employees, or others at the correctional institution or facility;

<sup>42</sup> All orders, subpoenas, warrants, or other statutorily authorized demand must be in accordance with 45 C.F.R 164, part E, governing security and privacy of health information.

<sup>43</sup> 45 C.F.R. 164.512(f)(1).

<sup>44</sup> The circumstances must be in accordance with 45 C.F.R. 164, part E, governing security and privacy of health information.

<sup>45</sup> 45 C.F.R. 164.512(f)(3).

<sup>46</sup> 45 C.F.R. 164.512(f)(5).

<sup>47</sup> 45 C.F.R. 164.508(a)(2)(C).

<sup>48</sup> *Id.*

- The health and safety of the individuals or officers responsible for transporting the inmate from one correctional institution, facility, or setting to another;
- Law enforcement on the premises of the correctional institution or facility; or
- The administration and maintenance of the safety, security, and good order of the correctional institution or facility.<sup>49</sup>
- The Department of Children and Families and the Florida Commission on Offender Review if the inmate received mental health treatment while in the custody of the DOC and becomes eligible for release under supervision or upon the end of his or her sentence.<sup>50</sup>

The DOC may also release the protected health information and mental health, medical, or substance abuse records of an inmate to persons acting on behalf of a deceased inmate or offender only for the purpose of requesting access to the information if:

- The person is appointed by a court to act as the personal representative, executor, administrator, curator, or temporary administrator of the deceased inmate's or offender's estate;
- A court has not made a judicial appointment, but the person was designated as a personal representative in a last will and testament; or
- A court has not made a judicial appointment and the inmate or offender has not designated a person in a self-proved last will. In such case, persons include surviving spouses, adult children, and parents of the inmate or offender.<sup>51</sup>

Protected health information, as well as mental health, medical, and substance abuse records may also be obtained by subpoena or other court process.<sup>52</sup>

### ***Public Necessity for Exemption***

In creating the exemption, the Legislature articulated the following reasons for the exemption:

[I]t is a public necessity that an inmate's or offender's protected health information and HIV testing information held by the Department of Corrections pursuant to s. 945.10, Florida Statutes, remain confidential and exempt from public disclosure as the Legislature envisioned in this statute and as provided in department rules. Allowing protected health information to be publicly disclosed would in some cases cause a conflict with existing federal law and would be a violation of an inmate's or offender's privacy under the State Constitution. Maintaining the confidentiality of an inmate's or offender's HIV testing information is essential to his or her participation in such testing. Thus, the harm from disclosure would outweigh any public benefit derived therefrom. Appropriate records and protected health information are available, however, to various governmental entities in order for them to perform their duties. It is mandatory that prisons function as effectively, efficiently, and nonviolently as possible. To release such information to the public

<sup>49</sup> 45 C.F.R. 164.512(f)(5).

<sup>50</sup> 45 C.F.R. 164.512(d)(2) or (6).

<sup>51</sup> 45 C.F.R. 164.512(g).

<sup>52</sup> 45 C.F.D. 164.512(e).



would severely impede that function and would jeopardize the health and safety of those within and outside the prison system.<sup>53</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless reenacted by the Legislature.<sup>54</sup>

The DOC reports that since 2019, its Office of Inspector General, which processes a portion of DOC's requests for public records, has asserted the exemption under s. 945.10(1)(a), F.S., for 398 requests out of a total of 800 responses.<sup>55</sup> Further, it reports that it has asserted the exemption approximately 800 times since 2017 and there has not been any litigation involving the exemption since its enactment. The DOC recommends retaining the exemption in its current form.<sup>56</sup>

### III. Effect of Proposed Changes:

The bill amends s. 945.10(1)(a)2. and (h), F.S., to save from repeal the current exemptions from public records disclosure of an inmate's or offender's personal health information or HIV testing information held by the DOC.

The bill deletes the scheduled repeal of the current public records exemption for an inmate's or offender's personal health information or HIV testing information held by the DOC.

The bill is effective October 1, 2022.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

#### B. Public Records/Open Meetings Issues:

##### 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 bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

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<sup>53</sup> Chapter 2017-114, Laws of Fla.

<sup>54</sup> Section 945.10(1)(a)2. and (h), F.S.

<sup>55</sup> E-mail correspondence from Philip A. Fowler, Attorney Supervisory, Administration Unit, Florida Department of Corrections, (September 14, 2021) (on file with the Senate Committee on Criminal Justice). The DOC's central office also receives public records requests and has asserted the exemption, it was unable to identify the number of times the exemption was asserted due to the volume of requests received and the need to manually review each response.

<sup>56</sup> *Id.*, and interview with staff from the DOC (August 26, 2021).

**Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion.

**Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the exemptions is to protect an inmate's or offender's personal health information and HIV testing information. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**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. Statutes Affected:**

This bill substantially amends section 945.10 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of 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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