

**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 Governmental Oversight and Accountability Committee

BILL: SB 1192

INTRODUCER: Children, Families, and Elder Affairs Committee and Senators Rich and Flores

SUBJECT: Public Records/Regional Autism Centers

DATE: April 13, 2011 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	<b>Favorable</b>
2.	O'Callaghan	Stovall	HR	<b>Fav/1 amendment</b>
3.	Naf	Roberts	GO	<b>Pre-meeting</b>
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/>            | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input checked="" type="checkbox"/> | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill creates a public-records exemption for all records that relate to a client of a regional autism center, the client's family, or a teacher or other professional who receives the services of a center or participates in center activities. The bill specifies circumstances under which the records may be released.

The bill provides that the public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2016, unless it is reviewed and reenacted by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution.

Because this bill creates a new public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends section 1004.55, Florida Statutes.

## II. Present Situation:

### Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.<sup>1</sup> In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act<sup>3</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection. Section 119.011(12), F.S., defines the term “public records” very broadly to include “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The Florida Supreme Court has interpreted the definition of public records to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formulize knowledge.”<sup>5</sup> Unless made exempt, all such materials are open for public inspection at the moment they become records.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>7</sup>

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>8</sup> If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.<sup>9</sup>

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

<sup>2</sup> FLA. CONST. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.

<sup>5</sup> *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>6</sup> *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

<sup>7</sup> FLA. CONST. art. I, s. 24(c).

<sup>8</sup> *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

<sup>9</sup> *Id.* at 54.

## Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>10</sup> provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>11</sup> An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be greatly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.<sup>12</sup>

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- 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?
- 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>13</sup>

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<sup>10</sup> Section 119.15, F.S.

<sup>11</sup> Section 119.15(6)(b), F.S.

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

<sup>13</sup> Section 119.15(6)(a), F.S.

### **Regional Autism Centers**

Section 1004.55, F.S., designates seven regional autism centers throughout the state to provide nonresidential resource and training services for persons of all ages and all levels of intellectual functioning who have:

- Autism;
- A pervasive developmental disorder that is not otherwise specified;
- An autistic-like disability;
- A dual sensory impairment; or
- A sensory impairment with other handicapping conditions.

Each center must be operationally and fiscally independent, provide services within its geographical region of the state, and coordinate services within and between state and local agencies provided by those agencies or school districts. The seven centers are located at:

- The College of Medicine at Florida State University;
- The College of Medicine at the University of Florida;
- The University of Florida Health Science Center;
- The Louis de la Parte Florida Mental Health Institute at the University of South Florida;
- The Mailman Center for Child Development and the Department of Psychology at the University of Miami;
- The College of Health and Public Affairs at the University of Central Florida; and
- The Department of Exceptional Student Education at Florida Atlantic University.<sup>14</sup>

Each of these centers must provide:

- Expertise in autism, autistic-like behaviors, and sensory impairments;
- Individual and direct family assistance;
- Technical assistance and consultation services;
- Professional training programs;
- Public education programs;
- Coordination and dissemination of local and regional information regarding available resources; and
- Support to state agencies in the development of training for early child care providers and educators with respect to developmental disabilities.<sup>15</sup>

### **Health Insurance Portability and Accountability Act**

The federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule establishes national standards, and requires appropriate safeguards, to protect individuals' medical records and other personal health information.<sup>16</sup> The Privacy Rule applies only to "covered entities," which are health plans, health care clearinghouses, and those health care

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<sup>14</sup> Section 1004.55(1), F.S.

<sup>15</sup> Section 1004.55(4), F.S.

<sup>16</sup> U.S. Department of Health and Human Services, *Health Information Privacy: The Privacy Rule*, available at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html> (Last visited on April 7, 2011).

providers that conduct certain health care transactions electronically.<sup>17</sup> Many organizations, institutions, and researchers that use, collect, access, and disclose individually identifiable health information are not covered entities.<sup>18</sup>

The Privacy Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records and to request corrections; it also sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.<sup>19</sup>

In 2009, the Institute of Medicine's Committee on Health Research and the Privacy of Health Information issued a report concluding that the HIPAA Privacy Rule does not adequately protect the privacy of people's personal health information and hinders important health research discoveries.<sup>20</sup>

The HIPAA Privacy Rule does not protect against all forced disclosure since it permits disclosures required by law, for example. Various federal agencies may grant a Certificate of Confidentiality for studies that collect information that, if disclosed, could damage subjects' financial standing, employability, insurability, or reputation, or have other adverse consequences. By protecting research and institutions from forced disclosure of such information, Certificates of Confidentiality help achieve research objectives and promote participation in research studies.<sup>21</sup>

### **Family Educational Rights and Privacy Act**

The Family Educational Rights and Privacy Act (FERPA)<sup>22</sup> is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.<sup>23</sup>

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."<sup>24</sup>

Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for

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<sup>17</sup> *Id.* See also U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at [http://privacyruleandresearch.nih.gov/pr\\_06.asp](http://privacyruleandresearch.nih.gov/pr_06.asp) (Last visited April 7, 2011).

<sup>18</sup> U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at [http://privacyruleandresearch.nih.gov/pr\\_06.asp](http://privacyruleandresearch.nih.gov/pr_06.asp) (Last visited April 7, 2011).

<sup>19</sup> *Supra* fn. 43.

<sup>20</sup> The Institute of Medicine, *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*. The National Academies' press release announcing the report is available at: <http://www.iom.edu/Reports/2009/Beyond-the-HIPAA-Privacy-Rule-Enhancing-Privacy-Improving-Health-Through-Research.aspx> (Last visited on April 7, 2011).

<sup>21</sup> *Id.*

<sup>22</sup> 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

<sup>23</sup> U.S. Department of Education, *Family Educational Rights and Privacy Act (FERPA)*, available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (Last visited on April 7, 2011).

<sup>24</sup> *Id.*

reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.<sup>25</sup>

Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.<sup>26</sup>

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions:

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and,
- State and local authorities, within a juvenile justice system, pursuant to specific State law.<sup>27</sup>

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.<sup>28</sup>

### III. Effect of Proposed Changes:

This bill provides that all records that relate to a client of a regional autism center, the client's family, or a teacher or other professional who receives the services of a center or participates in center activities are confidential and exempt from s. 119.071(1), F.S., and s. 24(a), Art. I of the State Constitution.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 34 CFR § 99.31.

<sup>28</sup> *Supra* fn. 23.

The bill provides that a client who receives the services of a center, if competent, or the client's parent or legal guardian if the child is incompetent, shall be provided with a copy of the client's individual records upon request. The bill also specifies that the regional autism center may release the confidential and exempt information or records as follows:

- To physicians, attorneys, and governmental entities having a need for the record to aid a client;
- In response to a subpoena or otherwise authorized by court order;
- To a qualified researcher, the State Board of Education, or the Florida Board of Governors when the director of the center deems it necessary for the treatment of the client, maintenance of adequate records, compilation of treatment data, or evaluation of programs, as long as all personally identifiable information is first removed; or
- For statistical and research purposes by the director of the center, provided that any personally identifiable information is removed.

The exemption is subject to the provisions of the Open Government Sunset Review Act and will expire on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also provides a public necessity statement as required by the State Constitution.<sup>29</sup> Specifically, the bill states that matters of personal health are traditionally private and confidential concerns and that an individual has an expectation of and right to privacy in all matters regarding his or her personal health. Furthermore, the bill provides that it is a public necessity to protect the records of clients of a regional autism center, the client's family, or a teacher or other professional who receives the services of a center because release of such records could be defamatory to the client or could cause unwarranted damage to the name or reputation of that client or the client's family. By protecting these records it ensures an environment in which the discussion of the condition of autism or related disorders can be conducted in a free and open manner, which in turn will enable individuals with autism and their families to receive appropriate diagnostic and treatment information.

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

#### **IV. Constitutional Issues:**

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

The provisions of this bill have no impact on municipalities and the counties under the requirements of article VII, section 18 of the Florida Constitution.

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

This bill creates a public records exemption for all records that relate to a client of a regional autism center, the client's family, or a teacher or other professional who receives the services of a center or participates in center activities. This bill appears to comply with the requirements of article I, section 24 of the Florida Constitution that public-

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<sup>29</sup> Section 24(c), Art. I of the State Constitution.

records exemptions state the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose, and be addressed in legislation separate from substantive law changes.

Additionally, because this bill is creating a new public-records exemption, it is subject to a two-thirds vote of each house of the Legislature for enactment as required by article I, section 24 of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f) of the Florida Constitution.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The seven regional autism centers in the state are located in conjunction with state universities, which, because universities are public entities, makes the records of clients accessible and subject to Florida's public-records law. According to the Board of Governors, the research centers do not fall under the protection of the Health Insurance Portability and Accountability Act (HIPAA) or the Family Educational Rights and Privacy Act (FERPA), so the passage of this bill will protect the identity and personal information of clients, clients' families, and teachers or other professionals receiving the services of the center.<sup>30</sup>

**C. Government Sector Impact:**

According to the Board of Governors, "[t]here will be additional Autism Center staff effort involved in removing personal identification information from requests for data by outside customers in the absence of permission to release such information. However, the amount of time required should be minimal and should not create a material employee workload issue."<sup>31</sup>

**VI. Technical Deficiencies:**

On line 40 of the bill, it provides that a "qualified researcher" may have access to portions of the confidential and exempt information covered by the bill. The bill does not define this term and it is unclear who will be considered a "qualified researcher."

<sup>30</sup> Bd. of Governors, *2011 Legislative Bill Analysis, HB 579* (Feb. 10, 2011) (on file with the Senate Health Regulation Committee) (HB 579 is identical to this bill).

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

Additionally, the bill provides that the public-records exemption is necessary because the release of the records could be defamatory to the client or could cause unwarranted damage to the name or reputation of that client or the client's family (lines 71-73). Although the public-records exemption is for all records that relate to a client of a regional autism center, the client's family, *or a teacher or other professional* who receives the services of a center or participates in center activities, the public necessity portion of the bill does not mention that the release of the records could cause damage to the name or reputation of the teacher or other professional.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

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

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

None.

**B. Amendments:**

**Barcode 112706 by Health Regulation on April 12, 2011:**

This amendment:

- Removes the public-records exemption provided for in the bill for records relating to teachers or other professionals who receive services of a regional autism center or participate in the center's activities.
- Authorizes release of confidential and exempt records to the State Board of Education or the Board of Governors, without requiring personal identifying information to be abstracted.
- Authorizes information contained in the confidential and exempt records to be released to a person engaged in bona fide research if the researcher signs a confidentiality agreement with the center, agrees to maintain confidentiality, and destroys any confidential information after the conclusion of the research.
- Makes personal identifying information of a financial donor or prospective financial donor to the regional autism center confidential and exempt.
- Provides a public necessity statement for the public-records exemption for the personal identifying information of a financial donor.

(WITH TITLE AMENDMENT)