

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 Criminal Justice

BILL: SB 1526

INTRODUCER: Senator Bracy

SUBJECT: Public Records/Health Information/Department of Corrections

DATE: March 20, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Hrdlicka	CJ	Favorable
2.			GO	
3.			RC	

I. Summary:

SB 1526 amends s. 945.10, F.S., to include protected health information of inmates and information related to HIV testing held by the Department of Corrections as records that are confidential and exempt from public disclosure in accordance with the federal Health Insurance Portability and Accountability Act (HIPAA).

The bill aligns Florida law with the exemptions established in the HIPAA Privacy Rule by authorizing the release of protected health information and mental health, medical, and substance abuse records to other agencies, including law enforcement agencies, for legitimate state purposes.

The bill provides that the exemptions for protected health information of an inmate and identity of an inmate upon whom an HIV test has been performed are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

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

The Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.

II. Present Situation:

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.¹ The Privacy Rule (rule) adopted by the U.S. Department of Health and Human Services (HHS) was required by the HIPAA² 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.

Department of Corrections and HIPAA

The Florida Department of Corrections (department) is a covered entity for purposes of the rule. The department provides comprehensive health care for inmates, including medical, nursing, pharmacy, mental health, and dental.³

“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).”⁴ 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.

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

¹ United States Department of Health and Human Services, *Summary of the HIPAA Privacy Rule*, Last Revised May 2003.

² 45 CFR Parts 160, 162, and 164.

³ Department of Corrections, *Health Care Facts*, available at <http://www.dc.state.fl.us/oth/hlthfact.html> (last visited March 16, 2017).

⁴ 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 March 16, 2017).

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.⁵

The department states that it is “unable to share inmate or offender protected health information and medical and mental health records for legitimate governmental functions in the absence of consent, a subpoena, or other court involvement.”⁶

Public Records Laws

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.⁷ The records of the legislative, executive, and judicial branches are specifically included.⁸

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act⁹ guarantees every person’s right to inspect and copy any state or local government public record¹⁰ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.¹¹

Only the Legislature may create an exemption to public records requirements.¹² This exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances.¹⁴

If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released to anyone other than the persons or entities specifically designated in

⁵ *Id.*

⁶ Department of Corrections, *Agency Bill Analysis: SB 1526*, (March 10, 2017) (on file with the Senate Committee on Criminal Justice).

⁷ Fla. Const., art. I, s. 24(a).

⁸ *Id.*

⁹ Chapter 119, F.S.

¹⁰ Section 119.011(12), F.S., defines “public records” 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 “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.” The Public Records Act does not apply to legislative or judicial records *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

¹¹ Section 119.07(1)(a), F.S.

¹² Fla. Const., art. I, s. 24(c).

¹³ *Id.*

¹⁴ *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); and *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).

the statutory exemption.¹⁵ 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 provisions¹⁶ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁷

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 public records exemptions.¹⁸ 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.¹⁹

The OGSR provides that a public records exemption may be created only if it serves an identifiable public purpose and is no broader than necessary.²⁰ An exemption serves an identifiable purpose if it meets one of the following purposes 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.
- The release of 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.
- It protects trade or business secrets.²¹

In addition, the Legislature must find that the purpose of the exemption overrides Florida’s public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.²² In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption. These 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?

¹⁵ *WFTV, Inc. v. School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004) and *Wait v. Florida Power and Light Co.*, 372 So.2d 420 (Fla. 1979).

¹⁶ However, the bill may contain multiple exemptions that relate to one subject.

¹⁷ Fla. Const., art. I, s. 24(c).

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 s. 119.15(2), F.S.¹⁸

¹⁹ Section 119.15(3), F.S.

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1.-3., F.S.

²² Section 119.15(6)(a), F.S.

- 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?²³

To enact an exemption, the Legislature must pass a bill by a two-thirds vote and the bill must include a public necessity statement justifying the exemption.²⁴

Confidential Information

Section 945.10, F.S., makes confidential and exempts from Florida public record laws the following Department of Corrections (department) records:

- Mental health, medical, or substance abuse records of an inmate or an offender;
- Preplea, pretrial intervention, and presentence or postsentence investigative records;
- Information regarding a person in the federal witness protection program;
- Florida Commission on Offender Review records which are confidential or exempt from public disclosure by law;
- Information which if released would jeopardize a person's safety;
- Information concerning a victim's statement and identity;
- Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection; and
- Records that are otherwise confidential or exempt from public disclosure by law.

Currently, the only permitted statutory disclosure of mental health, medical, or substance abuse records of an inmate or offender is to the Department of Health and the county health department where an inmate plans to reside if he or she has tested positive for the presence of the antibody or antigen to human immunodeficiency virus infection (HIV).²⁵ The identify of a person upon whom a test has been performed and the test results are generally confidential and exempt from public records pursuant to s. 381.004(2), F.S.

Section 456.057, F.S., which also governs medical and mental health records maintained by the department, also contains limited record sharing. Most of the allowed disclosures deal with issues such as insurance, billing, investigations of medical malpractice, or medical research, which do not "contemplate the unique needs" of the department.²⁶

²³ Section 119.15(6)(a)1.-6., F.S.

²⁴ Section 119.15(7), F.S.

²⁵ Section 945.10(1)(a), F.S.

²⁶ Department of Corrections, *Agency Bill Analysis: SB 1526*, (March 10, 2017).

III. Effect of Proposed Changes:

Confidential Information

The bill amends s. 945.10(1), F.S., to classify the following Department of Corrections (department) records and information as confidential and exempt from Florida's public record law:

- “Protected health information”²⁷ of an inmate or an offender;
- HIV tests²⁸ of an inmate or offender; and
- HIV test results²⁹ received on an inmate or offender.

The identify of a person upon whom a test has been performed and the test results are also currently confidential and exempt from public records pursuant to s. 381.004(2), F.S.

These additions to the department's confidential and exempt information are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

Release of protected health information and mental health, medical, or substance abuse records

The bill aligns Florida law with the exemptions established in the HIPAA Privacy Rule by authorizing the release of protected health information and mental health, medical, and substance abuse records. The bill allows the department's protected health information and mental health, medical, or substance abuse records of an inmate³⁰ to 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;³¹
- 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

²⁷ “Protected health information” means individually identifiable health information that is: transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium. (45 C.F.R. s. 160.103). It excludes 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.

²⁸ “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.).

²⁹ “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.).

³⁰ Section 945.10(1)(a), F.S.

³¹ 45 C.F.R. 164.512(d).

- administrative subpoena, a court-ordered warrant, or a statutorily authorized investigative demand or other process³² 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.³³
- 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 circumstances³⁴ 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.³⁵
 - 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.³⁶
 - 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 department.³⁷
 - The Department of Legal Affairs or an attorney retained to represent the department if the inmate is bringing a legal action against the department.³⁸
 - 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;

³² 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.

³³ 45 C.F.R. 164.512(f)(1).

³⁴ The circumstances must be in accordance with 45 C.F.R. 164, part E, governing security and privacy of health information.

³⁵ 45 C.F.R. 164.512(f)(3).

³⁶ 45 C.F.R. 164.512(f)(5).

³⁷ 45 C.F.R. 164.508(a)(2)(C).

³⁸ *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.³⁹
- 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 department and becomes eligible for release under supervision or upon the end of his or her sentence.⁴⁰

The bill also allows the department's protected health information and mental health, medical, or substance abuse records of an inmate be released to persons acting on behalf of a deceased inmate or offender only for the purpose of requesting access to the information if:⁴¹

- 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.

All requests for access to a deceased inmate or offender's protected health information are required to be in writing and accompanied by the following:

- If a person appointed by the court is acting as a personal representative, a copy of the letter of administration and a copy of the court order appointing the personal representative.
- If made by a person designated by the inmate as the personal representative in a last will and testament, a copy of the self-proved last will designating the person as the inmate's or offender's representative.
- If made by a surviving spouses, adult children, and parents of the inmate or offender, a letter from the person's attorney verifying the person's relationship to the inmate or offender and the absence of a court-appointed representative and self-proved last will.

Public Necessity

The bill provides that the Legislature finds that it is a public necessity that an inmate's or offender's protected health information and HIV testing information held by the department remain confidential and exempt from public disclosure.

The bill is effective July 1, 2017.

³⁹ 45 C.F.R. 164.512(f)(5).

⁴⁰ 45 C.F.R. 164.512(d)(2) or (6).

⁴¹ 45 C.F.R. 164.512(g).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 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 record exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created public record exemption. The bill creates a public record exemption and includes a public necessity statement.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, the bill does not appear to be in conflict with this constitutional requirement.

C. Trust Funds Restrictions:

None.

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:

SB 1604 (2017) amends s. 943.04, F.S., to authorize the Florida Department of Law Enforcement, when conducting an investigation or assisting in the investigation of an injury to or death of an inmate under the custody or control of the DOC, to serve a demand for production of the inmate's protected health information, medical records, or mental health records on the DOC. The records disclosed remain confidential and exempt from public records laws.

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.