

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 2146

SPONSOR: Commerce and Economic Opportunities Committee, Health, Aging and Long-Term Care Committee and Senator Mitchell

SUBJECT: Patient Records

DATE: April 18, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.	Joseph	Maclure	CM	Favorable/CS
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

The committee substitute prohibits the use of patient information for solicitation or marketing the sale of goods or services absent a specific written release or authorization permitting utilization of patient information for that purpose.

The committee substitute directs the Department of Insurance to adopt rules to govern the use of a consumer’s nonpublic financial and health information by health insurers and health maintenance organizations (HMOs) consistent with the National Association of Insurance Commissioners’ Privacy of Consumer and Health Information Regulation adopted September 26, 2000. The committee substitute also requires that these rules be consistent with, and not more restrictive than, the standards contained in Title V of the Gramm-Leach-Bliley Act of 1999 (Pub. L. No. 106-102).

The committee substitute amends the following sections of the Florida Statutes: 456.057, 395.3025, and 400.1415. The committee substitute creates s. 626.9651, F.S.

**II. Present Situation:**

**Ownership and Control of Patient Records**

Subsection (4) of s. 456.057, F.S., requires health care practitioners licensed by the Department of Health who generate a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person, upon request, to furnish, in a timely manner, to that person or that person’s legal representative, without delays for legal review, a copy of all reports and records relating to that examination or treatment, including X-

rays and insurance information. When a patient's psychiatric, psychological, or psychotherapeutic records are requested by the patient or the patient's legal representative, the health care practitioner may provide a report in lieu of copies of the record. The furnishing of such report or copies may not be conditioned upon payment of a fee for services rendered.

Except as provided in s. 456.057, F.S., patient records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. Such records may be disclosed: to any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent; when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff; in any civil or administrative action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking the records; or for statistical and scientific research, if the information is abstracted to protect the patient's identity or if written permission is received from the patient or the patient's legal representative.

Section 456.001, F.S., defines a health care practitioner as any person licensed under any of the following chapters of the Florida Statutes: chapter 457 (acupuncturists), chapter 458 (medical physicians), chapter 459 (osteopathic physicians), chapter 460 (chiropractic physicians), chapter 461 (podiatric physicians), chapter 462 (naturopaths), chapter 463 (optometrists), chapter 464 (nurses), chapter 465 (pharmacists), chapter 466 (dentists), chapter 467 (midwives), portions of chapter 468 (audiologists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dietitians/nutritionists, athletic trainers, orthotists, pedorthists, and prosthetists), chapter 478 (electrologists), chapter 480 (massage therapists), portions of chapter 483 (clinical laboratory personnel and medical physicists), chapter 484 (opticians and hearing aid specialists), chapter 486 (physical therapists), chapter 490 (psychologists), and chapter 491 (clinical social workers, marriage and family therapists, and mental health counselors).

As used in s. 456.057, F.S., "records owner" is defined to mean any health care practitioner who generates a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person; any health care practitioner to whom records are transferred by a previous records owner; or any health care practitioner's employer, if the contract or agreement between the employer and the health care practitioner designates the employer as the records owner. The following persons or entities are not authorized to acquire or own medical records, but are authorized under the confidentiality and disclosure requirements of s. 456.057, F.S., to maintain those documents required by regulations under which they are regulated: certified nursing assistants, pharmacists and pharmacies, dental hygienists, nursing home administrators, respiratory therapists, athletic trainers, electrologists, clinical laboratory personnel, medical physicists, opticians and optical establishments, or persons or entities making physical examinations for an injured person as part of personal injury protection claim.

Licensed health care practitioners who violate the requirements of s. 456.057, F.S., are subject to discipline by the appropriate licensing authority. The Attorney General is authorized to enforce

the provisions of s. 456.057, F.S., against any record owner who is not otherwise licensed in Florida, through injunctive relief and fines not to exceed \$5,000 per violation.

### **Confidentiality of Patient Records Maintained by Hospitals and Ambulatory Surgical Centers**

Section 395.3025, F.S., specifies requirements for confidentiality of patient records maintained by licensed hospitals or ambulatory surgical centers. Any licensed facility must furnish, upon written request, and only after discharge of the patient, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat, or to a guardian, the next of kin of a decedent, the parent of a minor, or some other recognized legal representative, a copy of all patient records concerning such person. Patient records are confidential and must not be disclosed without consent of the person to whom they pertain, but appropriate disclosure may be made without such consent to: licensed facility personnel and attending physicians, for use in connection with the treatment of the patient; licensed facility personnel, only for administrative purposes or risk management and quality assurance functions; the Agency for Health Care Administration (AHCA or the agency), for purposes of health care cost containment; in any civil or criminal action, unless otherwise prohibited by law, upon issuance of a subpoena by a court of competent jurisdiction; AHCA upon issuance of a subpoena, for purposes of disciplining health care practitioners; the Department of Health, for establishing and maintaining a trauma registry; the Department of Children and Family Services or its agent, for purposes of investigating child abuse, neglect, or exploitation of children or vulnerable adults; the State Long-Term Care Ombudsman Council and local councils, for conducting investigations involving patients if appropriate patient authorization is provided for the disclosure; a local or regional trauma agency, for quality assurance activities; organ procurement organizations, tissue banks, and eye banks required to conduct certain death records reviews; and the Medicaid Fraud Control Unit in the Department of Legal Affairs.

Under section 395.3025(5), F.S., the Department of Health may examine patient records for epidemiological investigations. The unauthorized release of information by agents of the Department of Health that would identify an individual patient is a first-degree misdemeanor punishable by up to one year of jail and a fine up to \$1,000.

If the content of any patient treatment record is provided under s. 395.3025, F.S., the recipient, if other than the patient or the patient's representative, may use such information only for the purpose provided and may not further disclose any information unless expressly permitted by written consent of the patient. The content of such patient records is confidential and exempt from disclosure under the Public Records Law.

### **Medical Records or Nursing Home Records**

Section 400.1415, F.S., provides that any person who fraudulently alters, defaces, or falsifies any medical record or other nursing home record, or causes or procures any of these offenses to be committed, commits a second-degree misdemeanor, punishable by up to 60 days of jail and a fine up to \$500.

## **Health Insurance Portability and Accountability Act of 1996**

On December 20, 2000, President Clinton issued landmark rules to protect the privacy of individuals' medical records. The 1996 Health Insurance Portability and Accountability Act (HIPAA)<sup>1</sup> required the administration to issue regulations protecting the privacy of health information. The United States Department of Health and Human Services issued Standards for Privacy of Individually Identifiable Health Information on December 28, 2000, which were originally scheduled to go into effect on February 26, 2001. The effective date for the regulations was delayed for a 30-day public comment period. The regulations took effect on April 14, 2001. The regulations only apply to health plans, health care clearinghouses, and certain health care providers. The regulations permit states to afford greater privacy protections to health information.<sup>2</sup>

The final regulations provide exceptions to permit marketing and fundraising activities by health care providers.<sup>3</sup> Patient authorization is not required before health information is used for these purposes. Under the regulations, health care providers are free to use or disclose protected health information as part of a discussion of their products and services, or the products and services of others, and to prescribe, recommend, or sell such products or services, as part of the treatment of an individual. The regulations limit the type of personal health information that a health care provider may use with fundraising activities.

## **Public Records Law**

The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. While the state constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Section 24 of Article I of the State Constitution governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. The State Constitution also provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, L.O.F. repealed the Open Government Sunset Review Act, contained in s. 119.14, F.S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The Open Government Sunset Review Act of 1995 provides for the repeal and prior review of any public records or public meetings exemptions that are created or substantially

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<sup>1</sup> Section 262 of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, enacted on August 21, 1996, directed the United States Department of Health and Human Services to develop standards to protect the security, including the confidentiality and integrity, of health information.

<sup>2</sup> Sections 160.201, 160.203, 160.204, and 160.205, C.F.R.

<sup>3</sup> Sections 164.501, 164.506, and 164.514, C.F.R.

amended in 1996 and subsequently. The review cycle begins in 2001. The chapter defines the term “substantial amendment” for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

### **Unfair Insurance Trade Practices**

Sections 626.951-626.99, F.S., constitute the Unfair Insurance Trade Practices Act, to regulate trade practices relating to the business of insurance by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

### **Gramm-Leach-Bliley Act**

The Gramm-Leach-Bliley (GLB) Act was signed into law by President Clinton on Nov. 12, 1999, and allows banks, securities firms and insurance companies to merge, affiliate with each other, and engage in new business activities outside their traditional areas. These entities can share certain consumer information which they can ultimately sell or provide to anyone they choose. However, GLB also authorizes state insurance regulators to issue regulations protecting the privacy of insurance consumers’ personal information. In response to GLB, the National Association of Insurance Commissioners (NAIC) adopted the model regulation noted above to provide specific protection for financial and health information about consumers held by insurers, agents, and other entities engaged in insurance activities. The model regulation requires insurers to:

- notify consumers about their privacy policies;
- give consumers the opportunity to prohibit the sharing of their protected financial information with non-affiliated third parties (a company that is not affiliated with an insurer); and
- obtain affirmative consent from consumers before sharing protected health information with any other parties, affiliated and non-affiliates alike.

The NAIC model is now under consideration by the states, and the Florida Department of Insurance needs to secure specific authorization from the Legislature before the department can promulgate consumer protection rules consistent with the NAIC regulation.

### **III. Effect of Proposed Changes:**

The committee substitute prohibits the use of patient information for solicitation or marketing the sale of goods or services absent a specific written release or authorization permitting utilization of patient information for that purpose.

The committee substitute directs the Department of Insurance to adopt rules to govern the use of a consumer’s nonpublic financial and health information by health insurers and health maintenance organizations (HMOs) consistent with the National Association of Insurance

Commissioners' Privacy of Consumer and Health Information Regulation adopted September 26, 2000. The committee substitute also requires that these rules be consistent with, and not more restrictive than, the standards contained in Title V of the federal Gramm-Leach-Bliley Act of 1999 (Pub. L. No. 106-102).

**Section 1.** Creates an undesignated section of law to provide legislative findings that personal identifying information, name, age, diagnosis, address, bank account numbers, and debit and credit card numbers contained in the records relating to an individual's personal health or eligibility for health-related services made or received by the individual's physician, pharmacist, and public or private health facility should be held confidential. Furthermore, the Legislature finds that every person has an expectation of and a right to privacy in all matters concerning her or his personal health when medical services are provided. Legislative intent is expressed to protect confidential information and the individual's expectations of and right to privacy in all matters regarding her or his personal health, and to not have such information exploited for purposes of solicitation or marketing the sale of goods and services.

**Section 2.** Amends s. 456.057, F.S., relating to the ownership and control of patient records, to prohibit the use of patient information for solicitation or marketing the sale of goods or services absent a specific written release or authorization permitting utilization of patient information for that purpose.

**Section 3.** Amends s. 395.3025, F.S., relating to patient and personnel records maintained by licensed hospitals and ambulatory surgical centers, to prohibit the use of patient information for solicitation or marketing the sale of goods or services absent a specific written release or authorization permitting utilization of patient information for that purpose.

**Section 4.** Amends s. 400.1415, F.S., relating to patient records or nursing home records maintained by licensed long-term care facilities, to expand the criminal offense for persons who fraudulently alter, deface, or falsify any medical or nursing home record, to prohibit the use of patient information for solicitation or marketing the sale of goods or services absent a specific written release or authorization permitting utilization of patient information for that purpose.

**Section 5.** Creates s. 626.9651, F.S., which authorizes the Department of Insurance to adopt rules to govern the use of a consumer's nonpublic personal financial and health information. Such rules must be consistent with, and not more restrictive than, the model regulation on consumer personal financial and health information developed by the National Association of Insurance Commissioners (NAIC: Privacy of Consumer Financial and Health Information Regulation, adopted September 26, 2000.). Specifically, the rules must permit the use and disclosure of nonpublic personal health information for scientific, medical, or public policy research, in accordance with federal law and be consistent with, and not more restrictive than, the standards contained in Title V of the Gramm-Leach-Bliley Act (GLB) of 1999, Pub. L. No. 106-102. (The GLB is also referred to as the "Financial Services Modernization Act.") If the department determines that a health insurer or health maintenance organization (HMO) is in compliance with the consumer privacy protection rules adopted by the U.S. Department of Health and Human Services, in conformance with the Health Insurance Portability and Affordability Act, that health insurer or HMO is in compliance with this section.

**Section 6.** Provides an effective date of July 1, 2001.

**IV. Constitutional Issues:**

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

The provisions of this committee substitute have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, State Constitution.

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

The committee substitute provides legislative findings that personal identifying information, name, age, diagnosis, address, bank account numbers, and debit and credit card numbers contained in the records relating to an individual's personal health or eligibility for health-related services made or received by the individual's physician, pharmacist, and public or private health facility should be held confidential.<sup>4</sup> To the extent that this creates a public records exemption for patient identifying information maintained by a public agency, it must be done in a bill that only relates to exemptions to the Public Records Law and Open Meetings Law. Section 24(c) of Article I of the State Constitution provides that legislation enacting public records exemptions or public meeting exemptions may *only* contain such exemptions and may only relate to one subject.

**C. Trust Funds Restrictions:**

The provisions of this committee substitute have no impact on the trust fund restrictions under the requirements of s. 19(f), Art. III, State Constitution.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

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<sup>4</sup> Section 119.07(3)(z), F.S., provides that bank account numbers or debit, charge, or credit card numbers given to an agency for the purpose of payment of any fee or debt owing are confidential and exempt from the Public Records Law as maintained by that agency with specified exceptions for use by the agency in any administrative or judicial proceeding.

**VII. Related Issues:**

The First Amendment Foundation has expressed concerns that section 1 of the committee substitute creates an exemption from the Public Records Law in a manner that is not authorized by the State Constitution. Section 1 of the committee substitute provides legislative findings that personal identifying information, name, age, diagnosis, address, bank account numbers, and debit and credit card numbers contained in the records relating to an individual's personal health or eligibility for health-related services made or received by the individual's physician, pharmacist, and public or private health facility should be held confidential.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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