

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/SB 1714

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Brown-Waite

SUBJECT: Nursing Homes

DATE: February 20, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable/CS
2.	_____	_____	CF	_____
3.	_____	_____	AHS	_____
4.	_____	_____	AP	_____
5.	_____	_____	RC	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for Senate Bill 1714 requires the Agency for Health Care Administration (AHCA) to conduct a 1-year pilot project to demonstrate the use of electronic monitoring equipment in nursing homes. The pilot project would be conducted in two private nursing homes in different parts of the state. A resident, or the resident's legal representative, would be permitted to request electronic monitoring of the resident's room. The participating nursing homes would be required to make reasonable physical accommodation for the electronic monitoring. The nursing homes would also be required to conduct electronic monitoring in common areas of the facility.

The bill specifies who may request electronic monitoring, if the resident is not competent to make the request. It also specifies that consent must be obtained from any roommates prior to electronic monitoring commencing. Roommates may give conditional consent, and conditions placed on the consent must be honored in the conduct of any electronic monitoring.

The resident, or the resident's legal representative, is responsible for the costs of conducting electronic monitoring in the resident's room. The nursing home may require the monitoring equipment to be in plain view and installed to ensure the safety of residents, employees, or visitors in the room. Signs must be posted to advise people that electronic monitoring is being conducted.

If questionable activity is detected through the use of electronic monitoring, either in a resident's room or a common area of the facility, it must be reported to the nursing home administrator and AHCA. The bill provides a procedure for the recording to be viewed or heard by specified people for the purpose of discussing the quality of care being provided to the resident and, if necessary, how to improve the quality of care.

Because of the nature of the pilot project, any information recorded through electronic monitoring is not admissible as evidence in civil litigation against the nursing home, licensed health care practitioners, or staff of the nursing home. The Agency for Health Care Administration may take regulatory action in response to questionable activity documented through electronic monitoring.

Each nursing home participating in the pilot project would receive \$10,000 to research and purchase an electronic monitoring system for common areas of the facility and for reporting specified information to the agency. In addition, they would be entitled to a one-time rebasing of operating costs under Medicaid to cover any increased costs in liability insurance because of the installation of the electronic monitoring equipment. The bill provides for a report on the pilot project to be submitted by October 1, 2003, and requires AHCA to convene a panel to advise it in its review of the pilot project and in producing the report. The bill provides an unspecified appropriation.

This bill creates one unnumbered section of law.

II. Present Situation:

In recent years, family members, seeking to monitor the quality of care of their loved ones, have expressed an interest in placing video cameras in the rooms of nursing home residents. Advocacy groups have also joined in to propose federal laws that would explicitly permit a nursing home resident and/or family member to install a camera, with the facility's knowledge. These advocacy groups believe residents currently have the right to install cameras, but believe legislation would ease the fear of retaliation against the resident by the nursing home or its personnel.

In 1996, in Illinois, Nursing Home Monitors attempted to place cameras in resident rooms, but the Illinois Legislature and Department of Public Health opposed the initiative. Three years later, Nursing Home Monitors and another advocacy group, the Coalition to Protect America's Elders, were asked by a U.S. Senate Special Committee on Aging to participate in a pilot project. Since that time, Nursing Home Monitors has begun a Family Controlled Surveillance Camera Pilot Project, which offers a camera system and legal protection to a resident or family member wishing to participate. The organization's goal is to ultimately test a case in court in order to establish a nursing home resident's clear legal right to use cameras for the monitoring of his or her own care.

In 2001, Texas became the first state to pass legislation allowing electronic monitoring devices in the rooms of residents of convalescent or nursing homes or related institutions. The law provides for the right of a resident or guardian to request and install an electronic monitoring device that is owned and operated by the resident or the resident's guardian. The law establishes criminal penalties against any administrator who knowingly refuses a resident/family member's request or knowingly refuses to admit a resident based on the desire to install a system, as well as criminal penalties against any person who tampers with, obstructs or destroys an electronic device.

During Maryland's most recent legislative session, lawmakers agreed to establish a pilot program at three nursing facilities. The pilot program will address the benefits to the resident and family, as well as the impact on facility staff.

Electronic monitoring and surveillance devices routinely monitor activities in department stores, banks, city parks, convenience stores, streets and sports arenas for purposes of crowd control, public safety, and law enforcement. Many day care centers, install cameras to chronicle daily events and monitor the treatment of children, and, in some centers, to provide an Internet-based service to parents who wish to view their children throughout the day. A video monitor in a nursing home resident's room would differ from these commonly accepted methods of surveillance because the room is not a public or common area, but is rather, the person's home.

Interest in placing surveillance cameras in nursing home residents' rooms has been increasing in response to reports of abuse, neglect and exploitation of the elderly. The National Elder Abuse Incidence Study (September 1998) conducted by the Administration on Aging estimates that for every substantiated report of elder abuse and neglect by adult protective services, more than five additional cases of abused and neglected elders go unreported. According to the Florida Department of Children and Family Services (DCF) 2,969 allegations of abuse, neglect and exploitation from nursing homes, assisted living facilities, or home health settings were either verified or had some indication of maltreatment in the fiscal year 2000-01.

Under s. 825.102, F.S., abuse of an elderly person or disabled adult is defined as:

- (a) Intentional infliction of physical or psychological injury upon an elderly person or disabled adult;
- (b) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or
- (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.

A person who knowingly or willfully abuses an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.

In addition, s. 825.102, F.S., defines neglect of an elderly person to include such things as a caregiver's failure or omission to provide the elderly person with the care and services necessary to maintain their physical and mental health. Willful neglect or neglect by culpable negligence constitutes a felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.

The 2001 Florida Legislature asked AHCA and the Office of the Attorney General to jointly review the issues surrounding the potential use of video cameras and other electronic devices in Florida's nursing homes. Section 3 of CS/CS/CS/SB 1202 (enacted as chapter 2001-45, Laws of Florida) defines this activity as "the placement of video cameras within a resident's room, upon their request or upon the request of their representative, to record activity within the area." According to the legislation, the joint agency review was to include legal issues, questions of

privacy and personal dignity, issues related to quality of care, and potential economic impact. The legislation designated AHCA as the lead agency for conducting the study.

The report (*Cameras in Nursing Homes*, Agency for Health Care Administration, January 2002) discussed current use of video cameras in Illinois, Maryland, and Texas, and described the experience of a Lake City, Florida assisted living facility that installed cameras in the common areas of the facility. Legislation from Texas, the first state to pass a law allowing electronic monitoring devices in residents' rooms was included in the report. Public comment and public testimony were solicited, and AHCA asked professionals within the legal, education and health care fields to provide comments or recommendations. Staff from the Office of the Attorney general reviewed the legal issues involved.

The report provided the following conclusion:

The conclusion of this comprehensive analysis is that existing Florida law and court decisions present no legal impediments to legislation authorizing the voluntary use of video cameras in nursing homes, at the request of individual residents. Such a system would have to include provisions for protecting the privacy rights of visitors and roommates of the requesting resident, and costs for such a system would be borne by the resident who requests it.

The report contained the following analysis of the privacy issues involved with the installation of cameras in nursing home residents' rooms:

A. Constitutional rights

The United States Supreme Court has held that the Bill of Rights created zones of privacy in which an individual can assert a privacy interest under the United States Constitution.

Case law has established a two-pronged test to determine whether an individual may assert such a privacy interest under the federal Constitution: 1) The complainant must have an actual expectation of privacy; and 2) The expectation must be one that society recognizes as reasonable.

In addition, Article I, section 23, of the Florida Constitution establishes a right of privacy: "Every natural person has the right to be left alone and free from governmental intrusion into the person's private life except as otherwise provided herein"

The courts have held that once a privacy right has been implicated, the state must establish a compelling state interest to justify an intrusion into an individual's privacy. The state's burden can be met "by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."

B. Statutory rights

(1) Florida law: State law recognizes certain privacy rights for nursing home residents and for incapacitated persons. For example, section 400.022, Florida Statutes, establishes the rights of nursing homes residents. Section 400.022(1)(m) states that a resident has the right to have privacy in treatment and in caring for personal needs; to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically contraindicated; and to security in storing and using personal possessions. Privacy of the resident's body shall be maintained during, but not limited to, toileting, bathing, and other activities of personal hygiene, except as needed for resident safety or assistance. In addition, section 400.022(1)(a) and (b) recognizes a resident's right to private communication and to privacy in treatment and in caring for personal needs. Section 744.3215, Florida Statutes, recognizes that an incapacitated person retains a right of privacy that cannot be removed.

(2) Federal law: Federal law contains provisions assuring quality care in nursing facilities. Title 42 U.S.C. section 1395i-3(c)(1)(A)(iii) establishes requirements for, and assures quality of care in, skilled nursing facilities. Meanwhile, 42 U.S.C. section 1396r(c)(1)(A)(iii), which establishes requirements for nursing facilities, recognizes that such facilities must protect and promote the rights of each resident, including the "right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups." The federal regulation, 42 C.F.R. section 483.70, sets forth requirements for long-term care facilities and provides in subsection (d) that resident rooms must be designed and equipped for, among other things, the privacy of residents.

The purpose of installing cameras is to monitor the quality of treatment of the resident. Nursing homes typically have opposed the use of cameras, fearing they would be used to provide evidence for lawsuits. The report contains the following statement on evidentiary issues:

The federal and Florida rules of evidence, supported by years of extensive case law, have produced a body of law that can be expected to handle any issues surrounding the admissibility and evidentiary value of visual and audio evidence in either civil or criminal cases.

In Florida, specific civil and criminal rules govern the admission of all evidence, including any video or other electronic recordings. Their admissibility, once challenged in a civil or criminal proceeding, are subject to judicial analysis by the trial court and appellate review by the courts on appeal.

Indeed, the Florida Legislature has previously recognized the use of video-taped testimony in civil or criminal trial courts, in lieu of live testimony, where a victim or witness is under the age of 16 or a person is mentally retarded.

The innovative use of cameras in a facility whether in a convenience store, child care center or elder care center will be subject to the same type of legal scrutiny that all

evidence must undergo. While the dynamics of a situation may be more or less complex, the standards to be applied in the introduction and use of evidence will remain the same.

The cost of installing electronic monitoring systems ranges from a few hundred dollars to several thousand dollars. In programs where the use of cameras is voluntary, the resident or his or her family pay the cost.

III. Effect of Proposed Changes:

The bill requires AHCA to solicit, by July 1, 2002, two private nursing homes, one for-profit and one not-for-profit, in two different geographic areas of the state to participate in a one-year pilot project to demonstrate the use of electronic monitoring equipment in nursing homes licensed under part II of ch. 400, F.S. If no nursing homes volunteer, AHCA must select the two facilities with the lowest ranking in quality of care performance under s. 400.191, F.S., and applicable rules. This decision will not be subject to review or challenge. If more than two nursing homes apply to participate in the pilot project, AHCA must select two nursing homes, the one with the highest ranking and the one with the lowest ranking in quality of care performance under s. 400.191, F.S., and applicable rules.

The nursing homes participating in the pilot project must install equipment to electronically monitor common areas of the facility. The participating nursing homes must also develop policies and procedures that permit each resident or, if appropriate, the resident's legal representative, to electronically monitor the resident's room. The policies and procedures must include steps to address the privacy and dignity of residents, roommates, and visitors.

The request for electronic monitoring of a resident's room must be in writing and signed by the resident or the resident's representative. If a resident has capacity to request electronic monitoring and has not been judicially declared to lack the required capacity, only the resident may request the electronic monitoring, notwithstanding the terms of any durable power of attorney or similar instrument. If a resident has been judicially declared to lack the capacity required to request electronic monitoring, only the guardian of the resident may request electronic monitoring.

If a resident does not have capacity to request electronic monitoring and has not been judicially declared to lack the required capacity, the resident's physician may make the determination regarding the capacity of the resident to request electronic monitoring and must document the determination in the resident's clinical record. In such case, only the legal representative of the resident may request the electronic monitoring. A person from the following list, in order of priority, may act as the resident's legal representative for the limited purpose of requesting electronic monitoring of the resident's room:

1. A person named in the resident's medical power of attorney or other advance directive.
2. The resident's spouse.
3. An adult child of the resident who has the waiver and consent of all other qualified adult children of the resident to act as the sole decision-maker.
4. A majority of the resident's reasonably available adult children.

5. The resident's parents.
6. The individual clearly identified to act for the resident by the resident before the resident became incapacitated or the resident's nearest living relative.

A resident, or resident's representative, who wishes to conduct electronic monitoring must obtain written, signed consent of other residents in the room. The written consent must be submitted to the administrator of the nursing home or his or her designee. Consent of other residents may be given only by:

- The other resident or residents in the room;
- The guardian of the other resident, if the resident has been judicially declared to lack the required capacity; or
- The legal representative of the other resident, for the limited purpose of requesting electronic monitoring of the resident's room, determined from the following list, in order of priority:
 1. A person named in the resident's medical power of attorney or other advance directive.
 2. The resident's spouse.
 3. An adult child of the resident who has the waiver and consent of all other qualified adult children of the resident to act as the sole decision-maker.
 4. A majority of the resident's reasonably available adult children.
 5. The resident's parents.
 6. The individual clearly identified to act for the resident by the resident before the resident became incapacitated or the resident's nearest living relative.

Another resident in the room may condition consent on pointing the camera away from the consenting resident, when the proposed electronic monitoring is a video surveillance camera; and limiting or prohibiting the use of an audio electronic monitoring device. Electronic monitoring must be conducted in accordance with any limitations placed on the monitoring as a condition of the consent given by or on behalf of another resident of the room.

When the request for electronic monitoring and all required consents have been given to the nursing home administrator or his or her designee, electronic monitoring may begin. If electronic monitoring is being conducted in a resident's room, and another resident is moved into the room who has not yet consented to electronic monitoring, the monitoring must cease until the new resident, or the resident's legal representative, consents.

Anyone conducting electronic monitoring must post and maintain a conspicuous notice at the entrance to the resident's room stating that an electronic monitoring device is monitoring the room. The nursing homes participating in the pilot project must post a notice in a prominent location in common areas that the areas are being electronically monitored.

The resident or resident's legal representative requesting the electronic monitoring of the resident's room is responsible for the costs associated with conducting electronic monitoring in the resident's room, including: the equipment and tapes; and the installation, maintenance, or removal of the equipment, other than the costs of electricity. The electronic monitoring equipment and tapes will be the property of the resident. The nursing home must make

reasonable physical accommodation for electronic monitoring which includes a reasonably secure place to mount the video surveillance camera or other electronic monitoring device; and access to power sources for the video surveillance camera or other electronic monitoring device.

The nursing home may:

- Require an electronic monitoring device to be installed in a manner that is safe for residents, employees, or visitors who may be moving about the room, and meets all local and state regulations;
- Require the electronic monitoring to be conducted in plain view; and
- Place a resident in a different room to accommodate a request for electronic monitoring.

A participating nursing home may not refuse to admit an individual and may not discharge a resident solely because of a request to conduct electronic monitoring.

Any questionable activity discovered as a result of viewing a tape produced by the electronic monitoring equipment shall be reported to the nursing home's administrator and AHCA within 24 hours of discovery of the questionable activity. When a questionable activity that occurred in a resident's room has been reported to the nursing home administrator and AHCA, the nursing home administrator shall arrange a meeting for viewing or listening to the recoding of the activity as soon as is practicable. The following persons must be at the meeting:

- The resident or the resident's legal representative;
- A long-term care ombudsman, if requested by the resident or the resident's legal representative;
- A quality-of-care monitor from the Agency for Health Care Administration;
- The nursing home's designated risk manager; and
- The nursing home administrator.

When a questionable activity that occurred in a common area of the nursing home has been reported to the nursing home administrator and the Agency for Health Care Administration, the nursing home administrator shall arrange a meeting for viewing or listening to the recording of the activity as soon as is practicable. The following persons must be at the meeting:

- The resident or residents involved in the questionable activity, or the resident's legal representative;
- A long-term care ombudsman, if requested by the resident or the resident's legal representative;
- A representative of the nursing home's resident council;
- A quality-of-care monitor from the Agency for Health Care Administration;
- The nursing home's designated risk manager; and
- The nursing home administrator.

The purpose of such a meeting is to facilitate discussion of the quality of care being provided to the resident and, if necessary, how to improve the care being provided. The Agency for Health Care Administration may take any regulatory action authorized under part II of chapter 400,

Florida Statutes, in response to a questionable activity documented through electronic monitoring and reported to the agency.

Any activity or information recorded on tape in the pilot project will be used to improve care and is not admissible as evidence in civil litigation against the nursing home, a licensed health care practitioner, or staff of the nursing home.

Each nursing home participating in the pilot project is granted the sum of \$10,000 to:

- Research and purchase an electronic monitoring system for common areas that would minimize security risks with tapes; and
- Submit six-month progress reports to the Agency for Health Care Administration on the status of the pilot project.

The reports must describe efforts by the nursing home to inform residents and their legal representatives of the circumstances under which electronic monitoring equipment will be installed in residents' rooms; provide an evaluation of resident, family, and staff response to the availability and use of electronic monitoring equipment; and document staff turnover and changes in liability insurance premiums and deductible attributed to the use of electronic monitoring equipment.

The nursing homes participating in the pilot project are entitled to a one-time rebasing of operating costs under the Medicaid program to cover any increased costs in liability insurance because of the installation of the electronic monitoring equipment during the 12 months that the pilot project is in effect and for six months thereafter.

AHCA must convene an advisory panel to advise the agency as it reviews the outcome of the pilot project and produces a report. The advisory panel must be comprised of a representative of AARP, a member of the clergy, a registered nurse, a physician licensed under chapter 458 or chapter 459, F.S., a long-term care ombudsman, a representative of AHCA, and a representative of the Office of the Attorney General. AHCA must submit a report on the outcome of the pilot project to the Governor, the President of the Senate and the Speaker of the House of Representatives by October 1, 2003.

The bill appropriates an unspecified sum from the General Revenue Fund to AHCA for the purpose of carrying out the provisions of this act during the 2002-2003 fiscal year.

The bill will take effect upon becoming a law.

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 Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) 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 Art. III, s. 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The program permitting installation of cameras in a nursing home resident's room would have to protect the privacy of the resident and the resident's roommate, or issues of the resident's or roommate's right to privacy under Article I, section 23 of the Florida Constitution would arise.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Nursing home residents or their families would incur the cost of placing cameras in a resident's room. Nursing homes participating in the pilot project would be provided \$10,000 each for the costs of installing electronic monitoring equipment.

C. Government Sector Impact:

The bill provides an appropriation of an unspecified amount for implementing the pilot project.

According to AHCA, contracted Registered Nursing Consultants, would serve as the agency participants in the review of questionable activity revealed through monitoring. That activity is anticipated to require at least eight (8) hours per week per facility for those monitors. Contracted hourly rates would be approximately \$30.00 per hour. The hourly rate with benefits is \$32.25 per hour. At that rate for eight hours per week, fifty-two weeks per year, the annualized cost would be \$13,416 per facility. The total amount of payment for the two facilities in the pilot project, \$26,832, would require an appropriation of funds.

Although rebasing is permitted, it is under the assumption that the carrier would declare the amount of coverage increase specifically due to the installation of the electronic monitoring equipment and that the reimbursement to the facility would be below its target and the overall ceiling. Medicaid estimates that additional costs could be \$187,274 per facility using an average of four different facilities. The range is \$36,317 to

\$339,647. If two large facilities in the southern region volunteered the total cost could be \$679,294.

According to AHCA, the bill would require general revenue funding in the amount of \$209,273 for fiscal year 2002-03. For Fiscal Year 2003-04, general revenue funding in the amount of \$81,221 will be required as well. Title XIX funding is available as federal match for the rebasing incentive.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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