

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 7020

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Florida Health Choices Program/Florida Health Choices, Inc.

DATE: January 8, 2016      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Lloyd	Stovall		<b>HP Submitted as Committee Bill</b>
1.	Kim	McVaney	GO	<b>Favorable</b>
2.			RC	

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**I. Summary:**

SB 7020 eliminates the scheduled repeal of the current public records exemptions for the Florida Health Choices Program. As a result, the following information continues to be confidential and exempt from disclosure:

- Personal, identifying information of an enrollee or participant who has applied for or participates in the Florida Health Choices Program;
- Client and customer lists of a buyer’s representative held by the Florida Health Choices Corporation (corporation); and
- Proprietary confidential business information of a vendor held by the corporation.

The bill also continues the retroactive application of the exemption to protect information held by the corporation prior to initial enactment of the exemption.

A simple majority vote is sufficient for passage.

**II. Present Situation:**

**Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

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

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

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</sup> Records designated as ‘confidential and exempt’ may

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<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” 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 as “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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

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

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

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> FLA. CONST. art. I, s. 24(c).

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>13</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.<sup>14</sup>

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

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>15</sup> 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.<sup>16</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:<sup>17</sup>

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>18</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.<sup>19</sup>

### **Florida Health Choices Corporation, Inc.**

In 2008, the Legislature created the Florida Health Choices Program to address the issue of Florida’s uninsured.<sup>20</sup> The Legislature created the Florida Health Choices Corporation

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<sup>14</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that 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. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(a), F.S.

<sup>18</sup> FLA. CONST. art. I, s. 24(c).

<sup>19</sup> Section 119.15(7), F.S.

<sup>20</sup> See Chapter 2008-32 Laws of Fla.

(corporation) to administer the program as a private, non-profit, corporation under s. 408.910, F.S. The corporation is to operate in compliance with part III of chapter 112 (Public Officers and Employees) and chapters 119 (Public Records), 286 (Public Business), and 617 (Corporations Not for Profit), F.S.<sup>21</sup>

The corporation is led by a 15-member board of directors, three of whom are ex-officio, non-voting board members:

- The Governor, President of the Senate, and Speaker of the House of Representatives each appoints four members.
- The three non-voting ex-officio members include:
  - The Secretary of Health Care Administration (AHCA) or a designee with expertise in health care services;
  - The Secretary of the Department of Management Services or a designee with expertise in health care services; and
  - The Commissioner of the Office of Insurance Regulation or a designee with expertise in insurance regulation.

Board members may not include insurers, health insurance agents or brokers, health care providers, health maintenance organizations (HMOs), prepaid service providers, or any other entity or affiliate or subsidiary of eligible vendors. Conflict of interest provisions govern board member participation.

The program is designed as a single, centralized marketplace for the purchase of health products, including, but not limited to, health insurance plans, HMO plans, prepaid services, and flexible spending accounts. Policies sold as part of the program are exempt from regulation under the Insurance Code and laws governing HMOs. The following entities are authorized to be eligible vendors:

- Insurers authorized under ch. 624, of the Insurance Code, such as self-insurers, indemnity plans, life and health insurers, church benefit plans, disability, and multi-employer welfare arrangements, and the Florida Healthy Kids Corporation;
- HMOs authorized under part I of ch. 641, F.S., relating to Health Service Programs, including health maintenance organization contracts, limited benefit policies, and other risk bearing coverage, benefits, and products;
- Prepaid limited health service organizations and discount medical plans under ch. 636, F.S.;
- Prepaid health clinics licensed under ch. 641, part II, F.S.;
- Health care providers, including hospitals and other licensed health facilities, health care clinics, pharmacies, licensed health care professionals, and other licensed health care providers;
- Provider organizations, including service networks, group practices, and professional associations; and
- Corporate entities providing specific health services.

The corporation's Florida Health Insurance Marketplace (marketplace) currently includes individual health plans, discount plans, and limited benefit plans.

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<sup>21</sup> Section 408.910(11), F.S.

The corporation is authorized to collect premiums and other payments from employers. The law further specifies who may participate as either an employer or an individual. Employers eligible to enroll include employers that meet criteria established by the corporation and their individual employees and other individuals meeting criteria established by the corporation.<sup>22</sup>

### **Information Collected by the Florida Health Choices Program**

In the administration of the program the corporation may collect personal, identifying information about applicants and participants. Insurance agents and employers also provide personal as well as financial and business information. More specifically, this information might include a participating insurance agent's client list; an employer's business, accounting, or human resource records; or other proprietary business or personal identification information.<sup>23</sup>

### ***Exemption from the Public Records Act***

The implementing legislation for the Florida Health Choices Program in 2008 did not include a public records exemption. The exemptions were added in 2011<sup>24</sup> and applied retroactively to protect personal, identifying information of an enrollee or a participant in the program; client and customer lists of a buyer's representatives; and proprietary confidential business information<sup>25</sup> of a vendor.

Two distinct public necessity statements supported the exemptions. The first public necessity statement pertained to any information identifying an enrollee or participant in the program and provided that the information must remain confidential and exempt because the harm in releasing such personal and sensitive information outweighs any public benefit in releasing it. Further, if such information were not held confidential, the administration of the program could be significantly impaired because businesses and individuals would be less inclined to apply, participate, or enroll.<sup>26</sup>

The second public necessity statement addressed proprietary confidential business information and the harm to the marketplace that may come from the disclosure of confidential business information or a customer or client list of a program buyer's representative. Disclosure of this information may provide competitors with detailed insights into confidential business information, strategies, or methodologies that is not otherwise accessible, thereby diminishing the advantage that a program vendor or buyer's representative may have in the marketplace. This, in turn, may deter private-sector vendors or buyer's representatives from participating in

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<sup>22</sup> Section 408.910(4)(a), F.S.

<sup>23</sup> Section 408.910(14), F.S.

<sup>24</sup> Chapter 2011-197, Laws of Fla. (effective October 1, 2011).

<sup>25</sup> Proprietary confidential business information is defined in 408.910(14)(a)4., F.S. to mean information, regardless of form or characteristics, that is owned or controlled by a vendor requesting confidentiality under this section; that is intended to be and is treated by the vendor as private in that the disclosure of the information would cause harm to the business operations of the vendor; that has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement providing that the information may be released to the public; and that is information concerning: business plans, internal auditing controls and reports of internal auditors, reports of external auditors for privately held companies, client and customer lists, potentially patentable materials, [or] a trade secret as defined in s. 688.002, F.S.

<sup>26</sup> Chapter 2011-197, s. 2, Laws of Fla. (effective October 1, 2011).

the program thereby harming the effective administration of the program and its ability to offer affordable health care coverage.<sup>27</sup>

Exceptions permit disclosure of protected information to:

- Another governmental entity in the performance of its official duties and responsibilities;
- Any person who has the written consent of the program's applicant;
- The Florida Kidcare program for the purpose of administering its program;<sup>28</sup> and
- A participant's legal guardian.

#### ***Penalty for Unauthorized Disclosure***

A person who knowingly and willfully discloses inappropriately information that is made confidential and exempt under this law commits a misdemeanor of the second degree.<sup>29</sup>

#### **OGSR of the Public Records Exemption**

Professional staff of the Legislature met with representatives of the Florida Health Choices Program on August 12, 2015, to discuss the Program and the necessity of continuing the public records exemption. Florida Health Choices Program explained that the exemption was working appropriately and did not recommend alterations to the exemption. Professional staff recommends that the exemption be continued as is in its current form.

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

The bill removes the scheduled repeal date of October 2, 2016, for the public records exemptions in s. 408.910(14), F.S. The public records exemptions apply to personal identifying information of enrollees and participants who have applied to the corporation, client and customer lists of buyer's representatives, and proprietary confidential business information held by the corporation. This information will remain both confidential and exempt from disclosure to the public under the public records laws.

Current law pertaining to retroactive application of the exemptions, conditions for authorized release, and the penalty for improper release of the protected information are likewise continued.

The effective date of the bill is October 1, 2016.

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<sup>27</sup> Chapter 2011-197, s. 3, Laws of Fla. (effective October 1, 2011).

<sup>28</sup> Under certain circumstances in federal law, health insurance exchanges similar to the marketplace created under the FHC program, could be required to exchange information with the state Medicaid program. In Florida, the state Medicaid program also exchanges data with the Florida Kidcare program. The current exception permits the FHC program to exchange information with those programs as necessary,

<sup>29</sup> Section 408.910(14)(e), F.S.

#### IV. Constitutional Issues:

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

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

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

The bill renews an existing public records exemption for the Florida Health Choices Corporation. Therefore, a simple majority vote of the members present in each house of the Legislature is required for passage.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

This bill continues a provision that permits a public-records exemption to apply to any information identifying an applicant or participant in the Florida Health Choices Program *before, on, or after* the effective date of the exemption.

Retroactive operation is disfavored by courts and generally “statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.”<sup>30</sup> The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was [a person’s] right vested or inchoate?
- Is the application of [the statute] to these facts unconstitutionally retroactive?<sup>31</sup>

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.<sup>32</sup>

Additionally, the initial enactment and this reenactment make it clear that it is the Legislature’s intent to apply the law retroactively. “Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision

<sup>30</sup> Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

<sup>31</sup> *Weingrad v. Miles*, 2010 WL 711801, \*2 (Fla. 3d DCA 2010) (internal citations omitted).

<sup>32</sup> See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

retroactively.”<sup>33</sup> A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.<sup>34</sup>

Generally, retroactive application is appropriate when the exemption is remedial in nature. In the context of public records exemption, the remedy lies in mitigating the provisions of the Florida Public Records Act.<sup>35</sup> Access to public records is not a vested right because the right to access public records is subject to divestment by the Legislature and the Public Rights Act grants public rights, not private ones.<sup>36</sup> If a public records exemption is remedial in nature, “it can and should be retroactively applied in other to serve its intended purposes.”<sup>37</sup>

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The corporation will continue to redact confidential information from any records that are disclosed to the public.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 408.910 of the Florida Statutes.

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<sup>33</sup> *Weingrad*, 2010 WL 711801 at \*3.

<sup>34</sup> *Id.* at \*4.

<sup>35</sup> *Campus Communications Inc., v. Earnhardt*, 821 So. 2d 388, 396-397 (Fla. 5th DCA 2002). The court quotes *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla 1986).

<sup>36</sup> *Campus Communications Inc.*, 821 So. 2d at 398.

<sup>37</sup> *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986).



**IX. Additional Information:**

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

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

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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