

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 16-07 OGSR Florida Health Choices Program

SPONSOR(S): Government Operations Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** SB 7020

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Toliver	Williamson

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The Florida Health Choices Program (program) is a single, centralized market for the sale and purchase of various health care products including, but not limited to, health insurance plans, health maintenance organization plans, prepaid services, service contracts, and flexible spending accounts. The Florida Health Choices, Inc. (corporation), is a not-for-profit corporation responsible for administering the program.

Current law provides that the following information relating to the program is confidential and exempt from public record requirements:

- Personal identifying information of an enrollee or participant who has applied for or participates in the program;
- Client and customer lists of a buyer’s representative held by the corporation; and
- Proprietary confidential business information held by the corporation.

Current law provides for retroactive application of the public record exemption. It also authorizes release of the confidential and exempt information in certain instances.

The bill reenacts the public record exemption, which will repeal on October 2, 2016, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal and the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Florida Health Choices Program

In 2008, the Legislature created the Florida Health Choices Program (program)⁶ as a single, centralized market for the sale and purchase of various products that enable individuals to pay for health care.⁷ The products include, but are not limited to, health insurance plans, health maintenance organization (HMO) plans, prepaid services, service contracts, and flexible spending accounts.⁸ Policies sold as part of the program are not subject to the licensing requirements of the Florida Insurance Code⁹ nor the mandated offerings or coverages established for HMOs.¹⁰

Participation in the program is voluntary and available to eligible employers, individuals, vendors, and health insurance agents.¹¹ Employers may enroll in the program provided they meet certain criteria¹² and elect to make their employees eligible through the program.¹³ Employees of enrolled employers,

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I, FLA. CONST.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Chapter 2008-32, s.4, L.O.F.; *see also* s. 408.910, F.S.

⁷ Section 408.910(3), F.S.

⁸ Section 408.910(5), F.S.

⁹ Chapters 624-632, 634, 635, 636, 641, 642, 648 and 651, F.S., constitute the Florida Insurance Code.

¹⁰ Section 408.910(10), F.S.

¹¹ Section 408.910(4), F.S.

¹² Section 408.910(4)(c), F.S., provides that employers who choose to participate in the program may enroll by complying with certain procedures that must include, in part, submission of required information; compliance with federal tax requirements for the establishment of a cafeteria plan; identification of eligible employees; and arrangement for periodic payments.

¹³ Section 408.910(4)(a) and (e), F.S.

as well as other individuals who meet specified criteria, may participate in the program.¹⁴ The following are eligible vendors who may sell certain services to program participants as provided in law:

- Insurers licensed under chapter 624, F.S.;
- HMOs licensed under part I of chapter 641, F.S.;
- Prepaid limited health service organizations;
- Discount medical plan organizations;
- Prepaid health clinic service providers licensed under part II of chapter 641, F.S.;
- Health care providers, including hospitals and other licensed health facilities, health care clinics, licensed health professionals, pharmacies, and other licensed health care providers;
- Provider organizations, including service networks, group practices, professional associations, and other incorporated organizations of providers; and
- Corporate entities providing specific health services in accordance with applicable law.¹⁵

Florida Health Choices, Inc.

Florida Health Choices, Inc., (corporation), which is a not-for-profit corporation, is established to administer the program.¹⁶ In part, the corporation is required to:

- Determine eligibility of employers, vendors, individuals, and agents, and establish policies and procedures regarding participation.
- Establish procedures necessary for the operation of the program.
- Arrange for collection of contributions from participating employers and individuals.
- Arrange for payment of premiums and other appropriate disbursements based on the selections of products and services by the individual participants.
- Provide for the operation of a toll-free hotline to respond to requests for assistance.
- Provide for initial, open, and special enrollment periods.¹⁷

A 15-member board of directors (board) governs the corporation.¹⁸ Board members are appointed for terms of up to three years and any member is eligible for reappointment.¹⁹

Public Record Exemption under Review

In 2011, the Legislature created a public record exemption for the program.²⁰

Current law provides that personal identifying information of an enrollee or participant who has applied for or who participates in the program is confidential and exempt²¹ from public record requirements.²² The term “enrollee” means an employer who is eligible to enroll in the program,²³ and the term “participant” means an individual who is eligible to participate in the program.²⁴

Current law also provides that the following information held by the corporation is confidential and exempt from public record requirements:

¹⁴ Section 408.910(4)(b), F.S.

¹⁵ Section 408.910(4)(d), F.S.

¹⁶ Section 408.910(11), F.S.

¹⁷ Section 408.910(11)(i), F.S.

¹⁸ The board is composed of four members appointed by the Governor; four members appointed by the President of the Senate; four members appointed by the Speaker of the House of Representatives; and three ex officio, nonvoting members. Section 408.910(11)(a), F.S.

¹⁹ Section 408.910(11)(b), F.S.

²⁰ Chapter 2011-197, s. 1, L.O.F.; codified as s. 408.910(14), F.S.

²¹ There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); *Op. Att’y Gen. Fla. 85-692* (1985).

²² Section 408.910(14)(b)1., F.S.

²³ Section 408.910(14)(a)2., F.S.

²⁴ Section 408.910(14)(a)3., F.S.

- Client and customer lists of a buyer's representative;²⁵ and
- Proprietary confidential business information.²⁶

The term "buyer's representative" means a participating insurance agent.²⁷ The term "proprietary confidential business information" means information, regardless of form or characteristics, that is owned or controlled by a vendor²⁸ requesting confidentiality under s. 408.910, F.S.; 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 material.
- A trade secret as defined in the Uniform Trade Secrets Act.^{29, 30}

The public record exemption is given retroactive application.³¹

Upon request, the confidential and exempt information must be released to:

- Another governmental entity in the performance of its official duties and responsibilities;
- Any person who has the written consent of the program applicant; and
- The Florida Kidcare Program for the purpose of administering that program.³²

Further, the public record exemption does not prohibit a participant's legal guardian from obtaining confirmation of coverage, dates of coverage, the name of the participant's health plan, and the amount of premium being paid.³³

Current law provides that a person who knowingly and willfully violates the provisions of the public record exemption commits a misdemeanor of the second degree,³⁴ which is punishable by a definite term of imprisonment not to exceed one year³⁵ and a fine not to exceed \$1,000.³⁶

The 2011 public necessity statement for the public record exemption provides that:

If such information is not held confidential, the administration of the [Florida Health Choices Program] could be significantly impaired because businesses and individuals would be less inclined to apply, participate, or enroll in the program, thereby significantly decreasing the number of program participants or

²⁵ Section 408.910(14)(b)2., F.S.

²⁶ Section 408.910(14)(b)3., F.S.

²⁷ Section 408.910(14)(a)1., F.S.

²⁸ Section 408.910(14)(a)5., F.S., defines "vendor" to mean a participating insurer or other provider of services as described in s. 408.910(4)(d), F.S.

²⁹ Section 668.002(4), F.S., defines "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

³⁰ Section 408.910(14)(a)4., F.S.

³¹ Section 408.910(14)(c), F.S. The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such. Access to public records is a substantive right. Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438, 441 (Fla. 2001).

³² Section 408.910(14)(d)1., F.S.

³³ Section 408.910(14)(d)2., F.S.

³⁴ Section 408.910(14)(e), F.S.

³⁵ Section 775.082(4)(a), F.S.

³⁶ Section 775.083(1)(d), F.S.

enrollees ... The disclosure of a vendor's proprietary confidential business information or a customer and client list of a program buyer's representative could cause injury in the marketplace by providing competitors with detailed insights into confidential business information, strategies, methodologies, plans, or client lists, thereby diminishing the advantage that the program vendor or program buyer's representative maintains over those that do not possess such information. Without these exemptions, private-sector vendors or buyer's representatives whose business records generally are not required to be open to the public might refrain from participating in the Florida Health Choices Program and not offer affordable, quality health insurance, health services, and benefits products through the program.³⁷

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2016, unless reenacted by the Legislature.³⁸

During the 2015 interim, subcommittee staff met with staff from the corporation as part of the Open Government Sunset Review process. Corporation staff indicated that the public record exemption is critical to its operation and that repealing the exemption would make participants and vendors less willing to engage in the Florida Health Choices Program. As such, the corporation recommended reenactment of the exemption without changes.

Effect of the Bill

The bill removes the repeal date thereby reenacting the public record exemption for the following information:

- 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 corporation; and
- Proprietary confidential business information held by the corporation.

B. SECTION DIRECTORY:

Section 1 amends s. 408.910, F.S., to save from repeal the public record exemption for the Florida Health Choices Program.

Section 2 provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

³⁷ Chapter 2011-197, s.2, L.O.F.

³⁸ Section 408.910(14)(f), F.S

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.