



Civil Justice Subcommittee

Tuesday, February 11, 2014

9:00 AM

404 HOB

**Will Weatherford
Speaker**

**Larry Metz
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Tuesday, February 11, 2014 09:00 am
End Date and Time: Tuesday, February 11, 2014 11:00 am
Location: Sumner Hall (404 HOB)
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 569 Nursing Home Litigation Reform by Gaetz
HB 595 The Council on the Social Status of Black Men and Boys by Williams, A.

Consideration of the following proposed committee bill(s):

PCB CJS 14-04 -- Security of Confidential Personal Information
PCB CJS 14-05 -- Pub. Rec./Security of Confidential Personal Information

NOTICE FINALIZED on 02/04/2014 16:18 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 569 Nursing Home Litigation Reform
SPONSOR(S): Gaetz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Bond <i>YB</i>	Bond <i>YB</i>
2) Health Innovation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law regarding nursing homes creates a cause of action where a resident may sue alleging negligence by the nursing home. The bill:

- Limits the liability of an individual manager of a nursing home consistent with the business judgment rule; and
- Provides that the legal remedies provided by the nursing home law are the exclusive legal remedies that can be brought by a nursing home resident against the nursing home.

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

The effective date of the bill is July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A nursing home is a facility that provides "24-hour nursing care, personal care, or custodial care for three or more persons . . . who by reason of illness, physical infirmity, or advanced age require [nursing] services" outside of a hospital.¹ Florida nursing homes are regulated under Part II of ch. 400, F.S.

Section 400.022, F.S., sets forth various legal rights of nursing home residents. Included in those rights is the right to receive "adequate and appropriate health care and protective and support services." Section 400.023, F.S., provides that any resident whose rights are violated by a nursing home has a cause of action against the nursing home.² Sections 400.023-.0238, F.S., create a comprehensive framework for litigation and recovery against a nursing home, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Named Defendants in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." It does not limit who can be named as a defendant in the lawsuit.

In a 2004 appellate decision, the court ruled that the managing member of a limited liability company could be held personally liable for damages suffered by a resident in a nursing home.³ There, the plaintiff alleged that the injuries to the nursing home resident were in part the result of management decisions.⁴ The court opinion did not discuss, and appears inconsistent with, a concept of general business law known as the "business judgment rule." That rule provides that an individual acting in a management capacity of a business entity is generally not liable in tort for injuries that occur solely as a result of those business decisions.⁵ The only exception is where the individual acted recklessly, in bad faith, or in wanton and willful disregard of human rights, safety or property. This 2004 opinion "is arguably an example of personal liability founded on business decisions normally protected by the 'business judgment rule,' which immunizes directors' business decisions from claims of simple negligence."⁶

This bill provides that only the nursing home licensee, a management company employed by the licensee, or a direct caregiver employee may be sued for a violation of a nursing home resident's rights. Thus, the bill protects an individual manager of a nursing home from being liable under the business judgment rule.

¹ Section 400.021(7), F.S.

² The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. See s. 400.023(1), F.S.

³ *Estate of Canavan v. National Healthcare Corp.*, 889 So.2d 825 (Fla. 2d DCA 2004).

⁴ The allegations were that the manager "ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems [the resident] suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, the [plaintiff] argues that a reasonable jury could have found that [the manager's] elevation of profit over patient care was negligent." *Id.* at 826.

⁵ Sections 607.0831(1) and 608.4228(1), F.S., applicable to corporations and limited liability companies, respectively.

⁶ Cazin, *Personal Liability Exposure for Nursing Home Operators: Canavan's Encroachment on the Business Judgment Rule*, Florida Bar Journal, May 2011, at 46.

Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." The statute is cumulative to other types of lawsuits, that is, an aggrieved resident may sue under the statute and may sue under some other legal theory if appropriate.

In general, a statute creating a remedy is considered cumulative to all other remedies. A remedy created by statute may only supplant other statutory and common law remedies if the statute specifically states that it is an exclusive remedy.⁷ Section 400.023, F.S., is not an exclusive remedy statute.⁸

This bill amends s. 400.023, F.S., to provide that the provisions of ss. 400.023-.0238, F.S., are the exclusive remedy against a licensee or management company for a cause of action for recovery of personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights.

B. SECTION DIRECTORY:

Section 1 amends s. 400.023, F.S., relating to civil enforcement of laws regarding nursing homes.

Section 2 provides that the bill takes effect on July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

⁷ *St. Angelo v. Healthcare and Retirement Corp. of America*, 824 So.2d 997, 999 (Fla. 4th DCA 2002).

⁸ *Id.* at 1000.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The state constitution provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So.2d 1 (Fla. 1973), the Florida Supreme Court held that:

[w]here a right of access to the courts for redress for a particular injury has been provided...the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.⁹

This bill limits lawsuits against management employees of a nursing home and provides that the remedies of ss. 400.023-.0238, F.S., are exclusive remedies, thereby foreclosing use of other remedies. Because injured parties would still have a remedy, it is possible that these limits do not implicate the Access to Courts provision. On the other hand, because these limits may limit tort remedies, the courts may review these limits under *Kluger* to determine whether the statutory remedies are a "reasonable alternative."

However, the *Kluger* decision was based only on citation to a position in a legal encyclopedia that today does not support the broad restriction created in *Kluger*. Indeed, that encyclopedia today includes the following statements:

A fundamental right to full legal redress is not guaranteed [by an access to courts provision in a state constitution].

[T]he right to a remedy is relative and does not prohibit all impairments of the right of access.

[The right to a remedy], while not guaranteeing all persons full compensation for their injuries . . . is not violated by legislative limitations on the amount of recovery in various actions. Such provisions do not mandate that a remedy be provided in any specific form, or that the nature of the proof necessary to the award of a judgment or decree continue without modification.¹⁰

The dissent in *Kluger* noted the problem with the broad holding, saying:

Obviously, a literal and dogmatic construction of said provision would deny both the Legislature and the Court the power to impose reasonable and logical limitations on the constitutional right to use the courts of Florida.¹¹

⁹ *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

¹⁰ See C.J.S. Constitutional Law, s. 2151

¹¹ *Kluger* at 6.

Kluger implies, by its reference to the adoption of the 1968 Constitution, that something changed in constitutional analysis between the prior state constitution and the substantial revision in 1968. However, a leading scholar assisting the committee in drafting that constitution said that the change in language creating the current version of the Access to Courts provision was merely "condensed without change in substance."¹² The subcommittee that adopted the change in language did so without comment.¹³ The lead analyst for the revision commission said that the clause "probably creates no new rights of action."¹⁴

Scholarly papers have criticized the idea that the courts have the authority to nullify legislative action under an access to courts theory. For instance, see:

- Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, Oregon Law Review, Winter 1995, at 1279 ("Although several contemporary commentators have argued that this provision should be treated as a 'remedies' clause, there is no indication that such an interpretation was ever intended by its earliest drafters.")
- Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, Rutgers Law Journal, Summer 2001, at 1005 ("Had the court examined the sources of the Maxim, it would have discovered that, whatever its source, the Maxim was historically applied to *effectuate* legislative policy, not thwart it.")(emphasis in original).
- Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, Wake Forest Law Review, Vol. 26 at 237 ("No serious analysis of either part of the test was attempted [by the Florida Supreme Court in creating the Kluger test].")("The substantive use of the remedies provision ignores the language of these statutes and enshrines the common law beyond legislative modification.").

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

¹² Handbook by Justice Sturgis, in Florida State Archives, Series 726, Box 2, Folder 8.

¹³ Records of the Committee on Human Rights, meeting of February 11, 1966, at page 4, on file with the Florida State Archives.

¹⁴ *The Florida Declaration of Rights and Human Rights Provisions of State Constitutions*, prepared by Professor David Dickson, June 1966, at 12, on file at the Florida Archives.

1 A bill to be entitled
 2 An act relating to nursing home litigation reform;
 3 amending s. 400.023, F.S.; specifying conditions under
 4 which a nursing home resident has a cause of action
 5 against a licensee or management company; providing an
 6 effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Subsection (1) of section 400.023, Florida
 11 Statutes, is amended to read:

12 400.023 Civil enforcement.—

13 (1) Any resident who alleges negligence or a violation of
 14 ~~whose~~ rights as specified in this part has ~~are violated~~ ~~shall~~
 15 ~~have~~ a cause of action against the licensee or its management
 16 company, as specifically identified in the application for
 17 nursing home licensure, and its direct caregiver employees.

18 Sections 400.023-400.0238 provide the exclusive remedy against a
 19 licensee or management company for a cause of action for
 20 recovery of damages for the personal injury or death of a
 21 nursing home resident arising out of negligence or a violation
 22 of residents' rights specified in s. 400.022. The action may be
 23 brought by the resident or his or her guardian, by a person or
 24 organization acting on behalf of a resident with the consent of
 25 the resident or his or her guardian, or by the personal
 26 representative of the estate of a deceased resident regardless

27 of the cause of death. If the action alleges a claim for the
28 resident's rights or for negligence that caused the death of the
29 resident, the claimant shall be required to elect either
30 survival damages pursuant to s. 46.021 or wrongful death damages
31 pursuant to s. 768.21. If the action alleges a claim for the
32 resident's rights or for negligence that did not cause the death
33 of the resident, the personal representative of the estate may
34 recover damages for the negligence that caused injury to the
35 resident. The action may be brought in any court of competent
36 jurisdiction to enforce such rights and to recover actual and
37 punitive damages for any violation of the rights of a resident
38 or for negligence. Any resident who prevails in seeking
39 injunctive relief or a claim for an administrative remedy is
40 entitled to recover the costs of the action, and a reasonable
41 attorney's fee assessed against the defendant not to exceed
42 \$25,000. Fees shall be awarded solely for the injunctive or
43 administrative relief and not for any claim or action for
44 damages whether such claim or action is brought together with a
45 request for an injunction or administrative relief or as a
46 separate action, except as provided under s. 768.79 or the
47 Florida Rules of Civil Procedure. Sections 400.023-400.0238
48 provide the exclusive remedy for a cause of action for recovery
49 of damages for the personal injury or death of a nursing home
50 resident arising out of negligence or a violation of rights
51 specified in s. 400.022. This section does not preclude theories
52 of recovery not arising out of negligence or s. 400.022 which

HB 569

2014

53 | are available to a resident or to the agency. The provisions of
54 | chapter 766 do not apply to any cause of action brought under
55 | ss. 400.023-400.0238.

56 | Section 2. This act shall take effect July 1, 2014.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Gaetz offered the following:

Amendment (with title amendment)

5 Remove everything after the enacting clause and insert:
 6 Section 1. Section 400.021, Florida Statutes, is amended to
 7 read:

8 400.021 Definitions.—When used in this part, unless the
 9 context otherwise requires, the term:

10 (1) "Administrator" means the licensed individual who has
 11 the general administrative charge of a facility.

12 (2) "Agency" means the Agency for Health Care
 13 Administration, which is the licensing agency under this part.

14 (3) "Bed reservation policy" means the number of
 15 consecutive days and the number of days per year that a resident
 16 may leave the nursing home facility for overnight therapeutic
 17 visits with family or friends or for hospitalization for an



Amendment No. 1

18 acute condition before the licensee may discharge the resident
19 due to his or her absence from the facility.

20 (4) "Board" means the Board of Nursing Home Administrators.

21 (5) "Custodial service" means care for a person which
22 entails observation of diet and sleeping habits and maintenance
23 of a watchfulness over the general health, safety, and well-
24 being of the aged or infirm.

25 (6) "Department" means the Department of Children and
26 Family Services.

27 (7) "Facility" means any institution, building, residence,
28 private home, or other place, whether operated for profit or
29 not, including a place operated by a county or municipality,
30 which undertakes through its ownership or management to provide
31 for a period exceeding 24-hour nursing care, personal care, or
32 custodial care for three or more persons not related to the
33 owner or manager by blood or marriage, who by reason of illness,
34 physical infirmity, or advanced age require such services, but
35 does not include any place providing care and treatment
36 primarily for the acutely ill. A facility offering services for
37 fewer than three persons is within the meaning of this
38 definition if it holds itself out to the public to be an
39 establishment which regularly provides such services.

40 (8) "Geriatric outpatient clinic" means a site for
41 providing outpatient health care to persons 60 years of age or
42 older, which is staffed by a registered nurse, a physician
43 assistant, or a licensed practical nurse under the direct



Amendment No. 1

44 supervision of a registered nurse, advanced registered nurse
45 practitioner, physician assistant, or physician.

46 (9) "Geriatric patient" means any patient who is 60 years
47 of age or older.

48 (10) "Licensee" means an individual, corporation,
49 partnership, firm, association, governmental entity, or other
50 entity that is issued a permit, registration, certificate, or
51 license by the agency. The licensee is legally responsible for
52 all aspects of the provider operation.

53 (11)~~(10)~~ "Local ombudsman council" means a local long-term
54 care ombudsman council established pursuant to s. 400.0069,
55 located within the Older Americans Act planning and service
56 areas.

57 (12) "Management or consulting company" means an
58 individual, person, or entity who is either contracted with, or
59 receives a fee from a licensee to provide services for any of
60 the following activities; the hiring and firing of the
61 administrator and director of nursing; controlling or having
62 control over the staffing levels at the facility; having control
63 over the budget of the facility; or implementing and enforcing
64 the policies and procedures of the facility.

65 (13)~~(11)~~ "Nursing home bed" means an accommodation which is
66 ready for immediate occupancy, or is capable of being made ready
67 for occupancy within 48 hours, excluding provision of staffing;
68 and which conforms to minimum space requirements, including the
69 availability of appropriate equipment and furnishings within the

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Amendment No. 1

70 48 hours, as specified by rule of the agency, for the provision
71 of services specified in this part to a single resident.

72 ~~(14)~~(12) "Nursing home facility" means any facility which
73 provides nursing services as defined in part I of chapter 464
74 and which is licensed according to this part.

75 ~~(15)~~(13) "Nursing service" means such services or acts as
76 may be rendered, directly or indirectly, to and in behalf of a
77 person by individuals as defined in s. 464.003.

78 ~~(16)~~ "Passive investor" means an individual or entity that
79 does not participate in the decision-making or operations of a
80 nursing home facility.

81 ~~(17)~~(14) "Planning and service area" means the geographic
82 area in which the Older Americans Act programs are administered
83 and services are delivered by the Department of Elderly Affairs.

84 ~~(18)~~(15) "Respite care" means admission to a nursing home
85 for the purpose of providing a short period of rest or relief or
86 emergency alternative care for the primary caregiver of an
87 individual receiving care at home who, without home-based care,
88 would otherwise require institutional care.

89 ~~(19)~~(16) "Resident care plan" means a written plan
90 developed, maintained, and reviewed not less than quarterly by a
91 registered nurse, with participation from other facility staff
92 and the resident or his or her designee or legal representative,
93 which includes a comprehensive assessment of the needs of an
94 individual resident; the type and frequency of services required
95 to provide the necessary care for the resident to attain or



Amendment No. 1

96 maintain the highest practicable physical, mental, and
97 psychosocial well-being; a listing of services provided within
98 or outside the facility to meet those needs; and an explanation
99 of service goals.

100 (20) ~~(17)~~ "Resident designee" means a person, other than the
101 owner, administrator, or employee of the facility, designated in
102 writing by a resident or a resident's guardian, if the resident
103 is adjudicated incompetent, to be the resident's representative
104 for a specific, limited purpose.

105 (21) ~~(18)~~ "State ombudsman council" means the State Long-
106 Term Care Ombudsman Council established pursuant to s. 400.0067.

107 (22) ~~(19)~~ "Therapeutic spa services" means bathing, nail,
108 and hair care services and other similar services related to
109 personal hygiene.

110 Section 2. Section 400.023, Florida Statutes, is amended to
111 read:

112 400.023 Civil enforcement.—

113 (1) Any resident who alleges negligence or a violation of
114 whose rights as specified in this part are violated shall have
115 an exclusive a cause of action for the recovery of damages for
116 the personal injury or death of a nursing home resident arising
117 out of negligence or a violation of residents' rights specified
118 in s. 400.022, for direct or vicarious liability against the
119 licensee, as specifically defined by s. 400.021(10), the
120 licensee's management or consulting company, as specifically
121 defined by s. 400.021(12), the licensee's managing employees,



Amendment No. 1

122 and any direct caregivers whether employees or contractors. An
123 action against any other individual, person or entity who is not
124 listed above may only be brought by or on behalf of a resident
125 pursuant to subsection (2) of this statute. A passive investor,
126 as defined by s. 400.021(16), shall not be liable under this
127 part.

128 (a) The action may be brought by the resident or his or her
129 guardian, by a person or organization acting on behalf of a
130 resident with the consent of the resident or his or her
131 guardian, or by the personal representative of the estate of a
132 deceased resident regardless of the cause of death.

133 (b) If the action alleges a claim for the resident's rights
134 or for negligence that caused the death of the resident, the
135 claimant shall ~~be required to~~ elect either survival damages
136 pursuant to s. 46.021 or wrongful death damages pursuant to s.
137 768.21 after verdict, but before a final judgment is entered. If
138 the action alleges a claim for the resident's rights or for
139 negligence that did not cause the death of the resident, the
140 personal representative of the estate may recover damages for
141 the negligence that caused injury to the resident.

142 (c) The action may be brought in any court of competent
143 jurisdiction to enforce such rights and to recover actual and
144 punitive damages for any violation of the rights of a resident
145 or for negligence.

146 (d) Any resident who prevails in seeking injunctive relief
147 or a claim for an administrative remedy is entitled to recover



Amendment No. 1

148 the costs of the action, and a reasonable attorney's fee
149 assessed against the defendant not to exceed \$25,000. Fees shall
150 be awarded solely for the injunctive or administrative relief
151 and not for any claim or action for damages whether such claim
152 or action is brought together with a request for an injunction
153 or administrative relief or as a separate action, except as
154 provided under s. 768.79 or the Florida Rules of Civil
155 Procedure. ~~Sections 400.023-400.0238 provide the exclusive~~
156 ~~remedy for a cause of action for recovery of damages for the~~
157 ~~personal injury or death of a nursing home resident arising out~~
158 ~~of negligence or a violation of rights specified in s. 400.022.~~

159 (e) This section does not preclude theories of recovery not
160 arising out of negligence or s. 400.022 which are available to a
161 resident or to the agency. The provisions of chapter 766 do not
162 apply to any cause of action brought under ss. 400.023-400.0238.

163 (2) A cause of action may not be asserted against a person
164 or entity other than those identified in subsection (1) unless
165 the court or arbitration panel determines, after a hearing on a
166 motion for leave to amend the complaint, that there is
167 sufficient evidence in the record or proffered by the claimant
168 to establish there is a reasonable showing that:

169 (a) The person or entity owed a duty of reasonable care to
170 the resident, and the person or entity breached that duty; and

171 (b) The breach of that duty is a legal cause of loss,
172 injury, damage, or death to the resident.

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Amendment No. 1

174 For purposes of this subsection, when such cause of action is
175 asserted, in any proposed amended pleading, alleging that it
176 arose out of the conduct, transaction or occurrence set forth or
177 attempted to be set forth in the original pleading, any proposed
178 amendment shall relate back to the original pleading.

179 (3)-(2) In a any claim brought pursuant to this part
180 alleging a violation of resident's rights or negligence causing
181 injury to or the death of a resident, the claimant has ~~shall~~
182 ~~have~~ the burden of proving, by a preponderance of the evidence,
183 that:

184 (a) The defendant owed a duty to the resident;

185 (b) The defendant breached the duty to the resident;

186 (c) The breach of the duty is a legal cause of loss,
187 injury, death, or damage to the resident; and

188 (d) The resident sustained loss, injury, death, or damage
189 as a result of the breach.

190
191 ~~Nothing in This part~~ does not ~~shall be interpreted to create~~
192 strict liability. A violation of the rights set forth in s.
193 400.022 or in any other standard or guidelines specified in this
194 part or in any applicable administrative standard or guidelines
195 of this state or a federal regulatory agency is ~~shall be~~
196 evidence of negligence but is ~~shall not be considered negligence~~
197 per se.

198 (4)-(3) In a any claim brought pursuant to this section, a
199 licensee, person, or entity has ~~shall have~~ a duty to exercise



Amendment No. 1

200 reasonable care. Reasonable care is that degree of care which a
201 reasonably careful licensee, person, or entity would use under
202 like circumstances.

203 ~~(5)(4)~~ In a ~~any~~ claim for resident's rights violation or
204 negligence by a nurse licensed under part I of chapter 464, such
205 nurse has ~~shall have~~ the duty to exercise care consistent with
206 the prevailing professional standard of care for a nurse. The
207 prevailing professional standard of care for a nurse is ~~shall be~~
208 that level of care, skill, and treatment which, in light of all
209 relevant surrounding circumstances, is recognized as acceptable
210 and appropriate by reasonably prudent similar nurses.

211 ~~(6)(5)~~ A licensee is ~~shall not be~~ liable for the medical
212 negligence of any physician rendering care or treatment to the
213 resident except for the administrative services of a medical
214 director as required in this part. ~~Nothing in~~ This subsection
215 does not ~~shall be construed to~~ protect a licensee, person, or
216 entity from liability for failure to provide a resident with
217 appropriate observation, assessment, nursing diagnosis,
218 planning, intervention, and evaluation of care by nursing staff.

219 ~~(7)(6)~~ The resident or the resident's legal representative
220 shall serve a copy of any complaint alleging in whole or in part
221 a violation of any rights specified in this part to the Agency
222 for Health Care Administration at the time of filing the initial
223 complaint with the clerk of the court for the county in which
224 the action is pursued. The requirement of providing a copy of
225 the complaint to the agency does not impair the resident's legal



Amendment No. 1

226 rights or ability to seek relief for his or her claim.

227 ~~(8)(7)~~ An action under this part for a violation of rights
228 or negligence recognized herein is not a claim for medical
229 malpractice, and the provisions of s. 768.21(8) do not apply to
230 a claim alleging death of the resident.

231 Section 3. Section 400.0237, Florida Statutes, is amended
232 to read:

233 400.0237 Punitive damages; pleading; burden of proof.—

234 (1) (a) In any action ~~for damages~~ brought under this part, a
235 ~~no~~ claim for punitive damages may not be brought shall be
236 permitted unless there is a reasonable showing by admissible
237 evidence that has been submitted in the record or proffered by
238 the claimant and provides claimant which would provide a
239 reasonable basis for recovery of such damages when the criteria
240 in this section are applied. The claimant may move to amend her
241 or his complaint to assert a claim for punitive damages as
242 allowed by the rules of civil procedure in accordance with
243 evidentiary requirements set forth in this section.

244 (b) The court shall conduct a hearing to determine whether
245 there is sufficient admissible evidence submitted by the parties
246 to ensure that there is a reasonable basis to believe that the
247 claimant, at trial, will be able to demonstrate by clear and
248 convincing evidence that the recovery of such damages is
249 warranted under a claim for direct liability as specified in
250 subsection (2), or a claim for vicarious liability as specified
251 in subsection (3). The rules of civil procedure shall be

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Amendment No. 1

252 | liberally construed so as to allow the claimant discovery of
253 | evidence which appears reasonably calculated to lead to
254 | admissible evidence on the issue of punitive damages. No
255 | Discovery of financial worth may not ~~shall~~ proceed until after
256 | the pleading on concerning punitive damages is approved by the
257 | court permitted.

258 | (2) A defendant may be held liable for punitive damages
259 | only if the trier of fact, by ~~based on~~ clear and convincing
260 | evidence, finds that a defendant actively and knowingly
261 | participated in intentional misconduct or engaged in conduct
262 | that constitutes gross negligence and that such misconduct or
263 | negligence contributed to the loss, damages, or injury suffered
264 | by the claimant ~~the defendant was personally guilty of~~
265 | ~~intentional misconduct or gross negligence~~. As used in this
266 | section, the term:

267 | (a) "Intentional misconduct" means that a ~~the~~ defendant
268 | against whom punitive damages are sought had actual knowledge of
269 | the wrongfulness of the conduct and the high probability that
270 | injury or damage to the claimant would result and, despite that
271 | knowledge, intentionally pursued that course of conduct,
272 | resulting in injury or damage.

273 | (b) "Gross negligence" means that a ~~the~~ defendant's conduct
274 | was so reckless or wanting in care that it constituted a
275 | conscious disregard or indifference to the life, safety, or
276 | rights of persons exposed to such conduct.

277 | (3) In the case of vicarious liability of an individual,



Amendment No. 1

278 employer, principal, corporation, or other legal entity,
279 punitive damages may not be imposed for the conduct of an
280 employee or agent unless ~~only if~~ the conduct of an ~~the~~ employee
281 or agent meets the criteria specified in subsection (2) and an
282 officer, director, or manager of the actual employer,
283 corporation, or legal entity condoned, ratified, or consented to
284 the specific conduct as alleged in subsection (2).+

285 ~~(a) The employer, principal, corporation, or other legal~~
286 ~~entity actively and knowingly participated in such conduct;~~

287 ~~(b) The officers, directors, or managers of the employer,~~
288 ~~principal, corporation, or other legal entity condoned,~~
289 ~~ratified, or consented to such conduct; or~~

290 ~~(c) The employer, principal, corporation, or other legal~~
291 ~~entity engaged in conduct that constituted gross negligence and~~
292 ~~that contributed to the loss, damages, or injury suffered by the~~
293 ~~claimant.~~

294 (4) The plaintiff shall ~~must~~ establish at trial, by clear
295 and convincing evidence, its entitlement to an award of punitive
296 damages. The "greater weight of the evidence" burden of proof
297 applies to a determination of the amount of damages.

298 (5) This section is remedial in nature and takes ~~shall take~~
299 effect upon becoming a law.

300 Section 4. Section 400.145, Florida Statutes, is repealed.

301 Section 5. Section 400.1451, Florida Statutes, is created
302 to read:

303 400.1451 Records of care and treatment of resident; copies



Amendment No. 1

304 to be furnished.-

305 (1) Upon receipt of a written request that complies with
306 the requirements of the Health Insurance Portability and
307 Accountability Act of 1996 (HIPAA), 42 U.S.C. Section 1320(d)-2,
308 et seq, any nursing home licensed pursuant to this part shall
309 furnish to a competent resident or a representative of that
310 resident authorized to make requests for the resident's records
311 under HIPAA or subsection (2), copies of the resident's paper
312 and electronic records that are in possession of the nursing
313 home. Such records shall include medical records and any records
314 concerning the care and treatment of the resident performed by
315 the facility, except progress notes and consultation report
316 sections of a psychiatric nature. The nursing home shall provide
317 the requested records within 14 working days of receipt of a
318 request for a current resident or within 30 working days of
319 receipt of a request for a former resident.

320 (2) Requests for a deceased resident's medical records
321 under this section may be made by:

322 (a) Any person duly appointed by a court of competent
323 jurisdiction to act as the personal representative, executor,
324 administrator or temporary administrator of the deceased
325 resident's estate.

326 (b) In the event no such judicial appointment has been
327 made, any person designated by the resident to act as his
328 representative in a legally valid will; or,

329 (c) If there is no judicially appointed representative or



Amendment No. 1

330 person designated by the resident in a valid will, by only the
331 following:

332 1. A surviving spouse:

333 2. If there is no surviving spouse, by any surviving child
334 of the resident;

335 3. If there is no surviving spouse or child, by any parent
336 of the resident.

337 (3) All requests for records of a deceased resident must be
338 in writing and comply with the requirements of this section and
339 HIPAA. Furthermore, all requests for a deceased resident's
340 records made by a person authorized under paragraph (2) (a) must
341 include a copy of the court order appointing such person as the
342 representative of the resident's estate.

343 (4) All requests for a deceased person's records made by a
344 person authorized under paragraph (2) (b) must include a copy of
345 the will designating the person as the resident's
346 representative.

347 (5) All requests for a deceased person's records made by a
348 person authorized under paragraph (2) (c) must be accompanied by
349 a letter from the person's attorney verifying the person's
350 relationship to the resident and the absence of a court
351 appointed representative and will.

352 (6) A facility may charge a reasonable fee for the copying
353 of resident records. Such fee shall not exceed \$1 per page for
354 the first 25 pages and 25 cents per page for each page in excess
355 of 25 pages. The facility shall further allow any whom are

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Amendment No. 1

356 deemed authorized to act on behalf of the resident to examine
357 the original records in its possession, or microfilms or other
358 suitable reproductions of the records, upon such reasonable
359 terms as shall be imposed, to help assure that the records are
360 not damaged, destroyed, or altered.

361 (7) If any nursing home licensed pursuant to this part
362 determines that disclosure of the records to the resident will
363 be detrimental to the physical or mental health of the resident,
364 the provider may refuse to furnish the record; however, upon
365 such refusal, the resident's record shall, upon written request
366 by the resident, be furnished to any other medical provider
367 designated by the resident.

368 (8) Any nursing home licensed pursuant to this part who, in
369 good faith and in reliance upon this section, releases copies of
370 records shall be indemnified by the requesting party, and not be
371 found to have violated any criminal, or civil laws, and will not
372 be civilly liable to the resident, the resident's estate, or any
373 other person.

374 (9) No person shall be allowed to obtain copies of
375 residents' records pursuant to this section more often than once
376 per month, except that physician's reports in the residents'
377 records may be obtained as often as necessary to effectively
378 monitor the residents' condition.

379 (10) A facility may not be cited by the agency through the
380 survey process for any alleged or actual noncompliance with any
381 of the requirements of this section.

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Amendment No. 1

382 Section 6. Section 400.1795, Florida Statutes, is created
383 to read:

384 400.1795 License suspension, renewal application denial or
385 change of ownership application denial for failure to pay a
386 judgment.—

387 (1) Upon the entry of an adverse final judgment arising
388 from an award pursuant to s. 400.023, including an arbitration
389 award, from a claim of negligence or violation of residents
390 rights, either in contract or tort, or from noncompliance with
391 the terms of a settlement agreement, as determined by a court of
392 competent jurisdiction or arbitration panel, arising from a
393 claim pursuant to s. 400.023, the licensee shall pay the
394 judgment creditor the entire amount of the judgment, award or
395 settlement with all accrued interest within 60 days after the
396 date such judgment, award or settlement became final and subject
397 to execution, unless otherwise mutually agreed to in writing by
398 the parties. Failure shall result in additional grounds that may
399 be used by the agency for suspending a license or denying a
400 renewal application or a change of ownership application as
401 provided in this section:

402 (2) Upon notification of the existence of an unsatisfied
403 judgment or settlement pursuant to subsection (1), the agency
404 shall notify the licensee by certified mail that it shall be
405 subject to disciplinary action unless, within 30 days from the
406 date of mailing, that either:

407 (a) Shows proof that the unsatisfied judgment or settlement

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Amendment No. 1

408 has been paid in the amount specified; or

409 (b) Shows proof that of the existence of a payment plan
410 mutually agreed upon by the parties in writing; or

411 (c) Furnishes the agency with a copy of a timely filed
412 notice of appeal; or

413 (d) Furnishes the agency with a copy of an order from a
414 court of competent jurisdiction staying execution of the final
415 judgment.

416 (e) Shows proof by submitting an order from any court of
417 competent jurisdiction or arbitration overseeing any action
418 seeking indemnification from an insurance carrier or any other
419 party that it believes was required to pay the award.

420 (3) If the agency determines that the factual requirements
421 of subsection (1) are met, and no proof pursuant to subsection
422 (2) is provided by the licensee, the agency shall issue an
423 emergency order determining that the facility lacks financial
424 ability to operate and shall suspend the license pending
425 revocation of any licensee who, after 30 days following receipt
426 of a notice from the agency, has failed to satisfy the claim as
427 identified in subsection (1) or to reach a written settlement of
428 the claim. In the event the claim is not satisfied or no
429 settlement is reached, the emergency order shall indicate that
430 the agency will begin the license revocation process.

431 (4) Following or during the period of revocation, no
432 licensee, person or entity identified as having a controlling
433 interest in the suspended licensee, as identified on the

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Amendment No. 1

434 licensee application, will be allowed to file an application for
435 a license at the facility at issue. In the event that a judgment
436 at trial or arbitration occurs, the agency shall not approve a
437 change in license to a related party until the requirements of
438 subsection (1) or (2) are met.

439 Section 7. This act shall take effect upon becoming a law.

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T I T L E A M E N D M E N T

444

Remove everything before the enacting clause and insert:

445

An act relating to nursing home litigation reform; amending

446

s. 400.021, F.S.; creating definitions; amending s. 400.023,

447

F.S.; limiting which persons may be named in a lawsuit alleging

448

nursing home negligence; creating means for court to review who

449

is a named defendant; amending s. 400.0237, F.S.; requiring a

450

pretrial hearing on whether punitive damages are allowed;

451

limiting punitive damages; repealing s. 400.145, F.S.; repealing

452

statute relating to records of care and treatment of a nursing

453

home resident; creating s. 400.1451, F.S.; requiring a nursing

454

home to provide records of patient care to a patient or a

455

patient's representative; authorizing a representative to obtain

456

records of a deceased patient; limiting fees charged for a copy

457

of patient records; limiting access to records in certain

458

circumstances; providing that issues relating to patient records

459

is not an offense against a nursing home license through the

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Amendment No. 1

460 survey process; creating s. 400.1795, F.S.; providing for
461 suspension or revocation of a nursing home license for failure
462 to pay an a settlement, claim or judgment relating to nursing
463 home negligence; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 595 The Council on the Social Status of Black Men and Boys
SPONSOR(S): Williams and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward <i>EW</i>	Bond <i>MB</i>
2) Government Operations Subcommittee			
3) Appropriations Committee			
4) Judiciary Committee			

SUMMARY ANALYSIS

The Council on the Social Status of Black Men and Boys was established within the Department of Legal Affairs in 2006. The council consists of 19 appointed volunteer members who serve a four year term. The council studies conditions affecting black men and boys, proposes measures to alleviate underlying conditions affecting black men and boys, and develops local councils. The Office of the Attorney General provides staff and administrative support to the council. In addition to its mandatory duties, the council may:

- Access public data;
- Request public officials and agencies for assistance and research;
- Seek state and federal grants;
- Accept gifts for defraying costs of administration; and
- Work with or request information from Florida's traditionally black colleges and universities.

The bill:

- Provides for removal of a member of the council for absences;
- Directs the council to perform some of those functions which were previously discretionary;
- Adds to the discretionary duties of the council;
- Changes the number of members required to form a quorum from eleven to nine; and
- Provides that the council may reimburse per diem and travel expenses for individuals and entities that make presentations to the council regarding the council's mission or strategic vision.

The bill has an undetermined but likely minimal fiscal impact on state government. The bill does not appear to have a fiscal impact on local governments.

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Council on the Social Status of Black Men and Boys

The Council on the Social Status of Black Men and Boys was established within the Department of Legal Affairs in 2006.¹ The council consists of 19 appointed volunteer² members who serve a four year term.³ A quorum consists of 11 members of the council.⁴ The council is directed by statute to:

- Study conditions affecting black men and boys;
- Propose measures to alleviate underlying conditions affecting black men and boys;
- Study other topics as suggested by the Legislature or chair of the council;
- Receive suggestions pertinent to applicable issues;
- Monitor the direct support organization established by statute;⁵ and
- Develop a strategic program and funding initiative to establish local councils.⁶

The council may also:

- Access public data;⁷
- Request public officials and agencies for assistance and research;⁸
- Seek state and federal grants, and accept gifts for defraying costs of administration;⁹
- Work with or request information from Florida's traditionally black colleges and universities.¹⁰

The Office of the Attorney General provides staff and administrative support to the council.¹¹ Council members are entitled to reimbursement for travel and per diem expenses.¹² The council is subject to the public records law,¹³ and its members must file a disclosure of financial interests.¹⁴

Effect of Proposed Changes

The bill adds to the existing statute that a member of the council is deemed to have vacated his or her position if:

- The member has three consecutive unexcused absences, defined as failure to notify the chair in advance; or
- The member is absent from at least half of the council meetings over a twelve month period.

¹ Section 16.615, F.S.

² Section 16.615(10), F.S.

³ Section 16.615(2), F.S.

⁴ Section 16.615(8), F.S.

⁵ Section 16.616, F.S.

⁶ Section 16.615(4), F.S.

⁷ Section 16.615(5)(a), F.S.

⁸ Section 16.615(5)(b)(c)(d), F.S.

⁹ Section 16.615(5)(e), F.S.

¹⁰ Section 16.615(5)(f), F.S.

¹¹ Section 16.615(6), F.S.

¹² Section 16.615(10), F.S.

¹³ Section 16.615(11), F.S.

¹⁴ Section 16.615(12), F.S., citing s. 112.3145, F.S.

The bill directs the council to perform some of those functions which were previously discretionary, directing the council to:

- Access public records held by any state department or agency;
- Make direct requests to the Joint Legislative Auditing Committee¹⁵ for assistance with research and monitoring of the outcomes provided by the Office of Program Policy Analysis and Government Accountability;¹⁶
- Request through member legislators, research assistance from the office of Economic and Demographic Research;¹⁷
- Request information from the state or any political subdivision, municipal corporation, public officer, or governmental department thereof;
- Apply for and accept funds, grants, gifts, and services from the state, federal government, or other sources for administrative costs and for council duties; and
- Work directly with or request information from Florida's historically black colleges and universities.

The bill adds to the discretionary duties by providing that the council may:

- Identify initiatives and programs that support the council's mission and strategic vision;
- Study other topics suggested by the Legislature or as directed by the chair of the council; and
- Subject to legislative appropriations, use funds appropriated to the Department of Legal Affairs for the council to:
 - Conduct additional research and studies that support the council's vision and strategic mission;
 - Provide information and assistance in the establishment of local Councils on the Social Status of Black Men and Boys; and
 - Host an annual statewide conference as provided in the statute.

The bill also:

- Changes the number of members required to form a quorum from eleven to nine;
- Provides that the council may present its strategic findings at an annual statewide conference; and
- Provides that the council may reimburse per diem and travel expenses for individuals and entities that make presentations to the council regarding the council's mission or strategic vision:
 - Removing the barriers to healthy lifestyles, health care, and community-based support and prevention services;
 - Ensuring a commitment to education and lifelong learning;
 - Addressing the disproportionately high rate of unemployment and unstable economic conditions;
 - Addressing crime prevention and criminal justice issues that adversely and disproportionately affect black men and boys; and
 - Promoting community awareness, leadership, and sustainable community and agency partnerships.

The bill also makes grammatical and stylistic changes that do not affect the meaning of the statute.

The bill has an effective date of July 1, 2014.

¹⁵ Rule 4.1(1)(c), Joint Rules of the Florida Legislature.

¹⁶ See s. 11.51, F.S.

¹⁷ Rule 3.1(1)(a), Joint Rules of the Florida Legislature.

B. SECTION DIRECTORY:

Section 1 amends s. 16.615, F.S., relating to Council on the Social Status of Black Men and Boys.

Section 2 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

According to the Agency Bill Analysis Request provided by the Office of Program Policy Analysis and Government Accountability, "The fiscal impact of HB 595 on OPPAGA cannot be determined at this time because the proposed language provides that the Council on the Social Status of Black Men and Boys shall make requests directly to the Joint Legislative Auditing Committee for assistance from OPPAGA with research and monitoring of outcomes on the broad range of issues within the mission of the council." The bill may have an impact on state expenditures due to the expansion of per diem reimbursement provisions, but this amount should be minimal and absorbed within the existing resources of the Office of Attorney General and the direct-support organization.¹⁸

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to the Council on the Social Status of Black Men and Boys; amending s. 16.615, F.S.; providing criteria for removal of a member of the council; revising the duties of the council; authorizing the council to identify specified initiatives and programs, study other topics suggested by the Legislature or as directed by the chair of the council, and, subject to legislative appropriations, use funds appropriated to the Department of Legal Affairs to perform certain tasks; revising what constitutes a quorum of the council; authorizing the council to present its findings and strategic issues at an annual statewide conference; providing for reimbursement for per diem and travel expenses for individuals and entities that make presentations to the council regarding the mission or strategic vision of the council; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 16.615, Florida Statutes, is amended to read:

16.615 Council on the Social Status of Black Men and Boys.—

(1) The Council on the Social Status of Black Men and Boys

27 is established within the Department of Legal Affairs and shall
 28 consist of 19 members appointed as follows:

29 (a) Two members of the Senate who are not members of the
 30 same political party, appointed by the President of the Senate
 31 with the advice of the Minority Leader of the Senate.

32 (b) Two members of the House of Representatives who are
 33 not members of the same political party, appointed by the
 34 Speaker of the House of Representatives with the advice of the
 35 Minority Leader of the House of Representatives.

36 (c) The Secretary of Children and Families ~~Family Services~~
 37 or his or her designee.

38 (d) The director of the Mental Health Program Office
 39 within the Department of Children and Families ~~Family Services~~
 40 or his or her designee.

41 (e) The State Surgeon General or his or her designee.

42 (f) The Commissioner of Education or his or her designee.

43 (g) The Secretary of Corrections or his or her designee.

44 (h) The Attorney General or his or her designee.

45 (i) The Secretary of Management Services or his or her
 46 designee.

47 (j) The executive director of the Department of Economic
 48 Opportunity or his or her designee.

49 (k) A businessperson who is an African American, as
 50 defined in s. 760.80(2)(a), appointed by the Governor.

51 (l) Two persons appointed by the President of the Senate
 52 who are not members of the Legislature or employed by state

53 government. One of the appointees must be a clinical
 54 psychologist.

55 (m) Two persons appointed by the Speaker of the House of
 56 Representatives who are not members of the Legislature or
 57 employed by state government. One of the appointees must be an
 58 Africana studies professional.

59 (n) The deputy secretary for Medicaid in the Agency for
 60 Health Care Administration or his or her designee.

61 (o) The Secretary of Juvenile Justice or his or her
 62 designee.

63 (2) Each member of the council shall be appointed to a 4-
 64 year term; however, for the purpose of providing staggered
 65 terms, of the initial appointments, 9 members shall be appointed
 66 to 2-year terms and 10 members shall be appointed to 4-year
 67 terms. A member of the council may be removed at any time by the
 68 member's appointing authority, who shall fill the vacancy on the
 69 council. A member of the council is deemed to have vacated his
 70 or her position on the council and the member's appointing
 71 authority shall fill the vacated position if:

72 (a) The member has three consecutive unexcused absences.
 73 As used in this paragraph, the term "unexcused absence" means
 74 the member's failure to notify the chair that the member will
 75 not be present at a meeting of the council; or

76 (b) The member is absent for at least 50 percent of the
 77 council meetings within a 12-month period.

78 (3)(a) At the first meeting of the council each year, the

79 members shall elect a chair and a vice chair.

80 (b) A vacancy in the office of chair or vice chair shall
81 be filled by vote of the remaining members.

82 (4)~~(a)~~ The council shall:

83 (a) Make a systematic study of the conditions affecting
84 black men and boys, including, but not limited to, homicide
85 rates, arrest and incarceration rates, poverty, violence, drug
86 abuse, death rates, disparate annual income levels, school
87 performance in all grade levels, including postsecondary levels,
88 and health issues.

89 ~~(b) The council shall~~ Propose measures to alleviate and
90 correct the underlying causes of the conditions described in
91 paragraph (a). These measures may consist of changes to the law
92 or systematic changes that can be implemented without
93 legislative action.

94 ~~(c) The council may study other topics suggested by the~~
95 ~~Legislature or as directed by the chair of the council.~~

96 (c)~~(d)~~ ~~The council shall~~ Receive suggestions or comments
97 pertinent to the applicable issues from members of the
98 Legislature, governmental agencies, public and private
99 organizations, and private citizens.

100 (d)~~(e)~~ ~~The council shall~~ Monitor outcomes of the direct-
101 support organization created pursuant to s. 16.616.

102 (e)~~(f)~~ ~~The council shall~~ Develop a strategic program and
103 funding initiative to establish local Councils on the Social
104 Status of Black Men and Boys.

105 | (f) Access data held by any state department or agency,
 106 | which is otherwise a public record.

107 | (g) Make requests directly to the Joint Legislative
 108 | Auditing Committee for assistance with the research and
 109 | monitoring of the outcomes provided by the Office of Program
 110 | Policy Analysis and Government Accountability.

111 | (h) Request, through council members who are also
 112 | legislators, research assistance from the Office of Economic and
 113 | Demographic Research within the Legislature.

114 | (i) Request information and assistance from the state or
 115 | any political subdivision, municipal corporation, public
 116 | officer, or governmental department thereof.

117 | (j) Apply for and accept funds, grants, gifts, and
 118 | services from the state, the Federal Government, or any of its
 119 | agencies, or any other public or private source for the purpose
 120 | of defraying clerical and administrative costs as may be
 121 | necessary for carrying out its duties under this section.

122 | (k) Work directly with, or request information and
 123 | assistance on issues pertaining to education from, this state's
 124 | historically black colleges and universities.

125 | (5) The council may:

126 | (a) Identify initiatives and programs that support the
 127 | council's mission and strategic vision.

128 | (b) Study other topics suggested by the Legislature or as
 129 | directed by the chair of the council.

130 | (c) Subject to legislative appropriations, use funds

131 appropriated to the Department of Legal Affairs for the council
 132 to:

133 1. Conduct additional research and studies that support
 134 the council's mission and strategic vision.

135 2. Provide information and assistance in the establishment
 136 of local Councils on the Social Status of Black Men and Boys.

137 3. Host an annual statewide conference as provided in
 138 paragraph (9) (a).

139 ~~(a) Access data held by any state departments or agencies,~~
 140 ~~which data is otherwise a public record.~~

141 ~~(b) Make requests directly to the Joint Legislative~~
 142 ~~Auditing Committee for assistance with research and monitoring~~
 143 ~~of outcomes by the Office of Program Policy Analysis and~~
 144 ~~Government Accountability.~~

145 ~~(c) Request, through council members who are also~~
 146 ~~legislators, research assistance from the Office of Economic and~~
 147 ~~Demographic Research within the Florida Legislature.~~

148 ~~(d) Request information and assistance from the state or~~
 149 ~~any political subdivision, municipal corporation, public~~
 150 ~~officer, or governmental department thereof.~~

151 ~~(e) Apply for and accept funds, grants, gifts, and~~
 152 ~~services from the state, the Federal Government or any of its~~
 153 ~~agencies, or any other public or private source for the purpose~~
 154 ~~of defraying clerical and administrative costs as may be~~
 155 ~~necessary for carrying out its duties under this section.~~

156 ~~(f) Work directly with, or request information and~~

157 ~~assistance on issues pertaining to education from, Florida's~~
 158 ~~historically black colleges and universities.~~

159 (6) The Office of the Attorney General shall provide staff
 160 and administrative support to the council.

161 (7) The council shall meet quarterly and at other times at
 162 the call of the chair or as determined by a majority of council
 163 members and approved by the Attorney General.

164 (8) Nine ~~Eleven~~ of the members of the council constitute a
 165 quorum, and an affirmative vote of a majority of the members
 166 present is required for final action.

167 (9)(a) The council shall issue an ~~its first~~ annual report
 168 by ~~December 15, 2007,~~ and by December 15 of each ~~following~~ year,
 169 stating the findings, conclusions, and recommendations of the
 170 council. The council shall submit the report to the Governor,
 171 the President of the Senate, the Speaker of the House of
 172 Representatives, and the chairs ~~chairpersons~~ of the standing
 173 committees of jurisdiction in each house ~~chamber~~. The council
 174 may also present its findings and its strategic issues regarding
 175 the status of black men and boys at an annual statewide
 176 conference hosted by the council. The strategic issues include
 177 the following:

178 1. Removing the barriers to healthy lifestyles, health
 179 care, and community-based support and prevention services.

180 2. Ensuring a commitment to education and lifelong
 181 learning.

182 3. Addressing the disproportionately high rate of

183 unemployment and unstable economic conditions.

184 4. Addressing crime prevention and criminal justice issues
 185 that adversely and disproportionately affect black men and boys.

186 5. Promoting community awareness, leadership, and
 187 sustainable community and agency partnerships.

188 (b) The initial report must include the findings of an
 189 investigation into factors causing black-on-black crime from the
 190 perspective of public health related to mental health, other
 191 health issues, cultural disconnection, and cultural identity
 192 trauma.

193 (10) Members of the council shall serve without
 194 compensation. Members are entitled to reimbursement for per diem
 195 and travel expenses as provided in s. 112.061. State officers
 196 and employees shall be reimbursed from the budget of the agency
 197 through which they serve. Other members may be reimbursed by the
 198 Department of Legal Affairs. The council may also reimburse per
 199 diem and travel expenses at the same rate provided for public
 200 employees under s. 112.061 for individuals and entities that
 201 make presentations to the council regarding the council's
 202 mission or strategic vision. These individuals and entities
 203 shall be paid from funds appropriated to the council for that
 204 purpose.

205 (11) The council and any subcommittees it forms are
 206 subject to ~~the provisions of~~ chapter 119, related to public
 207 records, and ~~the provisions of~~ chapter 286, related to public
 208 meetings.

HB 595

2014

209 (12) Each member of the council who is not otherwise
210 required to file a financial disclosure statement pursuant to s.
211 8, Art. II of the State Constitution or s. 112.3144~~7~~, must file a
212 disclosure of financial interests pursuant to s. 112.3145.

213 Section 2. This act shall take effect July 1, 2014.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Williams, A. offered the following:

Amendment (with title amendment)

Between lines 212 and 213, insert:

Section 2. Section 16.616, Florida Statutes, is repealed.

 T I T L E A M E N D M E N T

Remove line 18 and insert:

of the council; repealing s. 16.616, F.S.; repealing provision
 authorizing the creation of a direct-support organization;
 providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 14-04 Security of Confidential Personal Information
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: PCB CJS 14-05 **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Cary JMC	Bond NB

SUMMARY ANALYSIS

Current law requires that a person who conducts business in Florida and maintains personal information in a computerized data system must disclose a breach in the security of the data to affected residents no later than forty-five days following a determination that unencrypted personal information was acquired, or reasonably believed to have been acquired, by an unauthorized person if the acquired information materially compromises the security, confidentiality, or integrity of personal information.

This Proposed Committee Bill (PCB) repeals the current law and creates the Florida Information Protection Act of 2014 (Act). The Act requires notice of a breach be given to the Department of Legal Affairs (DLA) in addition to being given to affected residents, shortens the time limit for notice to 30 days, allows delay of notifications if a law enforcement agency requests that notice be delayed for investigation purposes, and provides the DLA with enforcement authority to civilly prosecute a violator of the terms of the Act under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The Act provides for penalties in addition to FDUTPA of \$1000 for each day, up to 30 days, that the required notice of the breach is not given, and a penalty of \$50,000 for each 30-day period thereafter that notice is not given, for up to 180 days, with an overall cap of \$500,000.

The PCB also requires covered entities to take all reasonable measures to dispose of personal information.

State government entities also must report a breach to the DLA, but are not liable for civil penalties and are not required to properly dispose of personal information by this PCB. Counties and municipalities appear to be exempt from the Act.

The fiscal impacts of this PCB on state government and the private sector are unknown. The PCB does not appear to have a fiscal impact on local government revenues or expenditures.

The PCB has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Current law requires that a person who conducts business in Florida and maintains personal information in a computerized data system must disclose a breach in the security of the data to any resident of this state subject to certain exceptions. When a disclosure is required, it must be made without unreasonable delay, and no later than forty-five days following the determination that unencrypted personal information was acquired, or reasonably believed to have been acquired, by an unauthorized person and the acquired information materially compromises the security, confidentiality, or integrity of personal information.¹

Current law provides that any person who fails to make the required disclosure within forty-five days is liable for the an administrative fine in the amount of \$1,000 for each day the breach goes undisclosed for up to 30 days. The person is liable for up to \$50,000 for each 30 day period the breach goes undisclosed up to 180 days.² If disclosure is not made within 180 days, the person is subject to an administrative fine of up to \$500,000.³

The disclosure required must be made by all persons in the state in possession of computerized data, but the administrative sanctions described above do not apply in the case of computerized information in the custody of any governmental agency or subdivision. However, if the governmental agency or subdivision has entered into a contract with a contractor of third party administrator to provide governmental services, the contractor or third party administrator is a person to whom the administrative sanctions would apply, although that contractor or third party administrator found in violation of the non-disclosure restrictions would not have an action for contribution or set-off available against the employing agency or subdivision.⁴

Further, current law provides that any person who, on behalf of another business entity, maintains computerized data that includes personal information, must notify the business entity for whom the information is maintained of any breach of the security of the data within 10 days of the determination that a breach has occurred, if the personal information is reasonably believed to have been acquired by an unauthorized person. The administrative fines described above apply to a person who fails to disclose a security breach under this provision. The PCB defines the terms "breach," "breach of the security of the system", "personal information," "unauthorized person," and "person." The PCB specifies what type of notice must be provided.⁵

Finally, current law provides that in the event that notification is required of more than 1,000 persons at one time, the person must also notify all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis⁶ of the timing, distribution and content of the notices.⁶

Effect of the PCB

The Proposed Committee Bill (PCB) repeals current law regarding data breaches at s. 817.5681, F.S., and creates s. 501.170, F.S., known as the "Florida Information Protection Act of 2014" (Act).

¹ Section 817.5681(1)(a), F.S.

² Section 817.5681(1)(b)1., F.S.

³ Section 817.5681(1)(b)2., F.S.

⁴ Section 817.5681(1)(d), F.S.

⁵ Section 817.5681(2)(a), F.S.

⁶ Section 817.5681(12), F.S.

The PCB creates s. 501.170(1), F.S., to provide definitions.

The PCB creates s. 501.170(2), F.S., to require a "covered entity" to provide notice of any breach of security once it is discovered. A covered entity is defined as a sole proprietorship, partnership, corporation, trust, estate, cooperative, association, or other commercial entity that acquires, maintains, stores, or uses personal information, including a governmental entity.⁷ A breach of security is an unauthorized access of data in electronic form containing personal information. Personal information includes either a user name or e-mail address, in combination with a password or security question and answer that would permit access to an online account, or an individual's first initial or name and last name in combination with any one or more of the following:

- Social security number;
- Driver license or identification card number, passport number, military identification number, or other similar number issued on a government document used to verify identity;
- Financial account number or credit or debit card number, in combination with any required security code, access, code, or password that is necessary to permit access to an individual's financial account;
- Any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional;
- An individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer to identify the individual; or
- Any other information from or about an individual that could be used to personally identify that person.

The PCB creates s. 501.170(3), F.S., to require that a covered entity provide notice to the Department of Legal Affairs (DLA), and also to each individual in Florida whose personal information was accessed, or the covered entity reasonably believes was accessed, as a result of the breach. If a third-party agent maintains the system that was breached, the third-party agent must notify the covered entity, who is responsible for the notification to the DLA and individuals.

The PCB creates s. 501.170(4), F.S., to require that such notification be made as expeditiously as practicable and without unreasonable delay. Notification to affected individuals must be made within 30 days unless, after an appropriate investigation and written consultation with relevant federal and state law enforcement agencies, the covered entity reasonably determines that the breach has not and likely will not result in identity theft or any other financial harm to the individuals. Such a determination must be documented in writing and maintained for at least 5 years, and must be provided to the DLA.

If notification to individuals must be made due to the breach likely resulting in identity theft or other financial harm, the covered entity must provide written notice to the DLA as promptly as possible, but in any event, within 30 days after determining that a breach occurred. Written notice to the DLA must include:

- A synopsis of the events surrounding the breach;
- A police report, incident report, or computer forensics report;
- The number of individuals in this state who were or potentially have been affected by the breach;
- A copy of the policies in place regarding breaches;
- Any steps that have been taken to rectify the breach;
- Any services being offered by the covered entity to individuals, without charge, and how to use such services;

⁷ A governmental entity is not subject to the enforcement provisions of the Act or the requirements for disposal of individual records. Furthermore, counties and municipalities do not appear to be "governmental entities" for the purposes of the Act.

- A copy of the notice sent to the individuals affected; and
- The name, address, telephone number, and e-mail address of an employee of the covered entity from whom additional information may be obtained about the breach and the steps taken to rectify the breach and prevent similar breaches.

If the covered entity is the judicial branch, the Executive Office of the Governor, the Department of Financial Services, or the Department of Agriculture and Consumer Services, the agency may post the information on their agency-maintained websites rather than providing written notice to the DLA.

If a federal or state law enforcement agency determines that such notices would interfere with a criminal investigation and provides a written request to that effect, the notification to affected individuals must be delayed for any period that the law enforcement agency determines is reasonably necessary.

The PCB creates s. 501.170(5), F.S., to require written notice to an individual to be by either a written notification sent to the postal address of the individual or an e-mail notification sent to the e-mail address of the individual and must include:

- The date, estimated date, or estimated date range of the breach of security;
- A description of the personal information that was accessed or reasonably believed to have been accessed as a part of the breach of security; and
- Information that the individual can use to contact the covered entity to inquire about the breach and the personal information that the covered entity maintained about the individual.

If the cost of such notification would exceed \$250,000, or if there are more than 500,000 affected individuals, or if the covered entity does not have an e-mail address or mailing address for the effective individuals, the covered entity may provide substitute notification. The substitute notification must include a conspicuous notice on the Internet website of the covered entity if the covered entity maintains a website, and notification in print and broadcast media, including major media in urban and rural areas where the affected individuals reside.

If a covered entity is in compliance with a federal law that requires the covered entity to provide notification to individuals following a breach of security, the covered entity is deemed to comply with the requirements of s. 501.170(5), F.S., as long as it provides notification to the DLA.

The PCB creates s. 501.170(6), F.S., to require a covered entity to notify consumer credit reporting agencies if the covered entity must provide notification to more than 1000 individuals at a single time.

The PCB creates s. 501.170(7), F.S., to require the DLA to provide an annual report, by February 1, to the President of the Senate and the Speaker of the House describing the nature of any reported breaches of security by governmental entities or third-party agents of governmental entities in the preceding year, along with recommendations for security improvements.

The PCB creates s. 501.170(8), F.S., to require each covered entity or third-party agent to take all reasonable measures to dispose, or arrange for the disposal, of personal information within its custody or control when the records are no longer retained. Such disposal must involve shredding, erasing, or otherwise modifying the personal information in the records to make it unreadable or undecipherable through any means.

The PCB creates s. 501.170(9), F.S., to provide the DLA with a means to enforce the Act. Specifically, if a covered entity violates any requirement of the Act, it will be treated as an unfair or deceptive act or practice⁸ in any action brought by DLA. An unfair or deceptive act or practice is punishable by a civil

⁸ Section 501.207, F.S., allows the DLA to bring (1) an action to obtain a declaratory judgment that an act or practice violates the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); (2) an action to enjoin any person who has

penalty of not more than \$10,000 for each violation.⁹ A civil penalty is "strictly construed and is not to be extended by construction."¹⁰ Therefore, a single breach event would likely be considered a single violation under FDUTPA.¹¹ However, the Act provides additional penalties beyond a typical unfair or deceptive act or practice claim. In addition to the \$10,000 per violation penalty under FDUTPA, the Act provides for a civil penalty of \$1000 for each day the breach goes undisclosed for up to 30 days and, thereafter, \$50,000 for each 30-day period or portion thereof for up to 180 days, not to exceed \$500,000. If notification is not made within 180 days, any person required to make notification but fails to do so is subject to a civil penalty of up to \$500,000. All penalties will be deposited into the General Revenue Fund.

The PCB creates s. 501.170(10), F.S., to explicitly state that the PCB does not create a private cause of action.

The PCB amends ss. 282.0041 and 282.318, F.S., to update cross references in accordance with the Act.

The PCB provides an effective date of July 1, 2014.

B. SECTION DIRECTORY:

Section 1 provides a name for the Act.

Section 2 repeals s. 817.5681, F.S., relating to breach of security concerning confidential personal information in third-party possession and administrative penalties.

Section 3 creates s. 501.170, F.S., relating to security of confidential personal information.

Section 4 amends s. 282.0041, F.S., relating to definitions.

Section 5 amends s. 282.318, F.S., relating to enterprise security of data and information technology.

Section 6 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The PCB may have an unknown, positive impact on state revenues to the extent that DLA enforces civil penalties against violators of the Act.

2. Expenditures:

The PCB appears to create an unknown increase in state government expenditures for the DLA, however the DLA indicates that any additional duties required of consumer protection staff can be absorbed within existing appropriations for the next fiscal year.

violated, is violating, or is likely to violate FDUTPA; and/or (3) an action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of FDUTPA.

⁹ Section 501.2075, F.S.

¹⁰ *3B TV, Inc. v. State, Office of Atty. Gen.*, 794 So.2d 744, 749 (Fla. 1st DCA 2001).

¹¹ See *id.* See also s. 501.170(9)(b) of the PCB, which provides that a civil penalty must be applied per breach, and not per individual affected.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The PCB does not appear to have any impact on local government revenues.

2. Expenditures:

The PCB does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCB creates a requirement to notify affected individuals of a breach. Because the reporting requirement is similar to that in current law, this requirement is not anticipated to have a fiscal impact on the private sector.

The PCB creates a requirement to notify the state in the event of a breach. The requirement is new, but is expected to have a minimal impact on the private sector.

The PCB contains civil penalties that may be assessed against individuals and entities in the private sector. The penalty can be as high as \$500,000 for violations of the Act. It is unknown how often these penalties would be assessed and their impact on the private sector is thus unknown.

The PCB mandates that businesses properly dispose of individual records in order to avoid having those records fall into the wrong hands. The fiscal impact of this requirement on the private sector is unknown. Many companies are already required by current state and federal law to take reasonable measures to properly dispose of certain personal information, and thus will not be impacted by this requirement in the PCB. For example, the Fair Credit Reporting Act and the Federal Trade Commission require that businesses properly dispose of consumer information; and the Health Insurance Portability and Accountability Act and the Gramm-Leach-Bliley Act require health care providers to properly dispose of certain health information.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCB does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The PCB does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to security of confidential personal
 3 information; providing a short title; repealing s.
 4 817.5681, F.S., relating to breach of security
 5 concerning confidential personal information in third-
 6 party possession; creating s. 501.170, F.S.; providing
 7 definitions; requiring specified entities to take
 8 reasonable measures to protect and secure data in
 9 electronic form containing personal information;
 10 requiring specified entities to notify the Department
 11 of Legal Affairs of data security breaches; requiring
 12 notice to individuals of data security breaches in
 13 certain circumstances; providing exceptions to notice
 14 requirements in certain circumstances; specifying
 15 contents of notice; requiring notice to credit
 16 reporting agencies in certain circumstances; requiring
 17 the department to report annually to the Legislature;
 18 providing requirements for disposal of customer
 19 records; providing for enforcement actions by the
 20 department; providing civil penalties; specifying that
 21 no private cause of action is created; amending ss.
 22 282.0041 and 282.318, F.S.; conforming cross-
 23 references; providing an effective date.

24
 25 Be It Enacted by the Legislature of the State of Florida:
 26

27 Section 1. This act may be cited as the "Florida
28 Information Protection Act of 2014."

29 Section 2. Section 817.5681, Florida Statutes, is
30 repealed.

31 Section 3. Section 501.170, Florida Statutes, is created
32 to read:

33 501.170 Security of confidential personal information.-

34 (1) DEFINITIONS.-As used in this section, the term:

35 (a) "Breach of security" means unauthorized access of data
36 in electronic form containing personal information.

37 (b) "Covered entity" means a sole proprietorship,
38 partnership, corporation, trust, estate, cooperative,
39 association, or other commercial entity that acquires,
40 maintains, stores, or uses personal information. For purposes of
41 the notification requirements of subsections (3)-(6), the term
42 includes a governmental entity.

43 (c) "Data in electronic form" means any data stored
44 electronically or digitally on any computer system or other
45 database and includes recordable tapes and other mass storage
46 devices.

47 (e) "Department" means the Department of Legal Affairs.

48 (e) "Governmental entity" means any department, division,
49 bureau, commission, regional planning agency, board, district,
50 authority, agency, or other instrumentality of this state that
51 acquires, maintains, stores, or uses data in electronic form
52 containing personal information.

53 (f)1. "Personal information" means either of the
 54 following:

55 a. An individual's first name or first initial and last
 56 name in combination with any one or more of the following data
 57 elements for that individual:

58 (I) Social security number.

59 (II) Driver license or identification card number,
 60 passport number, military identification number, or other
 61 similar number issued on a government document used to verify
 62 identity.

63 (III) Financial account number or credit or debit card
 64 number, in combination with any required security code, access
 65 code, or password that is necessary to permit access to an
 66 individual's financial account.

67 (IV) Any information regarding an individual's medical
 68 history, mental or physical condition, or medical treatment or
 69 diagnosis by a health care professional.

70 (V) An individual's health insurance policy number or
 71 subscriber identification number and any unique identifier used
 72 by a health insurer to identify the individual.

73 (VI) Any other information from or about an individual
 74 that could be used to personally identify that person; or

75 b. A user name or e-mail address, in combination with a
 76 password or security question and answer that would permit
 77 access to an online account.

78 2. "Personal information" does not include information

79 about an individual that has been made publicly available by a
 80 federal, state, or local governmental entity or information that
 81 is encrypted, secured, or modified by any other method or
 82 technology that removes elements that personally identify an
 83 individual or that otherwise renders the information unusable.

84 (g) "Customer records" means any material, regardless of
 85 the physical form, on which information is recorded or preserved
 86 by any means, including, but not limited to, written or spoken
 87 words, graphically depicted, printed, or electromagnetically
 88 transmitted that are provided by an individual in this state to
 89 a covered entity for the purpose of purchasing or leasing a
 90 product or obtaining a service.

91 (h) "Third-party agent" means an entity that has been
 92 contracted to maintain, store, or process personal information
 93 on behalf of a covered entity or governmental entity.

94 (2) REQUIREMENTS FOR DATA SECURITY.—Each covered entity,
 95 governmental entity, or third-party agent shall take reasonable
 96 measures to protect and secure data in electronic form
 97 containing personal information.

98 (3) NOTICE OF SECURITY BREACH.—

99 (a) A covered entity shall give notice of any breach of
 100 security following discovery by the covered entity. Notice of
 101 the breach of security shall be provided to the department and
 102 to each individual in this state whose personal information was,
 103 or the covered entity reasonably believes to have been, accessed
 104 as a result of the breach.

105 (b) In the event of a breach of security of a system
106 maintained by a third-party agent, such third-party agent shall
107 promptly notify the covered entity of the breach of security.
108 Upon receiving notification from a third-party agent, a covered
109 entity shall provide notification as required under subsection
110 (3).

111 (4) NOTIFICATION REQUIREMENTS.—

112 (a) A notification required under subsection (3) with
113 respect to a breach of security shall be made as expeditiously
114 as practicable and without unreasonable delay, taking into
115 account the time necessary to allow the covered entity to
116 determine the scope of the breach of security, to identify
117 individuals affected by the breach, and to restore the
118 reasonable integrity of the data system that was breached.
119 Notification to the affected individuals must be made within 30
120 days after the determination of the breach or reason to believe
121 a breach had occurred, unless subject to a delay authorized
122 under paragraph (d).

123 (b) Upon determining that a breach occurred, a covered
124 entity must provide written notice to the department as promptly
125 as possible, but within 30 days after the determination. Such
126 notice must be given to the department even for breaches
127 involving paragraph (c) or paragraph (d). Written notice must
128 include:

- 129 1. A synopsis of the events surrounding the breach.
130 2. A police report, incident report, or computer forensics

131 report.

132 3. The number of individuals in this state who were or
 133 potentially have been affected by the breach.

134 4. A copy of the policies in place regarding breaches.

135 5. Any steps that have been taken to rectify the breach.

136 6. Any services being offered by the covered entity to
 137 individuals, without charge, and instructions as to how to use
 138 such services.

139 7. A copy of the notice sent to the individual.

140 8. The name, address, telephone number, and e-mail address
 141 of the employee of the covered entity from whom additional
 142 information may be obtained about the breach and the steps taken
 143 to rectify the breach and prevent similar breaches.

144
 145 In lieu of providing the written notice to the department, the
 146 judicial branch, the Executive Office of the Governor, the
 147 Department of Financial Services, and the Department of
 148 Agriculture and Consumer Services may post the information
 149 described in subparagraphs 1.-7. on their agency-managed
 150 websites.

151 (c) If a federal or state law enforcement agency
 152 determines that the notification required under this subsection
 153 would interfere with a criminal investigation, the notification
 154 shall be delayed upon the written request of the law enforcement
 155 agency for any period that the law enforcement agency determines
 156 is reasonably necessary. A law enforcement agency may, by a

157 subsequent written request, revoke such delay or extend the
 158 period set forth in the original request made under this
 159 paragraph by a subsequent request if further delay is necessary.

160 (d) Notwithstanding paragraph (a), notification to the
 161 affected individuals is not required if, after an appropriate
 162 investigation and written consultation with relevant federal and
 163 state law enforcement agencies, the covered entity reasonably
 164 determines that the breach has not and will not likely result in
 165 identity theft or any other financial harm to the individuals
 166 whose personal information has been accessed. Such a
 167 determination must be documented in writing and maintained for
 168 at least 5 years. The covered entity shall provide the written
 169 determination to the department within 30 days after the
 170 determination.

171 (5) METHOD AND CONTENT OF NOTIFICATION.—

172 (a) A covered entity required to provide notification to
 173 an individual under subsection (3) shall be in compliance with
 174 such requirement if the covered entity provides such notice by
 175 one of the following methods:

176 1. Written notification sent to the postal address of the
 177 individual in the records of the covered entity.

178 2. E-mail notification sent to the e-mail address of the
 179 individual in the records of the covered entity.

180 (b) Regardless of the method by which notification is
 181 provided to an individual under paragraph (a) with respect to a
 182 breach of security, such notification shall include:

183 1. The date, estimated date, or estimated date range of
 184 the breach of security.

185 2. A description of the personal information that was
 186 accessed or reasonably believed to have been accessed as a part
 187 of the breach of security.

188 3. Information that the individual can use to contact the
 189 covered entity to inquire about:

190 a. The breach of security.

191 b. The personal information that the covered entity
 192 maintained about the individual.

193 (c) A covered entity required to provide notification to
 194 an individual under subsection (3) may provide substitute
 195 notification in lieu of the direct notification required by
 196 paragraph (a) if such direct notification is not feasible
 197 because the cost of providing notice would exceed \$250,000, the
 198 affected individuals exceed 500,000 persons, or the covered
 199 entity does not have an e-mail address or mailing address for
 200 the affected individuals. Such substitute notification shall
 201 include the following:

202 1. A conspicuous notice on the Internet website of the
 203 covered entity, if such covered entity maintains a website.

204 2. Notification in print and to broadcast media, including
 205 major media in urban and rural areas where the affected
 206 individuals reside.

207 (d) A covered entity that is in compliance with any
 208 federal law that requires such covered entity to provide

209 notification to individuals following a breach of security is
210 deemed to comply with this section as long as it promptly
211 provides the information required by paragraph (4)(b) to the
212 department.

213 (6) CREDIT REPORTING AGENCIES.—If a covered entity
214 discovers circumstances requiring notification pursuant to this
215 section of more than 1,000 persons at a single time, the covered
216 entity shall also notify, without unreasonable delay, all
217 consumer reporting agencies that compile and maintain files on
218 consumers on a nationwide basis, as defined in 15 U.S.C. s.
219 1681a(p), of the timing, distribution, and content of the
220 notices.

221 (7) ANNUAL REPORT.—By February 1 of each year, the
222 department shall submit a report to the President of the Senate
223 and the Speaker of the House of Representatives describing the
224 nature of any reported breaches of security by governmental
225 entities or third-party agents of governmental entities in the
226 preceding calendar year along with recommendations for security
227 improvements. The report shall identify any governmental entity
228 that has violated subsection (2), subsection (3), subsection
229 (4), or subsection (5) in the preceding calendar year.

230 (8) REQUIREMENTS FOR DISPOSAL OF INDIVIDUAL RECORDS.—
231 Each covered entity or third-party agent shall take all
232 reasonable measures to dispose, or arrange for the disposal, of
233 personal information within its custody or control when the
234 records are no longer to be retained. Such disposal shall

235 involve shredding, erasing, or otherwise modifying the personal
236 information in the records to make it unreadable or
237 undecipherable through any means.

238 (9) ENFORCEMENT.—

239 (a) A violation of this section shall be treated as an
240 unfair or deceptive act or practice in any action brought by the
241 department under s. 501.207 against a covered entity or third-
242 party agent.

243 (b) In addition to the civil penalties provided for in
244 paragraph (a), a covered entity that violates this section shall
245 be liable for a civil penalty not to exceed \$500,000, as
246 follows:

247 1. In the amount of \$1,000 for each day the breach goes
248 undisclosed for up to 30 days and, thereafter, \$50,000 for each
249 30-day period or portion thereof for up to 180 days.

250 2. If notification is not made within 180 days, any person
251 required to make notification under subsection (3) who fails to
252 do so is subject to a civil penalty of up to \$500,000.

253
254 The civil penalties for failure to notify provided in this
255 paragraph shall apply per breach and not per individual affected
256 by the breach.

257 (c) All penalties collected pursuant to this subsection
258 shall be deposited into the General Revenue Fund.

259 (10) NO PRIVATE CAUSE OF ACTION.—This section does not
260 establish a private cause of action.

261 Section 4. Subsection (5) of section 282.0041, Florida
 262 Statutes, is amended to read:

263 282.0041 Definitions.—As used in this chapter, the term:

264 (5) "Breach" has the same meaning as the term "breach of
 265 security" as provided in s. 501.170 ~~in s. 817.5681(4)~~.

266 Section 5. Paragraph (i) of subsection (4) of section
 267 282.318, Florida Statutes, is amended to read:

268 282.318 Enterprise security of data and information
 269 technology.—

270 (4) To assist the Agency for Enterprise Information
 271 Technology in carrying out its responsibilities, each agency
 272 head shall, at a minimum:

273 (i) Develop a process for detecting, reporting, and
 274 responding to suspected or confirmed security incidents,
 275 including suspected or confirmed breaches consistent with the
 276 security rules and guidelines established by the Agency for
 277 Enterprise Information Technology.

278 1. Suspected or confirmed information security incidents
 279 and breaches must be immediately reported to the Agency for
 280 Enterprise Information Technology.

281 2. For incidents involving breaches, agencies shall
 282 provide notice in accordance with s. 501.170 ~~817.5681~~ and to the
 283 Agency for Enterprise Information Technology in accordance with
 284 this subsection.

285 Section 6. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 14-05 Pub. Rec./Security of Confidential Personal Information

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: PCB CJS 14-04 **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Cary JAC	Bond YB

SUMMARY ANALYSIS

The Proposed Committee Bill (PCB) creates a public records exemption relating to the Florida Information Protection Act of 2014 (Act). The notice and information held by the Department of Legal Affairs (DLA) pursuant to an investigation of a violation of the Act is generally confidential and exempt from a public records request.

The PCB also contains a Legislative finding that it is a public necessity that the notice and information held by the DLA is confidential and exempt because notices may contain proprietary information about the security of breached systems, the release of which could result in the identification of vulnerabilities and further data breaches; and because notices provided to the DLA may contain personal information.

The PCB contains a sunset provision and will be repealed on October 2, 2019 unless it is reenacted.

The PCB provides a statement of public necessity as required by the State Constitution.

The PCB provides that the exemption will take effect on the same date as PCB CJS 14-04 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The PCB creates a public record exemption for certain information related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. An exemption 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.

Confidential versus Confidential and Exempt

There is a difference between records the Legislature has determined to be exempt and those which have been determined to be confidential and exempt.² If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.³ Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the statute.⁴ However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt.⁵

Effect of the PCB

The Proposed Committee Bill (PCB) creates s. 501.170(11), F.S., to provide a public records exemption relating to the Florida Information Protection Act of 2014 (Act).⁶ The Act requires commercial entities and certain government agencies to provide notice to the Department of Legal Affairs (DLA) in the event of a security breach. The information in the notice may contain protected information, such as:

¹ Art I., s. 24(c), Fla.Const.

² *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004).

³ *Id.*

⁴ *Id.*

⁵ See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

⁶ The Act is created by the tied bill, PCB CJS 14-04.

- Social security number;
- Driver license or identification card number, passport number, military identification number, or other similar number issued on a government document used to verify identity;
- Financial account number or credit or debit card number, in combination with any required security code, access, code, or password that is necessary to permit access to an individual's financial account;
- Any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional;
- An individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer to identify the individual; and
- Any other information from or about an individual that could be used to personally identify that person.

The report also may contain information about system vulnerabilities that led to the security breach.

The PCB provides that the notice and information held by the DLA pursuant to an investigation of a violation of the Act is generally confidential and exempt from a public records request. However, confidential and exempt information may be disclosed by the DLA in the performance of its official duties and responsibilities to a court or tribunal, a law enforcement agency, or another state or federal agency. Unless otherwise protected by law, confidential and exempt information is no longer confidential and exempt 5 years after the DLA either files its own action or closes its investigation.

The PCB also contains a Legislative finding that it is a public necessity that the notice and information held by the DLA is confidential and exempt because (1) notices may contain proprietary information about the security of breached systems, the release of which could result in the identification of vulnerabilities and further data breaches; and (2) notices provided to the DLA may contain personal information.

The PBC contains a sunset provision and will be repealed on October 2, 2019 unless it is reenacted.

B. SECTION DIRECTORY:

Section 1 amends s. 744.3701, F.S., regarding confidentiality.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of Proposed Committee Bill CJS 14-04, if adopted in the same legislative session.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The PCB does not appear to have any impact on state revenues.

2. Expenditures:

The PCB does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The PCB does not appear to have any impact on local government revenues.

2. Expenditures:

The PCB does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCB does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Like any other public records exemption, the PCB may lead to a minimal fiscal impact on the affected portions of the government, in this case, the Department of Legal Affairs (DLA). Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and the DLA may incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the DLA.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCB does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The PCB expands a public record exemption related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The PCB expands a public record exemption related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The PCB creates a public record exemption related to the investigation of a violation of the Florida Information and Protection Act of 2014. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The PCB does not appear to create a need for executive branch rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to public records; amending s.
 3 501.170, F.S.; providing exemptions from public
 4 records requirements for the notice of a data breach
 5 and information held by the Department of Legal
 6 Affairs pursuant to certain investigations; providing
 7 for disclosure under certain circumstances; limiting
 8 the period of confidentiality and exemption; providing
 9 for future legislative review and repeal of the
 10 exemption; providing a statement of public necessity;
 11 providing a contingent effective date.

12
 13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. Subsection (11) is added to section 501.170,
 16 Florida Statutes, as created by HB _____, 2014 Regular Session,
 17 to read:

18 501.170 Security of confidential personal information.—

19 (11) (a) PUBLIC RECORDS EXEMPTION.—Except as otherwise
 20 provided in this subsection, the notice and information held by
 21 the department pursuant to an investigation of a violation of
 22 this section is confidential and exempt from s. 119.07(1) and s.
 23 24(a), Art. I of the State Constitution.

24 (b) Information made confidential and exempt under
 25 paragraph (a) may be disclosed by the department in the
 26 performance of its official duties and responsibilities to a

27 court or tribunal, a law enforcement agency, or another state or
28 federal agency.

29 (c) Information made confidential and exempt under
30 paragraph (a) is no longer considered confidential and exempt 5
31 years after the department either files its own action or closes
32 its investigation without filing an action, unless the
33 information is otherwise protected by law.

34 (d) This subsection is subject to the Open Government
35 Sunset Review Act in accordance with s. 119.15 and shall stand
36 repealed on October 2, 2019, unless reviewed and saved from
37 repeal through reenactment by the Legislature.

38 Section 2. The Legislature finds that it is a public
39 necessity that the notice and information held by the Department
40 of Legal Affairs pursuant to an investigation of a violation of
41 s. 501.170, Florida Statutes, relating to information security,
42 be confidential and exempt from public records requirements for
43 the following reasons:

44 (1) Notices provided to the Department of Legal Affairs
45 and materials obtained during investigations of a violation of
46 s. 501.975, Florida Statutes, may contain proprietary
47 information about the security of the breached system. The
48 release of the proprietary information could result in the
49 identification of vulnerabilities and further data breaches of
50 that system. This exemption protects the security of the
51 breached systems, thus protecting the personal information of
52 Floridians stored within the systems.

53 (2) Notices provided to the Department of Legal Affairs
54 and materials obtained during investigations of a violation of
55 s. 501.975, Florida Statutes, may contain the personal
56 information. The release of this information by the department
57 in response to a public records request could be just as
58 problematic as the data breach or improper disposal of customer
59 records. This exemption protects the security of the personal
60 information by excluding it from the public record laws.

61 Section 3. This act shall take effect on the same date
62 that HB ____ or similar legislation takes effect, if such
63 legislation is adopted in the same legislative session or an
64 extension thereof and becomes a law.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	___	

1 Committee/Subcommittee hearing PCB: Civil Justice Subcommittee
 2 Representative Rodríguez, J. offered the following:

3
 4
 5
 6
 7
 8
 9
 10

Amendment

Remove line 46 and insert:

s. 501.170, Florida Statutes, may contain proprietary

Remove line 55 and insert:

s. 501.170, Florida Statutes, may contain the personal

