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PRIVACY REGULATIONS: FLORIDA AND TEXAS

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I. FLORIDA CONSTITUTION.

A. ARTICLE 1, SECTION 12 – Searches and Seizures.

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against unreasonable interception of private communications by any means, shall not be violated This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court”

B. Article 1, Section 23 – Right of Privacy.

“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life, except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”

II. PRIVACY OF PUBLIC RECORDS.

A. FLORIDA SUNSHINE ACT.

1. It “is the policy of this state that all state, county and municipal records shall be open for inspection by any person.” Chapter 119.01, F.S.
2. “Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian’s designee.” Chapter 119.07. F.S.
 - 2.1 Statutory right to inspect and copy public records is very broad.
 - 2.2 Unless there is an express statutory exception, the public has the right to inspect and copy any public records.
 - 2.3 With rare exception, Chapter 119.07, F.S. does not include an exception for medical records.

- 2.4 2001 Florida Legislature, Chapter 2001-108.
Amends Chapter 119.07, F.S. by exempting:

“[a]ll personal identifying information, bank account numbers, and debit, charge, and credit card numbers contained in records relating to an individual’s personal health or eligibility for health related services made or received by the Department of Health or its service providers are confidential and exempt from“ Florida’s Sunshine Act (with certain exceptions) unless the disclosure is made –

2.4.1 With the express written consent of the individual or their personal representative;

2.4.2 in a medical emergency, but only to the extent necessary to protect the individual’s health or life;

2.4.3 by court order, upon a showing of good cause; or

2.4.4 a health research facility for approved research purposes.

3. Public records custodians are expressly authorized to access these records “by remote electronic means.”
Chapter 119.085, F.S.

B. DEVELOPMENT OF A STATE-WIDE SYSTEM OF ELECTRONIC RECORD-KEEPING AND ACCESS.

1. State Technology Office, Department of Management Services. Chapter 282.102, F.S.

Initially created in 1992. The Office’s duties include adopting and integrating State agencies’ information technology systems.

2. Florida Task Force on Privacy and Technology.
Chapter 282.3095, F.S.

2.1 Established by 2000 Florida Legislature.

2.2 Responsible for studying and making policy recommendations concerning:

2.2.1 Privacy issues under the United States and Florida Constitutions and statutes.

2.2.2 Technology fraud, including identity theft.

2.2.3 The sale of public records to private parties.

C. PUBLIC HEALTH REPORTING.

1. Health care practitioners are obligated to report “the existence of a disease of public health significance” to the Department of Health. Chapter 381.0031, F.S.

1.1 The information is confidential and exempt from Florida’s Sunshine Act.

1.2 Reporting under this act expressly is not a violation of patient-practitioner confidentiality.

2. Information that is confidential by law may be exchanged between the Department of Health, on the one hand, and a hospital or health care provider, on the other, without losing its confidential nature.

3. Florida Patient’s Bill of Rights and Responsibilities. Chapter 381.026, F.S.

3.1 “The patient’s right to privacy must be respected to the extent consistent with providing adequate medical care to the patient and with the efficient administration of the health care facility or provider’s office.”

3.2 A patient has the right to know if their medical treatment is for experimental purposes and to consent prior to participation.

4. Birth records are exempt from Florida’s Sunshine Law. Chapter 382.025, F.S.

III. PRIVACY OF PRIVATE RECORDS

A. HEALTH CARE PROVIDERS AND PRACTITIONERS.

1. Mental Health

1.1 Rights of Mental Health Patients. Chapter 394.459, F.S.

1.1.1 Mental health patients have the right to communicate freely with parties outside of the facility.

1.1.2 Patients must be allowed private and confidential telephone communications.

1.1.3 Facilities may not open, screen, delay or censor patients' incoming or outgoing mail.

1.2 Confidentiality of mental health patients' clinical records. Chapter 394.4615, F.S.

1.2.1 These records are exempt from Florida's Sunshine Act.

1.2.2. A patient's clinical record will be released:

- Upon the authorization of the patient or their guardian; or
- the records are needed by the patient's counsel "for adequate representation"; or
- a court orders its release, after weighing the need for the information against the possible harm to the patient; or
- the patient is committed to the Department of Corrections, which requests the records; or
- when the patient has declared their intention to harm others, a facility

administrator may release “sufficient information to provide adequate warning” to those persons; or

- to the Medicaid Fraud Control Unit upon request, if the patient is a Medicaid recipient.

1.2.3 A private mental health practitioner or facility who acts in good faith in releasing a mental health patient’s clinical record will not be subject to civil or criminal liability.

1.2.4 “Nothing in this section is intended to prohibit the parent or next of kin . . . from requesting and receiving information limited to a summary of that person’s treatment plan and current physical and mental condition”.

2. Hospital Patient and Personnel Records.
Chapter 395.3025, F.S.

2.1 Hospital’s are obligated to furnish “a true and correct copy” of a patient’s records, but only after discharge.

2.1.1 Request for records must be in writing and come from –

2.1.2 Patient, guardian, personal representative, parent of a minor, next of kin, or anyone designated by the patient in writing.

2.1.3 Patients’ psychiatric and substance abuse records are excluded from disclosure.

2.3 Hospital may disclose a patient’s records, without their consent, to certain parties including:

2.3.1 Local trauma agency or regional trauma agency that performs quality assurance activities;

2.3.2 Organ procurement organizations; and

2.3.3 Medicaid Fraud Control Unit.

2.3.4 Note: These other parties may use the patient record only for their intended purpose, unless authorized by the patient.

2.4 Hospital patient records are exempt from the Florida Sunshine Act.

2.5 2001 Florida Legislature, Chapter 2001-222.

Amends 395.3025, F.S. by prohibiting the release and use of patient information for solicitation, marketing or sale of goods or services without a specific written release or authorization.

3. Substance Abuse Services – Client’s Rights.
Chapter 397.501, F.S.

3.1 Clients have the “right to freely and privately communicate with other persons within the limitations imposed by the provider’s policies.”

3.2 Records containing the identity, diagnosis, prognosis and services provided to a client are confidential and may not be disclosed without the client’s written consent, except (among other things):

3.2.1 To medical personnel in a medical emergency;
and

3.2.2 to provider personnel who need to know in order to carry out their duties.

3.3 A court may order disclosure of the client’s record for purposes of a criminal investigation or prosecution, if:

3.3.1 The crime involved is one which directly threatens loss of life or serious bodily injury;
and

3.3.2 there is “a reasonable likelihood” the record will provide information of “substantial value”;
and

3.3.3 other ways of obtaining the information are not available; and

3.3.4 the potential injury to the client is outweighed by the public interest and the need for disclosure.

3.4 Service provider personnel who violate a substance abuse client's rights are liable for damages, unless they acted in good faith and without negligence.

4. Nursing Facilities.

4.1 Resident's Rights.
Chapter 400.022, F.S.

Each resident of a nursing facility has a right to "private and uncensored communication, including, but not limited to," correspondence and access to a telephone.

4.2 Records of care and treatment.
Chapter 400.145, F.S.

4.2.1 "Unless expressly prohibited by a legally competent resident a nursing facility shall provide their spouse, guardian, surrogate, proxy, or attorney in fact . . . a copy of the resident's medical records."

4.2.2 The medical records to be furnished includes mental and psychiatric records of the patient's care and treatment, except "progress notes and consultation report sections of a psychiatric nature."

4.3 2001 Florida Legislature, Chapter 2001-222.

4.3.1 Amends Chapter 400.145 by prohibiting the release of medical records for purposes of solicitation, marketing, or sale of goods and services without a specific written release or authorization.

4.3.2 Violations are misdemeanors.

5. Assisted Living Facilities (“ALF”) – Appropriateness of Placement. Chapter 400.426.
 - 5.1 Each resident must be examined by a physician either within 60 days before admission, or 30 days thereafter, and a copy of that medical examination report is to be forwarded to the ALF administrator and become a permanent part of the resident’s record.
 - 5.2 A resident’s admission and continued stay in an ALF must be based upon the administrator’s assessment of the resident’s strengths, needs, and preferences, and their care and services arranged for by the ALF.
 - 5.3 Each resident must have an initial physical examination performed by a physician or nurse practitioner who is employed by the ALF.
 - 5.4 A nurse who is retained by the ALF must perform a monthly nursing assessment on each resident, and the ALF is obligated to maintain those assessments.

6. Home Health Agencies

- 6.1 HHA is required to maintain a clinical record for each patient. That clinical record is considered a “patient record” under Chapter 456.057, F.S. (See, Section 9, below).
Chapter 400.491, F.S.
 - 6.2 Information concerning a home health patient is confidential and may not be disclosed without the patient’s/their guardian’s written consent.
Chapter 400.494, F.S.

7. Hospices. Chapter 400.611, F.S.

Hospice patients’ records are confidential and may not be disclosed except:

- 7.1 With the express written authorization of the patient/legal guardian; or
 - 7.2 By order of a court of competent jurisdiction; or

- 7.3 By a Florida or federal agency to be included in aggregate statistical data.
- 8. Home Medical Equipment. Chapter 400.94
 - 8.1 HME suppliers are required to maintain a patient record for each patient, which includes the physician's order or certificate of medical necessity.
 - 8.2 HME patients' records are considered patient records under Chapter 455.057, F.S.
 - 8.3 If a patient transfers to another HME supplier, a copy of their patient record must be provided "upon request."
- 9. Health Professions and Occupation: Ownership and Control of Patient Records. Chapter 457.057, F.S.
 - 9.1 "Record Owner" is defined as (a) the health care practitioner who generates a medical record after rendering service; (b) a health care provider to whom the records are transferred; or (c) the health care practitioner's employer, if there is a contract that designates the employer as the record owner.
 - 9.2 Certain parties are excluded from the definition of records owner and are not authorized to acquire or own medical records, but are obligated to comply with the confidentiality and disclosure requirements. These parties include (but are not limited to):
 - 9.2.1 CRNAs.
 - 9.2.2 Pharmacists and pharmacies
 - 9.2.3 Nursing home administrators
 - 9.2.4 Respiratory therapists
 - 9.2.5 Opticians and optical establishments.

- 9.3 Hospitals and ambulatory surgical centers are excluded from this statute.
- 9.4 A health care practitioner “who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to any person shall provide that person or their legal representative a copy of their medical record; however, with respect to psychiatric, psychological and psychotherapeutic records the practitioner may provide a report in lieu of the records themselves.
- 9.5 Patient records may not be furnished to, and a patient’s medical condition may not be discussed with, any person other than (a) the patient, (b) the patient’s legal representative, or (c) other health care practitioners and providers who are involved in the patient’s care, without the patient’s/legal representative’s written authorization, with certain exceptions.
- 9.6 Record owners are obligated to (i) develop and implement policies and procedures to protect the confidentiality and security of patient records, and (ii) train their employees.
- 9.7 Record owners must maintain a record of all disclosures of patient records.
 - 9.7.1 The record must include “the purpose of the disclosure request”; and
 - 9.7.2 The party to whom the disclosure is made is prohibited from making any further disclosure without the written consent of the patient/legal representative.
- 9.8 A record owner shall provide a health care practitioner, who previously was its employee, copies of those records created or generated when he/she treated those patients.
- 9.9 The Attorney General is empowered to enforce Chapter 456.057 for those record owners not

otherwise licensed, by means of injunctive relief and a \$5,000 fine per violation.

9.10 Attorney General's Opinion 2001-33.

Florida Attorney General opines: "patient records of city employees who use the services of a medical clinic operated by the city are confidential and may only be released upon the written consent of the patient or under the specific circumstances provided under Florida law. Under its duty to ensure the confidentiality of such records, the city's grant of access to such records would appear to be limited to those city employees whose duties are related to the furnishing of medical care and treatment to the patient/employee."

9.11 2001 Florida Legislature- Chapter 2001 – 22.

Amends this statute by prohibiting the use or release of patient information for solicitation, marketing or sale of goods or services without a specific release or authorization.

10. Health Profession and Occupations: Psychiatric Communications. Chapter 456.059, F.S.

10.1 Patient – psychiatrist communications are confidential and shall not be disclosed except at the request of the patient/legal representative.

10.2 Providing psychiatric records and reports to third parties also is governed by Chapter 456.057, F.S.

10.3 Notwithstanding this section, if a patient under treatment makes an actual threat to physically harm identifiable persons, and the treating psychiatrist's clinical judgment is that the patient is capable of carrying out the threat, and it is more likely than not the patient will do so in the near future, the psychiatrist may warn the potential victim or warn a law enforcement agency.

11. Disclosure of HIV status.
Chapter 456.061, F.S.
 - 11.1 A health care practitioner who discloses a patient's otherwise confidential information to their sexual partner or needle-sharing partner is not civilly or criminally liable for that disclosure, if:
 - 11.1.1 An HIV positive patient discloses the identity of a sexual partner or needle-sharing partner; and
 - 11.1.2 The practitioner recommends that the patient notify the partner of the patient's positive status and also refrain from future "sexual or drug activity" with that partner, and the patient refuses; and
 - 11.1.3 The practitioner provides notice of their intention to notify the partner; and
 - 11.1.4 The practitioner, based upon a perceived civil duty or ethical guidelines, makes this disclosure to the partner in "good faith".
 - 11.2 Notwithstanding 456.061(1), a health care practitioner is not civilly or criminally liable for failing to make such a disclosure.

12. Pharmacy Disciplinary Actions.

- 12.1 A pharmacist may be disciplined (including license revocation) for any use or release of a patient's records, except as permitted under Chapter 456, F.S. Chapter 465.015, F.S.
- 12.2 Authority to inspect. 465.017, F.S.

Except as otherwise permitted by law, pharmacy records concerning the "filling of prescriptions and dispensing of medicinal drugs shall not" be disclosed to any person other than: (1) the patient or their legal representative, or (2) if the patient is incapacitated, their spouse, except with written authorization from the patient.

13. Medical Review Committee – Immunity from Liability.
Chapter 766.101.
 - 13.1 Liability immunity includes utilization review/peer review committees of:
 - 13.1.1 Hospitals, ambulatory surgical centers, HMOs;
 - 13.1.2 physician-hospital organizations, provider-sponsored organizations, integrated delivery systems;
 - 13.1.3 state and local professional societies;
 - 13.1.4 professional service corporations, or other corporations formed and operated for the practice of medicine, in which 25 or more health care providers (that is, physicians, podiatrists, optometrists, dentists, chiropractors, pharmacists, hospitals or ASCs) routinely render health care services;
 - 13.1.5 mental health treatment facilities and community mental health centers;
 - 13.1.6 substance abuse treatment programs;
 - 13.1.7 Department of Corrections or the Correctional Medical Authority; and
 - 13.1.8 insurers, self-insurers, or medical malpractice insurance joint underwriting associations.
 - 13.2 The investigations, proceedings and records of a medical record committee are not subject to discovery or introduction into evidence in any civil or administrative action against a provider arising out of matters that are the subject of that committee's review and evaluation.
 - 13.2.1 Persons who attend review committee meetings may not and may not be required to

testify about any matter, evidence or decision made by that committee.

13.2.2 Protection from discovery and use as evidence is limited and does not extend to –

- evidence obtained from another source, or
- a committee attendees' testimony concerning matters that are within their own knowledge.

14. 2001 Florida Legislature- Chapter 2001.194.

Creates new Chapter 430.105, F.S. – Confidentiality of information, under the Department of Elder Affairs.

14.1 Establishes “personal identifying information relating to an individual’s health or eligibility for or receipt of health-related, elder-care, or long-term care services” under any program administered or funded by the department as confidential and exempt from the Florida Sunshine Act.

14.2 Information made confidential under this section “may not be disclosed publicly unless the affected client or elder person or his or her legal representative provides written consent.”

B. HEALTH INSURERS

1. Medical tests for HIV and AIDS.
Chapter 627.429, F.S.

1.1 Insurer may require an applicant to take a test for HIV/AIDS as a precondition of any insurance policy.

1.2 Insurer must obtain the applicant’s prior written consent and provide an explanation that includes the applicant’s right to confidential treatment of this information.

- 1.3 Insurer must maintain “strict confidentiality” concerning an applicant/insured’s exposure to HIV, including:
 - 1.3.1 Specific test results may not be disclosed “outside of the insurance company, or its employees, insurance affiliates, agents, or reinsurers,” except with the consent of their patient.
 - 1.3.2 Specific test results may not be provided to an industry data book, if this information would identify the specific individual.
 - 1.4 Insurer may send specimens for testing to any CLIA certified laboratory.
2. 2001 Florida Legislature- Chapter 2001-142.
- 2.1 Created new Chapter 626.9651, F.S.

Mandating that the Department of Insurance adopt rules governing the use of an individual’s private financial and health information.
 - 2.2 These rules must meet certain parameters:
 - 2.2.1 Consistent with, but no more restrictive than, the National Association of Insurance Commissioners “Privacy of Consumer Financial and Health Information Regulations.”
 - 2.2.2 Permit disclosure for scientific, medical or public policy research.
 - 2.2.3 Consistent with, but no more restrictive than, GLB; however, if the Department of Insurance determines that a health insurer or HMO is in compliance with the HIPAA Privacy Rule, it is deemed to comply with this statute.

C. PRIVATE COMMUNICATIONS

1. Unemployment Compensation – Employer Information.
Chapter 443.1716.
 - 1.1 Florida Department of Labor contracts with private agencies to give creditors electronic access to 16 calendar quarters of employer-employee wage information.
 - 1.2 To access data concerning a specific individual, the creditor must have the credit applicant's written consent, which includes notice that –
 - 1.2.1 The applicant's data will be released to a consumer reporting agency;
 - 1.2.2 The "sole purpose" of the release is for reviewing a "specific application for credit made by the individual";
 - 1.2.3 The Department of Labor's files concerning the individual's employment history "may be accessed"; and
 - 1.2.4 A list of the parties who are authorized to receive this information.
 - 1.3 Consumer reporting agencies and creditors "must safeguard the confidentiality of such information and shall use the information only to support a single credit transaction". The Department of Labor may terminate the contract of a consumer-reporting agency if it or a creditor accessing data through it, violates this obligation.
2. Criminal use of personal identification information.
Chapter 817.568, F.S.
 - 2.1 Any person who, willfully and without authorization fraudulently, uses or intends to fraudulently use another person's personal identification information is guilty of a felony.

- 2.2 The willful and without authorization fraudulent use of another person's personal identification information for the purpose of harassing an individual constitutes a felony.
- 2.3 "Personal identification information" means any name or number that can be used alone, or in conjunction with other information to identify a specific individual, including, but not limited to; a driver's license, alien registration number, passport number, employer or taxpayer identification number, or Medicaid or food stamp account number.
- 2.4 A court, in sentencing a violator, may impose restitution including the victim's out of pocket expenses and attorney's fees incurred in clearing their credit history, credit rating, or any civil or administrative proceeding to satisfy a debt, lien or other obligation arising from the defendant's actions.
- 2.5 2001 Florida Legislature- Chapter 2001-233. Amended Chapter 817.566 by adding:
 - 2.5.1 Any person "who willfully and without authorization fraudulently uses personal identification information without" consent, when the value of their pecuniary gain or the amount of injury is \$75,000 is guilty of a felony.
 - 2.5.2 In the event the defendant uses public records to further the crime, the offense automatically is reclassified to the next higher degree.
 - 2.5.3 Venue for prosecuting an offense lies in any county in which an element of the crime is committed, including the county where the victim generally resides.
- 3. Prohibition against interception and disclosure of wire, oral or electronic communications. Chapter 934.03.
 - 3.1 Statute prohibits (with certain express exceptions) anyone from intentionally:

- 3.1.1 Intercepting, endeavoring to intercept, or procuring another person to intercept, or endeavoring to intercept any wire, oral or electronic transmission.
- 3.1.2 Using, endeavoring to use or procuring another person to use any electronic, mechanical or other device to intercept any oral communication if the device:
 - transmits a signal through a wire or cable, or
 - transmits communications by radio.
- 3.1.3 Disclosing or attempting to disclose the contents of any wire, oral or electronic communication the disclosing party knows or has reason to know was obtained in violation of this statute.

3.2 Statute also prohibits the interception of any wire, oral or electronic communication for the purpose of committing a crime.

4. Private remedies.
Chapter 934.10, F.S.

- 4.1 Private parties have a right to seek civil remedies if their oral, wire, or electronic communications are unlawfully intercepted. Remedies include:
 - 4.1.1 Equitable relief;
 - 4.1.2 actual damages equal to the greater of \$1,000, or \$100 per day for each day of the violation;
 - 4.1.3 punitive damages; and
 - 4.1.4 reasonable attorneys' fees.
- 4.2 Statute of limitations is 2 years from the first "reasonable opportunity to discover the violation."

- D. Additional privacy legislation.
2001 Florida Legislature- Chapter 2001 – 1.
- 1 Autopsy photographs, video and audio recordings are confidential and exempt from Florida's Sunshine Act.
 - 1.1 Access is granted to one of the following: first, the surviving spouse, next surviving parents, or if the parents are not surviving; the decedent's adult child;
 - 1.2 Local, state or federal agencies; or a court, upon a showing of good cause.
- 2 Knowing and willful violation of this statute are classified as felonies.