

May 21, 2018

NOTICE OF PROPOSED RULE

DEPARTMENT OF CORRECTIONS

RULE NO.: 33-601.901

RULE TITLE: Confidential Records

PURPOSE AND EFFECT: To implement HB1203 legislative changes to section 945.10, F.S. related to the protection, use, or disclosure of protected health information.

SUMMARY: The proposed rule implements language arising from changes to section 945.10, F.S., related to the protection, use, or disclosure of protected health information and creates a new form, DC4-542C that details costs and accounting related to inmate request for such records.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:

The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule.

A SERC has not been prepared by the Agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: upon review of the proposed changes to the rule, the Department has determined that the amendments will not exceed any one of the economic analysis criteria in a SERC as set forth in s. 120.541(2)(a), FS. Any person who wishes to provide information regarding the statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 944.09, 945.10, F.S.

LAW IMPLEMENTED: 119.07, 945.10, 945.25, F.S.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR. THE PERSON TO BE CONTACTED REGARDING THE PROPOSED

RULE IS: Gregory Hill, 501 South Calhoun Street, Tallahassee, Florida 32399-2500.

THE FULL TEXT OF THE PROPOSED RULE IS:

33-601.901 Confidential Records.

(1) No changes.

(2) Copy costs and special service charge for review of records.

(a) If the information being requested requires duplication, the cost of duplication shall be paid by the inmate or offender, and the inmate or offender will sign a receipt for such copies. The cost for copying is \$0.15 per page for single-sided copies. Only one sided copies will be made for inmates; two-sided copies will not be made for inmates. Additionally, a special service charge will be assessed for providing information when the nature or volume of the records requested requires extensive clerical or supervisory assistance by department personnel. "Extensive" means that it will take more than 15 minutes to locate, review for confidential information, copy and refile the requested material. The special service charge will be computed to the nearest quarter of an hour exceeding 15 minutes based on the current rate of pay for the paygrade of the person who performed the service. Exceptions will not be made for indigent inmates or offenders; indigent inmates will be required to pay for copies.

(b) If the inmate requests copies of his own medical file under section 766.204, F.S., copies will be provided in accordance with Rule 33-501.302, F.A.C. If funds are not available at the time of request, a lien will be placed on the requesting inmate's account for copies.

(3) The following records or information contained in department files shall be confidential and shall be released for inspection or duplication only as authorized in this rule or in Rule 33-401.701, F.A.C.:

(a) Protected health information of an inmate or offender. Protected health information refers to inmate or offender information that is created or received by the Department of Corrections, whether oral, recorded, transmitted, or maintained in any form or medium, that relates to the past, present, or future physical or mental health or condition of an inmate or offender, the provision of health care to an inmate or offender, or the past, present, or future payment for the provision of health care to an inmate or offender and such information identifies an inmate or offender or there is a reasonable basis to believe the information can be used to identify an inmate or offender. Records maintained by the Department that contain protected health information include: medical and hospital files as defined in Rule 33-401.701, F.A.C., medical reports, opinions, memoranda, charts or any other medical record or report of an inmate or offender, including medical, mental health, and dental information in dental and medical classification reports; as well as clinical drug treatment and assessment records; letters, memoranda or other documents containing opinions or reports on the description, treatment, diagnosis or prognosis of the medical or mental condition of an

inmate or offender; the psychological screening reports contained in the admission summary; the psychological and psychiatric evaluations and reports on inmates or offenders; health screening reports; Mentally Disordered Sex Offender Status Reports; portions of inspector general reports containing medical and mental health reports. Other persons may review medical and mental health records only when necessary to ensure that the inmate's or offender's overall health care needs are met, or upon a specific written authorization from the inmate or offender whose records are to be reviewed, or as provided by law. If a request for inmate or offender protected health information, mental health, medical, or substance abuse records is submitted upon consent or authorization given by the patient inmate or offender, Form DC4-711B, Consent and Authorization for Use and Disclosure, Inspection and Release of Confidential Information, or, when appropriate, its Spanish-language version, Form DC4-711Bsp, or a ~~legally approved~~, HIPAA compliant release of protected health information form from another governmental agency shall be utilized in accordance with Rule 33-401.701, F.A.C. Form DC4-711B is hereby incorporated by reference. Copies of this form are available from the Forms Control Administrator, 501 South Calhoun Street, Tallahassee, Florida 32399-2500, <http://www.flrules.org/Gateway/reference.asp?No=Ref-06699>. The effective date of this form is May, 2016. Form DC4-711Bsp is hereby incorporated by reference. Copies of this form are available from the Forms Control Administrator, 501 South Calhoun Street, Tallahassee, Florida 32399-2500, <http://www.flrules.org/Gateway/reference.asp?No=Ref-06698>. The effective date of this form is May, 2016. Offenders under supervision, or previously under supervision, who desire information from their own records, shall be referred to the agency or office originating the report or document to obtain such information.

(b) Pre-plea, pretrial intervention, presentence and post-sentence investigation reports including supplements, addenda and updates, except as provided in Section 960.001(1)(g), F.S.

(c) Information regarding a person in the federal witness protection program.

(d) Florida Commission on Offender Review records which are confidential or exempt from public disclosure by law.

(e) Information which, if released, would jeopardize a person's safety.

(f) Information pertaining to a victim's statement or which reveals a victim's identity, address or telephone number.

(g) The identity of an executioner or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

(h) The identity of any inmate or offender upon whom an HIV test has been performed and the inmate's or offender's test results, in accordance with s. 381.004. The term "HIV test" has the same meaning as provided in s. 381.004.

(i)(4) Records that are otherwise confidential or exempt from public disclosure by law. This confidentiality is not intended to prevent the use of the file material in management information systems or to limit the dissemination of information within the department to health services staff having a need to know or to other criminal justice system agencies approved by the department.

(4) - (5) No changes.

(6) Unless expressly prohibited by federal law, the following confidential records or information may be released to the Executive Office of the Governor, the Legislature, the Florida Commission on Offender Review, the Department of Legal Affairs, the Department of Children and Families ~~Family Services~~, a private correctional facility or program that operates under a contract, a state attorney, the court, or a law enforcement agency:

(a) Preplea, pretrial intervention, presentence and postsentence investigations along with attachments to such reports, except as provided in Section 960.001(1)(g), F.S.;

(b) Florida Commission on Offender Review records which are confidential or exempt from public disclosure by law;

(c) Information identifying or pertaining to a the victim and the victim's statement of a crime; ~~of a crime~~;

(d) Other confidential information, if not otherwise prohibited by law, upon receipt of a written request demonstrating a need for the records or information.

(7) After victim information has been redacted, access to preplea, pretrial intervention, presentence or postsentence investigations is authorized as follows:

(a) To any other state or local government agency not specified in subsection (6) upon receipt of a written request which includes a statement demonstrating a need for the records or information;

(b) To an attorney representing an inmate who is under sentence of death, upon receipt of a written request which includes a statement demonstrating a need for the records or information. Such reports on an inmate not represented by the attorney for an inmate under sentence of death shall not be provided;

(c) To a public defender upon request;

(d) Written requests under paragraphs (a) and (b) above must be submitted to the Bureau Chief of

Classification and Central Records or designee for approval if the request pertains to an inmate record. If the request pertains to a report in a supervision file, the request shall be submitted to the correctional probation circuit administrator or designee of the office where such record is maintained. If confidential protected health information is included in the presentence or postsentence investigation, authorization for release must be obtained from the inmate or offender as specified herein.

(8) No changes.

(9) Unless expressly prohibited by federal law, protected health information and mental health, medical and substance abuse records as specified in subparagraph (3)(a), may be released as follows:

(a) To the Department of Health and the county health department where an inmate plans to reside if he or she has tested positive for the presence of HIV as provided in section 381.004, F.S.;

(b) To the Executive Office of the Governor, the Correctional Medical Authority, and the Florida Department of Health for health care oversight activities authorized by state or federal law.

(c) To a state attorney, a state court, or a law enforcement agency conducting a continuing criminal investigation, provided that the inmate or offender agrees to the release of the information and provides written consent or, if the inmate or offender refuses to provide written consent, in response to a court order, a subpoena, such as a grand jury, investigative, or administrative subpoena, a court-ordered warrant, or a statutorily authorized investigative demand or other process as authorized by law, if:

(1) The protected health information is relevant and critical to a valid law enforcement inquiry;

(2) An obvious connection exists between the investigation and the inmate or offender whose protected health information is being pursued;

(3) The request is specific and limited in scope; and

(4) It would not be reasonable or beneficial to use de-identified information.

(d) To a state attorney or law enforcement agency if the inmate is or is suspected of being the victim of a crime provided that the inmate agrees to the disclosure and provides written consent or if the inmate is unable to agree because of incapacity or other emergency circumstance, if:

(1) The information is needed to determine whether a violation of law by a person other than the inmate victim has occurred;

(2) The information is not intended to be used against the inmate victim;

(3) The immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the inmate victim is able to agree to the disclosure; and

(4) If the department determines the disclosure is in the best interests of the inmate victim.

(e) To a state attorney or a law enforcement agency if the department believes in good faith that the information and records constitute evidence of criminal conduct that occurred in a correctional institution or facility, provided that:

(1) The information disclosed is specific and limited in scope;

(2) An obvious connection exists between the criminal conduct and the inmate or offender whose information is being pursued; and,

(3) It would not be reasonable or beneficial to use de-identified information.

(f) To the Division of Risk Management of the Department of Financial Services, upon certification by the Division that the information is necessary to investigate and provide legal representation for a claim against the department.

(g) To the Department of Legal Affairs or to an attorney retained to represent the department in a legal proceeding if the inmate or offender is bringing a legal action against the department.

(h) To another correctional institution or facility or law enforcement official having lawful custody of the inmate, if the information is necessary for:

(1) The provision of health care to the inmate;

(2) The health and safety of the inmate, other inmates, officers, employees, others at the correctional institution or facility, or individuals responsible for transporting the inmate from one correctional institution, facility, or setting to another;

(3) Law enforcement on the premises of the correctional institution or facility; or

(4) The administration and maintenance of the overall safety and security of the institution or facility.

(i) To the Department of Children and Families and the Florida Commission on Offender Review, if the inmate received mental health treatment while in the custody of the department and becomes eligible for release under supervision or upon the end of his or her sentence.

Rulemaking Authority 20.315, 944.09, 945.10 FS. Law Implemented 119.07, 944.09, 945.10, 945.25 FS. History—New 10-8-76, Amended 6-10-85, Formerly 33-6.06, Amended 1-12-89, 7-21-91, 9-30-91, 6-2-92, 8-4-93, 6-

12-96, 10-15-97, 6-29-98, Formerly 33-6.006, Amended 9-19-00, 7-8-03, 2-9-06, 11-27-07, 11-14-10, 5-25-16,

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NAME OF PERSON ORIGINATING PROPOSED RULE: Rusty McLaughlin, Chief of Classification Management

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Julie L. Jones, Secretary

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: May 11, 2018

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: October 30, 2017