



# *The Commonwealth of Massachusetts*

MASSACHUSETTS SENATE  
STATE HOUSE, ROOM 213B, BOSTON 02133  
TEL: (617) 722-1291  
FAX: (617) 722-1014

GALE D. CANDARAS, ESQ.  
STATE SENATOR  
1<sup>ST</sup> HAMPDEN AND HAMPSHIRE

CHAIR, COMMITTEE ON  
MENTAL HEALTH AND  
SUBSTANCE ABUSE

VICE-CHAIR, COMMITTEE ON  
ELDER AFFAIRS

DISTRICT OFFICE:  
17 MAIN STREET  
WILBRAHAM, MA 01095  
TEL: (413) 599-4785  
FAX: (413) 596-3779

[gale.candaras@state.ma.us](mailto:gale.candaras@state.ma.us)

September 26, 2007

The Hon. Susan C. Fargo, Senate Chair  
Joint Committee on Public Health  
The State House, Rm. 504  
Boston, MA 02133

The Hon. Peter J. Koutoujian, House Chair  
Joint Committee on Public Health  
The State House, Rm. 130  
Boston, MA 02133

**Re: S. 1215, "An Act Relative to Infectious Disease Control"**

Dear Chairwoman Fargo and Chairman Koutoujian:

I first filed S. 1215 in 2001, in response to an incident involving eight Springfield police officers who were exposed to the blood of a suspect during the course of his arrest. Subsequent attempts to obtain the HIV status of the perpetrator were futile, and in that case, Supreme Judicial Court Justice Martha Sosman ruled that it was up to the legislature to provide relief to the officers and their families. As you know, Massachusetts General Law provides an absolute bar to disclosure of this information, notwithstanding the facts and circumstances of a case, including cases involving rape.

S. 1215 seeks to remedy this oversight, and would provide immediate recourse for those public safety workers and health care professionals whose health may have been compromised by exposure to blood or other bodily fluids. In such cases, the aggrieved person may petition the superior court for an order compelling the production of medical, insurance or other records to determine the presence of any infectious disease in the blood or bodily fluid of the offending person. The petitioner may also request that the offender undergo a blood test for the purposes of determining the presence of an infectious disease.

This measure would provide additional protections to men and women who place their lives and safety in harm's way each day in the name of caring for and protecting our communities. These

individuals should not be mandated to put their lives at risk in order to protect the privacy of an offender.

That said, it should be noted that this legislation makes very reasonable efforts to protect the privacy of the offending person. A judge would determine whether or not the information should be produced, and upon her determination, there would be an *in camera* inspection by the court. The court will then immediately notify the petitioner of the presence or absence of an infectious agent in the offender's blood. This is not meant to be conclusive of the health status of the petitioner. He or she will be advised to monitor his or her health in the event that an infectious disease has been contracted and not yet diagnosed.

Opponents of this bill have raised questions with regard to its constitutionality. Although the public policy of our Commonwealth generally favors confidentiality with regard to a person's medical records, the result of numerous court cases have supported minimal intrusion when it comes to public health and safety.

In *Shmerber v. California* (1966), the United States Supreme Court decided that the Fifth Amendment right against self-incrimination applied to testimony, not the withdrawal of blood. *Shmerber* further held that the Constitution does not forbid minor intrusions into an individual's body.

More recently, in 1990, the California Court of Appeals found that although "compulsory blood tests are searches," "the control of a communicable disease is a valid exercise of the state's police power." (*Love v. Superior Court and San Francisco County*.) In this case, California had a statute requiring persons convicted of prostitution to undergo AIDS testing and counseling. The Court found that the Fourth Amendment prohibits only unreasonable searches, not all searches. The Court contended that what is unreasonable is determined by performing a balancing test whereby the intrusion of an individual's Fourth Amendment interests are weighed against the promotion of legitimate government interests. In the *Love* case, the Court found that there exists a "special need" in a state's interest in protecting the health and safety of its employees faced with the possibility of becoming infected with HIV in the line of duty.

In 1991, the Illinois Appellate Court held that a statute requiring a person convicted of the unauthorized possession of hypodermic needles to undergo medical testing to determine whether the defendant has been exposed to HIV was constitutional, as was the disclosure to jail personnel of positive HIV test results. (*People v. C.S.*) That Court further commented that the release of test results to police personnel was necessary to protect law enforcement officers against harm.

In *Matter of Juveniles A, B, C, D, E* (1993), five juveniles were found to have committed various sexual offenses under the Washington state statute, which provides for mandatory AIDS testing of convicted sexual offenders. The Court recognized that for offenders, the expectation of privacy in bodily fluids is greatly diminished because they have engaged in a class of criminal behavior which presents the potential of exposing others to HIV and AIDS. The Court also noted that where a victim is left to wonder as to an attacker's HIV status, the "mental anguish suffered by the victim... is real and continuing, and the intrusion upon the defendant of a routine drawing of a blood sample is very minimal and commonplace." Furthermore, the Court explained that even if a particular act for which an offender was prosecuted involved a minimal risk of exposure to HIV, it would not remove the state's interest in testing. The Court also held that the testing of offenders is reasonable under the Fourth Amendment because substantial government interests

are served by testing, and the disclosure of those test results to a limited group of people eclipses the defendant's interest in preventing the search.

In a recent Massachusetts case, *Landry v. Attorney General* (1999), the Supreme Judicial Court held that the involuntary collection of DNA samples from an individual subject to the DNA database statute did not result in unreasonable search and seizure for the purposes of the Fourth Amendment and the Constitution of the Commonwealth. The SJC acknowledged that "once a person is convicted of [a serious crime], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." In determining the constitutionality of the statute, the SJC found that while obtaining and analyzing DNA is a search and seizure, it is a *reasonable* search and seizure.

It is the contention of some opponents of this bill that if passed, it would deter individuals from being tested for HIV and other communicable diseases. I do not believe that individuals contemplating an HIV test refrain from doing so because of a concern that they may, in the future, commit a crime wherein they use blood and/or bodily fluids as a weapon.

I respectfully request that the Committee give this important legislation every consideration, and report favorably upon it. While, as a general rule, an individual's right to privacy should be paramount and held beyond government intrusion, an offender's privacy interest in his medical status must be subordinated to the rights of innocent individuals who have at risk their constitutionally protected interests in bodily integrity, mental health, and even continued life. As regards law enforcement and medical personnel, it is one thing to assume the risk of infection as part of one's occupation and a very different matter to be denied information that may save one's life.

As always, should you have questions or require additional information, please do not hesitate to contact me.

Very truly yours,

Gale D. Candaras  
State Senator