SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 18, 1998 Revised: _____ _____ _____ _____

Subject: Public Records Law and Public Meetings Law; Exemption of Private Corporate Entities that Lease Public Hospitals and Other Public Health Care Facilities and Confidentiality of Records and Meetings

	Analyst	Staff Director	Reference	Action
1.	Carter	Wilson	HC	Favorable/CS
2.			GO	
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1044 provides for the confidentiality of the records of private corporate entities that lease public hospitals or other public health care facilities. Such records and the meetings of the governing board of the private corporation are also made exempt from the constitutional and statutory Public Records Law and Public Meetings Law requirements. However, the confidential and exempt status of such records and meetings are relinquished if either of two conditions exists: (1) the public facility's governing board was involved in the formation of the private entity *or* (2) more than one-third of the members of the private corporations's governing board are concurrently members of the public facility's governing board. Additionally, a private corporation that leases a public hospital or other public health care facility, as provided in the bill, that receives in excess of $100,000 from the public entity that owns the facility may receive such funds only through the governmental entity's appropriations process. The provisions of the bill are made to apply retroactively to all existing lease arrangements of public hospitals and other public health care facilities and prospectively to all new lease arrangements that meet the requirements of the bill. A statement of public necessity is provided in conformity with the requirements of s. 24, Article I of the *State Constitution*. Clarifying language provides that the Florida Rules of Civil Procedure and statutory provisions relating to civil actions apply to all records and information made confidential and exempt in the bill.

This bill creates section 395.3036, Florida Statutes, and four undesignated provisions of law.

II. Present Situation:

Government in the Sunshine

Floridians have expressed an unequivocal preference for "open government" or "government in the sunshine" as most recently indicated in a 1992 statewide "referendum" by which they amended the *State Constitution* by adopting Article I, section 24 entitled, "Access to Public Records and Meetings Requirements." As authorized under this constitutional provision, the Legislature has enacted general laws that provide for the exemption of records, s. 119.07(1), F.S., and meetings, s. 286.011, F.S., from the requirements relating to public records and public meetings, as specified in subsections (a) and (b), respectively, of section 24 of Article I of the *State Constitution*. An exemption from the requirement of access to public records and meetings may be created constitutionally only by stating specifically the public necessity justifying the exemption. Furthermore, the exemption created may be no broader than necessary to accomplish the stated purpose of the law. Specifically, Article I, section 24 of the *State Constitution*, as relates to public records requirements, states:

> **Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution. . . . This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . Laws enacted pursuant to [subsection (c) of section 24] shall contain only exemptions from the requirements of subsection (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.**

Public Records Law

Public policy regarding access to government records is also addressed in the *Florida Statutes*. Section 119.07, F.S., provides:

> 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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

"Public records" are defined in s. 119.011(1), F.S., to mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. "Agency" is defined in s. 119.011(2), F.S., to mean any state, county, district, authority,

or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or *private agency*, person, partnership, corporation, or business entity *acting on behalf of any public agency*.

However, under Article I, s. 24, *Florida Constitution*, the Legislature is authorized to provide by general law for the exemption of records from the public access requirements of s. 24. Paragraph 119.15(3)(e), F.S., defines the term "exemption" to mean a provision of the *Florida Statutes* which creates an exception to subsection 119.07(1), F.S., or s. 286.011, F.S., and which applies to the executive branch of state government or to local government, but it does not include any provision of a special or local law.

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., relating to legislative review of exemptions from public meetings and public records requirements, sets forth specific criteria for evaluating whether confidentiality provisions serve an identifiable public purpose and are no broader than necessary to meet the public purpose they serve. Paragraph 119.15(4)(b), F.S., states:

> (4)(b) An exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:
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> 1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
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> 2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
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> 3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the

Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Public Meetings Law

Public policy regarding public meetings is also addressed in the *Florida Statutes*. Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority or any county, municipal corporation, or political subdivision, except as otherwise provided in the *State Constitution* at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Section 286.011, F.S., is often referred to as the "Sunshine Law." The Sunshine Law has been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. Although much of the recent litigation regarding the application of the open government laws to private organizations has been in the area of public records, courts have, however, looked to the Public Records Law in determining the applicability of the Sunshine Law. *Cape Coral Medical Center, Inc. v. News-Press Publishing Co.*, 390 So.2d 1216, 1218, n. 5 (Fla. 2d DCA 1980) [inasmuch as the policies behind ch. 119, F.S., and s. 286.011, F.S., are similar, they should be read together].

Accordingly, as the courts have emphasized in analyzing the application of ch. 119, F.S., to agencies under contract with governmental agencies, the mere receipt of public funds by private corporations, is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements. Thus, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it. *Government In The Sunshine Manual*, at p. 24.

Private-Sector Leases of Public Health Care Facilities

Section 155.40, F.S., provides for the sale or lease of a county, district, or municipal hospital. This provision was enacted in 1982 and was compiled in chapter 82-147, *Laws of Florida*. It has been amended four times since first enacted. The most recent amendments were adopted in 1996, as provided in chapter 96-304, *Laws of Florida.* A lease, contract, or agreement executed to effect the sale or lease of a hospital as authorized under this law must: (1) provide for the approval of the articles of incorporation of the Florida corporation by the board of directors or board of trustees of the hospital; (2) require a not-for-profit Florida corporation to become qualified under §501 (c)(3) of the Internal Revenue Code; (3) arrange for the orderly transition of

the operation and management of the facility; (4) provide for the return of the facility to the county, district, or municipality upon the termination of the lease, contract, or agreement; and (5) provide for the continued treatment of indigent patients, in accordance with requirements of the Florida Health Care Responsibility Act and as otherwise provided. A sale, lease, or contract entered into prior to the 1996 revisions of this section may be subject to other conditions adopted in earlier enactments of this law.

As authorized by s. 155.40, F.S., the governing board of any county, health care district, or municipal hospital may sell or lease the hospital to either a for-profit or not-for-profit Florida corporation. The governing board may lease the hospital to a Florida corporation for the purpose of the corporation operating and managing it. A governing board that sells or leases its hospital must find that the sale or lease is in the best interests of the public and must state the basis of such finding. When it decides to lease the facility, the governing board must publicly advertise the meeting at which it will consider the lease proposal, in accordance with the Public Meetings Law, or publicly advertise the offer to accept proposals and receive proposals from all interested and qualified purchasers.

A sale or lease of a county, district, or municipal hospital must be for fair market value and must be in compliance with state and federal antitrust laws. Furthermore, when a Florida for-profit or not-for-profit corporation operates a hospital through a lease agreement and the corporation receives more than $100,000 annually from the county, district, or municipality that owns the hospital, the corporation *must be accountable to the county, district, or municipality with respect to the manner in which the funds are expended* through either the annual appropriations process of the governmental entity involved or, when a contract is involved that provides for receipt of public revenues by the hospital for a period longer than 12 months, the governing body of the county, district, or municipality must have the ability to modify the contract upon providing 12-months notice to the hospital.

Proponents of private corporate entities leasing public hospitals and other public health care facilities assert that such arrangements, if structured properly, contribute, in a positive and responsible manner, to the fiscal well being of the governmental entity that leases the facility. This assertion is based, in part, on the ability of the governmental entity that owns the facility to reallocate funds that it has committed to the operation of the facility to other uses or to the expansion of the population served or services provided.

Opponents of such arrangements emphasize the public accountability that public discussion assures in protecting the public's interest that the private entity will be responsive to community interest in ensuring that indigent care, as well as other matters, will be addressed. They often point to the potential for decreased access to health care for the community's medically indigent, indigent, and non-indigent and working uninsured residents.

A complex question arises when determining whether a private corporation or entity, not otherwise connected with government, is “acting on behalf of” a public agency and thus subject to ch. 119, F.S., the Public Records Law. The Florida Supreme Court has stated that this broad

definition of "agency" ensures that a public agency cannot avoid disclosure under the Public Records Law by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

Recognizing that "the statute provides no clear criteria for determining when a private entity is, 'acting on behalf of' a public agency," the Florida Supreme Court adopted a "totality of factors" approach to use as a guide for evaluating whether a private entity is subject to ch. 119, F.S.

The factors listed by the Florida Supreme Court include the following, as stated in the *Government in the Sunshine Manual*, 1998 ed., Vol. 20, at 75:

1) the level of public funding;
2) commingling of funds;
3) whether the activity was conducted on publicly-owned property;
4) whether services contracted for are in integral part of the public agency's chosen decision-making process;
5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6) the extent of the public agency's involvement with, regulation of, or control over the private entity;
7) whether the private entity was created by the public agency;
8) whether the public agency has a substantial financial interest in the private entity;
9) for whose benefit the private entity is functioning.

In *News-Journal Corporation v. Memorial Hospital-West Volusia*, 695 So.2d 418 (Fla. 5th DCA 1997), the Fifth District Court of Appeal, reversing the lower court opinion, determined that Memorial Hospital-West Volusia, Inc., a private not-for-profit corporation ("Private Corporation"), was "acting on behalf of" a governmental entity, when it entered into a Lease and Transfer Agreement with the West Volusia Hospital Authority to operate the West Volusia Memorial Hospital. Because the court so held, the Private Corporation was therefore subject to the public records and public meetings laws. (The case is currently on appeal to the Florida Supreme Court.)

The court in *Memorial Hospital* utilized the *Schwab* totality of factors approach to reach its conclusion. In reaching its conclusion as to whether some of the factors were present, the court appeared to strain in order to reach its preferred conclusion. It is, however, beyond the scope of this analysis to debate the court's opinion; that is left to the affected parties on appeal.

Confidentiality of Public Hospital Records and Meetings

Section 395.3035, F.S., providing for confidentiality of public hospital records and meetings, declares that *all meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public, unless made confidential or exempt by law,* in

accordance with statutory and constitutional requirements. However, certain managed care contracts relating to the public hospital's provision of health care services and supporting documentation for such contracts; certain specified strategic plans of public hospitals; trade secrets, including reimbursement methodologies and rates; and documents, offers, and contracts, not including managed care contracts, resulting from negotiations with nongovernmental entities for payment for services that are or may reasonably be expected by a public hospital's governing board to be provided by the hospital's competitors comprise the list of public hospital records and information made confidential and exempt from the Public Records Law.

Section 395.3035, F.S., provides two Public Meetings Law exemptions relating to public hospitals. One such exemption pertains to the portion of a public hospital governing board meeting during which negotiations for contracts with nongovernmental entities occur or are reported on that relate to competitive market services. However, all portions of a governing board meeting that is closed to the public must be recorded by a certified court reporter, and no portion of such meeting may be off the record. The court reporter's notes must be fully transcribed within a reasonable time after the meeting and maintained by the hospital records custodian. The transcript and related tape recordings, minutes, and notes become public documents one year after termination or completion of the contract to which the negotiations relate or, if no contract was executed, one year after termination of negotiations. All governing board meetings at which the board is scheduled to vote to accept, reject, or amend contracts, other than managed care contracts, must be open to the public. The other Public Meetings Law exemption pertains to the portion of a public hospital governing board's meeting at which written strategic plans, including written plans for marketing its services, are discussed or reported on. However, as is required for closed portions of meetings at which a public hospital governing board discusses contracts, other than managed-care contracts, a certified court reporter must record activities and no portion of the meeting may be off the record. The transcript and tape recordings, minutes, and notes relating to the discussion of written strategic plans become public documents 3 years after the date of the board meeting.

Subsection 395.3035(6), F.S., imposes two tracking requirements relating to the closed portions of governing board public meetings and the documents generated during such periods. Paragraph (a) of that subsection requires the hospital, every three months, to report in writing to the governing board the number of records for which a public records request has been made and the records were declared to be confidential under s. 395.3035, F.S., along with certain specified descriptive details about the records. Additionally, the hospital is required to report in writing to the governing board each record that had been confidential to which the public has been granted access since the hospital's last report to the board, including certain specified descriptive details. The governing board is required to retain copies of these reports for 5 years from the date on which the report was submitted. If the governing board of the hospital is comprised of members who are appointed, the board must forward, within 10 working days after the date on which the board received the report from the hospital, the report to the official or authority that appoints board members. Paragraph 395.3035(b), F.S., requires the governing board to maintain a written list of the meetings or portions of meetings, and must include certain specified details about such meetings, that were closed to the public, as authorized under this section. The governing board is

authorized to purge information about a meeting from the list 5 years after the date on which the meeting was closed. If the governing board of the hospital is comprised of members who are appointed, the board must forward, every 3 months, the list to the official or authority that appoints board members.

III. Effect of Proposed Changes:

Section 1. Creates s. 395.3036, F.S., providing for confidentiality of records and meetings for private corporations that lease public hospitals and other public health care facilities. The records and meetings of the governing board of such a private corporation are also made exempt from the constitutional and statutory Public Records Law and Public Meetings Law requirements. However, the confidential and exempt status of such records and meetings are relinquished if either of two conditions exists: (1) the public facility's governing board was involved in the formation of the private corporate entity *or* (2) more than one-third of the members of the private corporations' governing board are concurrently members of the public facility's governing board. The exemptions are made subject to the Open Government Sunset Review Act of 1995.

Section 2. Any private corporation that leases a public hospital or other public health care facility that is exempted from the Public Records Law or the Public Meetings Law under s. 395.3036, F.S., as created in the bill, is required to participate in the public entity's (that owns the hospital or facility) appropriations process to receive public funds in an amount greater than $100,000, in accordance with s. 155.40(5), F.S.

Section 3. Provides for the applicability of the provisions of the bill. The bill is made to apply retroactively to all existing lease arrangements of public hospitals and other public health care facilities and prospectively to all new lease arrangements that meet the requirements of the bill.

Section 4. Provides a statement of public necessity for the Public Records Law and Public Meetings Law exemptions created in the bill based on legislative findings. The stated legislative finding of public necessity highlights five considerations: (1) leasing of public hospitals and other public health care facilities to private corporations will allow for increased access to health care in Florida; (2) by leasing its assets in the form of public hospitals and other public health care facilities, a public entity may retain the asset instead of selling it which might result in a loss to the public; (3) when leasing of a public hospital or other public health care facility to a private entity is the more desirable option for a public entity, such an option may be precluded if the private entity is required to conduct its affairs relating to the leased facility under public scrutiny; (4) the privatization of hospitals and other health care facilities, through lease arrangements, is critical to the delivery of health care in Florida; and (5) the fact that more than 20 private and public entities have entered into lease arrangements in accordance with provisions of Florida law that provide for such arrangements.

Section 5. Clarifies that the bill does not change the applicability of existing law relating to civil actions. Records and information made confidential and exempted from the Public Records and Public Meetings Laws by the bill that are otherwise discoverable remain subject to the Florida

Rules of Civil Procedure or any statutory provision allowing for discovery or pre-suit disclosure of such records and information.

Section 6. Provides for the bill to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill conditionally exempt the records of a private corporate entity that leases a public hospital or other public health care facility from the requirements of the Public Records Law and the meetings of such an entity from the requirements of the Public Meetings Law. The stated Legislative finding of public necessity relates to the need for flexibility for those public entities intent on retaining ownership of certain public assets.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Any fiscal impact resulting from the provisions of the bill are indeterminable and would occur only as indirect consequences of the business activities of the private-sector entities that lease public hospitals or other public health care facilities. Whether a private-sector entity would avoid certain business transactions if the public records exemption provided by this bill were unavailable is impossible to surmise in the abstract. However, if certain business transactions were avoided by private-sector entities that lease a public hospital because they would have to conduct all discussions relating to the transactions in a public forum, a definite negative fiscal impact would result.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The provisions contained in the bill seem to relate more appropriately to s. 155.40, F.S., pertaining to the sale or lease of county, district, or municipal hospitals than to ch. 395, F.S., providing for regulation of hospitals and ambulatory surgical centers. It would appear more useful for the Legislature to clarify the nature of a public asset after it is leased to a private entity. The provisions of this bill do not contribute any lucidity to the controversy regarding the status and legal character of such assets under such circumstances.

VII. Related Issues:

None.

VIII. Amendments:

None.