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: April 20, 1998 Revised: _____ _____ _____ _____

Subject: Public Hospital Strategic Planning; Meetings, and Records

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

I. Summary:

Committee Substitute for Senate Bill 1170 amends s. 395.3035, F.S., that provides for the confidentiality and exemption of public hospital records and meetings from the Public Records Law and the Public Meetings Law, respectively. The bill amends subsection 395.3035(4), F.S., to exempt from Public Meetings Law requirements those portions of a public hospital's governing board meeting at which the board modifies or approves the hospital's written strategic plans, including written plans for marketing its services. Also, the timeframe for the exemption from the Public Records Law of a transcript of a closed meeting to expire is revised to provide for an earlier alternative timeframe upon the governing board determining that the strategic plan discussed at the meeting has been fully implemented or that the circumstances do not require the transcript of the meeting to remain confidential. Language is added to s. 395.3035, F.S., that: (1) defines the term “strategic plan,” as used in that section of law; (2) prohibits public hospital governing boards from entering into a binding agreement to sell, lease, merge, or consolidate the hospital in any setting other than a public meeting that has been noticed as required under the Public Meetings Law; (3) authorizes the governing boards of public hospitals to conduct studies and fact-finding relating to reduction or termination of health services, but requires them to allow the public an opportunity to comment on any proposals to accomplish such objectives while prohibiting them from adopting any proposal other than a proposal or a combination of proposals presented to the public for comment; and (4) for those strategic plans or portions of such plans discussed during governing board meetings that were closed to the public, requires public hospital governing boards to give 15-days notice and conduct a public meeting for presentation of such plans prior to placing the plans into operation and make written materials describing or supporting the board's proposed actions available to the public 7 days in advance of the meeting, upon request. A statement of public necessity relating to the Public Records Law and Public Meetings Law exemptions created and modified in the bill is provided.

This bill substantially amends section 395.3035, Florida Statutes.

II. Present Situation:

Florida's Public Policy of "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 Art. I, s. 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 s. 24, Art. 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, Art. I, s. 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 Art. 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. Section 119.15(3)(e), F.S., defines the term "exemption" to mean a provision of the *Florida Statutes* which creates an exception to s. 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 chapter 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 chapter 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.

In 1997, the Fifth District Court of Appeal, in *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So.2d 434, (Fla. 5th DCA 1997), held the Public Meetings Law exemption in s. 395.3035(4), F.S., pertaining to discussions of written "strategic plans," violative of Article I, section 24 of the *State Constitution* which requires that an exemption be no broader than

necessary to accomplish its stated purpose. Because "strategic plans" is not a defined term, the court determined that it *could include more* than is necessary to be kept confidential. More particularly, the Fifth District's rationale for holding the Public Meetings Law exemption unconstitutionally over broad was the court's interpretation of the scope of the exemption and the duration of the exemption. The court stated:

> There is no definition of, and therefore no limitation on, what can be included in a strategic plan. . . . In order to comply with the limitations imposed by the constitution, at the very least the term "strategic plan" must be defined. It is not. Further, there appears no justification for an arbitrary three year duration for the secrecy to continue [the statutory timeframe for maintaining the transcript of a closed meeting as confidential before it is to become a public document].

Because of the critical nature of the issue statewide, the Fifth District Court of Appeal certified the following question to the Florida Supreme Court:

> IS THE EXEMPTION CONTAINED IN s. 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, s. 24(b) OF THE FLORIDA CONSTITUTION?

This case is pending before the Florida Supreme Court (Case No. 92,047).

Confidentiality of Public Hospital Records and Meetings

Chapter 95-199, Laws of Florida, enacted in 1995, reenacted and amended the confidentiality provisions regarding public hospital records and meetings that had been originally codified in s. 119.16, F.S. That reenactment renumbered s. 119.16, F.S., as s. 395.3035, F.S. Among other things, the revised law expanded the public records exemption applicable to public hospitals to include strategic plans, including plans for marketing services, which services are or may reasonably be expected by a public hospital's governing board to be provided by competitors of the hospital. The term "strategic plans" was not otherwise defined. Additionally, those portions of governing board meetings at which written strategic plans are discussed or are reported on were made exempt from the Public Meetings Law requirements of s. 286.011, F.S.

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 three 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 five 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 five 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 three months, the list to the official or authority that appoints board members.

III. Effect of Proposed Changes:

This bill:

1. Amends subsection 395.3035(4), F.S., relating to confidentiality of public hospital records and meetings, to expand the public meetings exemption to include those portions of a board meeting at which written strategic plans, including written plans for marketing its services, are *modified or approved* by the governing board. This expansion of the Public Meetings Law exemption has been made subject to the Open Government Sunset Review Act of 1995 and will automatically repeal on October 2, 2003, unless the Legislature reviews and reenacts the exemption.

2. Amends a provision of current law to require the governing board of a public hospital to make available to the public information about strategic plans that the board discussed during a meeting closed to the public at an *earlier date*, if such strategic plans have been fully implemented sooner than the statutory 3-year exemption period, that current law allows. Current law provides for the release of a transcript of a closed public hospital governing board meeting 3 years after the date of the board meeting.

3. Amends s. 395.3035, F.S., relating to confidentiality of public hospital records and meetings, to add a new subsection (6) to that section that defines the term "strategic plan" for purposes of that section to mean any plan to:

    (a) Initiate or acquire a new health service;
    (b) Expand an existing health service;
    (c) Acquire additional facilities;
    (d) Expand existing facilities;
    (e) Change all or part of the use of an existing facility or a newly acquired facility;
    (f) Acquire, merge, or consolidate with another health care facility or health care provider;
    (g) Enter into a shared service arrangement with another health care provider;
    (h) Enter into a transaction permitted by s. 155.40;
    (i) Market the services of the hospital and its ancillary facilities; or
    (j) Any combination of paragraphs (a) - (i).

    Language clarifying what the term "strategic plan" does *not* include provides that records that describe existing operations (i.e., expenditures related to implementing a strategic plan such as hiring of employees, purchasing equipment, placement of advertisements, or entering into contracts with physicians to perform medical services) of a public hospital or other public health care facility are not strategic plans within the meaning of the bill. However, such records may be included within the term "strategic plan," if their disclosure would result in disclosure of any part of a strategic plan which has not been fully implemented or result in the disclosure of a record that is otherwise exempted from public access under the Public

Records Law. Records that describe operations are expressly made *not exempt* from the Public Records Law or Public Meetings Law, unless otherwise exempted.

4. Public hospitals may not approve a binding agreement to sell, lease, merge, or consolidate the hospital at any governing board meeting that is closed to the public. In fact, such approval must be made at a meeting open to the public and noticed, as required under the Public Meetings Law. Additionally, governing boards of public hospitals are authorized to conduct studies and engage in other fact-finding activities and are authorized to discuss such studies and fact-finding reports in meetings closed to the public. However, prior to adoption of any proposal that would result in substantial reduction or termination of a health service that would be unavailable from another health care provider within 30-minutes driving time, the governing board must present all proposals under consideration at a public meeting noticed and conducted in accordance with the Public Meetings Law. The public must be allowed an opportunity to comment on all such proposals and the governing board is prohibited from adopting any proposal other than a proposal or any combination of proposals presented at the required public meeting. Likewise, the governing board of a public hospital that has closed a portion of one of its meetings to discuss a strategic plan or a discreet portion of such a plan must notice and conduct a public meeting in accordance with the Public Meetings Law prior to implementing the strategic plan or portion of the plan. The notice for the public meeting must be given not less than 15 days in advance of the meeting and must *state* that the implementation of all or a part of a strategic plan will be discussed at the meeting. Written materials distributed to governing board members in preparation for the noticed meeting which describe or support the proposed actions of the board are to be made available to the public, upon request, at least 7 days prior to the meeting.

5. Finally, this bill provides a detailed public necessity statement for the Public Records Law and Public Meetings Law exemptions created in the bill relating to the strategic plans of public hospital governing boards. The statement of public necessity emphasizes how public hospitals are placed at a competitive disadvantage to private hospitals when complying with the requirements of the Public Records Law and Public Meetings Law. The disclosure of service development or service delivery ideas before the public will result in premature exposure of public hospital planning activities to their competitors, whose representatives may attend such meetings, and thereby enable public hospital competitors to capitalize on such hospitals' business ideas before they are implemented by the public hospital. In contrast, public hospitals do not have the opportunity for comparable access to the business discussions of privately-owned hospitals whose records and meetings are not required to be open to the public.

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 Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill create an alternative timeframe, to the 3-year timeframe in current law, for conversion from confidential and Public-Records-Law exempt status of transcripts and related tape recordings and documents of public hospital governing board meetings that are closed to the public for the discussion of written strategic plans. The provisions of the bill provide for a new Public Meetings Law exemption for a portion of a public hospital governing board meeting in which written strategic plans are modified or approved by the governing board.

C. Trust Funds Restrictions:

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

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Any fiscal impact would be incidental to the consequences of premature public disclosure of a public hospital's strategic plans or the cloaking of such plans through exemption from the Public Meetings Law that would help a public hospital to pursue its business objectives while avoiding public disclosure that could enable its private-sector competitors to preempt or sabotage its market activities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.