STORAGE NAME: h0401.sgc.doc
DATE: February 20, 2001

HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: HB 401 (PCB SA 01-10)

RELATING TO: Public Records Exemption for Certain Information Submitted to the Office of the Attorney General by Members of the Health Care Community

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) STATE ADMINISTRATION YEAS 5 NAYS 0
(2) COUNCIL FOR SMARTER GOVERNMENT YEAS 11 NAYS 0
(3)
(4)
(5)

I. SUMMARY:

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 408.185, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature. This section provides that documents revealing preferred provider and health maintenance organization contracts, trade secrets, a health care provider's marketing plan, and proprietary confidential business information submitted to the Office of the Attorney General, by members of the health care community, are confidential and exempt from public disclosure for one year after the date of submission.

This bill reenacts s. 408.185, F.S., because disclosure of such information might provide an unfair business advantage to competitors and discourage members of the health care community from seeking the guidance provided by the no-action letter.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [] N/A [x]
2. Lower Taxes Yes [] No [] N/A [x]
3. Individual Freedom Yes [] No [] N/A [x]
4. Personal Responsibility Yes [] No [] N/A [x]
5. Family Empowerment Yes [] No [] N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida=s public policy regarding access to government records as follows:

> Every person has the right to inspect or copy any public records 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.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose (public necessity statement).

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that 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:

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;

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

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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"[1] of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 408.185, F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met. Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.[2]

---

[1] An exemption is "substantially amended" if the amendment **expands** the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. s. 119.15(3)(b), F.S.

[2] Please note that the effective date of this bill is prior to the repeal date of October 2, 2001.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.[3]

Antitrust Laws

Both the federal and state governments regulate business activities under their respective antitrust laws. Antitrust regulation is intended to discourage monopolies and to control the power of businesses to fix prices and exclude competition.

Three statutes establish the necessary framework for antitrust enforcement on the federal level. The Sherman Antitrust Act (15 U.S.C.A. §§ 1-7), the Clayton Act (15 U.S.C.A. §§ 12-27), and the Federal Trade Commission Act (15 U.S.C.A. § 45) prohibit anticompetitive conduct. The U.S. Department of Justice and the Federal Trade Commission (FTC) enforce the federal antitrust laws. In September 1993, both agencies released antitrust enforcement policy guidelines. These guidelines created "safety zones" for six specific merger or joint activities and provided additional guidance for similar activities falling outside of the safety zones. The safety zones represent certain acceptable collaborative activities that the federal government will not challenge. One year later, both agencies issued new and revised statements of enforcement policy and analytical principles relating to health care and antitrust. *See* Committee on Health Care Final Bill Analysis and Economic Impact Statement, CS for HB 1035, May 20, 1996.

On the state level, the Florida Antitrust Act of 1980 (ch. 542, F.S.) and other antitrust laws are enforced by the Department of Legal Affairs administered by the Attorney General (AG).

The application of antitrust laws to the health care sector has increased as the health care market has been restructured and market competition has increased. *See* The Florida Senate Interim Project Report 2001-044, November 2000.

Prior to 1975, the health care industry was viewed as a "learned profession" regulated under state law. In 1975, the United States Supreme Court's decision in *Goldfarb v. Virginia State Bar* (42 U.S. 773) held that the learned professions are engaged in commerce and do not have an exemption from antitrust laws. The *Goldfarb* decision allowed antitrust enforcement in an industry that regulated itself without market forces. It opened the door to competition in the health care industry, by making providers accountable to consumers for the cost of as well as the quality of their services. *Id.*

Florida Health Care Community Antitrust Guidance Act

In 1996, the Legislature created the Florida Health Care Community Antitrust Guidance Act. s. 408.18, F.S. Its purpose is to provide a mechanism for members of the health care community[1], who desire antitrust guidance, to request a review of their proposed business activities by the AG's office.

---

[3] If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

[1] This act defines "health care community" as all licensed health care providers, insurers, networks, purchasers, and other participants in the health care system. s. 408.18(3)(a), F.S.

To obtain the review, a member of the health care community must submit a written request to the AG's office for an antitrust no-action letter[2]. The requesting parties are under an affirmative obligation to make full, true, and accurate disclosure with respect to activities for which the antitrust no-action letter is requested. Each request must be accompanied by "all relevant material information; relevant data, including background information; complete copies of all operative documents; the provisions of law under which the request arises; and detailed statements of all collateral oral understanding, if any." s. 408.185(4)(c) F.S. All parties requesting the letter must provide the AG's office with whatever additional information or documents the office requests. s. 408.18, F.S.

The AG's office may seek whatever documentation, data, or other material it deems necessary from the Agency for Health Care Administration, the State Center for Health Statistics, and the Department of Insurance. s. 408.18, F.S.

Within 90 days of receiving all necessary information, the AG's office must act on the no-action letter request. The AG's office must do one of the following upon completion of its review:

- Issue the antitrust no-action letter;
- Decline to issue any type of letter; or
- Take such other position or action, as it considers appropriate.
  ss. 408.18(6)(a), (b), and (c), F.S.

If an antitrust no-action letter is issued, the recipient must annually file an affidavit stating that there has been no change in the facts presented to the AG's office. If there is no change in any of the material facts, the AG's office is prohibited from bringing an antitrust action concerning any specific conduct that is the subject of the no-action letter. The AG's office may bring any other action or proceeding based on a different set of facts. s. 408.18, F.S.

Section 408.185, F.S.

Section 408.185, F.S., provides that information revealing preferred provider and health maintenance organization contracts, trade secrets, a health care provider's marketing plan, and proprietary confidential business information submitted to the AG's office, by members of the health care community pursuant to a request for an antitrust no-action letter, are confidential and exempt from public disclosure. This section was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts s. 408.185, F.S., verbatim, with one exception. The bill removes the language scheduling the repeal of the exemption. By reenacting s. 408.185, F.S., trade secrets, preferred provider organization and health maintenance organization contracts, documents that reveal a health care provider's marketing plans, and proprietary confidential business information submitted to the AG's office, pursuant to a request for an antitrust no-action letter, will remain confidential and exempt from public disclosure for one year from the date of submission.

---

[2] This act defines "antitrust no-action letter" as a letter that states the intention of the Attorney General's office not to take antitrust enforcement actions with respect to the requesting party, based on the specific facts then presented, as of the date the letter is issued" s. 408.18(3)(b), F.S.

This exemption is limited to the period of time necessary for the AG's office to adequately investigate and respond to the request. It also protects the requestor from competitors gaining ready access to such information, which might provide an unfair business advantage for the competitors. In addition, without the exemption, members of the health care community might be discouraged from seeking the guidance provided by the no-action letter. See CS/HB 1035, s. 2, 1996.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:	Staff Director:
Heather A. Williamson, M.S.W.	J. Marleen Ahearn, J.D., Ph.D.

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:	Staff Director:
Heather A. Williamson, M.S.W.	Don Rubottom