SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 418

SPONSOR: Education Committee

SUBJECT: Public Records and Meetings/Health Services Support Organizations

DATE: February 16, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	deMarsh-Mathues	O'Farrell	ED	Favorable
2.			GO	
3.			RC	
4.				
5.				

I. Summary:

The Senate President assigned to the Senate Education Committee an Open Government Sunset Review of s. 240.2996(2), (3), & (4), F.S., related to records and meetings of university health services support organizations. This bill is based on Senate Interim Project Report # 2001-38.

This bill amends s. 240.2996, F.S., to revise the exemption for marketing plans, impose new requirements related to transcripts of certain governing board meetings, and provide for the earlier release of certain records. The bill repeals s. 240.2995(6), F.S., and places these provisions in s. 240.2996, F.S. This bill also creates a section of law for findings of public necessity (this has not been designated to a specific section of the Florida Statutes). The bill repeals ss. 240.2995 and 240.2996, F.S. (January 7, 2003), provides for prior legislative review, and provides an effective date (upon becoming a law).

II. Present Situation:

The Public Records Law, chapter 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. The law (s. 119.011(1), F.S.) defines public records as 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. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[1] in connection with official business which are used to perpetuate, communicate or formalize knowledge.[2]

[1]Section 119.011(2), F.S., defines an "agency" as 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

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 of any county, municipal corporation, or political subdivision, except as otherwise provided in the state constitution at which official acts are to be taken are public meetings open to the public at all times. 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., has been held to apply to private entities created by law or by public agencies, as well as to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. The open meetings requirements can apply if the public entity has delegated the performance of its public purpose to the private entity. Although much of the recent litigation regarding the application of the open government laws to private organizations providing services to public agencies has been in the area of public records, courts have, however, looked to the Public Records Law in determining the applicability of the Public Meetings Law.[3]

Section 119.15, F.S., the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:
(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
(b) The exemption is necessary for the effective and efficient administration of a governmental program; or
(c) The exemption affects confidential information concerning an entity.

Further, s. 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:
1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?

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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. The Florida Supreme Court held that courts should use a "totality of factors" test for determining when a private entity is acting sufficiently on behalf of a public agency to subject it to the public records law. The court set forth a non-exclusive list of 9 factors. (596 So.2d 1029 (Fla.1992), *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group,Inc.)*.

[2] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)

[3] *Government In The Sunshine Manual*, at p. 5 (2000 edition).

4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Additionally, under s. 119.15(4)(b), F.S., 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:

(a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?

(b) Does the exemption protect 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,

(c) Does the exemption protect 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?

Under s. 119.15(4)(e), F.S.,
"notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment."

University Health Services Support Organizations

Two provisions of law (ss. 240.2995 and 240.2996, F.S.) specifically relate to university health services support organizations. The 1995 Legislature allowed each university to create a university health services support organization to enter into arrangements with other entities as providers for accountable health partnerships and providers in other integrated health care systems or similar entities. Chapter 96-171, L.O.F., provides that university health services support organizations were established to serve as the corporate entities through which public colleges of medicine may participate as partners in integrated health care delivery organizations.

The law (s. 240.2995, F.S.) provides that a university health services support organization may be established to benefit the university academic health sciences center. Each organization must comply with the following requirements:

- licensure as an insurance company, under chapter 624, F.S., or certification as a health maintenance organization, under chapter 641, F.S., to the extent required by law or rule;
- incorporation as a Florida not-for-profit corporation; and
- provision of an annual financial audit by an independent certified public accountant, in accordance with rules of the Board of Regents (BOR).

In addition, the support organization is solely responsible for its acts, debts, liabilities, and obligations. The law specifically states that the state or university does not have any responsibility for the acts, debts, liabilities, and obligations incurred or assumed by the support organization.

The BOR chair may appoint a representative to the board of directors and the executive committee of any university health services support organization. The president of the university (or the president's designee) must serve on the board of directors and the executive committee of any university health services support organization established to benefit that university. The BOR must, by rule, provide for: budget, audit review, and oversight by the Board; and the provision of salary supplements and other compensation or benefits for university faculty and staff employees only as set forth in the organization's budget. The rules may prescribe conditions with which a university health services support organization must comply in order to be certified and to use property, facilities, or personal services at any state university. Under BOR rule 6C-9.020, F.A.C., each university wishing to establish a health services support organization must request Board approval. Upon approval, the organization is considered as certified and authorized to use university property, facilities, and personal services. A university president may request decertification of the organization if he or she determines that it is not serving the best interest of the university. Memoranda of the Chancellor for the State University System provide additional requirements for these organizations. Each organization is required to provide a statement about public access to public meetings and public records consistent with s. 240.2996, F.S.

Section 240.2996, F.S., declares that all meetings of the organization's governing board and all organization records are open and available to the public unless made confidential and exempt by law, in accordance with statutory and constitutional requirements. These exemptions do not apply if the organization's governing board votes to sell, lease, or transfer all or any substantial part of the facilities or property of the organization to a nonpublic entity. Also, the law does not preclude discovery of records or information that are otherwise discoverable under the Florida Rules of Civil Procedure or any statutory provision allowing discovery or presuit disclosure in civil actions. Records required by the Department of Insurance to discharge its duties must be made available to the department upon request.

The law allows a person to petition the court for an order to release those portions of any confidential and exempt public record (e.g., tape recording, minutes, or notes) generated during that portion of a closed governing board meeting and which contain confidential and exempt information relating to contracts, documents, records, market plans, or trade secrets. The university health services support organization may petition the court to continue the confidentiality of a public record upon a showing of good cause.

Existing Organizations

The University of Florida and the University of South Florida currently have public academic health science centers. The University of South Florida Health Sciences Center includes the College of Medicine, the College of Nursing, and the College of Public Health, as well as affiliated clinical facilities. The University of Florida Health Science Center consists of the six health related colleges of the University of Florida. It is affiliated with Shands at the University of Florida and Shands Jacksonville and their affiliated hospitals. The Health Science Center also contracts with the Veterans Affairs Medical Center in Gainesville for various services.

The Board of Regents staff reports that these same universities have established the following approved health services support organizations:

- The University of South Florida (USF) Health Services Support Organization Inc.[4]
- The University of South (USF) Physicians Group, Inc.[5]
- The University of Florida Health Services, Inc.[6]
- The University of Florida Jacksonville Healthcare, Inc.

None of these organizations are licensed as an insurer or certified as a health maintenance organization. Currently, the only existing managed care contracts associated with a university health services support organization are through the University of Florida. The university has approximately 74 contracts for managed care arrangements on behalf of the University of Florida Jacksonville Healthcare, Inc. At least one agreement between the University of Florida and an insurer specifically delegates to the university the credentialing function for all university providers who perform health services. Peer review, pursuant to chapter 395, F.S., is performed through the University of Florida Jacksonville Healthcare, Inc., by a panel comprised of University of Florida faculty physicians.

The only other managed care arrangement involved the University of South Florida Health Services Support Organization, Inc. In 1997, the organization entered into an agreement to develop and market a managed care behavioral health delivery system, in conjunction with the USF Department of Psychiatry. The contract was terminated in the summer of 1998. There are no current contracts for this organization or the University of Florida Health Services, Inc., although both organizations have retained a corporate structure.

Marketing Plans

The current provisions in s. 240.2996(2)(b), F.S., and s. 240.2996(3), F.S., are similar to the previous exemptions in the law for public hospitals. Prior to 1999, the law included an exemption (s. 395.3035(2)(b), F.S.) from the public records law requirements for strategic plans, including plans for marketing services, which were or were reasonably expected by a public hospital's governing board to be provided by the hospital's competitors. Additionally, there was an exemption (s. 395.3035(4), F.S.) from the public meetings requirements for those portions of governing board meetings involving discussions or reports on written strategic plans, including marketing plans. This exemption was amended in 1999 following a Florida Supreme Court decision involving portions of public hospital board meetings during which strategic plans were discussed.

In *Halifax Hospital Medical Center v. News Journal Corporation*, 724 So.2d 567, (Fla. 1999), the Florida Supreme Court affirmed the holding of the Fifth District Court of Appeal that the

[4] The University of South Florida considers this organization active. It is still listed as active with the Department of State.

[5] The University of South Florida (USF) Physicians Group, Inc., is currently inactive with the Department of State.

[6] According to the University of Florida, this organization is inactive (without current ongoing business); the organization is still listed as active with the Department of State.

exemption in s. 395.3035(4), F.S., is facially unconstitutional.[7] The court agreed with the two lower courts' conclusions that the statutory exemption does not meet the exacting constitutional standard of specificity as to stated public necessity and limited breadth to accomplish that purpose. The court noted that the exemption does not define what is meant by "strategic plan" or "critical confidential information." The Supreme Court, agreeing with the circuit court, stated that the Legislature had created a categorical exemption by exempting all discussion of the strategic plan that reaches far more information than necessary to accomplish the purpose of the exemption. The court also held that the exemption could not be judicially narrowed because the record lacked findings to define information that is "critical and confidential" within the stated purpose of protecting competitive secrecy.

Interim project respondents from the Board of Regents, the University of Florida, and the University of South Florida recommend reenacting the exemptions in s. 240.2996, F.S., without any changes. However, the First Amendment Foundation noted that the existing provisions for market plans in s. 240.2996, F.S., suffer from the overbreadth problem in *Halifax* and recommends amending these provisions to reflect the subsequent changes made to s. 395.3035, F.S.

Exemption Analysis

The specific records affected by the exemption are the organization's plans for marketing services which are, or may reasonably be expected by an organization's governing board to be, provided by an organization's competitors or its affiliated providers. However, the organization's budget and documents submitted to the organization's governing board as a part of the board's approval of the organization's budget are not confidential and exempt. Portions of meetings of the organization's governing board, committee, or peer review panel involving the discussion of confidential and exempt contracts, documents, records, market plans, or trade secrets are affected, as well as portions of public records generated during these closed meetings and which contain confidential and exempt information.

The exemption affects health services support organizations of state universities with public academic health sciences centers. The exemption currently affects meetings of the Board of Directors and the credentialing committee of the University of Florida Jacksonville Healthcare, Inc. The purpose of the exemption is to protect the organization's plans for marketing its services, including discussions at closed meetings and records of these closed meetings. The exemption protects the organization from competitors gaining ready access to its market plans that would provide an unfair business advantage for competitors and adversely affect the organization in the marketplace.

Generally, the information cannot be obtained by alternative means by persons other than parties privy to the organization's market plans and meetings during which the plans are discussed. The law provides no limit on the scope or duration of the exemption. All parts of the market plan, discussions of the plan at specific closed meetings, and records of these closed meetings are made confidential and exempt rather than only those parts of the record or discussions which contain critical confidential information. Similarly, there is no provision for the release of the

[7] *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So.2d 434, (Fla. 5th DCA 1997). The lawsuit challenged the legality of a series of closed meetings in which Halifax Hospital Medical Center and the Southeast Volusia Hospital district negotiated the terms of an agreement to create an interagency holding company.

organization's market plan even if it has been publicly released by the organization or has been implemented to the extent that confidentiality of the plan is no longer necessary.

Managed Care Contracts

For purposes of the exemption, the term "managed care" means systems or techniques generally used by third-party payors or their agents to affect access to and control payment for health care services. Managed-care techniques most often include one or more of the following: prior, concurrent, and retrospective review of the medical necessity and appropriateness of services or site of services; contracts with selected health care providers; financial incentives or disincentives related to the use of specific providers, services, or service sites; controlled access to and coordination of services by a case manager; and payor efforts to identify treatment alternatives and modify benefit restrictions for high-cost patient care. Generally, managed care contracts are considered proprietary confidential business information.

There are other provisions of law that provide a public records exemption for certain managed care contracts, including s. 408.185, F.S., related to information held by the Office of the Attorney General which is submitted by a member of the health care community pursuant to a request for an antitrust no action letter. Section 240.512(8)(b), F.S. (relating to the H. Lee Moffitt Cancer Center and Research Institute), makes proprietary confidential business information exempt from the public records requirements and includes contracts for managed care arrangements, as well as any documents directly related to the negotiation, performance, and implementation of these contracts. There is a similar exemption in s. 395.3035, F.S., related to managed care contracts in which a public hospital provides health care services.

The Department of Insurance regulates health maintenance organization (HMO) finances, contracting, and marketing activities under part I of chapter 641, F.S., while the Agency for Health Care Administration regulates the quality of care provided by HMOs under part III of chapter 641, F.S. Section 641.234, F.S., allows the Department of Insurance to require an HMO to submit certain contracts (e.g., contracts for administrative services, management services, provider services other than individual physician contracts, and with affiliated entities). The department may order the HMO to cancel the contract if it determines that the fees are so unreasonably high as compared with similar HMO contracts, or that the contract is detrimental to the subscribers, stockholders, investors, or creditors. The department may also order such contracts to be canceled if the contract is with an entity that is not licensed under state law, if such license is required, or is not in good standing with the applicable regulatory agency.

<u>Exemption Analysis</u>

The exemption is limited to managed care contracts in which the university health services support organization provides health care services and any documents directly relating to the negotiation, performance, and implementation of any such contracts for managed care arrangements or alliance network arrangements. However, organizations must make summary contract information available upon request. Portions of meetings of the organization's governing board, committee, or peer review panel involving the discussion of confidential and exempt contracts, documents, records, market plans, or trade secrets are affected, as well as portions of public records generated during these closed meetings and which contain confidential and exempt information.

The exemption for contracts for managed care arrangements is limited in that the contracts become public 2 years after termination or completion of the contract term. Portions of the contract containing trade secrets remain confidential and exempt. There is a limited exemption for portions of public records generated during a governing board meeting involving negotiations for managed care contracts, reports of negotiations, and actions by the board. These records become public 2 years after the termination or completion of the contract term. If no contract was executed, the records become public 2 years after the termination of the negotiations.

The exemption affects state universities with public academic health centers where the health services support organization provides health care services and private entities negotiating or entering into contracts for managed care or alliance network arrangements (e.g. managed care organizations or physicians selling their practices). The purpose of the exemption is to protect the organization's managed care contracts and documents directly related to their negotiation, performance, and implementation, as well as discussions at specific closed meetings and records of these closed meetings. The exemption protects the organization from competitors gaining ready access to information that would provide them with an unfair business advantage and adversely affect the business interests of the organization and its actual and potential contractors. In the absence of the exemption, negotiations could be undermined to the extent that competitors would have access to ongoing negotiation information, including offers and the services that are the subject of the negotiations.

Generally, the information cannot be obtained by alternative means by persons other than parties to managed care contracts or contract negotiations or persons privy to portions of documents and meetings related to managed care contracts. There is no provision for the release of a contract or a contract negotiation document that is generated at a governing board meeting even if it has been publicly released by the organization or has been implemented to the extent that confidentiality is no longer necessary for the entire document or part of the document.

Trade Secrets

Chapter 688, F.S., the Uniform Trade Secrets Act, provides definitions of improper means of acquisition or disclosure and misappropriation of a trade secret. As well, the law allows a court to enjoin the actual or threatened misappropriation of a trade secret, allows for damages (e.g., recovery of actual loss and unjust enrichment), and the award of attorney's fees in certain circumstances. The law (s. 812.081(2), F.S.) provides a criminal penalty (a third degree felony) for stealing, embezzling, or unauthorized copying of a trade secret, although the definition for a trade secret is different from that in chapter 688, F.S. Section 90.506, F.S., which is part of the Florida Evidence Code, currently provides a privilege for trade secrets. The privilege is not absolute in that a court may order production of requested materials.

There are other provisions of law that make trade secrets, as defined in s. 688.002, F.S., confidential and exempt, including s. 408.185, F.S., related to information held by the Office of the Attorney General which is submitted by a member of the health care community pursuant to a request for an antitrust no action letter. The law (s. 395.3035, F.S.) relating to hospital records makes trade secrets, as defined in s. 688.002, F.S., including reimbursement methodologies and rates, confidential and exempt. Although s. 240.241(2), F.S., makes specific information confidential and exempt, including materials related to potential and actual trade secrets received, generated, ascertained, or discovered during the course of *research* conducted within

state universities, it does not specifically address the trade secrets of a health services support organization.

Exemption Analysis

The exemptions affect portions of documents revealing trade secrets and sensitive proprietary information (e.g., reimbursement methodologies and rates, physician incentive plans, and business methods and practices) that the organization obtains from private entities. Also, the exemption affects proprietary information of the organization. Portions of meetings of the organization's governing board, committee, or peer review panel involving the discussion of confidential and exempt contracts, documents, records, market plans, or trade secrets are affected, as well as portions of public records generated during these closed meetings and which contain confidential and exempt information. Although portions of managed care contracts eventually become public, the portions containing trade secrets remain confidential and exempt.

The exemption also affects health services support organizations of state universities with public academic health centers and managed care organizations and community physicians selling their practices to university health services support organizations.

The purpose of the exemption is to protect confidential trade secrets and proprietary information that the organization obtains from private entities doing business with the health services support organization, as well as confidential proprietary information of the organization. Disclosing trade secrets and proprietary information in the organization's possession to competitors would negatively impact the business interests of private entities doing business with the health services support organization. If disclosed to competitors, the information revealing the organization's proprietary information would detrimentally affect the organization's business interests by damaging it in the marketplace. The information cannot be generally obtained by alternative means by persons other than parties privy to portions of documents or meetings that reveal trade secrets.

Credentialing/Peer Review Panels

The Department of Health is responsible for the regulation of health care practitioners. However, the law (s. 20.43(3), F.S) also provides that the department may contract with the Agency for Health Care Administration who shall provide consumer complaint, investigative, and prosecutorial services required by the department's Division of Medical Quality Assurance, councils, or boards, as appropriate. The division is responsible for specific health related boards and professions.

Chapter 456, F.S., provides for the general regulatory powers and duties of the Department of Health over licensed health care practitioners. Section 456.014, F.S., provides that all information required by the department of an applicant shall be a public record and shall be open to public inspection under the Public Records Law, *except* financial information, medical information, school transcripts, examination questions, answers, papers, grades, and grading keys, which are confidential and may not be discussed with or made accessible to anyone except members of the board, department, and staff thereof, who have a bona fide need to know such information. Any information supplied to the department by any other agency which is exempt from the provisions of the Public Records Law, or is confidential remains exempt or confidential pursuant to applicable law while in the custody of the Department of Health or the agency.

The law (s. 456.047, F.S., relating to standardized credentialing of health care practitioners) defines credentialing as the process of assessing and verifying the qualifications of a licensed health care practitioner or application for licensure as a health care practitioner.[8] Currently, physicians can submit information directly to the department or can designate an agent to do so (a health care entity or credentials verification organization).

Chapter 395, F.S., relates to hospital licensing and regulation and specifies regulatory roles for the Department of Health and the Agency for Health Care Administration. The law requires governing boards of each licensed facility to set standards and procedures for the facility and medical staff in considering and acting upon applications for staff membership or clinical privileges. The standards and procedures used in considering and acting upon applications for staff membership or clinical privileges must be made available for public inspection. The law requires licensed facilities (as a condition of licensure) to provide for peer review of physicians who deliver health care services at the facility. Each facility's peer review procedures must provide for focusing on a review of professional practices at the facility to reduce morbidity and mortality and to improve patient care. The law also requires a peer review panel to investigate and determine whether grounds for discipline exist for staff members or physicians.

Also, s. 766.101, F.S., provides requirements for "medical review committees," including the evaluation and improvement of the quality of health care rendered by providers of health care services. Medical review committees of a hospital, ambulatory surgical center, or health maintenance organization must screen, evaluate, and review the professional and medical competence of applicants to, and members of, medical staff. Health care providers, as a condition of licensure, must cooperate with these reviews.[9] Florida law provides statutory privileges related to the peer review and medical review process and federal law provides some protection for the peer review process.[10]

While the term "medical review committee" includes health maintenance organizations, provider-sponsored organizations, integrated delivery systems, as well as certain corporations formed and operated for the practice of medicine, it does not specifically include health services support organizations. Similarly, the exemption in s. 395.0193(7), F.S., does not address these organizations. An opinion of the Attorney General (AGO 95-10) determined that the exemption in s. 395.0193, F.S., for meetings of peer review panels of facilities licensed under chapter 395, F.S., did not apply to the proceedings of a quality assurance program established by a non-profit corporation to carry out physician peer review. The opinion noted that the corporation did not own, operate, or maintain any hospitals, health clinics, or other health facilities, and was not a health care provider. Also, no information indicated that a licensed facility had a specific written contract with the corporation for it to act as the facility's agent in peer review. The corporation

[8] This provision includes individuals licensed or, for credentialing purposes, any person applying for licensure under chapters 458, 459, 460, 461, F.S., s. 464.012, F.S., or any person licensed under another chapter of the Florida Statutes subsequently made subject to credentialing by the Department of Health with the approval of the applicable board.

[9] The term "health care providers" means individuals licensed under chapters 458, 459, 460, 461, 463, 465, and 466, F.S., or hospitals or ambulatory surgical centers licensed under chapter 395, F.S.

[10] See ss. 395.0191(8), 395.0193(8), and 766.101(5), F.S. The federal Health Care Quality Improvement Act of 1986 (42 U.S.C. § 11101 et. seq.) was designed both to provide for effective peer review and interstate monitoring of incompetent physicians and to grant qualified immunity from damages for those who participate in peer review activities.

considered in the opinion did not have an exemption similar to s. 240.2996, F.S., for university health services support organizations.

Exemption Analysis

The exemption solely affects the university health services support organization's records used by its peer review panels, committees, governing board, and agents to evaluate health care services and health care providers' professional credentials. Core credentials, under s. 456.047, F.S., are defined as the following: current name, any former name, and any alias; any professional education; professional training; licensure; current Drug Enforcement Administration certification; social security number; specialty board certification; Educational Commission for Foreign Medical Graduates certification; hospital or other institutional affiliations; evidence of professional liability coverage or evidence of financial responsibility as required by ss. 458.320, 459.0085, or 456.048, F.S.; history of claims, suits, judgments, or settlements; final disciplinary action reported pursuant to ss. 456.039(1)(a)8. or 456.0391(1)(a)8., F.S.; and Medicare or Medicaid sanctions.

Portions of meetings of the organization's governing board, committee, or peer review panel involving the discussion of confidential and exempt contracts, documents, records, market plans, or trade secrets are affected, as well as portions of public records generated during these closed meetings and which contain confidential and exempt information.

The exemption affects health care providers and physicians who are employed by or under contract with the university health services support organization and who are subject to the organization's peer review and credentialing process. The exemption is not to be construed to impair any otherwise established rights of an individual health care provider to inspect documents concerning the determination of the provider's professional credentials. The exemption currently affects meetings of the Board of Directors and credentialing committee of the University of Florida Jacksonville Healthcare, Inc.

The purpose of the exemption is to protect information of a sensitive personal nature concerning health care providers and physicians (e.g., employees and those under contract) who are the subject of the organization's peer review and credentialing process. The exemption also protects discussions at specific closed meetings, as well as records of these closed meetings. If disclosed, the information would defame individual health care providers and physicians or cause unwarranted damage to their good name or reputation. Without the public records and meetings exemptions, information necessary to the peer review and credentialing process (e.g., the professional and medical competence and conduct of health care providers and physicians) could not be obtained and meaningful review would not be possible.

Credentialing and peer review information cannot generally be obtained by alternative means by persons other than parties privy to documents and portions of meetings involving the evaluation of health care providers and physicians employed by or under contract with the organization. Section 395.0193(7), F.S., provides that proceedings and records of peer review panels, committees, and governing boards or agents of these entities, are not subject to public inspection; as well, meetings of these entities are not open to the public. The law (s. 766.101(7)(c), F.S.) provides an exemption from the public meetings requirements for the proceedings of medical review committees. Any advisory reports provided to the Department of Business and Professional Regulation by these committees are confidential and exempt from the statutory and

constitutional public records requirements, regardless of whether probable cause is found. Under s. 456.047(3)(b), F.S., the Department of Health must release core credentials data that is otherwise exempt from the statutory and constitutional provisions for open records, if authorized by the health care practitioner.

Meeting Transcripts

The law relating to university health services support organizations does not require transcripts by a certified court reporter for parts of a closed governing board or committee meeting involving discussions of market plans, contracts, or contract negotiations. Other provisions of law require court reporters to record closed meetings, including s. 286.011(8), F.S., which provides a governmental entity's attorney an opportunity to discuss pending litigation with the governmental entity. Section 395.3035(4)(b), F.S., contains a similar provision for all portions of closed hospital board meetings related to strategic plans. Both provisions confine the subject matter of the meeting to a specific topic, require the court reporter to record the entire session, provide that the transcript becomes part of the public record at a specified time, and require prior notice for meetings. If notice of a meeting is required by an entity subject to s. 286.011, F.S., the law (s. 286.0105, F.S.) states that the notice must provide advice for appeals of decisions on matters considered at the meeting. Persons wishing to appeal a decision must be advised that they will need a record of the proceedings and may, for that purpose, need to ensure that a verbatim record of the proceedings is made, including the testimony and evidence upon which the appeal is to be based.

III. Effect of Proposed Changes:

Section 1. The bill repeals the provision in s. 240.2995(6), F.S., declaring that meetings of the governing board of the health services support organization are public unless otherwise made confidential and exempt by law. (This provision is currently in s. 240.2996(1), F.S.) Also, the bill removes the provision authorizing the Department of Insurance to have the organization's records made available to the department upon request. The bill places this provision in s. 240.2996(1), F.S.

Section 2. The bill makes the following changes:

- Amends s. 240.2996, F.S., and requires the organization to provide the Department of Insurance, upon request, with records needed to discharge the department's duties.
- Provides that the organization's confidential and exempt marketing plan is limited to each plan which, if disclosed, may reasonably be expected by the governing board to be used by a competitor or affiliated provider to frustrate, circumvent, or exploit the plan's purpose before it is implemented and which is not otherwise known or cannot be legally obtained by a competitor or affiliated provider.
- Removes the provisions in s. 240.2996(2), (3), & (4), F.S., that repeal the exemptions on October 2, 2001.
- Requires the following for all portions of any governing board meeting that are closed to the public for the purpose of discussing the organization's marketing plans, managed care contracts, or contract negotiations, reports on negotiations, and actions on negotiations:
- recording by a certified court reporter;
- specific contents of the record;
- no portion of the meeting is off the record;

- court reporter's notes must be transcribed and maintained by the records custodian within a reasonable time after the meeting;
- discussion of the closed meeting is confined to specified topics;
- transcript becomes public at specified time (marketing plans: 2 years after the date of the governing board meeting; contracts: 2 years after contract termination or completion; contract negotiations, reports, actions: 2 years after contract termination or completion; or 2 years after termination of contract negotiations if no contract executed); and
- transcript becomes public earlier if the document discussed at the meeting has been publicly disclosed by the organization or has been implemented to the extent that confidentiality is no longer necessary.
- Specifies the requirements for the organization when the document discussed at the closed meeting has been publicly disclosed by organization or has been implemented to the extent that confidentiality is no longer necessary (the organization must redact the document and release only that part which records discussion of the nonconfidential part, unless its disclosure would divulge any part that remains confidential).
- Provides for the earlier release of confidential and exempt contracts for managed care arrangements when the contracts have been publicly disclosed by the organization or have been implemented to the extent that confidentiality is no longer necessary (the organization must redact the contract and release only that part which contains the nonconfidential part, unless the disclosure would divulge any part that remains confidential).
- Provides for the earlier release of confidential and exempt portions of records made in closed meetings of the governing board involving the organization's contract negotiations, reports on negotiations, and actions on negotiations (the records cease to be exempt at the same time the transcript becomes available to the public).

Section 3. The bill provides findings of public necessity to justify reenacting the exemptions.

Section 4. The bill provides for repeal (January 7, 2003) and prior legislative review of ss. 240.2995 and 240.2996, F.S.

Section 5. The bill provides an effective date (upon becoming a law).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The University of South Florida, in response to the interim project survey, noted that the Legislature authorized the creation of university health services organizations to provide a distinct and accountable legal vehicle for the academic health services center to enter into managed care and alliance network agreements with other entities. Similarly, the Board of Regents' response noted that:

"University health services support organizations are the sole entities within the State University System that provide the legal and organizational vehicle to enable the medical

schools to remain active participants in the highly competitive and integrated health care marketplace."

The enabling legislation provides that the organizations were established to serve as the corporate entities through which public colleges of medicine may participate as partners in integrated health care delivery organizations. Section 240.2995(1), F.S., allows the organizations to enter into managed care and alliance network arrangements with other entities as providers in other integrated health care systems or similar entities. The law provides that the organization is solely responsible for the organization's acts, debts, liabilities, and obligations and specifically provides that the state and universities have no responsibility for the acts, debts, liabilities, and obligations incurred or assumed by these organizations.

The only existing managed care contracts associated with a university health services support organization are through the University of Florida which has contracts for managed care arrangements on behalf of the University of Florida Jacksonville Healthcare, Inc. Clarification may be needed as to the applicability of the exemptions in s. 240.2996(2)(a), F.S., for existing managed care contracts between the university and private entities in which the university provides health care services for the benefit of the health services support organization. However, this clarification would expand the existing exemption. If the Legislature chooses to expand the exemption, s. 240.2996(3), (4), (6), &(7), F.S., should also be amended.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

To the extent that university health services support organizations are not currently using court reporter services to report on and transcribe notes of closed meetings, the organizations will experience some increased costs. The costs will vary based on the number and length of closed meetings, as well as the local rates for court reporter services.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Last year, Congressional hearings addressed responses from health care consumers, practitioners, health care organizations, and others to the recommendations in the Institute of Medicine's study on medical errors. The report discussed peer review protection and existing voluntary reporting entities (e.g., the sentinel event system conducted by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), [11] the Medication Errors Reporting Program, and the MedMARx program). The recommendations included enacting federal legislation to extend peer review protections to data on patient safety and quality improvement that have no serious consequences and where the information is collected and analyzed by health care organizations for internal use or shared with others solely for the purpose of improving safety and quality. The 2000 Florida Legislature created the Florida Commission on Excellence in Health Care (chapter 2000-256, L.O.F.) to address related issues. More recent developments involving the disclosure of information include the issuance of revised JCAHO accreditation standards for hospitals for patient safety and medical error reduction. Under the new standards, patients (and when appropriate their families) must be told about outcomes of care, including unanticipated outcomes.

The interim project report noted several factors that were beyond the scope of the Open Government Sunset Review. Chapter 2000-321, L.O.F., relating to governance, repeals ss. 240.2995 and 240.2996, F.S., effective January 7, 2003. Chapter 2000-303, L.O.F., related to the creation of the new College of Medicine at Florida State University, contemplates the creation of not-for-profit corporations to seek affiliation agreements with health care systems and organizations, local hospitals, medical schools, and military health care facilities in specified communities. The report recommended a Senate review prior to the repeal of ss. 240.2995 and 240.2996, F.S., to determine if any changes are needed to the structure of these organizations and the related public records and meetings exemptions.

VIII. Amendments:

None.

[11] JCAHO evaluates and accredits nearly 19,000 health care organizations and programs, including the following: general, psychiatric, children's and rehabilitation hospitals; health care networks, including health plans, integrated delivery networks and preferred provider organizations; home care organizations; nursing homes and other long term care facilities; certain assisted living residencies; behavioral health care organizations; ambulatory care providers; and clinical laboratories.