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 468

SPONSOR: Senate Committee on Health, Aging, and Long-Term Care

SUBJECT: Review of Public Meetings Exemption/Hospital Board Meetings Regarding Strategic Plans

DATE: November 13, 2003 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill reenacts and amends s. 395.3035(4)(a), F.S., to continue the public meetings exemption for those portions of a public hospital board meeting at which one or more written strategic plans that are confidential under s. 395.3035(2), F.S., are discussed, modified, or approved by the governing board.

This bill amends s. 395.3035, F.S.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, ch. 119, F.S., specifies the conditions under which public access must be provided to governmental records. Section 286.011, F.S., the Public Meetings Law, specifies the requirements for meetings of public bodies to be open to the public. While the state constitution provides that records and meetings are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, of the State Constitution, governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a

statement of the public necessity that justifies the exemption. Article I, s. 24, of the State Constitution, provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act, contained in s. 119.14, F. S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. The Open Government Sunset Review Act of 1995 provides for the repeal and prior review of any public records and meetings exemptions that are created or substantially amended in 1996 and subsequently. The review cycle began in 2001. The chapter defines the term "substantial amendment" for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

Under the Open Government Sunset Review Act of 1995, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- 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; or
- 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.

Public Meetings Exemption for Portions of Hospital Board Meetings

Section 395.3035(4)(a), F.S., exempts from the public meetings provisions of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, those portions of a public hospital board meeting at which one or more written strategic plans that are confidential under s. 395.3035(2), F.S., are discussed, modified, or approved by the governing board. This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

History of this Exemption

The 1991 Legislature enacted public records and meetings exemptions for public hospitals, originally codified in s. 119.16, F.S., which included a public records exemption applicable to public hospitals to include "documents that reveal a hospital's plan for marketing the hospital's services which services are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital." (ch. 91-219. L.O.F) In 1995, the Legislature

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. (ch. 95-199, L.O.F.) Among other provisions, 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 law specified that the hospital's budget and the board's approval of the budget were not confidential and exempt. 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., and s. 24(b), Art. I of the State Constitution.

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), affirmed the Seventh Circuit (trial) Court's finding that the series of meetings held between Halifax Hospital Medical Center and the Southeast Volusia Hospital District to create an interagency holding company through which these two entities could merge various aspects of their respective operations were in violation of the Public Meetings Law and the interlocal agreement generated was, consequently, void. The court of appeal held the Public Meetings Law exemption in s. 395.3035(4), F.S., pertaining to discussions of written strategic plans, to be violative of Art. I, s. 24 of the State Constitution which requires that an exemption be no broader than necessary to accomplish its stated purpose. Because strategic plan was not a defined term, the court determined that it could include more than the critical confidential information that the exemption was enacted to protect.

Halifax Hospital Medical Center appealed, and the Fifth District Court of Appeal certified the following question to the Florida Supreme Court:
IS THE EXEMPTION CONTAINED IN SECTION 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, SECTION 24(b) OF THE FLORIDA CONSTITUTION?

The Florida Supreme Court, in accepting the case for review, rephrased the certified question as:
IS THE EXEMPTION CONTAINED IN SECTION 395.3035(4), FLORIDA STATUTES (1995), CONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, SECTION 24(b) AND (c) OF THE FLORIDA CONSTITUTION?

The Florida Supreme Court affirmed the holding of the Fifth District Court of Appeal in its opinion in Halifax Hospital Medical Center v. News-Journal Corporation, Case No. 92,047 (1999), that the exemption was facially unconstitutional. The Supreme Court agreed with the two lower court's conclusions that "the statutory exemption does not meet the exacting constitutional standard of Art. I, s. 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose . . ." (p. 4). The Supreme Court's decision was based on its finding that the exemption did not define what was meant by strategic plan or critical confidential information. The Supreme Court, agreed with the circuit court's statement that "the legislature has created a categorical exemption which reaches far more information than necessary to accomplish the purpose of the exemption" (p. 5, quoting the circuit court).

Following this Supreme Court decision, the 1999 Legislature enacted the present, narrower exemption to the Public Meetings Law in s. 395.3035(4)(a), F.S., and provided a definition of strategic plan in s. 395.3035(6), F.S.

Public Necessity for the Exemption

The 1999 Legislature provided the following statement of public necessity for the exemption to the Public Meetings Law in s. 395.3035 (4)(a), F.S.:

> *The Legislature finds that community hospitals in this state are often the safety-net providers of health care to our less advantaged residents and visitors. Yet community hospitals that are subject to the public records and open meeting laws of the state, unlike most agencies that provide services to the public, must compete directly with their private sector counterparts. The economic survival of Florida's community hospitals depends on their ability to obtain revenues from services they provide in competition with their private-sector counterparts. The Legislature further finds that the governing boards of these hospitals do not discuss, debate, or participate in the modification or approval of their written strategic plans because the governing boards' discussions and the records are open to the public, thereby giving private-sector competitor hospitals advance disclosure of the hospitals' planned strategic moves. The Legislature finds that it is a public necessity that the governing boards of these hospitals be involved in the discussion, modification, and approval of the hospitals' strategic plans. Consequently, the Legislature finds that it is a public necessity that the written strategic plan of any hospital which is subject to the public records laws of the state, and notes and transcripts that are recorded pursuant to section 395.3035(4)(c), Florida Statutes, be confidential and exempt from the public records laws of this state as provided in this act. The Legislature also finds that it is a public necessity that those portions of a hospital's governing board meeting during which one or more written strategic plans which are exempt from the open records laws are discussed, reported on, modified, or approved shall be confidential and exempt from the public meeting laws of this state. The Legislature further finds that it is a public necessity to clarify that the records and meetings of any privately operated hospital which are subject to the public records law and open meetings law of this state are exempt from both in the same manner and to the same extent as are records and meetings of publicly operated hospitals and as otherwise provided by law.*

Public Meetings Exemption Review

The Senate staff reviewed the public records exemption for certain portions of hospital board meetings pursuant to the Open Government Sunset Review Act of 1995. As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Upon review, Senate staff determined that the exemption accomplishes the public purpose of permitting public hospitals to plan in a way that does not put them at a disadvantage vis-à-vis private hospitals. Senate Interim Project Report 2004-205 recommended that the exemption to the Public Meetings Law contained in s. 395.3035(4)(a), F.S., be reenacted without substantive changes.

III. Effect of Proposed Changes:

The bill reenacts and amends s. 395.3035(4)(a), F.S., to continue the public meetings exemption for those portions of a public hospital board meeting at which one or more written strategic plans that are confidential under s. 395.3035(2), F.S., are discussed, modified, or approved by the governing board.

The bill takes effect October 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

The bill reenacts the public meetings exemption found in s. 395.3035(4)(a), F.S.

C. Trust Funds Restrictions:

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

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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.