The Florida Senate

Interim Project Report 2001-044 *November 2000*

Committee on Health, Aging and Long-Term Care Senator Charlie Clary, Chairman

PUBLIC RECORDS EXEMPTION - HEALTH CARE PROVIDER INFORMATION FOR ANTITRUST REVIEW

SUMMARY

Section 408.185, Florida Statutes, makes trade secrets and other confidential proprietary business 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 confidential and exempt from the Public Records Law for one year after the date of submission. This section of law is subject to the Open Government Sunset Review Act of 1995, and expires on October 2, 2001, unless reviewed and saved from repeal by reenactment of the Legislature.

Section 119.15(2), F.S., provides that an exemption is to be maintained only if: the exempted record or meeting is of a sensitive, personal nature concerning individuals; the exemption is necessary for the effective and efficient administration of a governmental program; or the exemption affects confidential information concerning an entity. The Open Government Sunset Review Act also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law.

Staff has reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995 and finds that without the exemption, the Office of the Attorney General would not be able to effectively administer the Florida Health Care Community Antitrust Guidance Act. Staff also finds that the identifiable public purpose or goal of the exemption is to provide assurance to the members of the health care community who seek guidance from the Attorney General's office on antitrust issues relating to health care business activities that their otherwise confidential, proprietary information will not be disclosed to competitors for at least one year after a request for an antitrust no-action letter has been submitted.

Staff recommends that the exemption to the public records requirements in s. 408.185, F.S., for trade information and other proprietary business information submitted to the Office of the Attorney General by a member of the health care community who is seeking guidance on antitrust issues, be reenacted without substantive changes.

BACKGROUND

The Open Government Sunset Review Act of 1995

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 meeting 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.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

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 consideration of the following specific questions as part of the review:

(a) What specific records or meetings are affected by the exemption?
(b) Whom does the exemption uniquely affect, as opposed to the general public?
(c) What is the identifiable public purpose or goal of the exemption?
(d) 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 paragraph, 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(3)(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 a 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.

Health Care Antitrust Protections

The federal and state governments both regulate business activities under their respective antitrust laws. Antitrust regulation is intended to discourage monopolies and control the exercise of "monopoly power," meaning the power to fix prices and exclude competition. The application of antitrust laws to the health care sector, a relatively recent phenomenon, has increased as the health care market has been restructured and market competition has increased. Antitrust issues arise not from the actual delivery of care, but from the economic and business relationships that prevail in the health care industry.

Before 1975, the health care industry was not viewed as commerce, but as a "learned profession" regulated under state law to which antitrust laws did not apply. The United States Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 42 U.S. 773 (1975), held that the learned professions are engaged in commerce and do not have an exemption from antitrust laws. The *Goldfarb* decision has had an effect on health care policy by providing the background for competition and in effect has revolutionized the notion that health care providers could be trusted to determine the framework under which health care is provided. After *Goldfarb*, health care competitors would potentially be in violation of antitrust law for business activities in the provision of health care services that restrained competition. *Goldfarb* allowed antitrust enforcement in an industry that regulated itself without market forces and, in effect, opened the door to competition in the health care industry, by making providers accountable to consumers for cost as well as the quality of their services.

Federal antitrust laws (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 anti-competitive conduct and are enforced

by the U.S. Department of Justice and the Federal Trade Commission (FTC). In September 1993, both agencies released antitrust enforcement guidelines, which 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, which the federal government will not challenge. Both federal agencies have issued new and revised statements of enforcement policy and analytical principles relating to health care and antitrust since 1993.

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.

Florida Health Care Community Antitrust Guidance Act

In 1996, the Florida Legislature created the Florida Health Care Community Antitrust Guidance Act, codified at s. 408.18, F.S., to provide a mechanism for members of the health care community who desire antitrust guidance to request a review of their proposed business activities by the Attorney General's office. The act defines "health care community" to include all licensed health care providers, insurers, networks, purchasers, and other participants in the health care system. "Antitrust no-action letter" is defined to mean 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.

To obtain the review, a member of the health care community must submit a written request for an antitrust no-action letter to the Attorney General's office. The requesting party is 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; complete copies of all operative documents; the provisions of law under which the request arises; and detailed statements of all collateral oral understandings, if any. All parties requesting the letter must provide the Attorney General's office with whatever additional information or documents the office requests.

The Attorney General'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. The Agency for Health Care Administration is to collect, coordinate, and analyze health care data and the Department of Insurance is to make available any relevant information on entities regulated by the Department of Insurance.

Within 90 days after it receives all information necessary to complete the review, the Attorney General's office must act on the no-action letter request. Upon review of the proposal, the Attorney General's office may either issue an antitrust no-action letter, decline to issue any type of letter, or take other appropriate action.

If an antitrust no-action letter is issued, the recipient must annually file with the Attorney General's office an affidavit stating that there has been no change in the facts presented, at which time the Attorney General's office is stopped from bringing an antitrust action concerning any specific conduct that is the subject of the no-action letter, as long as there is no change in any material fact. The no-action letter is, if relevant, admissible as evidence in any court proceeding in Florida. The Attorney General's office may bring any other action or proceeding based on a different set of facts.

Section 408.185, Florida Statutes

408.185 Information submitted for review of antitrust issues; confidentiality.--The following 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 shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution for 1 year after the date of submission.

(1) Documents that reveal trade secrets as defined in s. 688.002.

(2) Preferred provider organization contracts.

(3) Health maintenance organization contracts.

(4) Documents that reveal a health care provider's marketing plan.

(5) Proprietary confidential business information as defined in s. 364.183(3).

This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 and shall stand repealed on October 2, 2001, unless reviewed and saved from repeal by reenactment of the Legislature

METHODOLOGY

Staff has reviewed s. 408.185, F.S., and applicable law pursuant to the Open Government Sunset Review Act of 1995. Staff sought the input of the Attorney General's office and sent questionnaires to interested stakeholders.

FINDINGS

The records covered by the exemption to the public records requirements in s. 408.185, F.S., include: documents that reveal trade secrets; documents that reveal a health care provider's marketing plan; proprietary confidential business information; preferred provider organization contracts; and health maintenance organization contracts. A health care provider may submit these documents to the Attorney General's office as part of a request for an antitrust no-action letter under the Florida Health Care Community Antitrust Guidance Act. The records are available to the public one year after a request for an antitrust no-action letter has been submitted. The Department of Legal Affairs, in response to a questionnaire, indicated that no one has ever made a public records request for such material, and that it is not possible to state whether any disclosures of the material covered by the exemption could cause damage or loss to any person or entity.

The Attorney General's office noted that the Florida Medical Association originally sought the exemption to assure that any providers seeking advice from that office would be able to provide potentially sensitive trade secret information or any other relevant information subject to the exemption with full confidence that the material would not be disclosed to competitors or potential competitors. The Florida Medical Association, in response to a questionnaire, indicated that the association is without knowledge regarding the topic and that the association has no policy on the matter.

The identifiable public purpose or goal of the exemption is to assure the members of the health care community who seek guidance from the Attorney General's office on antitrust issues relating to health care business activities that their otherwise confidential, proprietary information will not be disclosed to competitors for at least one year after a request for an antitrust no-action letter has been submitted. The health care community includes all licensed health care providers, insurers, networks, purchasers, and other participants in the health care system. Since the enactment of the Florida Health Care Community Antitrust Guidance Act, the Office of the Attorney General has received only three requests for antitrust no-action letters.

Two requests were submitted by dental providers and resulted in no action letters and one was rendered moot by events in the marketplace. One request from the Clay County Dental Society sought guidance on a proposed survey, report, and exchange of information relating to the society's members' 'usual and customary' fees for certain dental procedures. Another request from Premier Dental, Inc., sought guidance on two activities: its plans to develop a discounted fee-for-service dental benefits program; and its plans to assist groups of medium and large employers to develop capitated dental managed care plans for the benefit of their employees.

The Attorney General's office has indicated that the exemption allows that office to effectively administer the Florida Health Care Community Antitrust Guidance Act and its responsibilities to administer the act would be impaired without the exemption. If a request for antitrust guidance from the Attorney General's office involves sensitive trade information, contracts, marketing plans, and proprietary business information then that office cannot conduct a thorough and adequate review without being provided that trade information. The exemption ensures that the Attorney General's office receives all sensitive information it must receive in order to make an informed decision regarding the request for an antitrust no-action letter. Members of the health community who wish to engage in proposed business activities would not wish to avail themselves of the option of seeking an antitrust no-action letter to avoid antitrust enforcement by the Attorney General if their proprietary information can immediately be disclosed to the public in a period less than one year after submission of the request.

Professional associations, in response to a staff questionnaire, support the reenactment of the exemption to the public records requirements in s. 408.185, F.S. Some associations have argued that the exemption should be modified to prevent disclosure of trade information and other business records submitted with a request for an antitrust no-action letter so that the records would never be disclosed to the public. Current law allows disclosure of the trade information one year after the submission of the request for an antitrust no-action letter. The associations note that the limited disclosure tends to dissuade members of the health community from seeking guidance from the Office of the Attorney General on antitrust issues. The Department of Legal Affairs, in response to a questionnaire, indicated that no one has ever made a public records request for such material.

RECOMMENDATIONS

Staff has reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995 and finds that without the exemption, the Office of the Attorney General would not be able to effectively administer the Florida Health Care Community Antitrust Guidance Act. Staff also finds that the identifiable public purpose or goal of the exemption is to provide a safe forum for the members of the health care community to seek guidance from the Attorney General's office on antitrust issues relating to health care business activities. Staff finds that the members may be deterred from seeking such guidance if their otherwise confidential, proprietary information will be disclosed to competitors.

Staff finds that the exemption is narrowly tailored to balance the state's strong public policy of open government and the need for assurance to members of the health community seeking antitrust guidance from the Attorney General's office. Under current law, the exemption protects trade secrets and other proprietary business information from disclosure by preventing disclosure to the public for at least one year after a request for an antitrust no-action letter.

Staff recommends that the exemption to the public records requirements in s. 408.185, F.S., for trade information and other proprietary business submitted to the Office of the Attorney General by a member of the health care community who is seeking guidance on antitrust issues, be reenacted without substantive changes.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
Committee on Health, Aging and Long-Term Care, 404 South Monroe Street, Tallahassee, FL 32399-1100, (850) 487-5824 SunCom 277-5824

MEMBER OVERSIGHT
N/A