The Florida Senate

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Committee on Health, Aging and Long-Term Care | Senator James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR NOTIFICATION OF ADVERSE INCIDENTS BY HOSPITALS, AMBULATORY SURGICAL CENTERS, AND MOBILE SURGICAL FACILITIES (S. 395.0198, F.S.)

SUMMARY

Section 395.0198, F.S., makes confidential and exempt from the disclosure requirements for public documents information contained in the notification of an adverse incident that a licensed hospital, ambulatory surgical center, or mobile surgical facility must report to the Agency for Health Care Administration within one business day after the facility determines that the event occurred. This section of law is subject to the Open Government Sunset Review Act of 1995 and will expire on October 2, 2003, unless it is reviewed and saved from repeal through reenactment by 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 of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that, with modification, the exemption meets the requirements for reenactment. The exemption should be narrowed to exempt information that could be used to identify the facility or the person reporting on behalf of the facility, information that could be used to identify the patient, the health care practitioner, the name and contact number for the medical examiner if the incident involved death, and descriptions of the circumstances of the incident and the actions taken to implement an investigation. Other information contained in the 24-hour report, such as the outcome, the potential risk to other patients, the date and time of the incident, and the location of the incident within the facility, should be available to the public.

BACKGROUND

Constitutional Access to Public Records and Meetings

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies (Section 1, ch. 5945, 1909; RGS 424; CGL 490). Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967 (Chs. 67-125 and 67-356, L.O.F.) These statutes have been amended numerous times since their enactment. In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice.

Article I, s. 24 of the State Constitution provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. (*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *(Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)).

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

1. Must state with specificity the public necessity justifying the exemption;
2. Must be no broader than necessary to accomplish the stated purpose of the law;
3. Must relate to one subject;
4. Must contain only exemptions to public records or meetings requirements; and
5. May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida's citizens to discover the actions of their government. (*Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997)). The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. (*Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987)).

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute. (Attorney General Opinion 85-62.) If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances. (*Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991)).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. (*Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985)). For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant. (*B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999)). The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records. (*Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

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 meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state 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 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.

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.

Under the requirements of the Open Government Sunset Review Act of 1995, 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.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

(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?

Further, 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:

(a) 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;
(b) 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
(c) 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves (*Memorial Hospital –West Volusia, Inc. v. News-Journal Corporation*, 2002WL 390687 (Fla.Cir.Ct)). In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Internal Risk Management Program for Hospitals, Ambulatory Surgical Centers, and Mobile Surgical Centers

As a licensure requirement, each hospital, ambulatory surgical center, and mobile surgical facility is required, at a minimum, under s. 395.0197, F.S., to establish an internal risk management program. Such a program is considered to be part of what is known as the quality assurance process that hospitals, ambulatory surgical centers, and mobile surgical facilities use in their day-to-day operations to ensure that "adverse incidents," are conscientiously examined on a continuous basis. The statute defines adverse incident to be an event over

which health care personnel could exercise control, which is associated with the medical intervention rather than the condition for which the intervention was performed, and which resulted in one of the following: death; brain or spinal damage; permanent disfigurement; fracture or dislocation of bones or joints; limitation of neurological, physical, or sensory functioning; any condition that required specialized medical attention or surgical intervention; or any condition that required transfer of the patient to another facility or a unit providing a more acute level of care.

At a minimum, an internal risk management program must provide for: 1) the investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients; 2) the development of appropriate measures to minimize the risk of injuries and adverse incidents to patients, including specifying the circumstances under which staff may have access to patients in a recovery room subject to alternative surveillance measures; 3) the analysis of patient grievances that relate to patient care and the quality of medical services; and 4) the development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and all agents and employees of the licensed facility to report adverse incidents.

The facility's governing board is responsible for the internal risk management program. The board is required to engage a risk manager to implement and oversee the program. Risk managers are exempted from liability and legal action for activities they undertake in implementing an internal risk management program that is in conformity with law as long as they are not intentionally fraudulent in their conduct. The qualifications of a risk manager, procedures for licensure, and fees are established in s. 395.10974, F.S.

Reports of Adverse Incidents

The statute requires facilities to provide the Agency for Health Care Administration with the following type of reports concerning adverse incidents:

A 24-hour report to be issued within one business day after the risk manager receives an adverse incident report and determines that any of the following occurred:

- The death of a patient;
- Brain or spinal damage to a patient;
- The performance of a surgical procedure on the wrong patient;
- The performance of a wrong-site surgical procedure; or
- The performance of a wrong surgical procedure.

The written notification must be delivered by facsimile or by overnight mail and must include the identity of the affected patient; the type of adverse incident; the initiation of an investigation by the facility; and whether the events causing the adverse incident pose a potential risk to other patients.

A 15-day report must be issued within 15 calendar days after the occurrence of any of the following adverse incidents:

- The death of a patient;
- Brain or spinal damage to a patient;
- The performance of a surgical procedure on the wrong patient;
- The performance of a wrong-site surgical procedure;
- The performance of a wrong surgical procedure;
- The performance of a surgical procedure that is medically unnecessary or otherwise unrelated to the patient's diagnosis or condition;
- The surgical repair of damage resulting to a patient from a planned surgical procedure, where the damage is not a recognized specific risk; or,
- The performance of procedures to remove unplanned foreign objects remaining from a surgical procedure.

An annual report summarizing the incident reports that have been filed in the facility for the year. The annual report must include:

- The total number of adverse incidents;
- A listing of the types of operations or diagnostic or treatment procedures that resulted in injury and the number of incidents;
- A listing of the types of injuries caused and the number of incidents;
- A code number using the health care professional's license number and a separate code number identifying all other individuals directly involved in the adverse incident; and,
- A description of all malpractice claims against the facility.

Exemptions from Public Records Requirements

Section 395.0197, F.S., provides three adverse incident reporting schedules: the 24-hour report, the 15-day report and the annual report. Public records exemptions for the 15-day report and the annual report were implemented prior to the Florida Constitution's requirement of a five-year renewal cycle for their continued effect. Thus, the public records exemption for the 24-hour report is the only exemption subject to repeal.

Under s. 395.0197(8), F.S., the entire 15-day report is exempt from the public records law and is not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by the agency or the appropriate regulatory board. However, the agency must make available to a health care professional against whom probable cause has been found any records which form the basis of the determination of probable cause.

Under s. 395.0197(6), F.S., the annual report is confidential and exempt from the public records law and is not discoverable or admissible in any civil or administrative action. As with the 15-day report, the agency must make the records available to a health care professional against whom probable cause has been found.

Section 395.0198, F.S., provides an exemption from the disclosure requirements of ch. 119, F.S., relating to public records and s. 24(a) and (b), Art. I of the State Constitution for information contained in the notification of an adverse incident that a licensed hospital, ambulatory surgical center, or mobile surgical facility must report to the Agency for Health Care Administration within one business day after the facility determines that the event occurred. The information is also made confidential. The exemption is scheduled for repeal on October 2, 2003, unless it is reviewed and saved from repeal by the Legislature.

Publication of Summary and Trend Analyses of Adverse Incident Reports

Section 395.0197(9), F.S., requires the Agency for Health Care Administration to publish on its website, at least quarterly, a summary and trend analysis of adverse incident reports the agency has received. The agency also must publish an annual summary of all adverse incident reports and malpractice claim information provided by the facilities in their annual reports. The quarterly and annual summaries must not include information that would identify the patient, the reporting facility, or the health care practitioners involved.

METHODOLOGY

Committee staff reviewed the provisions and applicable law according to the criteria specified in the Open Government Sunset Review Act of 1995. Staff sought input from the Agency for Health Care Administration and other interested stakeholders to determine if any aspects of s. 395.0198, F.S., should be revised and saved from repeal through reenactment.

FINDINGS

Section 119.15(4)(a), F.S., requires that certain questions be answered as part of the review process for a public records or meetings exemption. The review must address the nature of the records, the affected individuals, the public purpose for the exemption, and the availability of the records by alternative means.

What Specific Records or Meetings Are Affected by the Exemption?

The specific records affected by the exemption are the 24-hour adverse incident reports which contain the following information:

- The outcome of the adverse incident;
- A statement as to whether the event represents a potential risk to other patients;
- The name, address, and telephone number of the facility and the name and title of the person reporting the incident;
- The patient's name, age, sex, address, and identification number; the admitting diagnosis and diagnosis code; and whether the patient is enrolled in Medicaid or Medicare;
- The date and time of the incident and the location within the facility where the incident occurred;
- If the incident involved a patient's death, whether the medical examiner was notified, the name and contact number of the medical examiner, and whether an autopsy will be performed;
- A description of the circumstances of the incident and what actions have been taken to implement the investigation.

Whom Does the Exemption Uniquely Affect, as Opposed to the General Public?

The exemption uniquely affects the patient whose name, address, age, sex, diagnosis and

Medicaid/Medicare status would be made public along with a description of the adverse incident that involved the patient. The exemption also affects risk managers and other individuals investigating the adverse incident to the extent that making the information public might inhibit the willingness of the practitioners to speak about the event. If the practitioner is identified in the narrative description of the adverse incident, then the practitioner, too, would be uniquely affected by the exemption.

What Is the Identifiable Public Purpose or Goal of the Exemption?

The goal of the exemption is to enable a facility and the Agency for Health Care Administration to investigate an adverse incident in an environment that is not open to public scrutiny. Many adverse incidents are attributable to procedures in the system rather than to a single individual's error. Thus, if the risk manager and Agency surveyors could conduct an inquiry in a blame-free environment where all parties involved could communicate without fear that what they said would immediately become a public record the investigators would be more likely to gather complete information about the incident. According to the Agency, "Information contained in a 24-hour report even at the best is preliminary, and serves the regulatory purpose of permitting the Agency early warning of events that may be potentially harmful to other patients. This permits early investigation and where warranted, intervention in situations of public concern."

Can the Information Contained in the Records Be Readily Obtained by Alternative Means?

According to the Agency for Health Care Administration, the notification of an adverse incident cannot readily be obtained from another source.

Continued Necessity for the Exemption

Much of the information contained in the 24-hour report of an adverse incident appears to meet the requirements of the Open Government Sunset Review Act of 1995 and Article I, s. 24 of the State Constitution. Information relating to the patient is of a sensitive, personal nature concerning an individual. Information relating to the facility, if released, could impede the facility's ability to conduct an investigation. The exemption should be narrowed to exempt information that could be used to identify the facility or the person reporting on behalf of the facility, information that could be used to identify the patient, the health care practitioner, the name and contact number for the medical examiner if the incident involved death, and descriptions of the circumstances of the incident and the actions taken to implement an investigation. Other information contained in the 24-hour report, such as the outcome, the potential risk to other patients, the date and time of the incident, and the location of the incident within the facility, should be available to the public.

RECOMMENDATIONS

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that, with modification, the exemption meets the requirements for reenactment. The exemption should be narrowed to exempt information that could be used to identify the facility or the person reporting on behalf of the facility, information that could be used to identify the patient, the health care practitioner, the name and contact number for the medical examiner if the incident involved death, and descriptions of the circumstances of the incident and the actions taken to implement an investigation. Other information contained in the 24-hour report, such as the outcome, the potential risk to other patients, the date and time of the incident, and the location of the incident within the facility, should be available to the public.