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 AND MEETINGS EXEMPTIONS OF THE STATEWIDE PROVIDER AND SUBSCRIBER ASSISTANCE PROGRAM PANEL (S. 408.7056, F.S.)

SUMMARY

Section 408.7056(15), F.S., makes information that identifies a managed care entity's subscriber or the spouse, relative or guardian of a subscriber in a document, report, or record prepared or reviewed by the Statewide Provider and Subscriber Assistance Program (SPSAP) panel or obtained by the Agency for Health Care Administration (AHCA) confidential and exempt from the Public Records Law. Section 408.7056(15), F.S., also provides that the meetings of the panel must be open to the public unless the provider or subscriber whose grievance will be heard requests a closed meeting, or the Agency for Health Care Administration or the Department of Insurance (DOI) determines that information of a sensitive personal nature that discloses a subscriber's medical treatment or history, information that constitutes a trade secret, or information relating to an internal risk management program will be discussed and therefore the meeting must be closed to the public and is exempt from the Public Meetings Law. These exemptions are subject to the Open Government Sunset Review Act of 1995, and will expire on October 2, 2003, unless 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 or Public Meetings Law.

Staff has reviewed the exemptions in s. 408.7056(15), F.S., pursuant to the Open Government Sunset Review Act of 1995, and finds that the exemptions meet the requirements for reenactment with some substantive changes. The exemptions, viewed against the open government sunset review criteria, do protect information of a sensitive personal nature as documented in files and meetings held by the SPSAP panel for subscriber grievances. The exemption allows the SPSAP panel, AHCA, and DOI to effectively and efficiently administer the SPSAP program by assuring confidentiality of sensitive personal information that is discussed in the resolution of subscriber grievances.

Accordingly, staff recommends that the exemptions in s. 408.7056, F.S., be revived and readopted and amended to consolidate the exemption for the identity of the subscriber of a grievance contained in subsections (13) and (15) of that section, to provide for the release of the records in a subscriber's grievance to the subscriber or the managed care entity involved in that grievance without redaction of personal information of the subscriber, and to delete the Public Meetings Law exemption for trade secrets discussed in SPSAP hearings because there is no rationale for maintaining the exemption without a Public Records Law exemption for records generated for trade secrets.

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 Grievance Procedures for Managed Care Entities

Exclusive provider organizations must provide a grievance procedure for hearing and resolving the complaints of their subscribers under s. 627.6472(12), F.S. The grievance procedure must be described in the policy and certificates of the insurer. Grievances must be written and may be subject to arbitration. Corrective action must be taken promptly if a grievance is found to be valid. All concerned parties are required to be notified about the results of a grievance. Exclusive provider organizations are required to annually report the number of grievances filed during the past year and a summary of the subject, nature, and resolution of such grievances to AHCA.

Section 641.511, F.S., specifies requirements for health maintenance organization (HMO) subscriber grievance reporting and resolution. An HMO must maintain records of all grievances and annually submit a report to AHCA that delineates the total number of grievances handled, a categorization of the cases underlying the grievances, and the resolution of the grievances. Additionally, HMOs are required to send to AHCA and DOI quarterly reports, which are forwarded to the SPSAP under s. 408.7056, F.S., that list the number and nature of all grievances which have not been resolved to the subscriber's or provider's satisfaction after the entire internal grievance procedure of the HMO has been completed.

The internal grievance procedure of an HMO begins with submission of an initial complaint. Organizations are required to respond to an initial complaint within a reasonable time after its submission; advise subscribers of their right to file a written grievance; and establish a procedure for addressing urgent grievances, including the use of expedited review of such grievances. Also, Florida law provides for emergency review within 24 hours, as part of the external review process through the SPSAP, when AHCA determines that the life of a subscriber is in imminent and emergent jeopardy.

Each HMO must: advise subscribers of their right to file a written grievance with the HMO within 365 days after the date of occurrence of the incident on which the grievance is based; inform subscribers that the organization must assist in the preparation of the written grievance; and advise that, following the organization's final disposition of the grievance, the subscriber, if not satisfied with the outcome, may submit the grievance to the SPSAP. When a grievance concerns an adverse determination, the HMO is required to make available to the subscriber a review of the grievance by an internal review panel.

An adverse determination may be the basis for a grievance. A subscriber who chooses to challenge an adverse determination or file another type of grievance is required, under Florida law, to first go through the HMO's internal grievance procedure. Once a final decision is rendered through the internal grievance procedure, if the decision is unsatisfactory to the subscriber, then the subscriber may appeal through a binding arbitration process by the HMO or to the SPSAP.

The subscriber, or provider acting on the subscriber's behalf, must request the review within 30 days after the HMO's transmittal of the final determination notice of adverse determination. The majority of the review panel must be comprised of persons not previously involved in rendering the adverse determination and the HMO must ensure that a majority of the persons reviewing a grievance involving an adverse determination are providers who have appropriate expertise. A person involved in rendering the adverse determination may appear before the panel. The review panel must be given the authority by the HMO to bind the entity to the review panel's decision. Voluntary binding arbitration, as provided under the terms of the contract under which services are provided, if offered by the HMO, may be used as an alternative to the SPSAP. HMOs must notify subscribers that use of the arbitration option may result in costs to the subscriber. HMOs are subject to administrative sanctions for noncompliance with the internal grievance procedure.

Statewide Provider and Subscriber Assistance Program

Section 408.7056, F.S., requires AHCA to implement the Statewide Provider and Subscriber Assistance Program to assist consumers of managed care entities with grievances that have not been satisfactorily resolved through the managed care entity's internal grievance process. The program can hear grievances of subscribers of HMOs, prepaid health clinics, and exclusive provider organizations. As part of the SPSAP, AHCA must investigate unresolved quality-of-

care grievances received from HMO annual and quarterly grievance reports as well as subscriber appeals of grievances that have gone through the HMO's full grievance procedure.

Grievances are heard by a panel that meets as often as necessary to timely consider grievances and make recommendations to AHCA or DOI. Section 408.7056(11), F.S., provides that the panel must consist of members employed by AHCA and members employed by DOI, chosen by their respective agencies; a consumer appointed by the Governor; a physician appointed by the Governor, as a standing member; and physicians who have expertise relevant to the case to be heard, on a rotating basis. The agency may contract with a medical director and a primary care physician who may provide additional expertise. The medical director must be selected from a Florida licensed HMO.

Section 408.7056(15), F.S., makes information that identifies a managed care entity's subscriber or the spouse, relative or guardian of a subscriber in a document, report, or record prepared or reviewed by the SPSAP panel or obtained by AHCA *confidential and exempt* from the Public Records Law. Similarly, s. 408.7056(13), F.S., makes any information which would identify a subscriber or the spouse, relative or guardian of a subscriber which is contained in a report obtained by DOI as part of its duties with the SPSAP under s. 408.7056, F.S., *confidential and exempt* from the Public Records Law. Both ss. 408.7056 (13) and (15)(a), F.S., protect the identity of the subscriber because the medical information or other identifying information contained in the document or other report of the grievance is of a personal and sensitive nature, and could be used to discriminate or cause harm to the reputation of the person to which the information pertains.

Section 408.7056(15) (b), F.S., also provides that the meetings of the panel must be open to the public unless the provider or subscriber whose grievance will be heard requests a closed meeting, or AHCA or DOI determines that information of a sensitive personal nature that discloses a subscriber's medical treatment or history, information that constitutes a trade secret, or information relating to internal risk management programs of a managed care entity may be revealed. That portion of the meeting during which such sensitive personal information, trade secret information, or internal risk management program information is discussed must be closed to the public and is exempt from the Public Meetings Law.

METHODOLOGY

Staff has reviewed s. 408.7056(15), F.S., and applicable law pursuant to the Open Government Sunset Review Act of 1995. Staff sought input from the Agency for Health Care Administration, the Department of Insurance, and other interested stakeholders through the development and distribution of a questionnaire, to determine if s. 408.7056, F.S., should be maintained and, if so, whether it should be revised.

FINDINGS

The Statewide Provider and Subscriber Assistance Program Panel, AHCA and DOI, come into possession of records, documents, and reports generated to support a managed care subscriber's grievance that may reveal a subscriber's medical treatment or history. The records are maintained by AHCA or DOI and are only released to authorized personnel within either the agency or department to implement the SPSAP program or enforce the recommendations of the panel.

Section 119.07(2)(a), F.S., requires the custodian of a public record that contains some information that is exempt from disclosure to delete or excise only that portion of the record for which an exemption is asserted and to provide the remainder of the document for inspection or examination. If a public records request is received, AHCA's public records coordinator works in consultation with the General Counsel's Office to ensure that appropriate information remains exempt from public disclosure. In response to a staff questionnaire, AHCA has noted that the following information identifying the subscriber or the spouse, relative, or guardian of a subscriber in its possession is routinely redacted: name, social security number, names of family members, date of birth, date of death, diagnosis, physician names, drugs, physical description of the patient, telephone numbers, personal characteristics of a patient, methods of reimbursement, gender, ethnic origin, or anything that identifies or could lead to identification of the subscriber.

In response to a staff questionnaire, AHCA has suggested that subscribers and managed care entities have complained when AHCA has informed them that they do not have access to the complete file relating to a subscriber. The unredacted file for a subscriber's grievance contains information that is *confidential and exempt* from the Public Records Law. 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.

The Agency for Health Care Administration recommends an exception to s. 408.7056(15), F.S., that would give the subscriber or the managed care entity access to the records in a grievance in which each has been involved, without redaction of the personal information of the subscriber, when the subscriber has provided written consent for its release. In such a scenario, a subscriber may grant an unconditional release or may otherwise limit the extent of the release of such personal information. In the event of disclosures that are inconsistent with the subscriber's release it is unclear what penalties would apply to the managed care entity if the subscriber's information was disclosed beyond the requirements of the subscriber's release. Further DOI or AHCA could not release any other information that was otherwise confidential and exempt from the Public Records Law such as internal risk management program information.[1]

The meetings of the SPSAP panel must be open in accordance with ss. 286.011 and 408.7056, F.S., unless the provider or subscriber whose grievance will be heard requests a closed meeting or AHCA or DOI determines that information of a sensitive personal nature that discloses a subscriber's medical treatment or history, information that constitutes a trade secret, or information relating to internal risk management programs of a managed care entity may be revealed.

In response to a staff questionnaire, AHCA has stated that it has elected to close all SPSAP hearings to the public to protect the individual subscriber's sensitive medical information and to encourage participation in the program. The SPSAP panel heard 147 cases in 2000 and 179 cases in 2001. Section 408.7056(15), F.S., requires all closed meetings of the panel to be recorded by a certified court reporter.

Section 119.07(5), F.S., provides that an exemption from disclosure of a public record does not imply an exemption from or exception to the open meetings requirements of s. 286.011, F.S. Exceptions to or exemptions from the Public Records Law do not allow an agency to close a meeting in which exempted material is to be discussed in the absence of a specific exemption or exception to s. 286.011, F.S. By analogy, although an exemption to the open meetings requirements exists for trade secrets that may be revealed during SPSAP proceedings, there is currently no exemption from the Public Records Law for any records generated that would reveal such trade secret information.

In response to a staff questionnaire, DOI has stated that there is no statutory authority to exempt any records generated from the SPSAP panel relating to trade secrets. Further, DOI stated that there is no rationale to maintain the Public Meetings Law exemption for such information if there is no exemption from the Public Records Law. According to DOI, managed care organizations may assert that trade secrets discussed at panel meetings may include underwriting guidelines, reimbursement methodologies, or provider contracts. Records generated by the panel that would reveal such trade information are public. In response to a staff questionnaire, AHCA has stated that discussion of trade secrets are not generally part of a SPSAP panel hearing and that removal of the exemption for trade secrets would not have any effect on the quality of the SPSAP proceedings.

Disclosure of sensitive personal information or internal risk management information in a public meeting would disrupt the effective and efficient administration of the SPSAP program. The confidentiality of the subscriber's medical treatment or history is necessary to prevent the public disclosure of sensitive, personal information concerning individuals. The respondents to the staff questionnaire have indicated that much of the exempted information held or discussed as part of the SPSAP program is of a personal, sensitive nature, the release of which could cause unwarranted damage to the subscriber. Subscribers would not bring a grievance to the SPSAP panel without assurance that information of a personal, sensitive information would be kept confidential.

Repeal of the exemption for the subscriber's identity may impair the effective and efficient administration of the SPSAP program under s. 408.7056, F.S. The respondents to the staff questionnaire, state that the administration of the SPSAP program would be impaired because the program also depends on forthright production of evidence and documentation from the managed care entity. The exemptions for internal risk management information from managed

[1] Section 641.55(5)(c), (6), and (8), F.S., makes any identifying information contained in internal risk management reports of managed care entities filed with AHCA *confidential and exempt* from the Public Records Law.

care entities held or discussed as part of a grievance is necessary.

RECOMMENDATIONS

Staff has reviewed the exemptions in s. 408.7056(15), F.S., pursuant to the Open Government Sunset Review Act of 1995, and finds that the exemptions meet the requirements for reenactment with some substantive changes. The exemptions, viewed against the open government sunset review criteria, do protect information of a sensitive personal nature as documented in files and meetings held by the SPSAP panel for subscriber grievances. The exemption allows the SPSAP panel, AHCA, and DOI to effectively and efficiently administer the SPSAP program by assuring confidentiality of sensitive personal information that is discussed in the resolution of subscriber grievances.

Accordingly, staff recommends that the exemptions in s. 408.7056, F.S., be revived and readopted and amended to consolidate the exemption for the identity of the subscriber of a grievance contained in subsections (13) and (15) of that section, to provide for the release of the records in a subscriber's grievance to the subscriber or the managed care entity involved in that grievance without redaction of personal information of the subscriber, and to delete the Public Meetings Law exemption for trade secrets discussed in SPSAP hearings because there is no rationale for maintaining the exemption without a Public Records Law exemption for records generated for trade secrets.