The Florida Senate

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

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR INFORMATION ABOUT CERTAIN EMPLOYEES OF HOSPITALS, AMBULATORY SURGICAL CENTERS, AND MOBILE SURGICAL FACILITIES (S. 395.3025(10) & (11), F.S.)

SUMMARY

Section 395.3025 (10) & (11), F.S., makes confidential and exempt from the disclosure requirements of the Public Records Law certain personal information about employees of any hospital, ambulatory surgical center, or mobile surgical facility. These exemptions are subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

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 in subsection (10) should be reenacted and narrowed to exempt only the home address and telephone number of an employee who provides direct patient care or security services; the home address, telephone number and place of employment of such employee's spouse or child; and the identity of the daycare or school of such employee's children.

The exemption in subsection (11) should be reenacted and narrowed to include only the home address and telephone number of any employee who does not provide direct patient care or security services who has a reasonable belief that release of the information would result in threat, intimidation, harassment, the inflicting of violence upon, or defrauding of the employee or any member of the employee's family, subject to the employee submitting a written request for confidentiality, as well as the home address, telephone number and place of employment of such employee's spouse or child and the identity of the daycare or school of such employee's children.

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 (s. 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 Art. 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:

- Must state with specificity the public necessity justifying the exemption;
- Must be no broader than necessary to accomplish the stated purpose of the law;
- Must relate to one subject;
- Must contain only exemptions to public records or meetings requirements; and
- 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:

- 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.

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?

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:

- 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.

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.

Public Records Exemption for Information about Employees at Public Hospitals

The 1999 Legislature added subsections (10) and (11) to s. 395.3025, F.S., to provide an exemption from the Public Records Law for certain personal information about employees of any hospital, ambulatory surgical center, or mobile surgical facility. Section 395.3025, F.S., requires a licensed hospital, ambulatory surgical center, or mobile surgical facility to provide a copy of a patient's record to the patient, or to the patient's guardian, curator, personal representative, or other specified individuals upon written request.

Under s. 395.3025(10), F.S., the home addresses, telephone numbers, social security numbers, and photographs of employees who provide direct patient care or security services in licensed facilities; the home address, telephone numbers, social security numbers, photographs, and places of employment of such an employee's spouse and children; and the names and locations of schools and day care facilities attended by such an employee's children are confidential and exempt from the disclosure requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption is subject to availability of the otherwise exempted information to state and federal agencies in the furtherance of their statutory responsibilities. The exemption is repealed effective October 2, 2004, unless saved from repeal through reenactment by the Legislature following an Open Government Sunset Review.

Under s. 395.3025(11), F.S., the home addresses, telephone numbers, social security numbers, and photographs of employees of any licensed facility who do not provide direct patient care or security services but who have reason to believe that release of the information may be used to threaten, intimidate, harass, inflict violence upon, or defraud the employee or any member of an employee's family; the home address, telephone numbers, social security numbers, photographs, and places of employment of such an employee's spouse and children; and the names and locations of schools and day care facilities attended by such an employee's children are confidential and exempt from the disclosure requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption is subject to availability of the otherwise exempted information to state and federal agencies in the furtherance of their statutory responsibilities. The exemption is repealed effective October 2, 2004, unless saved from repeal through reenactment by the Legislature following an Open Government Sunset Review.

The legislation that created subsections (10) and (11) of s. 395.3025, F.S., provided a statement of public necessity for the public records exemption. Regarding the exemption in subsection (10), the bill stated: *Employees in such facilities who provide direct patient care or security services encounter a wide spectrum of individuals including, among others, prisoners, criminal suspects brought for treatment by local law enforcement officers prior to incarceration, patients under the influence of drugs or alcohol at the time of treatment, and patients who have been admitted for treatment of mental illnesses, including involuntary admissions under the Baker Act. In addition, patients or family members of patients may at times become angry or upset with the nature of the treatment or the circumstances under which it has been provided. If any of these individuals gain access to the personal information specified in this act, they could use that information to threaten, intimidate, harass, or cause physical harm or other injury to the employees who provide direct patient care or security services or to their families. This concern is not mere speculation. Incidents have occurred in which patients have inflicted injuries upon health care providers which have resulted in the death of the provider. Therefore, the Legislature finds that it is a public necessity that the personal information of employees who provide direct patient care or security services be confidential and exempt from disclosure pursuant to the open records laws of this state in order to protect the health, safety, and welfare of these employees and their families.*

The statement of public necessity for subsection (11) reads:

The Legislature further finds that incidents have occurred in which the personnel records of other employees of hospitals and ambulatory surgical centers have been requested under circumstances that could have threatened the safety or welfare of these employees or their families, whether or not actual harm resulted. While these employees may not provide direct patient care or security services, they may yet face circumstances under which release of this information could be used to threaten, intimidate, harass, inflict violence upon, or defraud them or their families. Because release of this personal information under these circumstances would not benefit the public or aid it in monitoring the effective and efficient

operation of government, but could result in harm to these employees or their families, the Legislature finds that it is public necessity that the personal information specified in this act be confidential and exempt from disclosure pursuant to the public records laws of this state when such protection is requested by a hospital or ambulatory surgical center employee in accordance with the provisions of this act.

The statement of public necessity asserts that the exemption is consistent with the long-standing policy of the State relating to exempting the same type of personal information about certain active and former employees of state and local government, and judges in the judicial branch of government.

While the public records exemption in s. 395.3025(10) and (11), F.S., applies to all facilities licensed under ch. 395, F.S., in practice only publicly-owned hospitals would be subject to the Public Records Law. Thus the question being answered in this Open Government Sunset Review is whether certain information in personnel records of public hospitals should continue to be exempt from the Public Records Law.

METHODOLOGY

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 public hospitals and other interested stakeholders to determine if any aspects of s. 395.3025(10) and (11), 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 home addresses, telephone numbers, social security numbers, and photographs of employees of licensed hospitals, ambulatory surgical centers, and mobile surgical facilities who provide direct patient care or security services;
- The home addresses, telephone numbers, social security numbers, photographs and places of employment of spouses and children of those employees;
- The names and locations of schools and day care facilities attended by the children of those employees.

The exemption also applies to employees of licensed facilities who have a reasonable belief that release of their home addresses, telephone numbers, social security numbers, and photographs may be used to threaten, intimidate, harass, inflict violence upon, or defraud the employee or any member of the employee's family, subject to the employee submitting a written request for confidentiality and subject to availability of the otherwise exempted information to state and federal agencies in the furtherance of their statutory responsibilities.

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

The exemption uniquely affects certain employees of public hospitals and their spouses and children. The exemption applies to all employees who provide direct care to patients or security services and to other employees who believe the release of the information could be used to threaten them and who sign a statement to that effect.

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

The goal of the exemption is to enable public hospitals to protect the privacy of certain information relating to their employees and their employees' families in order to protect the employees and members of their families from possible harm by a hospital patient or a member of a patient's family. In particular hospital administrators mention, prisoners, criminals, suspects brought for treatment by local law enforcement officers, and patients who have been admitted for treatment of mental illnesses, including involuntary admissions under the Baker Act as being among those who might pose a threat.

The exemption also enables public hospitals to recruit and hire personnel on a basis that is competitive with private hospitals, where the information would remain private. Survey respondents said the privacy provided by this exemption is important in recruiting staff, especially in a time of staff shortages.

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

For many, but not all, employees, some of the information contained in the records could be obtained by other means. An employee's home address could be listed in the telephone directory, local property records, public utility records, and drivers' license records. An employee's telephone number would be listed in the telephone directory unless the employee had requested an unlisted number.

All social security numbers held by an agency, its agents, employees, or contractors are exempt under s. 119.0721, F.S., and would not be available. The exemption for social security numbers became law October 1, 2002, and thus was not in effect at the time the exemption in s. 395.3025(10) and (11), F.S., was enacted.

Photographs of the employees or their family members could be available if they were taken at a hospital event and subsequently posted on a bulletin board or published in a newsletter, on a website, or in the local newspaper. Without such posting or publication, it is unlikely that such photos would be available to the public. However, hospitals reported that they do not keep photos of employees, spouses, or children in their personnel files, with the possible exception of photos of hospital awards ceremonies or events at hospital daycare centers.

Information identifying an employee's spouse could be available in the telephone directory, local property records, or public utility records. Information identifying an employee's children and their places of daycare, school, or work, likely would not be available from another source.

Continued Necessity for the Exemption

The public purposes for the exemption include the purpose stated when the law was enacted, protecting hospital employees from threat and harm. An additional purpose stated by some of the respondents to the survey is to enable them to recruit and retain employees on a competitive basis with private hospitals, by protecting personal information of public hospital employees as it would be protected in a private hospital.

The exemption provides two sets of circumstances under which employee information will be exempt: (1) if the employee provides direct patient care or security services, or (2) if the employee does not provide direct patient care or security services but has "a reasonable belief" that releasing the information could lead to threat, intimidation, harassment, infliction of violence upon, or defrauding of the employee or the employee's family, and the employee requests the exemption in writing.

Based on findings of the Open Government Sunset Review, the staff found that the following information should not be protected by this public records exemption:

- Social security numbers which are protected by another public records exemption under s. 119.0721, F.S.; and
- Photographs of the employee's spouse and children which are not collected by the hospitals.

Thus, the exemption should be narrowed to exclude those items.

RECOMMENDATIONS

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption accomplishes the public purpose of protecting personal information of employees who provide direct patient care or security services in public hospitals.

The exemption in subsection (10) should be reenacted and narrowed to exempt only the following:

- The home address and telephone number of an employee who provides direct patient care or security services.
- The home address, telephone number and place of employment of such employee's spouse or child.
- The identity of the daycare or school of such employee's children.

The exemption in subsection (11) should be reenacted and narrowed to include only the following:

- The home address and telephone number of any employee who does not provide direct patient care or security services who has a reasonable belief that release of the information would result in threat, intimidation, harassment, the inflicting of violence upon, or defrauding of the employee or any member of the employee's family, subject to the employee submitting a written request for confidentiality.

- The home address, telephone number and place of employment of such employee's spouse or child.
- The identity of the daycare or school of such employee's children.

Notwithstanding the exemptions in subsections (10) and (11), the exempted information must be available to state and federal agencies in the furtherance of their statutory responsibilities.