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 MEETINGS EXEMPTION FOR HOSPITAL BOARD MEETINGS REGARDING STRATEGIC PLANS (S. 395.3035(4)(a), F.S.)

SUMMARY

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is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

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 Meetings Law.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption meets the criteria for reenactment. Staff recommends that the exemption be saved from repeal and reenacted by the Legislature.

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. 286.011(3), F.S., any public officer violating any provision of the Public Meetings Law is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person who is a member of a board or commission who knowingly violates any provision of the Public Meetings Law is guilty of a second degree misdemeanor, punishable by potential imprisonment not exceeding 60 days and a fine not exceeding $500. Section 286.011, F.S., also provides a second degree misdemeanor penalty for conduct which occurs outside the state which would constitute a knowing violation of the Public Meetings Law.

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.

Confidentiality of Hospital Records and Meetings

Under s. 395.3035, F.S., all meetings of a governing board of a public hospital and all public hospital records must be open and available to the public in accordance with s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution and ch. 119, F.S., and s. 24(a), Art. I of the State Constitution, respectively, unless the meetings or records are made confidential or exempt by law. Subsection (2) of s. 395.3035, F.S., makes confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution: contracts for managed care arrangements under which the public hospital provides health care; a strategic plan the disclosure of which would be likely to be used by a competitor to thwart the plan; trade secrets as defined in s. 688.002, F.S.; and documents, offers, and contracts, other than contracts for managed care, that are the product of negotiations with nongovernmental entities for the payment for services that could reasonably be expected to be provided by competitors of the hospital.

Under s. 395.3035(4)(a), F.S., those portions of a board meeting at which one or more written strategic plans

that are confidential under s. 395.3035(2), F.S., are discussed, modified, or approved by the governing board are exempt from the provisions of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. The exemption in s. 395.3035(4)(a), F.S., is scheduled for repeal on October 2, 2004, unless it is reviewed and saved from repeal 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.

History of this Exemption

The 1991 Legislature enacted public records and meetings exemptions for public hospitals, originally codified in s. 119.16, F.S., which included a public records exemption applicable to public hospitals to include "documents that reveal a hospital's plan for marketing the hospital's services which services are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital." (ch. 91-219. L.O.F) In 1995, the Legislature reenacted and amended the confidentiality provisions regarding public hospital records and meetings that had been originally codified in s. 119.16, F.S. That reenactment renumbered s. 119.16, F.S., as s. 395.3035, F.S. (ch. 95-199, L.O.F.) Among other provisions, the revised law expanded the public records exemption applicable to public hospitals to include strategic plans, including plans for marketing services, which services are or may reasonably be expected by a public hospital's governing board to be provided by competitors of the hospital. The law specified that the hospital's budget and the board's approval of the budget were not confidential and exempt. The term *strategic plans* was not otherwise defined. Additionally, those portions of governing board meetings at which written strategic plans are discussed or are reported on were made exempt from the Public Meetings Law requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

In 1997, the Fifth District Court of Appeal, in *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So.2d 434, (Fla. 5th DCA 1997), affirmed the Seventh Circuit (trial) Court's finding that the series of meetings held between Halifax Hospital Medical Center and the Southeast Volusia Hospital District to create an interagency holding company through which these two entities could merge various aspects of their respective operations were in violation of the Public Meetings Law and the interlocal agreement generated was, consequently, void. The court of appeal held the Public Meetings Law exemption in s. 395.3035(4), F.S., pertaining to discussions of written strategic plans, to be violative of Art. I, s. 24 of the State Constitution which requires that an exemption be no broader than necessary to accomplish its stated purpose. Because *strategic plan* was not a defined term, the court determined that it could include more than the critical confidential information that the exemption was enacted to protect.

Halifax Hospital Medical Center appealed, and the Fifth District Court of Appeal certified the following question to the Florida Supreme Court:

IS THE EXEMPTION CONTAINED IN SECTION 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, SECTION 24(b) OF THE FLORIDA CONSTITUTION?

The Florida Supreme Court, in accepting the case for review, rephrased the certified question as:

IS THE EXEMPTION CONTAINED IN SECTION 395.3035(4), FLORIDA STATUTES (1995), CONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, SECTION 24(b) AND (c) OF THE FLORIDA CONSTITUTION?

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

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

exemption to the Public Meetings Law in s. 395.3035 (4)(a), F.S.:

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

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 to determine if any aspects of s. 395.3035(4)(a), 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 exemption affects those portions of a public hospital's board meeting at which one or more portions of a strategic plan that are confidential under s. 395.3035(2)(a), F.S., are discussed, reported on, modified, or approved by the governing board.

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

The exemption uniquely affects the governing boards of public hospitals when they discuss strategic plans.

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

The goal of the exemption is to enable public hospitals to compete on an equal footing with their private sector counterparts.

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

The information cannot be readily obtained by alternative means. However, all portions of a board meeting that are closed to the public must be recorded by a certified court reporter. The transcript of the closed part of a meeting will become public 3 years after the date of the board meeting, or at an earlier date if the strategic plan in question has been publicly disclosed by the hospital or implemented to the extent that confidentiality of the plan is no longer necessary.

Continued Necessity for the Exemption

The public purpose for the exemption is to enable the governing boards of public hospitals to plan strategically and confidentially in the same way private hospitals do. The exemption is narrowly drawn to make confidential only those portions of a meeting at which the board discusses a strategic plan that could reasonably be used by a competitor to frustrate, circumvent, or exploit the purpose of the plan before it is implemented.

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 permitting public hospitals to plan in a way that does not put them at a disadvantage vis-à-vis private hospitals.

The exemption to the public meetings law contained in s. 395.3035(4)(a), F.S., should be reenacted.