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Committee on Health Regulation

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 458.3193, F.S., PHYSICIAN WORKFORCE SURVEYS

Issue Description

Each Florida-licensed allopathic physician is required to furnish specified information to the Department of Health (DOH) in a physician workforce survey in conjunction with the renewal of his or her medical license. Section 458.3193, F.S., creates an exemption from the requirements of the Public Records Law to make all personal identifying information contained in records provided by physicians in response to the physician workforce survey that is held by the DOH confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24 of the State Constitution. This exemption will be repealed on October 2, 2012, unless it is reviewed under the Open Government Sunset Review Act and saved from repeal through reenactment by the Legislature.

Background

Public Records and Meetings

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(a) Every person has 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term "public record" is broadly defined to mean:

¹ Section 1390, 1391 Florida Statutes. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean "... any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

. . . 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.⁸ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act (the Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

⁵ s. 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Art. I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ s. 119.15, F.S.

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The Act also requires the Legislature to consider the following:

- 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?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Physician Licensure

Prior to engaging in the practice of medicine in this state, a physician must be licensed under ch. 458, F.S., The Medical Practice Act.¹⁷ A license issued under the Medical Practice Act must be renewed biennially.¹⁸

Physician Workforce Planning

The Legislature recognizes that physician workforce planning is an essential component of ensuring that there is an adequate and appropriate supply of well-trained physicians to meet Florida's future health care service needs as the general population and elderly population of the state increase.¹⁹ Physician workforce planning encompasses, among other things, analyzing current workforce data collected through the physician workforce surveys, planning for the availability and capacity of quality medical schools and graduate medical education programs in this state, and incentivizing physicians to practice in needed specialties and underserved areas in a manner that addresses projected needs for physician manpower.

¹⁵ s. 119.15(6)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ s. 458.327(1)(a), F.S., and s. 456.065(1), F.S.

¹⁸ s. 458.319, F.S.

¹⁹ s. 381.4018(2), F.S.

The DOH is charged with developing a state strategic plan and assessing the implementation of the plan. This is to be accomplished by using existing programs under the jurisdiction of the DOH and other state agencies and coordinating governmental and nongovernmental stakeholders and resources.²⁰ In particular, the DOH shall:

- Monitor, evaluate, and report on the supply and distribution of physicians licensed under the Medical Practice Act and the Osteopathic Medical Practice Act. The DOH must maintain a database to serve as a statewide source of data concerning the physician workforce.
- Develop a model and quantify, on an ongoing basis, the adequacy of the state's current and future physician workforce as reliable data becomes available. This model must take into account demographics, physician practice status, place of education and training, generational changes, population growth, economic indicators, and issues concerning the pipeline into medical education.
- Develop and recommend strategies to determine whether the number of qualified medical school applicants who might become competent, practicing physicians in this state will be sufficient to meet the capacity of the state's medical schools. If appropriate, the DOH might also develop strategies and recommendations and identify best practice programs for grade schools and at the college level to increase this state's potential pool of medical students.
- Develop strategies to ensure that the number of graduates from the state's allopathic and osteopathic medical schools is adequate to meet physician workforce needs, based on the analysis of the physician workforce data.
- Pursue strategies and policies to create, expand, and maintain graduate medical education positions in the state based on the analysis of the physician workforce data.
- Develop strategies to maximize federal and state programs that provide for the use of incentives to attract physicians to this state or retain physicians within the state.
- Coordinate and enhance activities relative to physician workforce needs, undergraduate medical education, graduate medical education, and reentry of retired military and other physicians into the physician workforce provided by the Division of Medical Quality Assurance, area health education center networks and other offices and programs within the DOH.
- Work in conjunction with and act as a coordinating body for government and nongovernmental stakeholders to address matters relating to the state's physician workforce assessment and development for the purpose of ensuring an adequate supply of well-trained physicians to meet the state's future needs.
- Serve as a liaison with other states and federal agencies and programs in order to enhance resources available to the state's physician workforce and medical education continuum.
- Act as a clearinghouse for collecting and disseminating information concerning the physician workforce and medical education continuum in this state.

Physician Workforce Surveys

The requirement for the physician workforce survey was enacted in Chapter 2007-172, L.O.F., and codified in s. 458.3191, F.S., relating to allopathic physicians and s. 459.0081, F.S., relating to osteopathic physicians. Section 458.3191, F.S., requires each Florida-licensed allopathic or osteopathic physician, in conjunction with the renewal of his or her license, to furnish specified information to the DOH in a physician survey. The information required under this statute to be submitted includes but is not limited to:

- Licensee information related to:
 - Frequency and geographic location of practice within the state,
 - Practice setting,
 - Percentage of time spent in direct patient care,
 - Anticipated change to license or practice status, and
 - Areas of specialty or certification; and
- Availability and trends relating to critically needed services including:
 - Obstetric care and services, including incidents of deliveries,
 - Radiological services, particularly performance of mammograms and breast-imaging services,
 - Physician services for hospital emergency departments and trauma centers, including on-call hours, and

²⁰ s. 381.4018(4), F.S.

- Other critically needed specialty areas, as determined by the DOH.

The information furnished by the physician must include a statement that the information provided is true and accurate to the best of his or her knowledge and the submission does not contain any knowingly false information.²¹ The physician workforce survey is available on line and may be viewed at http://www.doh.state.fl.us/mqa/medical/info_Survey.pdf.

The survey must be completed on line if the medical physician renews his or her license on line. Otherwise, the physician must submit a paper copy of the survey with his or her renewal application.²² The DOH shall issue a non-disciplinary citation to a licensee who fails to complete the survey within 90 days after the renewal of his or her license to practice as a physician. The citation must notify the physician that his or her medical license will not be renewed for any subsequent license renewal unless he or she completes the survey.²³

Annually, the DOH is required to analyze the results of the physician workforce survey²⁴ to determine by geographic area and specialty the number of physicians who:

- Perform deliveries of children in Florida.
- Read mammograms and perform breast-imaging-guided procedures in Florida.
- Perform emergency care on an on-call basis for a hospital emergency department.
- Plan to reduce or increase emergency on-call hours in a hospital emergency department.
- Plan to relocate outside the state.
- Practice medicine in Florida.
- Plan to reduce or modify the scope of their practice.

The DOH is required to report its findings to the Governor, the President of the Senate, and the Speaker of the House of Representative by November 1 of each year. Additionally, the annual report must include findings, recommendations, and strategic planning activities as provided in s. 381.4018, F.S., relating to physician workforce assessment and development. The DOH may also include other information requested by the Physician Workforce Advisory Council.²⁵

Physician Workforce Advisory Council

In 2010, the Legislature created, within the DOH, the Physician Workforce Advisory Council (the Council)²⁶ to advise and assist the State Surgeon General and the DOH on matters concerning current and future physician workforce needs in this state. Prior to creation of the Council, the State Surgeon General had created the Healthcare Practitioner Ad Hoc Committee to provide the DOH with expertise and guidance on technical and programmatic areas related to implementing the 2007 Legislation providing for physician workforce assessment and development.²⁷

The Council is composed of 19 members appointed by the State Surgeon General.²⁸ Additional responsibilities of the Council include:

- Reviewing survey materials and the compilation of survey information;
- Annually reviewing the number, location, cost, and reimbursement of graduate medical education programs and positions;
- Providing recommendations to the department regarding the physician workforce survey;
- Assisting the department in preparing the annual report to the Legislature pertaining to the physician workforce;

²¹ s. 458.3191(2), F.S.

²² Rule 64B-9.002, F.A.C.

²³ s. 458.3191, F.S.

²⁴ s. 458.3192, F.S.

²⁵ *Id.*

²⁶ ch. 2010-161, L.O.F., s. 29.

²⁷ *Infra 32 and 33.*

²⁸ s. 381.4018(5)(a), F.S., identifies the groups to be represented on the Council.

- Assisting the department in preparing an initial strategic plan, conducting ongoing strategic planning and providing ongoing advice on implementing the recommendations;
- Monitoring and providing recommendations regarding the need for an increased number of primary care or other physician specialties to provide the necessary current and projected health and medical services for the state; and
- Monitoring and making recommendations regarding the status of the needs relating to graduate medical education in this state.

Exemption from the Public Records Law

Section 458.3193, F.S., also enacted in 2007,²⁹ exempts all personal identifying information contained in records provided by physicians in response to the physician workforce survey required as a condition of license renewal and held by the DOH confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24 of the State Constitution, with certain exceptions.

Information made confidential and exempt shall be disclosed:

- With the express written consent of the individual to whom the information pertains or the individual's legally authorized representative.
- By court order upon a showing of good cause.
- To a research entity, if the entity:
 - Seeks the records or data pursuant to a research protocol approved by the DOH,
 - Maintains the records or data in accordance with the approved protocol, and
 - Enters into a purchase and data-use agreement with the department.

The DOH may deny a request for records or data if the protocol provides for intrusive follow-back contacts, does not plan for the destruction of confidential records after the research is concluded, is administratively burdensome, or does not have scientific merit. The agreement between the DOH and the research entity must restrict the release of information that would identify individuals, limit the use of records or data to the approved research protocol, and prohibit any other use of the records or data.

When enacting the exemption from the public records law, the Legislature found that it is a public necessity that personal identifying information concerning a Florida-licensed allopathic physician who responds to the mandatory physician workforce survey be made confidential and exempt from disclosure. Further, the failure to maintain the confidentiality of such personal identifying information would frustrate and prevent the resolution of important state interests to implement and maintain effective strategies to ensure the availability of physicians in the state. Specific reasons stated in the law include:

- Candid and honest responses to the survey will ensure that timely and accurate information is available for the DOH to review and use in making important policy decisions regarding the use of resources to facilitate the needs of current or projected medically underserved areas in the state.
- Long-term planning, based on the information provided by physicians in the surveys, is essential for improving health care access for Florida residents and enabling the use of strategies for a well-trained supply of physicians.
- Accurate and honest information obtained through the surveys will assist state policy-makers in their decisions to ensure the availability of quality medical schools and graduate medical education and the development of strategies that might provide for physicians to practice in needed specialties and in underserved areas in a manner that addresses projected needs for physician manpower.

Findings and/or Conclusions

Survey / Reporting Process

Responding to the physician workforce survey is required as part of the licensure renewal process for physicians licensed under the Medical Practice Act. As of June 30, 2011, there were 62,610 allopathic physicians licensed

²⁹ ch. 2007-96, L.O.F. This law is also codified in s. 459.0083, F.S.

under the Medical Practice Act.³⁰ For licensure renewal, the population of licensed allopathic physicians is divided into two groups, with each group renewing every other year.

The first physician workforce survey mandated by law³¹ went live October, 2007 and included one half of the allopathic physicians (25,850) and all osteopathic (4,839) physicians renewing their licenses during that licensure cycle.³² The results and analysis of that partial survey of the physician workforce were published in the 2008 Florida Physician Workforce Annual Report.

The first report encompassing mandated survey responses for all allopathic and osteopathic physicians renewing licenses is the 2009 Florida Physician Workforce Annual Report.³³ This report combines the 2008 and 2009 mandatory physician workforce surveys responses, consisting of 12 core questions for the half of the allopathic physicians and all of the osteopathic physicians responding in 2008 and 18 core questions for the other half of the allopathic physicians responding in 2009. The 2009 survey instrument also included an expanded list of questions relating to medical specialties.

The most recent Physician Workforce Annual Report published on November 1, 2010, details the survey results from 2009 and 2010. There were 57,750 allopathic and osteopathic physicians eligible for renewal in 2009 and 2010, with 99 percent responding to the survey.³⁴

The survey instrument requests the physician's name and license number along with a series of questions addressing different aspects of his or her practice, including specific questions related to specialties, and future plans. Through a series of questions in the survey, coupled with demographic information in the physician's licensure file, the DOH is able to define physician workforce by location and specialty.³⁵

As reported in the Physician Workforce Annual Report 2010, of the 57,750 allopathic and osteopathic physicians eligible for renewal in 2009 and 2010, 41,210 were included within the published study results. Excluded are those physicians indicating he or she had not practiced medicine in Florida over the course of the year prior to renewal; failing to provide a valid Florida practice address; indicating participation in a residency, internship, or fellowship program; or having a licensure status disallowing the practice of medicine.

Stakeholder Questionnaire

As a part of the review required under the Open Government Sunset Review Act, Senate professional staff of the Health Regulation Committee sent questionnaires³⁶ to the DOH, Florida Board of Medicine, Florida Medical Association, and the Council. All responses supported continuing the physician workforce surveys and the Legislature reenacting the public records exemption for the personal identifying information pertaining to the responding physicians that is received in the survey and held by the DOH. One of the entities responding to the questionnaire said, "Physicians are more likely to complete these surveys with full honesty or disclosure if they feel their personal identifying information will be kept confidential."

³⁰ Email dated July 22, 2011 from by the Department of Health on file with the Senate Health Regulation Committee.

³¹ Prior to the physician workforce survey mandated in s. 458.3191, F.S., a voluntary physician workforce questionnaire had been in place since October, 2006. *See infra* 32.

³² Florida Department of Health 2008 Florida Physician Workforce Annual Report, published November 1, 2008, at page 13. A copy of the report is on file with the Senate Health Regulation Committee.

³³ Florida Department of Health 2009 Florida Physician Workforce Annual Report, published November 1, 2009 is available at: <http://www.doh.state.fl.us/Workforce/Physicians_Workforce_Annual_Rpt_2009.pdf> (Last visited on July 25, 2011).

³⁴ Florida Department of Health Physician Workforce Annual Report 2010, published November 1, 2010, at page 9, available at: <http://www.doh.state.fl.us/Workforce/Workforce/Annual_Reports/PhysicianWorkforce_Nov2010.pdf> (Last visited on July 25, 2011).

³⁵ *Id.*

³⁶ The questionnaires and responses are on file with the Senate Health Regulation Committee.

None of the entities responding to the stakeholder questionnaire recommended changes to the current exemption. In addition, The First Amendment Foundation is not opposed to reenactment of the exemption in its current form.³⁷

Options and/or Recommendations

Senate professional staff recommends that the exemption from the public records requirements for all personal identifying information contained in records provided by Florida-licensed allopathic physicians in response to the physician workforce survey required as a condition of license renewal and held by the DOH as provided in s. 458.3193, F.S., be reenacted by the Legislature. The exemption serves an identifiable public purpose by allowing the state to effectively and efficiently administer and plan for an adequate and appropriate supply of well-trained physicians as the general and elderly population of the state increase. Meaningful and reliable analysis can only occur if physicians respond honestly and fully disclose relevant information concerning their current and planned future activities related to their medical practice. Maintaining the confidentiality of the responses will help ensure the state receives honest and complete responses.

³⁷ Correspondence from the First Amendment Foundation dated July 18, 2010 to The Honorable Jeremy Ring, Chair, Governmental Oversight and Accountability Committee. A copy of this correspondence is on file with the Senate Health Regulation Committee.