

By the Committees on Governmental Reform and Oversight, Health Care and Senator Williams

302-2132-98

1                                   A bill to be entitled  
 2           An act relating to public records and meetings;  
 3           creating s. 395.3036, F.S.; providing that when  
 4           a public lessor complies with the public  
 5           finance accountability provisions of s.  
 6           155.40(5), F.S., with respect to the transfer  
 7           of any public funds to a private lessee, the  
 8           records of a private corporation that leases a  
 9           public hospital or other public health care  
 10          facility are confidential and exempt from  
 11          public records requirements, and the meetings  
 12          of the governing board of such corporation are  
 13          exempt from public meeting requirements if the  
 14          corporation meets specified criteria; providing  
 15          for future review and repeal; providing a  
 16          finding of public necessity; providing an  
 17          effective date.

18  
 19 Be It Enacted by the Legislature of the State of Florida:

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 21           Section 1. Section 395.3036, Florida Statutes, is  
 22           created to read:  
 23           395.3036 Confidentiality of records and meetings of  
 24           corporations that lease public hospitals or other public  
 25           health care facilities.--The records of a private corporation  
 26           that leases a public hospital or other public health care  
 27           facility are confidential and exempt from the provisions of s.  
 28           119.07(1) and s. 24(a), Art. I of the State Constitution, and  
 29           the meetings of the governing board of a private corporation  
 30           are exempt from s. 286.011 and s. 24(b), Art. I of the State  
 31           Constitution when the public lessor complies with the public

1 finance accountability provisions of s. 155.40(5) with respect  
2 to the transfer of any public funds to the private lessee and  
3 when the private lessee meets at least three of the five  
4 following criteria:

5 (1) The public lessor that owns the public hospital or  
6 other public health care facility was not the incorporator of  
7 the private corporation that leases the public hospital or  
8 other health care facility.

9 (2) The public lessor and the private lessee do not  
10 commingle any of their funds in any account maintained by  
11 either of them, other than the payment of the rent and  
12 administrative fees or the transfer of funds pursuant to  
13 subsection (2).

14 (3) Except as otherwise provided by law, the private  
15 lessee is not allowed to participate, except as a member of  
16 the public, in the decisionmaking process of the public  
17 lessor.

18 (4) The lease agreement does not expressly require the  
19 lessee to comply with the requirements of s. 119.07(1) and s.  
20 286.011.

21 (5) The public lessor is not entitled to receive any  
22 revenues from the lessee, except for rental or administrative  
23 fees due under the lease, and the lessor is not responsible  
24 for the debts or other obligations of the lessee.

25 Section 2. (1) The Legislature finds that it is a  
26 public necessity that all records of a private corporation and  
27 all meetings of the governing board of the private corporation  
28 be confidential and exempt from the public records and public  
29 meeting laws of this state when the private corporation leases  
30 a public hospital or other public health care facility from a  
31 public entity in accordance with the terms of this act. The

1 Legislature further finds that private corporations have  
2 entered into such leases in reliance on the legal standard  
3 governing the application of the public records and open  
4 meeting laws to such lease agreements which was set forth in  
5 case law existing at the time of the transaction. That  
6 standard provided that such private lessees were not "acting  
7 on behalf of" the public entity and, therefore, not subject to  
8 the state's public records laws so long as the public entity  
9 did not retain control over the private lessee. No one factor  
10 was used to determine whether the public entity exerted  
11 control; instead a "totality of factors" was analyzed and the  
12 decision made on the balance of those factors. In a recent  
13 decision, however, the Fifth District Court of Appeal has now  
14 applied the standard in a manner that may cause more lessees  
15 to be subject to public records and meetings requirements. The  
16 Legislature finds that the effect of the decision has been:  
17 (a) To create uncertainty with respect to the status  
18 of records and meetings under existing lease arrangements; and  
19 (b) To create a disincentive for private corporations  
20 to enter into such lease agreements in the future.  
21 (2) Public entities have chosen to privatize the  
22 operations of their public hospitals and public health care  
23 facilities in order to alleviate three problems that pose a  
24 significant threat to the continued viability of Florida's  
25 public hospitals:  
26 (a) A financial drain on the facilities from their  
27 forced participation in the Florida Retirement System;  
28 (b) The competitive disadvantage placed on these  
29 facilities vis a vis their private competitors resulting from  
30 their required compliance with the state's public records and  
31 public meeting laws; and

1           (c) State constitutional restrictions on public  
2 facility participation in partnerships with private  
3 corporations as a result of the limitations contained in the  
4 State Constitution. For years, the Legislature has approved  
5 and encouraged these leases, first through special acts that  
6 it has adopted authorizing the lease agreements and, more  
7 recently, through the adoption of section 155.40, Florida  
8 Statutes, which provides for the conversion of public hospital  
9 facilities to private operation by lease, as a means to  
10 provide public entities with the necessary flexibility to use  
11 these public assets in a manner that best serves the interests  
12 of the public. Through such lease arrangement, public entities  
13 have been able to obtain substantial and oftentimes  
14 desperately needed private capital investment into these  
15 facilities and to relieve the oftentimes burdensome drain on  
16 public tax revenues which resulted from public operation.

17           (3) In the absence of a defined and, therefore,  
18 predictable statewide standard for determining when the public  
19 records and public meetings laws apply to future lease  
20 agreements, public entities may find it difficult, if not  
21 impossible, to find a private corporation that is willing to  
22 enter into a lease to operate the public hospital or other  
23 public health care facility. This, in turn, could force the  
24 public entity:

25           (a) To close the hospital or other health care  
26 facility, which would result in a reduction in health care  
27 services to the public;

28           (b) To sell the hospital or other health care  
29 facility, which sale, if the facility has deteriorated because  
30 of inadequate capital investments over time, will likely be at  
31 a loss; or

1           (c) To continue operating the hospital or other health  
2 care facility using public tax dollars to subsidize recurring  
3 losses. None of these options is in the best interest of the  
4 public.

5           (3) The Legislature, therefore, finds that it is a  
6 public necessity for it, through this act, to clarify when the  
7 public records and public meeting laws apply to private  
8 lessees of public hospital or other public health care  
9 facilities. The Legislature further finds that it is a public  
10 necessity for these private lessees to be exempt from the  
11 public records and public meetings laws of the state so long  
12 as, applying the standard codified by this act, the public  
13 entity does not retain control over the private entity.

14           Section 3. This act shall take effect upon becoming  
15 law and shall apply to existing leases and future leases of  
16 public hospitals and other health care facilities.

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18                           STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
19                           COMMITTEE SUBSTITUTE FOR  
20                           CS/SB 1044

21 Exempts private corporation that leases public hospital or  
22 other public health care facility from public records and  
23 meetings requirement if public lessor complies with public  
24 finance accountability provisions of s. 155.40(5), F.S., and  
25 if private lessee meets at least three of five criteria: (1)  
26 the public lessor that owns public hospital or other health  
27 care facility was not the incorporator of the private  
28 corporation that leases the public hospital or other health  
29 care facility; (2) the public lessor and private lessee do not  
30 commingle any of their funds in any account maintained by  
31 either of them, other than the payment of the rent and  
administrative fees or the transfer of funds; (3) except as  
otherwise provided by law, the private lessee is not allowed  
to participate, except as a member of the public, in the  
decision-making process of the public lessor; (4) the lease  
agreement does not expressly require the lessee to comply with  
the requirements of s. 119.07(1) and s. 286.011, F.S.; and (5)  
the public lessor is not entitled to receive any revenues from  
the lessee, except for rental or administrative fees due under  
the lease, and the lessor is not responsible for the debts or  
other obligations of the lessee.