SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1012

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Carlton

SUBJECT: Public Records and Public Meetings Exemptions; Hospital Strategic Plans

DATE: March 11, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carter	Wilson	HC	Favorable/CS
2.			RC	
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 1012 amends the law that provides for the confidentiality and exemption of public hospital records and meetings from the Public Records Law and the Public Meetings Law, respectively. The Public Records Law exemption extended to a public hospital strategic plan, as well as records and information generally, is broadened to apply to a strategic plan of any hospital subject to the Public Records Law, but then the applicability of the exemption specific to strategic plans is narrowed to such plans that a hospital decides a competitor may be advantaged by and about which the competitor could not otherwise become knowledgeable. The confidentiality and Public Records Law exemption covering strategic plans is modified to delete reference to marketing of services. The portion of a hospital governing board meeting during which *written* strategic plans are *discussed, reported, modified, or approved* is exempted from the Public Meetings Law contained in statute and the *State Constitution*. This exemption is scheduled for repeal in 2004, unless reenacted following Sunset review prior to the repeal date.

The bill revises the confidential status and the exemption from the Public Meetings Law of a transcript of any closed hospital governing board meeting to explicitly restrict such a meeting to discussion, reports, modification, or approval of a written strategic plan. It also provides for earlier expiration of the confidentiality and Public Meetings Law exemption than the otherwise applicable 3-year time limit based on the governing board's determination that the strategic plan discussed, reported on, modified, or approved at the meeting has been implemented to the extent that confidentiality of the strategic plan is no longer needed. The bill defines the term "strategic plan."

If a governing board of a hospital closes a portion of a public meeting to discuss a written strategic plan, it must give notice, in accordance with the Public Meetings Law, and conduct the meeting to inform the public, generally, of the business activity to be implemented pursuant to the plan prior to implementing the plan or a component of the plan. A public hospital governing board is prohibited from entering into binding agreements to sell, lease, merge, or consolidate the

hospital in any setting other than a public meeting that has been noticed as required under the Public Meetings Law. The bill also contains a statement of public necessity relating to the Public Records Law and Public Meetings Law exemptions created and modified in the bill.

This bill substantially amends s. 395.3035, Florida Statutes.

II. Present Situation:

Florida's Public Policy of "Government in the Sunshine"

Floridians have expressed an unequivocal preference for "open government" or "government in the sunshine" as most recently indicated in a 1992 statewide "referendum" by which they amended the State Constitution by adopting Art. I, s. 24 entitled, "Access to Public Records and Meetings Requirements." As authorized under this constitutional provision, the Legislature has enacted general laws that provide for the exemption of records, s. 119.07(1), F.S., and meetings, s. 286.011, F.S., from the requirements relating to public records and public meetings, as specified in subsections (a) and (b), respectively, of s. 24, Art. I of the State Constitution. An exemption from the requirement of access to public records and meetings may be created constitutionally only by stating specifically the public necessity justifying the exemption. Furthermore, the exemption created may be no broader than necessary to accomplish the stated purpose of the law. Specifically, Art. I, s. 24 of the State Constitution, as relates to public records requirements, states:

> 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. . . . This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. . . . Laws enacted pursuant to [subsection (c) of section 24] shall contain only exemptions from the requirements of subsection (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Public Records Law

Public policy regarding access to government records is also addressed in the *Florida Statutes*. Section 119.07, F.S., provides:

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

"Public records" are defined in s. 119.011(1), F.S., to mean 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. "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*.

However, under Art. I, s. 24, S*tate Constitution*, the Legislature is authorized to provide by general law for the exemption of records from the public access requirements of s. 24. Section 119.15(3)(e), F.S., defines the term "exemption" to mean a provision of the *Florida Statutes* which creates an exception to s. 119.07(1), F.S., or s. 286.011, F.S., and which applies to the executive branch of state government or to local government, but it does not include any provision of a special or local law.

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., relating to legislative review of exemptions from public meetings and public records requirements, sets forth specific criteria for evaluating whether confidentiality provisions serve an identifiable public purpose and are no broader than necessary to meet the public purpose they serve. Paragraph 119.15(4)(b), F.S., states:

> (4)(b) An exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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:
>
> 1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
>
> 2. 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. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
>
> 3. 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.

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings 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.

Public Meetings Law

Public policy regarding public meetings is also addressed in the *Florida Statutes*. Section 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 or any county, municipal corporation, or political subdivision, except as otherwise provided in the *State 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. The board or commission must provide reasonable notice of all such meetings.

Section 286.011, F.S., has been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. Although much of the recent litigation regarding the application of the open government laws to private organizations has been in the area of public records, courts have, however, looked to the Public Records Law in determining the applicability of the Public Meetings Law. *Cape Coral Medical Center, Inc. v. News-Press Publishing Co.*, 390 So.2d 1216, 1218, n. 5 (Fla. 2d DCA 1980) [inasmuch as the policies behind chapter 119, F.S., and s. 286.011, F.S., are similar, they should be read together].

Accordingly, as the courts have emphasized in analyzing the application of chapter 119, F.S., to agencies under contract with governmental agencies, the mere receipt of public funds by private corporations, is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements. Thus, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Public Meetings Law unless the public agency's governmental or legislative functions have been delegated to it. *Government In The Sunshine Manual*, at p. 24.

Confidentiality of Public Hospital Records and Meetings

Chapter 95-199, Laws of Florida, enacted in 1995, 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. Among other things, 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 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.

Section 395.3035, F.S., providing for confidentiality of public hospital records and meetings, declares that *all meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public, unless made confidential or exempt by law,* in accordance with statutory and constitutional requirements. However, certain managed care contracts relating to the public hospital's provision of health care services and supporting documentation for such contracts; certain specified strategic plans of public hospitals; trade secrets, including reimbursement methodologies and rates; and documents, offers, and contracts, not including managed care contracts, resulting from negotiations with nongovernmental entities for payment for services that are or may reasonably be expected by a public hospital's governing board to be provided by the hospital's competitors comprise the list of public hospital records and information made confidential and exempt from the Public Records Law.

Section 395.3035, F.S., provides two Public Meetings Law exemptions relating to public hospitals. One such exemption pertains to the portion of a public hospital governing board meeting during which negotiations for contracts with nongovernmental entities occur or are reported on that relate to competitive market services. However, all portions of a governing board meeting that are closed to the public must be recorded by a certified court reporter, and no portion of such meeting may be off the record. The court reporter's notes must be fully transcribed within a reasonable time after the meeting and maintained by the hospital records custodian. The transcript and related tape recordings, minutes, and notes become public documents one year after termination or completion of the contract to which the negotiations relate or, if no contract was executed, one year after termination of negotiations. All governing board meetings at which the board is scheduled to vote to accept, reject, or amend contracts, other than managed care contracts, must be open to the public.

The other Public Meetings Law exemption pertains to the portion of a public hospital governing board's meeting at which written strategic plans, including written plans for marketing its services, are discussed or reported on. However, as is required for closed portions of meetings at which a public hospital governing board discusses contracts, other than managed-care contracts, a certified court reporter must record activities and no portion of the meeting may be off the record. The transcript and tape recordings, minutes, and notes relating to the discussion of written strategic plans become public documents three years after the date of the board meeting.

Subsection 395.3035(6), F.S., imposes two tracking requirements relating to the closed portions of governing board public meetings and the documents generated during such periods. Paragraph (a) of that subsection requires the hospital, every three months, to report in writing to the governing board the number of records for which a public records request has been made and the records were declared to be confidential under s. 395.3035, F.S., along with certain specified descriptive details about the records. Additionally, the hospital is required to report in writing to the governing board each record that had been confidential to which the public has been granted access since the hospital's last report to the board, including certain specified descriptive details. The governing board is required to retain copies of these reports for five years from the date on which the report was submitted. If the governing board of the hospital is comprised of members who are appointed, the board must forward, within 10 working days after the date on which the board received the report from the hospital, the report to the official or authority that appoints board members. Paragraph 395.3035(6)(b), F.S., requires the governing board to maintain a written list of the meetings or portions of meetings, which must include certain specified details

about such meetings, that were closed to the public, as authorized under this section. The governing board is authorized to purge information about a meeting from the list five years after the date on which the meeting was closed. If the governing board of the hospital is comprised of members who are appointed, the board must forward, every three months, the list to the official or authority that appoints board members.

Background of the Issue

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," violative of Article I, section 24 of the *State Constitution* which requires that an exemption be no broader than necessary to accomplish its stated purpose. Because "strategic plans" is not a defined term, the court determined that it *could include more* than is necessary to be kept confidential. More particularly, the Fifth District's rationale for holding the Public Meetings Law exemption unconstitutionally overly broad was the court's interpretation of the scope of the exemption and the duration of the exemption. The court stated:

> There is no definition of, and therefore no limitation on, what can be included in a strategic plan. . . . In order to comply with the limitations imposed by the constitution, at the very least the term "strategic plan" must be defined. It is not. Further, there appears no justification for an arbitrary three year duration for the secrecy to continue [the statutory timeframe for maintaining the transcript of a closed meeting as confidential before it is to become a public document].

The case is designated by Case No. 92,047. Because of the critical nature of the issue statewide, the Fifth District Court of Appeal certified the following question to the Florida Supreme Court:

> IS THE EXEMPTION CONTAINED IN s. 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, s. 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 *Halifax Hospital Medical Center v. News-Journal Corporation*, Case No. 92,047 (1999), that the exemption is *facially* unconstitutional, p. 4. The Supreme Court agreed with the two lower court's conclusions that "*the statutory exemption does not meet the exacting constitutional standard of article I, section 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 does not define what is meant by "strategic plan" or "critical confidential information." The Supreme Court, agreeing with the circuit court, stated that the Legislature had created a categorical exemption by exempting *any and all discussion of the strategic plan* that reaches *far more information than necessary to accomplish the purpose of the exemption*, p. 5 (quoting the circuit court).

III. Effect of Proposed Changes:

The bill amends s. 395.3035, F.S., relating to confidentiality of public hospital records and meetings, to:

1. Expand the applicability of the Public Records Law exemption in subsection (2) to include *any hospital that is subject to* the statutory and constitutional public records requirements.

2. Narrow the Public Records Law exemption applicable to strategic plans to apply to such plans that the disclosure of which a hospital, in its judgment, believes could be used by a competitor to frustrate, circumvent, or exploit the purpose of the plan before it is implemented and which is not otherwise known or is discoverable only by illicit or clandestine means.

3. Delete specific reference to certain marketing plans as strategic plans exempt from the public records requirements.

4. Create a Public Meeting Law exemption for portions of hospital governing board meetings at which written strategic plans are discussed, reported on, modified, or approved by the governing board, and schedule the exemption for repeal on October 2, 2004, subject to prior reenactment by the Legislature following Sunset review.

5. Explicitly limit activities permissible during the closed portion of a public meeting during which a written strategic plan is considered to discussion, reports, modification, or approval of such a plan. Also, the governing board of a hospital that closes a portion of a public meeting for consideration of a strategic plan is required to give notice of and conduct a public meeting, in accordance with the requirements of the Public Meeting Law, before implementing the strategic plan or any component of the strategic plan.

6. Provide an alternative early release timeframe for transcripts of portions of public meetings closed to the public for purposes of considering a written strategic plan to require release earlier than the otherwise applicable 3-year time limit before a transcript is to be made public when the strategic plan considered at the closed meeting has been implemented to the extent that confidentiality of such plan is no longer necessary.

7. Add a definition of the term "strategic plan," for purposes of s. 395.3035, F.S., to mean any plan to:

   (a) Initiate or acquire a new health service;
   (b) Expand an existing health service;

(c) Acquire additional facilities;
(d) Expand existing facilities;
(e) Change all or part of the use of an existing facility or a newly acquired facility;
(f) Acquire, merge, or consolidate with another health care facility or health care provider;
(g) Enter into a shared service arrangement with another health care provider;
(h) Enter into or terminate a joint venture, subject to the provisions of s. 155.40, relating to selling or leasing a health care facility; or
(i) Any combination of paragraphs (a) - (h).

Clarifying language is included that states what the term "strategic plan" does *not* include. Specifically, it provides that records that describe existing operations of a hospital or other public health care facility are not strategic plans within the meaning of the law. However, such records may be included within the term "strategic plan," if their disclosure would result in disclosure of any part of a strategic plan which has not been fully implemented or result in the disclosure of a record that is otherwise exempted from public access under the Public Records Law. Existing operations that are referred to in the clarifying language are specifically described as, but not limited to, hiring of employees, purchase of equipment, placement of advertisements, and entering into contracts with physicians to perform medical services. Records that describe operations are expressly made *not exempt* from the Public Records Law or Public Meetings Law, unless otherwise exempted.

A new subsection (7) is added to s. 395.3035, F.S., that requires a governing board of a hospital that closed a portion of any board meeting for consideration of a written strategic plan to notice an open meeting in accordance with requirements of the Public Meetings Law and conduct the meeting to inform the public, generally, of the business activity that is to be implemented from the plan or a component part of the plan. A new subsection (8) prohibits a hospital from approving a binding agreement to sell, lease, merge, or consolidate the hospital at any closed meeting of the board, and explicitly requires that any such approval occur at an open meeting that is noticed in accordance with the requirements of the Public Meetings Law.

Section 2 of the bill provides a detailed public necessity statement for the Public Records Law and Public Meetings Law exemptions created in the bill relating to the strategic plans of community hospital governing boards. The statement of public necessity explains how community hospitals are placed at a competitive disadvantage to private hospitals when complying with the requirements of the Public Records Law and Public Meetings Law. The disclosure of service development or service delivery ideas to the public will result in premature exposure of a community hospital's planning activities to their competitors, whose representatives may attend public meetings, and enable the community hospital's competitors to capitalize on such hospital's business ideas before they are implemented. The statement of public necessity contains a legislative finding that the governing boards of hospitals do not participate in discussions, debates, modifications, or approvals of the hospital's written strategic plan because to do so would render such plans subject to the Public Records and Public Meetings Laws while staff level considerations of such plans are not subject to public records and public meetings law requirements. An additional legislative finding states that it is a public necessity to clarify that the records and meetings of privately operated hospitals that are subject to the Public Records and Public Meetings Laws *are exempt* from such laws *in the same manner and to the same extent as are records and meetings of publicly operated hospitals*.

Section 3 of the bill summarizes and characterizes the *stated purpose* of section 1 of the bill relating to the Public Records and Public Meetings Law exemptions created for consideration of hospital written strategic plans. The purpose is *to allow hospital boards to fully discuss adoption or modification of and to receive reports concerning their written strategic plans without the strategic plans and unimplemented portions of the written strategic plans being disclosed in advance to private-sector competitor hospitals*.

The provisions of the bill are to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill revises the Public Records Law currently limited to public hospitals to make the exemption applicable to the records and information of any hospital that is subject to the Public Records Law. Additionally, the exemption specific to strategic plans is narrowed to apply to such plans that a hospital, in its judgment, believes disclosure will advantage a competitor who could not legally or ethically learn of the details of such plans otherwise.

The Public Meetings Law exemption for a portion of a public meeting closed by a hospital's governing board relating to written strategic plans is expanded to apply to discussion of, reports on, modification of, or approval of written strategic plans. Language that explicitly restricts the activities during the closed portion of a public meeting provides that the only permissive activities are discussion of, reports on, modification of, or approval of a written strategic plan. The bill also adds to current law an alternative early release timeframe, to the 3-year timeframe in current law, for making public those transcripts of portions of public meetings that are closed to the public because a written strategic plan is being discussed, reported on, modified, or approved.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Provision of significant amounts of indigent and uncompensated care has developed as one of the mandates of community hospitals. To the extent that communities around the state have benefitted from these services, the quality of life may reasonably be understood to have been enhanced. Committee Substitute for Senate Bill 1012 is designed to allow community hospitals to function in a more competitive environment than has been the case traditionally. The bill would allow some protection from the competitive disadvantage that the Public Records Law and Public Meetings Law would impose on such hospitals, if complied with, by requiring community hospitals to disclose strategic plans that for-profit hospitals, or other competitors, that are not required to disclose strategic information since they are private entities, could obtain before the plans could be implemented.

However, while the bill is designed to help community hospitals survive in a more competitive environment, it is also designed to ensure that the public has access to information about the operations and activities of these hospitals although the disclosure of such information is delayed as provided for in the bill. As community entities, many of which are established and maintained with public dollars, the delayed disclosure of discussions relating to strategic plans balances the need for secrecy during implementation of business strategies while ensuring accountability in time enough sufficient to meaningfully inform and allow for actions to protect the public interest as necessary.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.