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DATE: February 18, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 357

RELATING TO: Public hospital meetings and records

SPONSOR(S): Representative Fasano

COMPANION BILL(S): SB 1012 (similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS YEAS 5 NAYS 0
 - (2) COMMUNITY AFFAIRS
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill relates to public hospital records and meetings. It defines the term "strategic plan" in detail for purposes of provisions which provide for confidentiality of such plans and of meetings related to such plans.

This bill expands the public hospital meetings exemption to include not only when a strategic plan is "discussed or reported [on]" but also when it is being "modified or approved". This expansion of the exemption is made subject to the Open Government Sunset Review Act of 1995 and will repeal on October 2, 2004, unless reviewed and reenacted by the Legislature.

This bill authorizes the release of the transcripts of such meetings earlier than the statutory three years "if the governing board determines that the strategic plan discussed, reported on, modified, or approved at the meeting has been fully implemented or the circumstances do not require the transcript of the meeting to remain confidential."

Finally this bill provides a public necessity statement for the exemptions in s. 395.3035, F.S., dealing with the confidentiality of public hospital records and meetings, including the above-described expansion of the existing public meetings exemption.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Public Records Law

Article I, sec. 24, Florida Constitution, expresses Florida's public policy regarding access to government records in providing that:

(a) Every person has the right to inspect or copy any public records 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.

Article I, sec. 24, Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of sec. 24. The general law exempting the records must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the 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.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that 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.

Public Meetings Law

Article I, sec. 24(b), Florida Constitution, 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

Article I, s. 24(c), Florida Constitution, states that public meetings exemptions may be provided for by general law, if such law states with specificity the public necessity justifying the exemption and is no broader than necessary to accomplish the stated purpose of the 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 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.

The provisions of s. 119.15, F.S., the Open Government Sunset Review Act of 1995, as discussed above regarding public records exemptions are equally applicable to public meetings exemptions.

Public Hospital Records and Meetings

In 1995, pursuant to SB 166, Ch. 95-199, Laws of Florida, the confidentiality provisions regarding public hospital records and meetings found in s. 119.16, F.S., were reenacted and amended, and that section of law was renumbered as s. 395.3035, F.S. Among other things, SB 166, expanded the public records exemption to include "strategic plans, including plans for marketing its services, which services are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital." "Strategic plans" was not otherwise defined. Additionally, those portions of board meetings at which written strategic plans are discussed or are reported on were made exempt from the open meetings requirements.

Section 395.3035, F.S., requires that all portions of any board meeting which are closed to the public must be recorded by a certified court reporter. The reporter must record the times of commencement and termination of the meeting, all discussion and proceedings, the names of all persons present at any time, and the names of all persons

speaking. No portion of the meeting can be off the record. The court reporter's notes must be fully transcribed and maintained by the hospital records custodian within a reasonable time after the meeting. The transcript will become available to the public 3 years after the date of the board meeting.

In 1997, the Fifth District Court of Appeal, in *Halifax Hospital Medical Center v. News-Journal Corp.*, 701 So.2d 434, (Fla. 5th DCA 1997), held the public meetings exemption in s. 395.3035(4), F.S., pertaining to discussions of "strategic plans", violative of Fla. Const., Art. I, sec. 24, which requires that an exemption be no broader than necessary to accomplish its stated purpose. Because "strategic plans" was not a defined term, the court determined that it could include more than was necessary to be kept confidential. More particularly, the Fifth District's rationale for holding the public meetings exemption unconstitutional was that the scope of the exemption, as well as the exemption's duration, was overly broad. 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 [that is the three years that the transcript of a closed meeting must be held confidential before it can be released to the public].

On January 21, 1999, the Florida Supreme Court affirmed the decision of the Fifth DCA for the reasons cited above. See *Halifax Hospital Medical Center v. News-Journal Corp.*, (Fla., No. 92047, Jan. 21, 1999). Regarding a possible judicial construction which would narrow the term "strategic plan," the court wrote that it "cannot move into the legislature's province by making the factual determination that would bring this statutory exemption within constitutional boundaries. * * * The task of enacting a more limited statutory exemption appropriately belongs to the legislature in this case." Id.

B. EFFECT OF PROPOSED CHANGES:

This bill defines "strategic plan" to mean any record which describes actions or activities 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 a transaction permitted by s. 155.40¹;
- (i) Market the services of the hospital and its ancillary facilities; or
- (j) Any combination of paragraphs (a) - (i).

¹ Section 155.40, F.S., deals with the sale or lease of county, district, or municipal hospitals.

This bill also provides that "strategic plan" does not include records that describe the existing operations of a public hospital or other public health care facility which implement or execute the provisions of a strategic plan, unless disclosure of any such document would disclose any part of a strategic plan which has not been fully implemented or is a record that is otherwise exempt from the public records laws. Furthermore, records that describe operations are not exempt, except as otherwise specifically provided.

Current law also provides for the release of a transcript of a closed meeting 3 years after the date of the board meeting. This bill amends that provision to add "or at an earlier date if the governing board determines that the strategic plan discussed at the meeting has been fully implemented or the circumstances do not require the transcript of the meeting to remain confidential."

Additionally, this bill expands the public meetings exemption to include those portions of a board meeting at which written strategic plans, including written plans for marketing its services, are "modified or approved" by the governing board. Currently, the meetings are closed only when such plans are "discussed or [are] reported on." It could reasonably be argued that when the board "modifies" or "approves" a plan such would be subsumed within the existing exemption for "discussing" a plan. However, it might otherwise be argued that the actual vote to modify or approve a plan is not within the scope of "discussing". Thus, in an abundance of caution, and to avoid such a debate, the public meetings exemption has expressly been amended to include "modifies" or "approves." This expansion of the exemption has been made subject to the Open Government Sunset Review Act of 1995 and will automatically repeal on October 2, 2004, unless the Legislature reviews and reenacts the exemption.

This bill prohibits the governing board from approving "a binding agreement to sell, lease, merge, or consolidate the hospital at any closed meeting of the board." The board must approve such action at a meeting open to the public in accordance with s. 286.011, F.S.

Finally, this bill provides a detailed public necessity statement for existing exemptions as well as a statement of public necessity for the public meetings exemption with regard to strategic plans.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

- (3) any entitlement to a government service or benefit?

Yes. This bill would prevent citizens from attending certain meetings of a public hospital relating to its strategic plans, and from having access to records relating to such strategic plans.

- b. If an agency or program is eliminated or reduced:

The bill does not purport to eliminate or reduce an agency or program.

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Yes. This bill would prevent citizens from attending certain meetings of a public hospital relating to its strategic plans, and from having access to records relating to such strategic plans.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not purport to create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill amends s. 395.3035, F.S.

E. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes" section above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

By allowing the governing boards of state-owned public hospitals to meet in private when discussing their strategic plans, the bill would allow public hospitals to more efficiently compete in the health care marketplace. This would result in greater revenues and perhaps less reliance on tax dollars for the operation of the public hospitals. Disclosure of the strategic plan to private sector competitors would place public hospitals at a competitive disadvantage.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

By allowing the governing boards of locally-owned public hospitals to meet in private when discussing their strategic plans, the bill would allow public hospitals to more efficiently compete in the health care marketplace. This would result in greater revenues and perhaps less reliance on tax dollars for the operation of the public hospitals. Disclosure of the strategic plan to private sector competitors would place public hospitals at a competitive disadvantage.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

By allowing the governing boards of public hospitals to meet in private when discussing their strategic plans, the bill would allow public hospitals to more efficiently compete in the health care marketplace. This would result in more choice for the health care consumer.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue raising authority of counties or municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 17, 1999, the Committee on Governmental Operations adopted without objection a strike everything amendment sponsored by Rep. Fasano which provides that (1) privately operated hospitals which are subject to the public records and public meetings laws enjoy the benefits of s. 395.3035, F.S., regarding the confidentiality of strategic plans; (2) the definition of strategic plans includes any record which describes an activity to terminate a joint venture; (3) the transcripts of a closed strategic plans meeting shall become public earlier than the statutory three years to the extent that the confidentiality of the plan is no longer necessary; and (4) the legislature finds it a public necessity to clarify that privately

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operated hospitals which are subject to the public records and public meeting laws are exempt in the same manner as public hospitals. This amendment will travel with the bill.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

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