

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
STATE ADMINISTRATION
FINAL ANALYSIS**

BILL #: HB 407 (PCB SA 01-13)

RELATING TO: Public Records and Meetings Exemptions for University Health Services Support Organizations

SPONSOR(S): Committee on State Administration and Representative(s) Brummer

TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 12 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

On April 25, 2001, HB 407 was approved by the Governor and became law as Chapter 2001-35, Laws of Florida (the "act"). The effective date of the act is October 1, 2001.

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Sections 240.2996(2), (3), and (4), F.S., were certified by the Division of Statutory Revision for repeal on October 2, 2001, unless otherwise reenacted by the Legislature. These sections provide that certain university health services support organization's records and information are exempt from public disclosure, such as managed care arrangement contracts and documents directly relating to negotiation, performance, and implementation of contracts for managed care arrangements or alliance network arrangements; marketing plans; trade secrets; records of peer review panels, committees, governing boards, and agents of the university health services support organizations which relate solely to the evaluation of health care services and professional credentials of health care providers and physicians employed by or providing services under contract. These sections further provide that any portion of a governing board or peer review panel or committee meeting during which a confidential and exempt contract, document, record, marketing plan, or trade secret is discussed is closed to the public. Records generated during closed meetings are also exempt from public disclosure.

This act reenacts the exemptions in ss. 240.2996(3) and (4), F.S., verbatim, and slightly narrows and reenacts the exemption in s. 240.2996(2), F.S. This act also removes the repeal language. See "Present Situation."

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records and Public Meetings Laws

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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.

In regard to public meetings, Article I, s. 24(b), Florida Constitution, provides that

[a]ll 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, does, however, permit the Legislature to provide by general law for the exemption of records and meetings from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article 1, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

With regard to public meetings, section 286.011, F.S., provides that

[a]ll 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.

Open Government Sunset Review Act of 1995

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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"¹ of an existing exemption, the

¹An 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. s. 119.15(3)(b), F.S.

exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Sections 240.2996(2), (3), (4), F.S., were certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.² Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption can be in a separate bill.

University Health Services Support Organizations

Section 240.2995, F.S., allows each state university to establish a university health services support organization to serve as the not-for-profit corporation through which public colleges of medicine may participate as partners in integrated health care delivery systems for the benefit of the public academic health center.

The partnerships were needed to establish physician training not only within hospitals but also within community settings, to maintain the patient base necessary for medical education, and to enable medical faculty to continue to produce the clinical income from which the medical schools derive the majority of their operating budgets.⁴

Existing University Health Services Support Organizations

The University of Florida (UF) and the University of South Florida (USF) currently have public academic health centers. The Board of Regents staff reports that these universities have established the following approved health services support organizations:

- USF Health Services Support Organization, Inc.⁵

² The requirements of Article 1, s. 24(c), Florida Constitution, must however, be met with regard to any exemption created on or after July 1, 1993. *See infra Florida Constitution.*

³ Please note that the effective date of this act is prior to the repeal date of October 2, 2001.

⁴ *See* The Florida Senate Interim Project Summary 2001-038, at 3, August 2000.

⁵ This organization is considered active by USF although the organization had no activity during FYs 1998-1999 and 1999-2000. *See* The Florida Senate Open Government Sunset Review: s. 240.2996(2), (3), & (4), F.S., Report Number 2001-038, at 9, September

- USF Physicians Group, Inc.⁶
- UF Health Services, Inc.⁷
- UF Jacksonville Healthcare, Inc.⁸

These organizations are not licensed as insurers or as certified health maintenance organizations.⁹

Sections 240.2996(2), (3), and (4), F.S.

Section 240.2996(1), F.S., provides that all organizational records are open and available to the public unless made confidential and exempt from public disclosure. Section 240.2996(2), F.S., provides that the following university health services support organization's records and information are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

- Contracts for managed care arrangements;
- Preferred provider organization contracts;
- Health maintenance organization contracts;
- Alliance network arrangements;
- Exclusive provider organization contracts;
- Documents directly relating to the negotiation, performance, and implementation of any such contracts for managed care arrangements or alliance network arrangements;
- University health services support organization's plans for marketing its services;
- Trade secrets; and
- Records of the peer review panels, committees, governing board, and agents of the university health services support organization which relate solely to the evaluation of health care services and professional credentials of health care providers and physicians employed by or providing services under contract.

Section 240.2996(3), F.S., provides that "any portion of a governing board or peer review panel or committee meeting during which a confidential and exempt contract, document, record, marketing plan, or trade secret is discussed" is closed to the public. Section 240.2996(4), F.S., exempts from public disclosure records generated during portions of closed meetings, which contain confidential and exempt information relating to contracts, documents, records, marketing plans, or trade secrets.

According to the public necessity statement in the bill that created the exemption, all contracts for managed care arrangements must be exempt from public disclosure because "preferred provider and health maintenance organization contracts, as well as other managed care contracts, including

2000.

⁶ USF Physicians Group, Inc., is currently inactive with the Department of State. "It was originally incorporated in 1994 as a not-for-profit corporation and approved by the Board of Regents as a university health services support organization in 1995." See The Florida Senate Open Government Sunset Review: s. 240.2996(2), (3), & (4), F.S., Report Number 2001-038, at 9, September 2000. On April 24, 2000, the organization was voluntarily dissolved. It functioned as the organization responsible for governing the development and management of the group practice of the College of Medicine Faculty Practice Plan, according to the 1999 audit report. The Board of Regents approved the dissolution of the corporate entity and the plan for distribution of its assets on July 21, 2000. "The Board of Regents' staff summary noted that faculty physicians will participate in governance through committees of the College of Medicine rather than through the separate entity." *Id.*

⁷ According to UF, this organization is inactive. The organization is still listed as active with the Department of State. There were no activities for FY1999-2000. None are anticipated for FY 2000-2001. See The Florida Senate Open Government Sunset Review: s. 240.2996(2), (3), & (4), F.S., Report Number 2001-038, at 10, September 2000.

⁸ See The Florida Senate Open Government Sunset Review: s. 240.2996(2), (3), & (4), F.S., Report Number 2001-038, at 9, September 2000.

⁹ *Id.* at 10.

exclusive provider organization contracts and network alliance agreements,” contain, among other things, “payment methodologies and rates and utilization review and quality assurance methods and techniques which, if disclosed might negatively affect a university health services support organization in the marketplace.”¹⁰ In addition, documents relating to the negotiation, performance, and implementation of contracts for managed care arrangements might also reveal such proprietary confidential and trade secret information.

Additionally, the public necessity statement provided:

- A university health services support organization’s plans for marketing its services ought to be exempt from public disclosure since it might otherwise be extremely difficult, if not impossible, for the organization to effectively and efficiently compete in the marketplace;
- Trade secrets should also be held confidential and exempt to enable the organization to protect such proprietary and trade secret information and function effectively in the marketplace;
- Records of peer review bodies and agents of a university health services support organization ought to be exempt from public disclosure, because, if they are not, then cooperation with and participation in the university health services support organization quality assurance activities and programs might be impaired, thereby diminishing the effectiveness of these organizations;
- A university health services support organization’s governing board, peer review panel, or committee meetings are closed when confidential contracts, documents, records, and information are discussed; otherwise, critical confidential information regarding contracts, marketing plans, trade secrets, and the evaluation of health care services and the professional credentials of health care providers might be revealed. This might make it very difficult, if not impossible, for a university health services support organization to effectively compete in the marketplace against private entities, whose records and meetings are not required to be open to the public; and
- Portions of public records generated at closed university health services support organization’s meetings, such as tape recordings, notes, and minutes, recording the discussions regarding such “confidential contracts, documents, records, and information,” ought to be held confidential; otherwise, confidential proprietary and trade secret information might become public and impair the organization’s ability to effectively and efficiently compete in the marketplace.¹¹

Section 240.2995(6), F.S.

Section 240.2995(6), F.S., provides that all meetings of a governing board of a university health services support organization are open to the public in accordance with s. 286.011, F.S., unless made confidential and exempt by law. This is superfluous language because such is already the law. Additionally, s. 240.2995(6), F.S., provides that records required by the Department of Insurance must be made available to the department upon request.

C. EFFECT OF PROPOSED CHANGES:

This act reenacts the public records exemption in s. 240.2996(2), F.S., which provides that the following university health services support organization’s records and information are confidential and exempt from public disclosure:

- Contracts for managed care arrangements;

¹⁰ SB 560, s. 2, 1996.

¹¹ SB 560, s. 2, 1996.

- Preferred provider organization contracts;
- Health maintenance organization contracts;
- Alliance network arrangements;
- Exclusive provider organization contracts;
- Any documents directly relating to the negotiation, performance, and implementation of any such contracts for managed care arrangements or alliance network arrangements;
- Marketing plan;
- Trade secrets; and
- Records of the peer review panels, committees, governing board, and agents of the university health services support organization which relate solely to the evaluation of health care services and professional credentials of health care providers and physicians employed by or providing services under contract.

The exemption is narrowed, however, in that the exemption for marketing plans is limited to only those marketing plans, the disclosure of which may be reasonably expected by the organization's governing board to be "used by a competitor or an affiliated provider of the organization to frustrate, circumvent, or exploit the purposes of the plan before it is implemented and which is not otherwise known or cannot be legally obtained by a competitor or an affiliated provider."

This act also reenacts verbatim the public meetings exemption in s. 240.2996(3), F.S., which provides that any portion of a governing board or peer review panel or committee meeting during which a confidential and exempt contract, document, record, marketing plan, or trade secret is discussed is closed to the public.

Further, this act reenacts verbatim the public records exemption in s. 240.2996(4), F.S., which provides that those portions of any public record, such as a tape recording, minutes, and notes, generated during that portion of a governing board or peer review panel or committee meeting which is closed to the public and which contains information relating to contracts, documents, records, marketing plans, or trade secrets are exempt from public disclosure.

This act also repeals s. 240.2995(6), F.S., which provides that all meetings of a governing board of a university health services support organization must be open to the public unless made confidential and exempt by law. This is unnecessary language because meetings are otherwise required to be open by law. This act also relocates the sentence, "[r]ecords required by the Department of Insurance to discharge its duties shall be made available to the department upon request" from s. 240.2995(6), F.S., to s. 240.2996(1), F.S.

Finally, the language in the statutes repealing these exemptions is removed.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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