# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Governmental Oversight and Productivity Committee

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| BILL: | SB 1190 |
| INTRODUCER: | Senator Atwater |
| SUBJECT: | Hospitals/Sale or Lease |
| DATE: | April 5, 2006 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Wilson | HE | **Fav/1 amendment** |
| 2. | Rhea | Wilson | GO | **Favorable** |
| 3. | | | CA | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

**Please see last section for Summary of Amendments**

- [ ] Technical amendments were recommended
- [ ] Amendments were recommended
- [x] Significant amendments were recommended

## I. Summary:

Section 119.011(2), F.S., includes within the definition of "agency," for purposes of the Public Records Act, ". . . any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency [emphasis added]*."

Section 155.40, F.S., establishes requirements relating to the sale or lease of a county, district, or municipal hospital. Section 155.40(7), F.S., specifies that the *lessee* of a public hospital is not "acting on behalf of" the lessor unless the lease document expressly provides to the contrary. By providing that a lessee of a public hospital is not acting on behalf of that public hospital, the section would release lessees from complying with the open government requirements that apply to the public entity. In May 2004, the First District Court of Appeal found that the provision did not comply with requirements for creating a public records or meetings exemption under Art. I, s. 24 of the State Constitution because the Legislature did not state a public necessity in support of an exemption.

The bill amends the provision to provide that a *purchaser* of a public hospital is not "acting on behalf of" the seller unless the *purchase* document expressly provides to the contrary.

This bill amends section 155.40, Florida Statutes.

## II. Present Situation:

### Public Records

**Public Records** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] 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. . . .

Unless specifically exempted, all agency[5] records are available for public inspection. The term "public record" is broadly defined 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.[6]

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.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

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[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[5] 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."
[6] Section 119.011(11), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] 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 examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] 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.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

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[9] Article I, s. 24(c) of the State Constitution.
[10] *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).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53, *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So.2d 203 (Fla. 1998).
[21] 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests*. Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" *[emphasis added]*. Sometimes agencies are authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

**Sale or Lease of a Public Hospital**

Section 155.40, F.S., permits any county, district, or municipal hospital organized and existing under the laws of Florida to sell or lease the county, district or municipal hospital to a for-profit or not-for-profit Florida corporation, and enter into leases or other contracts with that corporation to operate and manage the hospital. The governing board of the hospital must find that the sale, lease, or contract is in the best interests of the public and must state the basis of the finding. If the governing board of a county, district, or municipal hospital decides to lease the hospital, it must give notice and comply with the requirements of the section.

Unless otherwise expressly stated in the sale or lease documents, the sale or lease of a hospital may not be construed to: (1) transfer a *governmental function* from the governmental entity to the private purchaser or lessee; (2) constitute a financial interest of the public lessor in the private lessee; or (3) make a private lessee an integral part of the public lessor's decisionmaking

[22] *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

process.[23] Under subsection 155.40(7), F.S., the lessee of a hospital, pursuant to s. 155.40, F.S., or any special act of the Legislature, operating under a lease may not be construed to be "acting on behalf of" the lessor as that term is used in statute, *unless the lease document expressly provides to the contrary*.

In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, a newspaper and its publisher brought an action against a private lessee of a public hospital seeking mandamus, injunctive, and declaratory relief regarding a public records request for the lessee's board minutes. The 1st District Court of Appeal found that subsections 155.40(6) and (7), F.S., did not effectively exempt the private lessee from the public records and meetings laws because the subsections were not supported by a legislative statement of public necessity as required by Art. I, s. 24 of the State Constitution.[24] Under that provision, the Legislature may create exemptions from public records and meetings requirements, but the law must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish its purpose. Nevertheless, the court held in favor of nondisclosure of the records under another provision of law. Section 395.3036, F.S., expressly provides an exemption for the records of a private corporation that leases a public hospital.

**West Volusia Hospital Authority**

The Florida Legislature created West Volusia Hospital Authority (authority), an independent taxing district, in 1957.[25] The authority was empowered to establish, construct, operate, and maintain such hospitals as in the elected governing board's opinion were necessary for the preservation of the public health, public good, and for the use of the people of the district, and to provide care to the indigent sick residing within the taxing district without charge in those facilities. The authority developed, owned and operated the West Volusia Memorial Hospital until 1994 through public facilities. In 1993, the authority negotiated with Memorial Health System to *lease and operate* Volusia Memorial Hospital.[26] In 1994, a local newspaper filed a complaint seeking a declaratory decree that the records of Memorial Health System were public and the meetings were subject to the public meetings law. The Circuit Court in Volusia County entered a summary final judgment in favor of Memorial Health System. The Fifth District Court of Appeal reversed and held that Memorial Health System was subject to the public records and meetings laws.[27] The Florida Supreme Court upheld the Fifth District Court of Appeals and held that Memorial Health System, *a lessee not a purchaser of a public hospital*, was acting on behalf of the authority in performing and carrying out obligations of the agreement.[28] The Supreme Court also held that the totality of factors demonstrates that the authorized function of the authority was transferred and delegated to a private corporation, a lessee.[29]

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[23] Section 155.40(6), F.S.
[24] See *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.
[25] See section 1, chapter 57-2085, Laws of Florida.
[26] Memorial Health System leased and operated authority-owned hospital facility and other assets through, Hospital Corporation, a not-for-profit corporation. Under the lease, the Hospital Corporation agreed to provide indigent care for the indigent sick in taxing district and the authority agreed to reimburse the corporation for those services.
[27] See *News-Journal Corp. v. Memorial Hospital-West Volusia*, Inc. 695 So.2d 418 (Fla. 5th DCA 1997).
[28] See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373 (Fla. 1999).
[29] Id.

In a recent action, the Circuit Court in Volusia County granted a newspaper's motion for final summary judgment and denied Memorial Hospital-West Volusia, Inc.'s motion for summary judgment.[30] The Circuit Court in Volusia County declared that the public records law applies to the Memorial Health System, *a purchaser (not a lessee) of a public hospital*, when it engaged in the function of operating the hospital and caring for the indigent within the taxing district of the Authority under and pursuant to the terms and conditions of the transfer documents.[31] The Circuit Court ordered that, as of the effective date of the documents, Memorial Health System, *a purchaser (not a lessee) of a public hospital*, must comply with the Public Records and Meetings Laws.[32] The circuit court's decision was appealed to the Fifth District Court of Appeal.[33] The district court, however, reversed the lower court, finding that public records and meetings requirements no longer applied to the private corporation. The court, noting a prior case,[34] found that where the facts compel the conclusion that a public agency has transferred or delegated its statutory responsibility to a private entity, "it is unnecessary to engage in the factor-by-factor analysis in Schwab."[35] In *Stansfield*, the Salvation Army contracted with Marion County to provide probationary services for misdemeanants. The court in that case held that because the Salvation Army contract provided for the "complete assumption of a governmental obligation," it was subject to the Public Records Act. Further, in *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*,[36] the Second District Court of Appeal noted:

> The case law establishes two general sets of circumstances in which documents in the possession of private entities must be produced as public records. First, when a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records. [citation omitted] Second, when a public entity contracts with a private entity for the provision of certain goods or services to facilitate the public agency's performance of its duties, the private entity's records in that regard may be public if the "totality of the factor" indicates a significant level of involvement by the public agency."

While the Fifth DCA in the most recent *Memorial* case noted there were significant differences in the facts between the purchase of the hospital and the lease of the hospital, it nevertheless performed an analysis under the *Schwab* "totality of factors test," apparently because there were attached covenants in the sale affecting the purchaser's obligations. Nevertheless, the court noted that the requisite factors did not support agency status under *Schwab*. The court noted that Memorial owned the hospital and has sole financial responsibility for its operation and maintenance. It also noted that public funding of the hospital had dropped significantly and that the only public funding Memorial received was to reimburse it for services provided for indigent care. Further, the court noted that there was no evidence of commingling of public and private funds. The court also found that the public authority was no longer involved in the operation of

[30] See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp. and Tanner Andrews*, Case No. 2002-31972, Seventh Judicial Circuit, Volusia County, (February 16, 2005).
[31] *Id*.
[32] *Id*.
[33] See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, et al*., Case Number 5D05-925.
[34] *Stanfield v. Salvation Army*, 695 So.2d 501, 501 (Fla. 5th DCA 1997).
[35] *Memorial Hospital-West Volusia, Inc., v. News-Journal Corporation, et al*, 2006 WL 735965 (5th DCA 2006).
[36] 829 So.2d 970 (Fla. 2d DCA 2002).

the hospital.[37] Additionally, the court noted that the authority could no longer terminate a lease and take possession of the hospital. Having the right to sue for breach of contract does not equate to "involvement with, regulation of, or control over" Memorial. After reviewing the applicable factors under *Schwab*, the court concluded that Memorial was no longer "acting on behalf of" the public agency.

**Public Records and Meetings Requirements for Leased Hospitals**

Section 395.3036, F.S., provides that the records of a private corporation that *leases* a public hospital or other public health care facility are confidential and exempt from the Public Records Law and s. 24(a), Art. I of the State Constitution and the meetings of the governing board of a private corporation are exempt from the Public Meetings Law and s. 24(b), Art. I of the State Constitution when the *public lessor* complies with the public finance accountability provisions of s. 155.40(5), F.S., with respect to the transfer of any public funds to the private lessee and when the private lessee meets at least three of the following five criteria:

- The public lessor that owns the public hospital or other public health care facility was not the incorporator of the private corporation that leases the public hospital or other health care facility;
- The public lessor and the private lessee do not commingle any of their funds in any account maintained by either of them, other than the payment of the rent and administrative fees or the transfer of funds;
- Except as otherwise provided by law, the private lessee is not allowed to participate, except as a member of the public, in the decisionmaking process of the public lessor;
- The lease agreement does not expressly require the lessee to comply with the requirements of the Public Records and Meetings Laws; and
- 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.

The Circuit Court in Hillsborough County in a consolidated case held that the Florida Health Sciences Center, Inc., the entity that leases Tampa General Hospital is subject to the public records and meetings laws. The Circuit Court also declared s. 395.3036, F.S., is unavailable to the Florida Health Sciences Center, Inc., *a lessee*; to the extent, it would exempt all of the center's meetings and records from the public records and meetings laws. The Circuit Court also declared s. 395.3036, F.S., unconstitutionally overbroad.[38]

[37] Under the enabling act for the authority, it was empowered to establish, construct, operate, and maintain such hospital or hospitals as in their opinion are necessary for the use of the people of the district. Further, by amendment, the authority was permitted to acquire clinics, computer facilities, food service and preparation services, among other powers.

[38] See *Florida Health Sciences Center, Inc. v. The Tribune Co., The Tribune Co. v. Florida Health Sciences Center, Inc., Times Publishing Co. v. Hillsborough*, Case nos. 99-580, 99-605, 99-1082 (October 22, 1999). The Second District Court of Appeal in Case No. 2D99-4386 affirmed in a per curiam opinion and appellant's motion for rehearing and motion for certification of questions to the Florida Supreme Court were denied. However, see, *Baker County Press, Inc. v. Baker County*

## III. Effect of Proposed Changes:

The bill revises subsection (7) of s. 155.40, F.S., which specifies that a lessee of a public hospital shall not be construed to be "acting on behalf of" the lessor unless the lease document expressly provides to the contrary. The bill extends this provision to a purchaser of a public hospital. The bill provides that the *purchaser* of a hospital, pursuant to s. 155.40, F.S., or any special act of the Legislature, may not be construed to be "acting on behalf of" the *seller* as that term is used in statute, unless the *purchase* document expressly provides to the contrary.

## 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 Art. VII, s. 18 of the Florida Constitution.

### B. Public Records/Open Meetings Issues:

In *Baker* as discussed *supra*, the First District Court of Appeal found that the apparent purpose of subsections 155.40(6) and (7), F.S., is to exempt private lessees from the public records and meetings laws by Baker County Medical Services, Inc., in support of its argument for nondisclosure. The court held subsections 155.40(6) and (7), F.S., unconstitutional because there were not any legislative findings regarding public necessity for the exemption when the subsection was enacted by the Legislature.[39] Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Under ch. 119, F.S., "agency" is defined 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.

### C. Trust Funds Restrictions:

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

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*Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.

[39] See *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

# VIII. Summary of Amendments:

**Barcode 551812 by Health Care:**
The amendment revises provisions relating to the sale or lease of a public hospital to a private party to provide that, unless expressly stated in the sale documents, the sale of a hospital shall not be construed as: a transfer of a governmental function from the county, district, or municipality to the private purchaser; constituting a financial interest of the public seller in the private purchaser; or making a private purchaser an integral part of the public seller's decision-making process. The purchaser of a hospital, operating after a sale of the hospital, is not "acting on behalf of" the seller and is not an agency within the meaning of that term as used in the Public Records Law, unless the sale document expressly provides to the contrary. (WITH TITLE AMENDMENT)