

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 675 CS

Public Records and Public Meetings

**SPONSOR(S):** Pickens

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 1190

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Health Care Regulation Committee</u>	<u>11 Y, 0 N, w/CS</u>	<u>Bell</u>	<u>Mitchell</u>
2) <u>Local Government Council</u>	<u>8 Y, 0 N</u>	<u>Nelson</u>	<u>Hamby</u>
3) <u>Governmental Operations Committee</u>	<u>6 Y, 0 N, w/CS</u>	<u>Mitchell</u>	<u>Williamson</u>
4) <u>Health &amp; Families Council</u>	<u></u>	<u>Bell</u>	<u>Moore</u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The bill makes stylistic changes and removes references to sale from the provisions related to the effect of a lease of a public hospital.

The bill provides for the effect of a sale of a public hospital. The bill prohibits the sale of a hospital, unless expressly stated otherwise in the sale documents, from being construed as (1) a transfer of a governmental function from the county, district, or municipality to the private purchaser; (2) constituting a financial interest of the public seller in the private purchaser; or (3) making a private purchaser an integral part of the public seller's decisionmaking process.

The bill further provides that a purchaser of a hospital, who is operating the hospital after the sale, is not "acting on behalf of" the seller, unless the sale document expressly provides to the contrary.

The bill also adds a provision related to public records: the purchaser of a hospital operating after a sale of the hospital may not be construed as an "agency" within the meaning of s. 119.011(2), F.S., unless the sale document expressly provides to the contrary.

*The bill amends provisions related to the effect of a lease of a public hospital without providing legislative findings regarding the public necessity for the exemption, which is the reason these provisions were declared unconstitutional.*

*In creating what appears to be an additional public records exemption, the bill fails to satisfy the constitutional requirement for legislative findings regarding the public necessity for the exemption.*

**As a public records exemption, the bill will require passage by a two-thirds vote of each house.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government** – The bill may decrease access to certain public records.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background on Public Records and Public Meetings Laws**

Section 24(a), Art. I of the State Constitution provides the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive and judicial branches of government, except with respect to records which are exempted or specifically made confidential. Section 24(b) of Art. 1 provides the state's public policy regarding access to government meetings. The section requires that all meetings 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.

The Legislature may provide by general law passed by two-thirds vote for the exemption of records and meetings from these constitutional requirements. Any such law must state with specificity the public necessity justifying the exemption, and be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records and meetings also is addressed in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county or municipal record, and s. 286.011, F.S., requires that all state, county or municipal meetings be open and noticed to the public.

The "Open Government Sunset Review Act"<sup>1</sup> provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and is no broader than necessary to meet the public purpose that 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or jeopardize an individual's<sup>2</sup> safety; or
- Protects trade or business secrets.

##### **Public Records Requirements of Leased Hospitals**

Section 395.3036, F.S., provides that records of a private corporation that leases a public hospital or other public health care facilities are confidential and exempt from s. 119.07(1), F.S., and s.24(a), Art. I of the State Constitution, and the meetings of the governing board of such a corporation are exempt

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Only the identity of an individual may be exempted under this provision.

from s. 286.011, F.S., 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 decision making process of the public lessor;
- The lease agreement does not expressly require the lessee to comply with the requirements of ss. 119.07(1) and 286.011, F.S.; 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.

### **Sale or Lease of a Public Hospital**

Section 155.40, F.S., authorizes any county, district or municipal hospital organized and existing under the laws of Florida, acting by and through its governing board, to sell or lease the hospital to a for-profit or not-for-profit Florida corporation, and enter into leases or other contracts with a for-profit or not-for-profit Florida corporation for the purpose of operating and managing such hospital and any or all of its facilities. The term of any such lease, contract or agreement and the conditions, covenants and agreements contained therein must be determined by the governing board of the county, district or municipal 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.

Section 155.40(6), F.S., provides that, *unless otherwise expressly stated in the lease documents*, the transaction involving the sale or lease of a hospital *may not be construed* as: a transfer of a *governmental function* from the county, district or municipality to the private purchaser or lessee; constituting a financial interest of the public lessor in the private lessee; or making a private lessee an integral part of the public lessor's decisionmaking process. Under s. 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*.

When 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 First District Court of Appeal found that the apparent purpose of ss.155.40(6) and (7), F.S., are to exempt private lessees from the public records and meetings laws as argued 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 no legislative findings regarding public necessity for the exemption when the subsection was enacted by the Legislature. See, Baker County Press, Inc. v. Baker County Medical Services, Inc., 870 So.2d 189 (Fla. 1st DCA 2004).

## Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation and Tanner Andrews

In 1957, the Florida Legislature created the West Volusia Hospital Authority (the "Authority"), as an independent taxing district (ch. 57-2085, s.1, L.O.F.). 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 as a publicly-owned hospital. In 1993, the Authority entered into negotiations with Memorial Health Systems (MHS) to lease and operate West Volusia Memorial Hospital. This lease was executed on July 28, 1994.

In December 1994, News-Journal, a Florida corporation which publishes *The News-Journal*, a daily newspaper in Daytona Beach, Florida, filed a complaint in the Circuit Court seeking a declaratory decree that the records of MHS were subject to the Public Records Act and the Sunshine Law. The Circuit Court entered a final judgment in favor of MHS. On appeal, the Fifth District Court of Appeal reversed and held that MHS was subject to the Public Records Act and the Sunshine Law. The court concluded that MHS was "acting on behalf of the Authority." See, News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 695 So. 2d. 418, (Fla. 5<sup>th</sup> DCA 1997). The Supreme Court of Florida upheld the Fifth District Court of Appeal, noting that the totality of factors demonstrated that the authorized function of the Authority was transferred and delegated to a private corporation, a lessee. See, Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 383, (Fla. 1999).

On March 23, 2000, MHS advised the Authority that it intended to terminate the lease contract as of midnight September 30, 2000. The Authority was not interested in operating the hospital and eventually worked out a sale agreement with Adventist Health Systems, a not-for-profit Florida corporation, as authorized in s.155.40, F.S. Under the new ownership the name of the hospital was changed to Florida Hospital Deland.

In a recent action, the Circuit Court in Volusia County granted the newspaper's motion for final summary judgment and denied Memorial Hospital-West Volusia, Inc.'s motion for summary judgment.<sup>3</sup> The Circuit Court 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.<sup>4</sup> The Circuit Court ordered that, as of the effective date of the transfer documents, Memorial Health System, a *purchaser (not a lessee) of a public hospital*, must comply with the Public Records and Meetings Laws.<sup>5</sup>

On March 24, 2006, however, the Fifth District Court of Appeal concluded that the public disclosure laws no longer apply because Memorial Hospital-West Volusia, Inc., had purchased the hospital. The Fifth District Court of Appeal reversed the summary judgments entered in favor of the newspaper.

### **Effect of Proposed Changes**

The bill revises the provisions related to the effect of a lease of a public hospital to make stylistic changes to s. 155.40(7), F.S., and remove references to sale in s. 155.40(6), F.S.

The bill expands s. 155.40, F.S., to provide for the effect of a sale of a public hospital. Specifically, the bill tracks the current language related to the lease of a hospital and prohibits the sale of a hospital, unless *expressly* stated otherwise in the sale documents, from being construed as:

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<sup>3</sup> 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).

<sup>4</sup> Id.

<sup>5</sup> Id.

- 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 decisionmaking process.

The bill further tracks the current lease provisions to provide that a purchaser of a hospital, who is operating the hospital after the sale, is not "acting on behalf of" the seller, unless the sale document expressly provides to the contrary.

The bill also adds a public records limitation not currently found in the lease provisions: the purchaser of a hospital operating after a sale of the hospital may not be construed as an "agency" within the meaning of s. 119.011(2), unless the sale document expressly provides to the contrary.

C. SECTION DIRECTORY:

**Section 1.** - Amends s. 155.40, F.S., to revise provisions related to the effect of a lease of a public hospital and to provide for the effect of the sale of a public hospital.

**Section 2.** - Provides that the bill takes effect on July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

This bill may have a fiscal impact on state government expenditures because staff responsible for complying with public records requests will require training relating to the newly created public records exemption.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local government revenues unless the local government is leasing or selling a public hospital.

2. Expenditures:

This bill does not appear to have a fiscal impact on local government expenditures unless the local government is leasing or selling a public hospital.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may have a direct economic impact on lessees or purchasers of public hospitals.

D. FISCAL COMMENTS:

The provisions of the bill may impact the lease or sale of public hospitals.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds. This bill does not reduce the percentage of state tax shared with counties or municipalities. This bill does not reduce the authority that counties or municipalities have to raise revenue.

##### 2. Other:

###### **Public Records**

Article 1, section 24(c) of the Florida Constitution contains three requirements for any general law creating an exemption to the constitutional 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: (1) passed by a two-third votes of each house, (2) state with specificity the public necessity justifying the exemption, and (3) be no broader than necessary to accomplish the stated purpose of the law.

As previously discussed, the First District Court of Appeal previously held s. 155.40(6) and (7), F.S., unconstitutional because there were no legislative findings regarding public necessity for the exemption when the subsection was enacted by the Legislature. It is not clear how the Legislature can simply amend these subsections when they have been found to be unconstitutional.

In addition, it appears that provisions related to the effect of a sale of a public hospital, which are similar to the provisions related to the effect of a lease of a public hospital, would also require legislative findings regarding public necessity under article 1, section 24(c) of the Florida Constitution.

As the bill appears to create what the courts have interpreted as public records exemptions, the bill may require a two-thirds vote for passage.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create, modify, or eliminate rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### **Drafting Issue: Public Necessity Statements**

The sponsor may wish to provide legislative findings regarding the public necessity for the exemption for both the provisions related to the effect of a sale of a public hospital and the provisions related to the effect of a lease of a public hospital.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 8, 2005, the Health Care Regulation Committee adopted a "strike-all" amendment and reported the bill favorably with committee substitute. The amendment provided a public necessity statement for the public records exemption, changed the bill to a public records exemption bill, and provided that the bill will take effect upon becoming law.

On April 17, 2006, the Governmental Operations Committee adopted a "strike-all" amendment and reported the bill favorably with committee substitute. The amendment removed the public records exemption and, instead, provided for the effect of the sale of a public hospital.

The analysis is drafted to the committee substitute.