HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 675 CS Public Records and Public Meetings
SPONSOR(S): Pickens
TIED BILLS: **IDEN./SIM. BILLS:** SB 1190

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care Regulation Committee	11 Y, 0 N, w/CS	Bell	Mitchell
2) Local Government Council		Nelson	Hamby
3) Governmental Operations Committee			
4) Health & Families Council			
5)			

SUMMARY ANALYSIS

Current Florida law specifies that the 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. HB 675 w/CS extends this provision to the purchaser of a public hospital.

The bill also provides that the records and certain portions of governing board meetings of a private corporation that leases or purchases a public hospital are confidential and not subject to the state’s public records and open meetings laws.

The bill provides a public necessity statement which includes findings that:

- the Legislature always intended that private corporations that purchase public hospitals are not subject to public records and open meetings laws;
- private entities do not act on behalf of the public entities from which they purchase or lease a public hospital; and
- if the public records laws and open meetings laws apply to private corporations that purchase or lease public hospitals, public entities may find it difficult, if not impossible, to find a private corporation that is willing to purchase or lease such a hospital.

The bill provides for future review and repeal October 2, 2011, pursuant to the Open Government Sunset Review Act.

The bill specifies that it does not impact existing law relating to discovery of records and information that are otherwise discoverable under the Florida Rules of Civil Procedure, or any statutory provision allowing discovery or presuit disclosure of such records and information for the purpose of civil actions.

The effective date of the bill is upon becoming law. The bill also specifies that certain provisions of the act will apply to all private corporations that have purchased or leased public hospitals regardless of whether such purchase or lease occurred prior to the effective date of the act.

This bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background

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, examine 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"[1] 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 is necessary to meet the public purpose that it serves. An identifiable public purpose if 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[2] 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 the provisions of 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 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

[1] Section 119.15, F.S.
[2] Only the identity of an individual may be exempted under this provision.

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 not any 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. 5th 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.[3] 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.[4] 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.[5]

Effect of Proposed Changes

This bill extends s. 155.40(7), F.S., (which specifies that the *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) to the *purchaser* of such a hospital.

The bill also specifies that the records of a private corporation that leases or purchases a public hospital are confidential and not subject to s. 119.07(1) or s. 24(a), Art. I of the State Constitution, and that the meetings of the governing board of a private corporation that leases or purchases a public hospital are not subject to s. 286.011, or s. 24(b), Art. I of the State Constitution.

The bill provides a public necessity statement that includes findings that:

- the Legislature always intended that private corporations that purchase public hospitals are not subject to public records and open meetings laws;
- private entities do not act on behalf of the public entities from which they purchase or lease a public hospital; and
- if the public records laws and open meetings laws apply to private corporations that purchase or lease public hospitals, public entities may find it difficult, if not impossible, to find a private corporation that is willing to purchase or lease a public hospital.

The bill provides for future review and repeal of the exemptions on October 2, 2011, pursuant to the Open Government Sunset Review Act of 1995.

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[3] 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).
[4] Id.
[5] Id.

Additionally, the bill provides that it does not impact existing law relating to discovery of records and information that are otherwise discoverable under the Florida Rules of Civil Procedure, or any statutory provision allowing discovery or presuit disclosure of such records and information for the purpose of civil actions.

The effective date of the bill is upon becoming law. The bill also specifies that certain provisions of the act will apply to all private corporations that have purchased or leased public hospitals regardless of whether such purchase or lease occurred prior to the effective date of the act.

C. SECTION DIRECTORY:

Section 1.- Amends s. 155.40, F.S., to extend provisions (specifying that a lessee of a public hospital not be construed to be "acting on behalf of" the lessor) to the purchaser of such a hospital.

Section 2. - Provides a public necessity statement.

Section 3. – Provides that the act does not operate to change existing law relating to discover of records and information.

Section 4. - Provides that the bill is effective upon becoming law.

II. 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:

   Unknown. See, FISCAL COMMENTS, below.

2. Expenditures:

   Unknown. See, FISCAL COMMENTS, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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

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 municipalities have to raise revenue.

3. Other:

Section 6, Art. III of the State Constitution requires that, "every law shall embrace but one subject and matter properly connected." The bill may violate this provision because it appears to include substantive language as well as a public records and public meetings exemption.

Section 24(c), Art. I of the State Constitution requires that laws enacted pursuant to that subsection shall contain only exemptions from the requirements of subsections (a) or (b), and shall relate to one subject.

Section 24(c), Art. I of the State Constitution also requires that all public records include a public necessity statement that is narrowly drawn. The language in the bill may need to be narrowed in scope in order to meet this provision in the Constitution.

Section 24(c), Art. I, of the State Constitution, additionally requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, the bill requires a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

The Agency for Health Care Administration has the necessary rulemaking authority to carry out the provisions in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As a private corporation is not subject to Florida's public records and open meeting laws except when acting on behalf of a public agency,[6] such an exemption—particularly one drawn to a law which has been declared unconstitutional—may be problematic.

Section 3 of the bill is unnecessary because public records exemptions do not impact the Florida Rules of Civil Procedure.

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 (CS). The CS provided a public necessity statement for the public records exemption, changed the bill to a public records exemption bill, and provides that the bill will take effect upon becoming law.

The analysis is drafted to the Committee Substitute.

[6] The definition of "agency" for purposes of ch. 119, F.S., includes a "a public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." See, also, s. 24(a) of Art. I of the State Constitution which provides that the constitutional right of acess to public records extends to "any public body, officer, or employee of the state, or persons acting on their behalf…." Recognizing the need to provide criteria for determining when a private entity is acting on behalf of a public agency, the Supreme Court has adopted a "totality of factors" approach which includes: the level of public funding; commingling of funds; whether the activity was conducted on publicly-owned property; whether services contracted for are an integral part of the public agency's chosen decision-making process; whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; the extent of the public agency's involvement with, regulation of, or control over the private entity; whether the private entity was created by the public agency; whether the public agency has a substantial financial interesting the private entity; and for whose benefit the private entity is functioning. News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992).