

The Florida Senate
PROFESSIONAL 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: Higher Education Committee

BILL: CS/SB 2390

INTRODUCER: Higher Education Committee and Senator Atwater

SUBJECT: Public Records/Florida Atlantic University/Hospital Sublessee

DATE: March 28, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Matthews	HE	Fav/CS
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill provides a public records exemption for all records and information in the possession of Boca Raton Community Hospital, a private hospital that will lease land from Florida Atlantic University for a replacement hospital. The exemption will not apply to records relating to medical education programs at the University of Miami Miller School of Medicine at Florida Atlantic University.

The bill also creates a public meetings exemption for board meetings of the hospital, or one of its subsidiaries, at which information is presented that is confidential and exempt under this bill. The public meetings exemption does not apply to a meeting or portions of a meeting where medical education at the University of Miami Miller School of Medicine at Florida Atlantic University is discussed. The records of hospital board meetings that are closed to the public are made confidential and exempt from public records requirements.

The exemption will stand repealed on October 2, 2012, unless reviewed and saved from repeal by the Legislature.

The public necessity for the exemptions is to protect information that, if disclosed, could place the hospital on an unequal footing in the market place and adversely affect its ability to carry out medical treatment, research, and education.

This bill creates section 1004.433 of the Florida Statutes and one undesignated section of law.

II. Present Situation:

Public Records – The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(a) Every person 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. 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 addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ 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.

Unless specifically exempted, all agency 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.⁵

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ 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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

⁵ Section 119.011(11), F.S.

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.¹⁴ Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An exemption meets the three statutory criteria if it:

- (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 would be defamatory or cause unwarranted damage to

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

- the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4)(e), F.S., makes explicit that:

... notwithstanding s. 768.28 [Florida Statutes] or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

¹⁵ Section 119.15(4)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

III. Effect of Proposed Changes:

The bill defines “lessee” to mean “the Boca Raton Community Hospital, Inc., pursuant to the agreement signed June 28, 2006, and approved by the Board of Governors of the State University System, in the implementation of a land lease for the development and operation of a community-university affiliated teaching hospital which will serve as the primary teaching hospital for the regional campus of the University of Miami Miller School of Medicine at Florida Atlantic University.” The public records and public meetings exemptions created in the bill pertain to the Boca Raton Community Hospital, Inc., in its capacity as “lessee.”

The bill makes records and information in the possession of the hospital or a subsidiary thereof, in its capacity as lessee, confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The exemption does not apply to records relating to undergraduate and graduate medical programs at the University of Miami Miller School of Medicine at Florida Atlantic University.

The bill exempts from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution a meeting or portion of a meeting of the board of directors of the hospital or a subsidiary thereof, in its capacity as lessee, at which information is presented that is confidential and exempt under this bill. The exemption does not apply to a meeting or portion of a meeting of the board at which information is presented or discussed that is solely related to the undergraduate and graduate medical programs of the University of Miami Miller School of Medicine at Florida Atlantic University.

This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill provides a statement of public necessity for the exemption—to protect information that, if disclosed, could place the hospital on an unequal footing in the market place and adversely affect its ability to carry out medical treatment, research, and education.

The bill will take effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records

and meetings requirements and provisions governing enforcement and must relate to one subject.

The records and meetings of the board of a private hospital are not subject to the public records and public meetings requirements of Article I, section 24 of the State Constitution, chapter 119, F.S., or s. 286.011, F.S. 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 certain other requirements listed in the statute. In the situation addressed in this bill, a private hospital will be sited on publicly owned land which the hospital will lease. The hospital presumably will remain a private corporation. The proponents of the bill have stated that the hospital anticipates naming the president of Florida Atlantic University to the hospital's board and that the hospital board might need a public records exemption because of the presence of the FAU president on the board. The service of a university president on a private board would not, by itself, make the private corporation subject to public records laws. Records sent to the president of the state university in his capacity as president, or records sent to his university office would be public records unless they were otherwise exempted in law.

C. Trust Funds Restrictions:

None.

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.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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