

OPEN GOVERNMENT SUNSET REVIEW: s. 240.2996(2),(3),&(4), F.S.

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Background

Florida has a long history of providing public access to the records of governmental and other public entities. Article I, s. 24 of the Florida Constitution, expresses Florida's public policy regarding access to public records by providing that:

(a) 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.

The Constitution also expresses Florida's public policy regarding access to public meetings. While the State Constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. The Constitution also provides that any bill that contains an exemption may not contain other substantive provisions.

Public Records and Public Meetings Laws

The Public Records Law, chapter 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

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 or the custodian's designee.

The law (s. 119.011(1), F.S.) defines public records as 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. The Florida Supreme Court has interpreted this definition to encompass all materials made or

received by an agency¹ in connection with official business which are used to perpetuate, communicate or formalize knowledge.²

Section 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the state constitution at which official acts are to be taken are public meetings open to the public at all times. 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.

Section 286.011, F.S., has been held to apply to private entities created by law or by public agencies, as well as to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. The open meetings requirements can apply if the public entity has delegated the performance of its public purpose to the private entity. Although much of the recent litigation regarding the application of the open government laws to private organizations providing services to public agencies has been in the area of public records, courts have, however, looked to the Public Records Law in determining the applicability of the Public Meetings Law.³

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially

¹Section 119.011(2), F.S., defines an "agency" as 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 Supreme Court held that courts should use a "totality of factors" test for determining when a private entity is acting sufficiently on behalf of a public agency to subject it to the public records law. The court set forth a non-exclusive list of 9 factors. (596 So.2d 1029 (Fla.1992), *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*).

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

³ *Government In The Sunshine Manual*, at p. 5 (2000 edition).

amends an existing exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

An 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.

In the year before the repeal of an exemption, the Legislature's Division of Statutory Revision must certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the statutory criteria of an exemption. Any exemption that is not identified and certified is not subject to legislative review and repeal under s. 119.15, F.S. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year's certification after that determination.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

- (1) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (2) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (3) The exemption affects confidential information concerning an entity.

Further, s. 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

- (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?

Additionally, under s. 119.15(4)(b), F.S., 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:

(a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?

(b) Does the exemption protect 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,

(c) Does the exemption protect 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?

Under s. 119.15(4)(e), F.S.,

“notwithstanding s. 768.28, F.S., 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 an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment.”

History

Two provisions of law (ss. 240.2995 and 240.2996, F.S.) specifically relate to university health services support organizations. The 1995 Legislature allowed each university to create a university health services support organization to enter into arrangements with other entities as providers for accountable health partnerships and providers in other integrated health care systems or similar entities. The law (s. 240.2995, F.S.) provides that a university health services support organization may be established to benefit the university academic health sciences center.

Each organization must comply with the following requirements:

- licensure as an insurance company, under chapter 624, F.S., or certification as a health maintenance organization, under chapter 641, F.S., to the extent required by law or rule;
- incorporation as a Florida not-for-profit corporation; and
- provision of an annual financial audit by an independent certified public accountant, in accordance with rules of the Board of Regents.

In addition, the support organization is solely responsible for its acts, debts, liabilities, and obligations. The law specifically states that the state or university does not have any responsibility for the acts, debts, liabilities, and obligations incurred or assumed by the support organization.

The chair of the Board of Regents may appoint a representative to the board of directors and the executive committee of any university health services support organization. The president of the university (or the president's designee) must serve on the board of directors and the executive committee of any university health services support organization established to benefit that university.

The Board of Regents must, by rule, provide for:

- budget, audit review, and oversight by the Board; and
- provision of salary supplements and other compensation or benefits for university faculty and staff employees only as set forth in the organization's budget.

The rules may prescribe conditions with which a university health services support organization must comply in order to be certified and to use property, facilities, or personal services at any state university.

The 1995 legislation also provided that all meetings of a governing board of a support organization are open to the public, unless made confidential and exempt by law. Also, records required by the Department of Insurance to discharge its duties must be made available to the department upon request. The current exemptions and legislative intent for certain public records and public meetings of university health services support organizations were created in 1996 in s. 240.2996, F.S.

Chapter 97-171, L.O.F., provides that university health services support organizations were established to serve as the corporate entities through which public colleges of medicine may participate as partners in integrated health care delivery organizations. The enabling legislation for the exemptions states that the partnerships are needed to expand physician training beyond hospitals and into the community settings in which health care is increasingly being provided, to maintain the patient base necessary for medical education, and to enable medical faculty to continue to generate the clinical income from which the medical schools derive the majority of their operating budgets.

Under the rules for the Board of Regents (6C-9.020, F.A.C.), each university wishing to establish a health services support organization must request Board approval. Upon approval, the organization is considered as certified and authorized to use university property, facilities, and personal services. A university president may request decertification of the organization if he or she determines that it is not serving the best interest of the university. Memoranda of the Chancellor for the State University System provide additional requirements for health services support organizations. Each organization is required to provide a statement about public access to public meetings and public records consistent with s. 240.2996, F.S.

Confidentiality of University Health Services Support Organizations' Records

Chapter 96-171, L.O.F., codified as s. 240.2996, F.S., declares that all meetings of the organization's governing board and all organization records are open and available to the public unless made confidential and exempt by law, in accordance with statutory and constitutional requirements. The law created the following exemptions from the public records and meetings requirements. However, these exemptions do not apply if the organization's governing board votes to sell, lease, or transfer all or any substantial part of the facilities or property of the organization to a nonpublic entity. Also, the law does not preclude discovery of records or information that are otherwise discoverable under the Florida Rules of Civil Procedure or any statutory provision allowing discovery or presuit disclosure in civil actions.

- **Marketing Plans**

The public records exemption applicable to the organization includes plans for marketing services which are, or may reasonably be expected by an organization's governing board to be, provided by an organization's competitors or its affiliated providers. The term "marketing plan" is not otherwise defined. The budget and documents submitted to the organization's governing board as a part of the board's approval of the organization's budget are not confidential and exempt.

- **Managed Care Contracts**

The law provides a definition of the term "managed care" and examples of managed care techniques. Certain managed care contracts relating to the organization's provision of health care services, supporting documentation for such contracts, as well as documents directly relating to the negotiation, performance, and implementation of contracts for managed care or alliance network arrangements are confidential and exempt. However, the law requires the organization to make available upon request the following information: the title and general description of a contract for managed care arrangements; the names of the contracting parties; and the duration of the contract. The exemption for contracts for managed care arrangements is limited in that the contracts become public 2 years after termination or completion of the contract term. Portions of the contract containing trade secrets remain confidential and exempt.

- **Trade Secrets**

The law provides that trade secrets as defined in chapter 688, F.S., the Uniform Trade Secrets Act, are confidential and exempt.⁴ This includes reimbursement methodologies and rates.

- **Evaluations of Health Care Services and the Professional Credentials of Health Care Providers and Physicians**

Records of the peer review panels, committees, governing board, and agents of the organization which relate solely to evaluations of health care services and professional credentials of health care services providers and physicians employed by or under contract with the organizations are confidential and exempt. This exemption is not to be construed to impair any otherwise established rights of an individual health care provider to inspect documents concerning the determination of the provider's professional credentials.

⁴ The law (s. 688.002, F.S.) defines a "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(a) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Confidentiality of University Health Services Support Organizations' Meetings and Related Records

The law also provides an exemption from the public meetings requirements for any portion of governing board, peer review panel, or committee meetings at which confidential and exempt contracts, documents, records, marketing plans, or trade secrets are discussed.

In addition, an exemption from the public records requirements is provided for those portions of any public record generated during meetings closed to the public to discuss confidential and exempt records. Upon request, however, certain contract information must be provided. There is a limited exemption for portions of public records generated during a governing board meeting involving negotiations for managed care contracts, reports of negotiations, and actions by the board. These records become public 2 years after the termination or completion of the contract term. If no contract was executed, the records become public 2 years after the termination of the negotiations.

Petition for the Public Release of Public Records

The law allows a person to petition the court for an order to release those portions of any confidential and exempt public record (e.g., tape recording, minutes, or notes) generated during that portion of a closed governing board meeting. The court's order must contain a finding that: 1) the compelling public interest served by the release of the record exceeds the public necessity in law for maintaining confidentiality; and 2) the release of the record will not damage or adversely affect the interests of private persons, business entities, the university health services support organization, or the affiliated university.

The university health services support organization may petition the court to continue the confidentiality of a public record upon a showing of good cause. The court, in determining good cause, must balance the property, privacy, and economic interests of affected parties with those of the organization and the public interest. As well, the court must find that a substantial public interest is served by the continued confidentiality of the public record for an additional time period. However, the continued exemption may be no longer than is necessary to protect the substantial public interest.

Methodology

The project involved reviewing relevant case law and other materials, as well as the provisions in s. 119.15, F.S., and conducting a survey of the Board of Regents and state universities with university health services support organizations. Follow-up interviews were conducted, as needed, with respondents as well as experts on public records law.

Findings

Existing University Health Services Support Organizations

Since the passage of the enabling legislation, the role of private and public academic health centers in managed care has been extensively discussed in the literature.⁵ The experiences of Florida's academic health centers in managed care have also been discussed.⁶ The University of Florida and the University of South Florida currently have public academic health centers.⁷ The Board of Regents staff reports that these same universities have established the following approved health services support organizations.

- The University of South Florida (USF) Health Services Support Organization Inc.⁸
- The University of South (USF) Physicians Group, Inc.⁹

⁵ See, for example, DeAngelis, C.D. "The Plight of Academic Health Centers," *Journal of the American Medical Association*, May 10, 2000:283;2438-2439. Barzansky, B., Jonas, H.S., Etzel, S.I. "Educational Programs in U.S. Medical Schools, 1998-1999," *Journal of the American Medical Association*, September 1, 1999:282;840-846. Krakower, J.Y., Williams, D.J., Jones, R.F. "Review of U.S. Medical School Finances, 1997-1998," *Journal of the American Medical Association*, September 1, 1999:282;847-854. Blumenthal, D., Campbell, E.G., Weissman, J.S. "The Social Missions of Academic Health Centers," *The New England Journal of Medicine*, November 20, 1997;337; 21

⁶ Florida Senate Budget Committee. "Evaluate Reimbursement Rate Policies for Teaching and Specialty Hospitals." *Report 2000-09*, September 1999; "Study of Methods to Ensure the Availability of Graduate Medical Education Opportunities," *Report 2000-10*, August 1999. Howard, R. "The Value Circle: A Profile of J. Richard Gaintner, M.D.," [CEO, Shands HealthCare] *Physician Executive*, March/April 1999: 25; 16. and Beerman R., Bendell A, Breeden A., Denker A.L., Gallego, G, Harvin V.S., Kontz M.M., Krueger-Jones J.A., Martin M.O., Mass J., Oza K., Perdue M.E., Rogers, J., Sears, S., Williams-Welch A. "University of Miami/Jackson Memorial Medical Center Restructures Its Health Care System for the 21st Century," *Nursing Administration Quarterly*, Spring 1998; 22 (3):18-65.

⁷ The University of South Florida Health Sciences Center includes the College of Medicine, the College of Nursing, and the College of Public Health, as well as affiliated hospitals and clinics. The Health Science Center consists of the six health related colleges of the University of Florida. It is affiliated with Shands at the University of Florida and Shands Jacksonville and their affiliated hospitals. The Health Science Center also contracts with the Veterans Affairs Medical Center in Gainesville for various services.

⁸ This organization is considered active by the University of South Florida. During FYs 1998-1999 and 1999-2000, the organization had no activity. [Written correspondence dated August 13, 1999.]

⁹ The University of South Florida (USF) Physicians Group, Inc., is currently inactive with the Department of State. It was originally incorporated in 1994 as a not-for-profit

- The University of Florida Health Services, Inc.¹⁰
- The University of Florida Jacksonville Healthcare, Inc.

None of these organizations are licensed as an insurer or as a certified health maintenance organization.

Currently, the only existing managed care contracts associated with a university health services support organization are through the University of Florida.¹¹ The university has approximately 74 contracts for managed care arrangements on behalf of the University of Florida Jacksonville Healthcare, Inc. In 1999, the organization operated 30 primary and specialty care clinics.

The only other managed care arrangement involved the University of South Florida Health Services Support Organization, Inc. In 1997, the organization entered into an agreement with FPMBH Clinical Services, Ltd., and U.B.H. Holdings, L.C., to develop and market a managed care behavioral health delivery system in 4 counties, in conjunction with the USF Department of Psychiatry. The contract was terminated in the summer of 1998. There are no current contracts for this organization or the University of Florida Health Services, Inc., although both organizations have retained a corporate structure.

Finding

The creation and dissolution of university health services support organizations is initiated by the university, subject to approval by the Board of Regents (BOR). The organization's expenditure plans are subject to approval by the university president. The articles of incorporation or bylaws for each organization provide that the university president retains control over the use of university resources. The bylaws for each organization provide that changes to bylaws must be

corporation and approved by the Board of Regents as a university health services support organization in 1995. The organization was voluntarily dissolved on April 24, 2000. According to the 1999 audit report, it functioned as the organization responsible for governing the development and management of the group practice of the College of Medicine Faculty Practice Plan. On July 21, 2000, the Board of Regents approved the dissolution of the corporate entity and the plan for distribution of its assets. 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.

¹⁰ According to the University of Florida, this organization is inactive (without current ongoing business); the organization is still listed as active with the Department of State. There were no activities for FY 1999-2000 and none are anticipated for FY 2000-2001. [Annual Budget and Expenditure Report for FY 2000-2001 and written correspondence dated 8/21/00]

¹¹ Response to Senate interim project survey.

approved by the BOR. A statement of public access to records and meetings is contained in the current bylaws of each existing corporation.

BOR policy requires the organization's budget to specifically include certain information (e.g., the revenues and obligations resulting from each contractual arrangement entered into by the organization with health care provider entities, individual providers, and insurers for the delivery of services, as well as other major commitments of organization resources) while maintaining the confidentiality required by s. 240.2996, F.S. This level of detail is not included in either the fiscal data provided in the annual budget and expenditure report for the University of Florida Jacksonville Healthcare, Inc., or the budget information provided to Committee staff for FY 2000-2001.

Records and Meetings

At the University of South Florida, the Department of Administration for the College of Medicine Faculty Practice Plan is responsible for the custody and maintenance of all records related to the exemptions. The Dean of the College of Health Professions maintains the records related to the University of Florida Health Services, Inc., and the office of the Senior Vice President and Chief Financial Officer for the University of Florida Jacksonville Healthcare, Inc., maintains the corporation's records. Files are maintained in secure file cabinets.

The following specific records are affected by the exemption: the organization's contracts for managed care and alliance network arrangements, as well as any documents directly related to the negotiation, performance, and implementation of these contracts; the organization's plans for marketing services provided by, or expected to be provided by, competitors or affiliated providers; documents containing trade secrets of third parties (including reimbursement methodologies and rates); and records of the organization's governing board, peer review panels, committees, or agents solely related to the evaluation of health care services and the credentials of physicians and health care providers employed or under contract with the organization.

Portions of meetings of the organization's governing board, committee, or peer review panel involving the discussion of confidential and exempt contracts, documents, records, market plans, or trade secrets are affected. Also, portions of public records generated during these closed meetings and which contain confidential or exempt information relating to contracts, documents, records, market plans, or trade secrets are affected.

The public records exemption affects health care providers and physicians who are the subject of peer review and credentialing activities, managed care organizations doing business with the organization, community physicians selling their practices to the organization, and universities with academic health centers.

The public records exemption also affects members of the press and other individuals who wish to obtain information about records of contract negotiations generated at closed governing board meetings, prior to its release 2 years after contract termination, contract completion, or termination of negotiations.

The exemption affects those who wish to obtain information about the following records of the organization:

- managed care contracts (other than summary information) prior to their release 2 years after the termination or completion of the contract;
- documents directly related to the performance or implementation of contracts for managed care or alliance network arrangements;
- market plans (other than budget and documents submitted to the organization's governing board as a part of the board's approval of the organization's budget);
- trade secrets; and
- evaluations of health care services and professional credentials of physicians and health care providers employed by or under contract to the organization.

According to respondents, confidential records cannot be obtained by alternative means except as provided for in law (e.g., s. 240.2996(6)&(7), F.S.)

Finding

The analysis of the existing exemptions is primarily based on the current health services support organization that is engaged in managed care arrangements, the University of Florida Jacksonville Healthcare, Inc. According to the response on behalf of the Board of Regents, the inactivity of three other organizations should not be interpreted as evidence of their lack of importance or value to either the medical schools or the Board. Rather, the inactive status indicates that they are serving the intended function. Activity occurs only when there are appropriate opportunities for partnerships in the health care marketplace.

The goal of the exemptions, according to respondents for the University of Florida and the University of South Florida, is to enable the organizations to effectively carry out the statutory function of entering into managed care arrangements for the benefit of the state university academic health centers. The exemption allows the public university health centers to fulfill the missions of educating students, providing medical care to the state's residents, and conducting medical research through competition on an equal basis with other medical professionals with access to patient populations and clinical revenue derived from contracts with managed care organizations and insurers.

The response from the Board of Regents noted that the traditional academic health center patient population is steadily being eroded as more individuals enter managed care systems. In some teaching hospitals, overall admissions of certain

patients for specific procedures has declined so dramatically that some undergraduate and graduate (residency) medical education and training programs are compromised. Further, managed care has placed pressure on the quality of medical education programs by reducing the number of hospital admissions and the lengths of stay. As well, the response noted that managed care organizations are responsible for a decline in the professional fees collected by medical school faculty for the provision of patient care services.

Faculty practice revenues are critical to the financial viability of the state's public medical schools and constitute the single largest source of revenue for the College of Medicine at both the University of Florida (49 percent) and the University of South Florida (44 percent). In order for the Colleges of Medicine to retain their clinical classrooms and generate the faculty practice revenues needed to support their missions of teaching, research, and public service, they must participate with organizations that integrate health care providers and entities that assume risk. The medical schools' ability to form partnerships with successful players in the highly managed and competitive health care marketplace will enhance the financial viability and academic quality of the medical schools.

The respondents for the University of Florida and the University of South Florida, as well as the Board of Regents, recommend reenacting the exemptions with no changes.

Managed Care Contracts

Respondents indicated that efficient and effective administration of the public university academic health centers would be impaired without the exemption. University faculty physicians and other health care providers must provide clinical services to patients in order to provide educational opportunities to students, maintain the professional skills of faculty physicians and other health care providers, provide medical services to underserved communities, and fund the academic health centers' programs. In order to obtain access to patients and receive payment for patient care services, the university must negotiate contracts with managed care organizations and other private insurers who are also negotiating contracts with private physicians and medical groups.

Without the ability to maintain the confidentiality of reimbursement rates, payment methodologies (including physician incentive plans, and business methods and practices) physician data, and other sensitive information, the universities would be unable to successfully obtain critical contracts. Payers would be unwilling to share confidential information and competing providers would unfairly underbid the universities by requesting information related to the university payment rates. Release of this information to competitors of private entities would irreparably damage their ability to successfully operate.

Marketing Plans

According to the respondents, the public purpose served by the exemption for market plans in s. 240.2996, F.S., is the efficient and effective administration of the public university academic health centers. They indicated without the ability to maintain the confidentiality related to market plans, the organizations would be seriously disadvantaged in the marketplace.

The current provisions in s. 240.2996(2)(b), F.S., and s. 240.2996(3), F.S., are similar to the previous exemptions in the law for public hospitals. Prior to 1999, the law included an exemption (s. 395.3035(2)(b), F.S.) from the public records law requirements for strategic plans, including plans for marketing services, which were or were reasonably expected by a public hospital's governing board to be provided by the hospital's competitors. Additionally, there was an exemption (s. 395.3035(4), F.S.) from the public meetings requirements for those portions of governing board meetings involving discussions or reports on written strategic plans, including marketing plans. This exemption was amended in 1999 following a Florida Supreme Court decision involving portions of public hospital board meetings during which strategic plans were discussed.

In *Halifax Hospital Medical Center v. News Journal Corporation*, 724 So.2d 567, (Fla. 1999), the Florida Supreme Court affirmed the holding of the Fifth District Court of Appeal that the exemption in s. 395.3035(4), F.S., is facially unconstitutional.¹² The court agreed with the two lower courts' conclusions that the statutory exemption does not meet the exacting constitutional standard of specificity as to stated public necessity and limited breadth to accomplish that purpose. The court noted that the exemption does not define what is meant by "strategic plan" or "critical confidential information." The Supreme Court, agreeing with the circuit court, stated that the Legislature had created a categorical exemption by exempting all discussion of the strategic plan that reaches far more information than necessary to accomplish the purpose of the exemption. The court also held that the exemption could not be judicially narrowed because the record lacked findings to define information that is "critical and confidential" within the stated purpose of protecting competitive secrecy.

The 1999 changes to s. 395.3035, F.S., included the following:

- Expanded the public records law exemption to include any hospital that is subject to the statutory and constitutional public records requirements.
- Narrowed the public records law exemption for strategic plans to apply to such plans that, if disclosed, could be used by a competitor to frustrate,

¹² *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So.2d 434, (Fla. 5th DCA 1997). The lawsuit challenged the legality of a series of closed meetings in which Halifax Hospital Medical Center and the Southeast Volusia Hospital district negotiated the terms of an agreement to create an interagency holding company.

circumvent, or exploit the plan's purpose before it is implemented and which is not otherwise known or cannot be obtained by legal means.

- Deleted specific reference to written marketing plans as strategic plans exempt from the public records and meetings requirements.
- Amended an exemption from the public meetings law requirements to include portions of hospital governing board meetings at which confidential strategic plans are modified or approved by the governing board.
- Explicitly limited activities permissible during the closed portion of a public meeting during which a written strategic plan is considered to discussion, reports, modification, or approval of the plan.
- Required a hospital governing board that closes a portion of a public meeting for consideration of a written strategic plan to give notice of and conduct an open public meeting to inform the public, generally, of the business activity that is to be implemented from the plan.
- Provided an alternative early release timeframe for transcripts of portions of public meetings closed to the public for purposes of considering a written strategic plan to require release when the strategic plan considered at the closed meeting has been publicly disclosed or implemented to the extent that confidentiality is no longer necessary.
- Defined the term "strategic plan" and clarified what is not included in the term.
- Prohibited a hospital from approving a binding agreement to implement a strategic plan at any closed meeting of the board and explicitly required approval at a properly noticed open meeting.
- Prohibited the boards of two separate public entities from meeting together in a closed meeting to discuss, report on, modify, or approve the implementation of a strategic plan that affects both entities.

Peer Review Panels

Chapter 395, F.S., relates to hospital licensing and regulation, and requires governing boards of each licensed facility to set standards and procedures for the facility and medical staff in considering and acting upon applications for staff membership or clinical privileges. The law requires licensed facilities (as a condition of licensure) to provide for peer review of physicians who deliver health care services at the facility. The focus of the peer review process is on professional practices at the facility to reduce morbidity and mortality and to improve patient care. The law also requires a peer review panel to investigate and determine whether grounds for discipline exist for staff members or physicians. The law (s. 395.0193(7), F.S.) provides that proceedings and records of peer review panels, committees, and governing boards or agents of these entities, are not subject to public inspection; as well, meetings of these entities are not open to the public.

According to the respondents, the identifiable public purpose of the exemption in s. 240.2996, F.S., is to protect information of a sensitive and personal nature concerning individuals. The individuals affected by the exemption are community physicians and other providers who are the subject of the organization's peer review and credentialing process. The respondents noted that many managed care plans require committee approval of the credentials of physicians providing services under the plan. Often this function is delegated to an entity like the health services support organization. In performing this function, the organization receives and evaluates sensitive, personally identifiable information that is not otherwise available to the public.

Trade Secrets

Chapter 688, F.S., the Uniform Trade Secrets Act, provides definitions of improper means of acquisition or disclosure and misappropriation of a trade secret. As well, the law allows a court to enjoin the actual or threatened misappropriation of a trade secret, allows for damages (e.g., recovery of actual loss and unjust enrichment), and the award of attorney's fees in certain circumstances. The law (s. 812.081(2), F.S.) provides a criminal penalty (a third degree felony) for stealing, embezzling, or unauthorized copying of a trade secret, although the definition for a trade secret is different from that in chapter 688, F.S. Section 90.506, F.S., which is part of the Florida Evidence Code, currently provides a privilege for trade secrets. The privilege is not absolute in that a court may order production of requested materials.

There are other provisions of law that make trade secrets as defined in s. 688.002, F.S., confidential and exempt, including s. 408.185, F.S., related to information held by the Office of the Attorney General which is submitted by a member of the health care community pursuant to a request for an anti-trust no action letter. The law (s. 395.3035, F.S.) relating to hospital records, makes trade secrets as defined in s. 688.002, F.S., including reimbursement methodologies and rates, confidential and exempt.

The respondents indicated that the exemption protects information of a confidential nature involving an entity (e.g., trade secrets) the disclosure of which could result in injury in the marketplace. If the confidentiality of confidential information received from private entities (e.g., sensitive reimbursement rate information) cannot be maintained, managed care organizations doing business with the health services support organization and community physicians selling their practices to the corporation would likely be unwilling to enter into partnerships with the medical schools.

Conclusions and Recommendations

Managed Care Contracts

Committee staff recommends reenactment of the public records exemption for managed care contracts, although clarification may be needed as to the applicability of the exemptions in s. 240.2996(2)(a), F.S., for contracts between the university and managed care organizations or others for the benefit of the health services support organization. The public purpose associated with this provision is the efficient and effective administration of the public university academic health centers.

Marketing Plans

The Board of Regents and the two universities recommend reenacting the exemptions in s. 240.2996, F.S., without any changes. However, the First Amendment Foundation noted that the existing provisions in s. 240.2996, F.S., related to market plans, suffer from the overbreadth problem in *Halifax* and recommends amending these provisions to reflect the subsequent changes made to s. 395.3035, F.S. Committee staff concurs with this recommendation. The purpose of the exemption is related to the efficient and effective administration of the public university academic health centers.

Peer Review Panels

According to the University of Florida's Office of the General Counsel, peer review services, pursuant to chapter 395, F.S., are performed through the organization by a panel comprised of University of Florida faculty-physicians.¹³ The exemption for these panels serves the public purpose of protecting information of a personal nature that would defame an individual or cause unwarranted damage to the good name or reputation of an individual. Committee staff recommends reenactment of this provision.

Trade Secrets

Based on the determination that this exemption serves the identifiable public purpose of protecting information of a confidential nature concerning entities, committee staff recommends reenacting the substance of the provisions related to trade secrets.

Other

There are factors related to this review that are beyond its current scope. Chapter 2000-321, L.O.F., relating to governance, repeals ss. 240.2995 and 240.2996,

¹³ Telephone conversation with Office of the General Counsel, University of Florida.

F.S., effective January 7, 2003. Chapter 2000-303, L.O.F., related to the creation of the new College of Medicine at Florida State University, contemplates the creation of not-for-profit corporations to seek affiliation agreements with health care systems and organizations, local hospitals, medical schools, and military health care facilities in specified communities.

There is only one health services support organization that is currently engaged in managed care arrangements as contemplated under s. 240.2995, F.S. Given the significant movement to managed care in Florida, it is recommended that ss. 240.2995 and 240.2996, F.S., be reviewed prior to their repeal by the Senate Committees on Budget, Education, and Governmental Oversight and Productivity, to determine if any changes are needed to the structure of these organizations and the related public records and meetings exemptions.

Although the Committee was not charged with a review of s. 240.2995, F.S., this provision contains issues directly related to the public records and public meetings exemptions in s. 240.2996, F.S. The recommendations related to this provision include the following:

Amend s. 240.2995(6), F.S., to clarify that all meetings of the governing board of a university health services support organization are open to the public in accordance with s. 286.011, F.S., and s. 24(b), Article I of the State Constitution, unless made confidential and exempt by law.

Make technical and minor substantive changes to s 240.2996, F.S., to provide that any portion of a closed meeting must be recorded in a manner that reflects the requirements for closed meetings in other provisions of law.

Appendixes

APPENDIX A

ORGANIZATION BACKGROUND

•**The University of South Florida (USF) Health Services Support Organization, Inc.**, was incorporated as a not-for-profit corporation and a health services support organization in 1996. There is a board of directors. According to the independent audit, the organization had no employees, assets, liabilities, or revenues during the years ended June 30, 1999 and 1998. The stated purposes of the organization are:

- To enter into, for the benefit of the university's academic health sciences center, arrangements with other entities as providers for accountable health partnerships and providers in other integrated health care systems or similar entities.
- To operate a health care consortium.
- To provide facilities and subjects that support and enhance the university's approved program of education, research, and service.
- To provide certain skills, supervision, and personnel.
- To establish, manage, control, operate, govern or participate in an organized system which integrates health care and provides either directly or through arrangements with hospitals, health care systems, other clinical facilities, or specified personnel.
- To own, operate, construct, and lease other medical and related support facilities.
- To provide specified support for the university and its affiliates, educational treatment, or research related to health care, and the study and investigation of the delivery and financing of health care by a prepaid health care delivery and financing system.
- To promote and fund research related to the care of the sick and injured.
- To hold property and any undivided interest, as well as to dispose of property and invest, reinvest or use principal or income.
- To participate in and form joint ventures, partnerships, and other legal entities.
- To participate in activities that promote the general health of Florida's citizens.

•**The University of Florida Health Services, Inc.**¹⁴, was incorporated in 1995 as a not-for-profit corporation. There is a board of directors. The following lists the current purposes of the corporation:

- To promote education, research, and community service related to the care of the sick and injured.
- To create essential clinical practice opportunities for University of Florida students, residents, and fellows.
- To provide support for the University of Florida and its affiliated entities, including but not limited to the Florida Clinical Practice Association, Inc., as long as the organization is qualified as a tax exempt organization.
- To develop or participate in a provider network of sufficient size to manage the medical care of individuals through contractual arrangements, affiliations, and practice acquisitions.
- To invest in, own, operate, construct, and lease other medical and related support facilities.

¹⁴ According to the University of Florida, this organization is inactive (without current ongoing business); the organization is still listed as active with the Department of State.

- To transact all lawful business.
- To provide management activities for affiliated physicians, including services designed to attain economies of scale and reduce practice costs.
- To hold property and any undivided interest, as well as to dispose of property and invest, reinvest or use principal or income.
- To participate in and form joint ventures and other legal entities, subject to certain limitations
- To promote public health through investment and participation in a managed care health care provider network.
- To participate in activities that promote the general health of Florida's citizens.

•**The University of Florida Jacksonville Healthcare, Inc.**,¹⁵ was incorporated as a not-for-profit corporation in 1996. The members of the corporation are all clinical faculty who serve at least .51 full time equivalent (FTE) on the faculty of the University of Florida College of Medicine at the campus in Jacksonville. According to the independent audit, the corporation had a liability to the University of Florida Jacksonville Physicians, Inc., of \$2,159,297 and \$3,376,472 as of June 30, 1999 and 1998, respectively, for operating expenses. The corporation also guaranteed \$6 million health care facilities revenue bonds of the University of Florida Jacksonville Physicians, Inc.¹⁶ The following reflects the current purposes of the organization:

- To promote education, research, and community service related to the care of the sick and injured.
- To create essential clinical practice opportunities for University of Florida students, residents, and fellows.
- To provide support for the University of Florida and its affiliated entities, including but not limited to the University of Florida Jacksonville Physicians, Inc., as long as the organization is qualified as a tax exempt organization.
- To develop or participate in a provider network of sufficient size to manage the medical care of individuals through contractual arrangements, affiliations, and practice acquisitions.
- To invest in, own, operate, construct, and lease other medical and related support facilities.
- To provide management activities for affiliated physicians, including services designed to attain economies of scale and reduce practice costs.
- To hold property and any undivided interest, as well as to dispose of property and invest, reinvest or deal with principal or income.
- To participate in and form joint ventures and other legal entities, subject to certain limitations.
- To promote public health through investment and participation in a managed care health care provider network.
- To transact all lawful business.
- To participate in activities that promote the general health of Florida's citizens.

¹⁵ It was originally incorporated as the Physician's Family Clinic, Inc., in 1981 as a not-for-profit corporation.

¹⁶ Independent financial audit for years ending June 30, 1999 and 1998 and independent auditor's report, Deloitte and Touche. The University of Florida Jacksonville Physicians, Inc., is an approved faculty practice plan corporation that was organized to support the educational, research, and service programs of the University of Florida College of Medicine/Jacksonville.

