



# The Florida Senate

Interim Project Report 2002-220

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Committee on Health, Aging and Long-Term Care

Senator Burt L. Saunders, Chairman

## PUBLIC RECORDS AND PUBLIC MEETINGS EXEMPTION - MANAGED CARE OMBUDSMAN PROGRAM

### SUMMARY

Section 641.67, Florida Statutes, makes the patient records and name or identity of a complainant, including any identified problem, held by the Statewide or District Managed Care Ombudsman Committees confidential and exempt from the Public Records Law. Those portions of meetings of the Statewide or District Managed Care Ombudsman Committees during which any patient records, complainant identities or identified problems are reviewed are as well confidential and exempt from the Public Meetings Law under section 641.68, Florida Statutes. These sections of law are subject to the Open Government Sunset Review Act of 1995, and expire on October 2, 2002, unless reviewed and saved from repeal by reenactment of the Legislature.

Section 119.15(2), Florida Statutes, provides that an exemption is to be maintained only if: the exempted record or meeting is of a sensitive, personal nature concerning individuals; the exemption is necessary for the effective and efficient administration of a governmental program; or the exemption affects confidential information concerning an entity. The Open Government Sunset Review Act of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records and Meetings Laws.

Committee staff has reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995 and finds that without the exemption, the Statewide and District Managed Care Ombudsman Committees would not be able to effectively administer the managed care ombudsman program. Staff also finds that the identifiable public purpose or goal of the exemption is to provide necessary confidentiality to managed care plan subscribers who seek assistance from an ombudsman for otherwise personal, confidential information. In the absence of such current

confidentiality protections, subscribers will be forced to make their personal medical records public information merely for the reason of access to an ombudsman.

Staff recommends that the exemptions to the public records and meetings requirements contained in sections 641.67 and 641.68, Florida Statutes, for medical records, complainant identities and identified problems, be reenacted without substantive changes.

### BACKGROUND

#### *The Open Government Sunset Review Act of 1995*

Section 119.15, Florida Statutes, the "Open Government Sunset Review Act of 1995," establishes a review and repeal process for exemptions to public records or meeting 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 2, unless the Legislature acts to reenact the exemption. Section 119.15(3)(a), Florida Statutes, requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five 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 scheduled repeal of an exemption, the Division of Statutory Revision is required to 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 criteria of an exemption as defined in section 119.15, Florida Statutes. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an

exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Section 119.15(2), Florida Statutes, states that an exemption is to be maintained only if:

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

Further, section 119.15(4)(a), Florida Statutes, requires consideration of the following specific questions as part of the review:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so how?

Additionally, under section 119.15(4)(b), Florida Statutes, 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 paragraph, only information

that would identify the individuals may be exempted.)

- (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 section 119.15(4)(e), Florida Statutes, notwithstanding section 768.28, Florida Statutes, or any other law, neither the state or its political subdivisions nor any other public body shall be made a 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.

### ***Managed Care Ombudsman Program***

The Florida Managed Care Ombudsman Program is a consumer advocacy organization for subscribers of managed care plans. Ombudsman programs are distinctive in that they are independent, volunteer-based entities that seek to address grievances of health care consumers by means of intervention, advocacy and dispute resolution.

The Florida Managed Care Ombudsman Program (MCOP) has a decidedly grassroots background. In approximately 1985, a group of interested health professionals in Broward County formed a group termed "HMO Patient Advocates," whose name was then changed to "Advocates for Patients of Managed Care." This group of approximately 50 to 100 individuals began to unofficially act as advocates for managed care subscribers and became the genesis for the MCOP.

In 1996, the Advocates for Patients of Managed Care became the official MCOP under chapter 96-391, Laws of Florida, to act as a consumer protection and advocacy organization on behalf of all managed care plan subscribers in the state under section 641.60, Florida Statutes, et seq.

At least nine states currently have some type of formal ombudsman or consumer assistance program for managed care subscriber grievance resolution.<sup>1</sup>

<sup>1</sup> Including California, Connecticut, Massachusetts, New Jersey, New York, Pennsylvania, Texas, Vermont and

The MCOP is authorized to have a Statewide Managed Care Ombudsman Committee and 11 district committees under sections 641.60 and 641.65, Florida Statutes. Currently, only four of the 11 district committees are operational – in Broward, Palm Beach, Dade and Charlotte/Lee/Collier Counties. The district committees consist of a minimum of nine and a maximum of 16 members and are directed to: protect the health, safety and welfare of managed care enrollees; receive complaints regarding quality of care from the Agency for Health Care Administration (AHCA) and assist AHCA with resolutions; conduct site visits with AHCA if appropriate; and submit an annual report to the statewide committee detailing activities, recommendations and complaints reviewed under section 641.65, Florida Statutes.

For administrative purposes, the MCOP is located within AHCA under section 641.60(2), Florida Statutes, and AHCA is charged with the responsibility of providing administrative support for the program. AHCA assists in training for the district committees, provides complaint referrals, and maintains a database of referrals and case outcomes.<sup>2</sup>

There are 28 managed care organizations in Florida with approximately six million subscribers (4,805,122 commercial, 689,729 Medicare and 524,969 Medicaid),<sup>3</sup> representing health maintenance organizations (HMOs), prepaid health clinics, Medicaid prepaid health plans, Medicaid primary care case management programs, and other similar Medicaid programs.

As a prerequisite to an HMO obtaining a mandatory Health Care Provider Certificate from AHCA and a Certificate of Authority from the Department of Insurance (DOI), the HMO must establish and maintain an internal subscriber grievance procedure under sections 641.21(1)(e), 641.22(9) and 641.495(9), Florida Statutes. Upon exhaustion of subscriber rights under the internal grievance procedure, the subscriber may have his or her grievance heard by AHCA's Statewide Provider and Subscriber Assistance Panel under section 408.7056(2), Florida Statutes.

The MCOP often assists subscribers by guiding them through the managed care organization's internal grievance process, including: advising subscribers on filling out forms, contacting the organization's staff, discussing terms of coverage and the like.

The MCOP receives referrals from AHCA that originate with the AHCA telephone complaint center. For fiscal year 2000-2001 the MCOP handled 636 disputes, the vast majority of which related to HMOs.

While the MCOP has been in existence since 1996, it has never received funding. MCOP volunteers are free to utilize AHCA district offices' equipment and supplies, but there is not an AHCA office in each of the 11 districts, and no funds are allocated for any travel expenses incurred by the volunteers. Senate Bill 1454 and House Bill 981 for the 2001 legislative session both proposed annual funding for the MCOP of \$50,000, but neither SB 1454 nor HB 981 was passed into law.

#### *Managed Care Ombudsman Confidentiality*

The medical records of a subscriber and the identity of a complainant involved in an ombudsman review are exempt from public records disclosure under section 641.67, Florida Statutes. That portion of any meeting of an ombudsman committee addressing medical records or complainant identity is exempt from public meeting requirements under section 641.68, Florida Statutes. As well, "any problem identified by the ombudsman committee as a result of an investigation" is made exempt under section 641.67(1)(b), Florida Statutes.

The public purpose or goal of maintaining the disclosure exemptions for medical records and complainant identity is primarily to protect information of a sensitive personal nature concerning individuals, the release of which information could cause embarrassment, loss of privacy or harm to reputation or public standing of such individuals. The principal purpose or goal of the exemption for a "problem identified" is instead to allow the state or its political subdivisions to effectively and efficiently administer the ombudsman program, which administration would be significantly impaired without the exemption, and to protect information of a confidential nature concerning managed care entities, the disclosure of which could injure the affected entity in the marketplace.

The nature of the exemption for a "problem identified" is similar to the exemption provided for medical peer review committees and hospital risk management

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Virginia.

<sup>2</sup> While managed care organizations are dually regulated by AHCA and DOI under chapter 641, Florida Statutes, DOI reported that it had no contact with the MCOP.

<sup>3</sup> As of March 31, 2001.

functions under sections 395.0197 and 766.101, Florida Statutes. Without the exemption for a “problem identified” under section 641.67(1)(b), Florida Statutes, there would be a significant disincentive for managed care organizations to candidly discuss issues and cooperate in ombudsman complaint resolution.

## METHODOLOGY

Staff has reviewed sections 641.67 and 641.68, Florida Statutes, and applicable law pursuant to the Open Government Sunset Review Act of 1995. Staff sought the input of chairs of the district ombudsman councils, AHCA, and interested industry associations and sent questionnaires to interested stakeholders.

## FINDINGS

Staff surveyed the district ombudsman council chairs, AHCA, industry associations and interested stakeholders and received the following feedback:

- Ombudsmen report that the specific records or meetings the exemption covers include: patient records, the identity of patients and complainants, and identified problems. Such information may be found on committee meeting minutes, claims logs, committee members’ correspondence and electronic mail, and AHCA call center records. The exemption relates to both the physical records themselves, as well as the portions of meetings wherein such materials are subject to discussion.
- Ombudsmen state that the exemption is narrowly tailored and is applicable only to managed care subscribers involved with grievances with their managed care organizations.
- Ombudsmen note that medical records are made confidential independently of sections 641.67 and 641.68, Florida Statutes, under sections 395.3025(4), and 456.057, Florida Statutes, and under individual health care provider practice acts.
- Ombudsmen report that the information is kept confidential by dissemination only to council members and the subsequent physical safeguarding of such disseminated records. Meeting confidentiality is maintained by requesting that any person, other than a patient or complainant, who has not been afforded attendance through specific waiver of confidentiality by the patient or complainant be asked to leave the meeting room until all confidential material has been discussed.
- Ombudsmen state that without the current exemptions, the specific problems salient to the subscriber grievance could not be discussed, analyzed or resolved. Without the exemptions, the entire ombudsman process would be hindered due to subscribers and would-be-complainants electing privacy and anonymity rather than non-confidential dispute resolution.
- Ombudsmen note that the public purposes for maintaining the exemption include: allowing the state or its political subdivisions to effectively and efficiently administer a governmental program which administration would be significantly impaired without the exemption; and, protecting information of a sensitive personal nature concerning individuals the release of which information would be defamatory to or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize their safety.
- Ombudsmen offer that the information at issue cannot be readily obtained by alternative means. Patient records, the identity of patients and complainants, and identified problems remain confidential in perpetuity.
- Ombudsmen report that there are no incremental costs associated with keeping the documents and portions of meetings at issue confidential.
- Ombudsmen state that the exemption should not be modified and should be reenacted.
- A stakeholder reported that the exemption of “any problem identified by the ombudsman committee as a result of an investigation” under section 641.67(1)(b), Florida Statutes, is unclear. The concern is that if the phrase simply applies to patient or complainant identities in “any problem identified” then the statute should so state, and that if instead the phrase exempts identified problems from public disclosure, then it may impinge on the public’s right of oversight.

## RECOMMENDATIONS

Staff has reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995 and finds that without the exemption, the Statewide and District Managed Care Ombudsman Committees would not be able to effectively administer the managed care ombudsman program. Staff also finds that the identifiable public purpose or goal of the exemption is to provide a forum for subscribers of managed care plans to secure assistance and advocacy in grievance resolution from an ombudsman without sacrificing personal medical privacy. Staff finds that subscribers may be deterred from seeking such assistance if their

otherwise confidential medical records will become public. Further, the repeal of the exemption would act as a deterrent to complainants who elect to stay silent in lieu of publicly revealing their “whistleblower” status. Retention of the exemption as to identified problems out of the public eye will continue to foster candid and honest dispute resolution. Staff finds that the exemption is narrowly tailored to balance the state’s strong public policy of open government and the need

for assurance of personal medical privacy for managed care plan subscribers. Under current law, the exemption protects medical records, identities of complainants, and the nature of problems at issue. Staff recommends that the exemption to the public records and meetings requirements in sections 641.67 and 641.68, Florida Statutes, for managed care ombudsman operations be reenacted without substantive changes.