



# The Florida Senate

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Committee on Domestic Security

Senator Alex Diaz de la Portilla, Chair

## OPEN GOVERNMENT SUNSET REVIEW OF S. 395.1056(1)(2)(3), F.S., EMERGENCY MANAGEMENT PLANS

### SUMMARY

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Chapter 2001-362, L.O.F., created a public records and public meetings exemption for plan components addressing a hospital's response to terrorism. The exemption applies to those portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism as defined by s. 775.30, F.S., and which are filed with or are in the possession of the agency, a state or local law enforcement agency, a county or municipal emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs.

### BACKGROUND

#### Government in the Sunshine

The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians approved an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the State Constitution provides:

- (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

Law<sup>1</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

The term *public records* has been defined by the Legislature in s. 119.011(11), F.S., to include:

... 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24 (c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

Section 286.011, F.S., requires all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, city, or political subdivision at which official acts are to be taken to be public, and held after reasonable notice, with minutes taken.

<sup>1</sup> Chapter 119, Florida Statutes.

### Open Government Sunset Review Act

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. Under s. 119.15(3), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Section 286.0111, F.S. applies s. 119.15, F.S. to the provisions of law which provide exemptions to s. 286.011, F.S. Further, a law that enacts or substantially amends an exemption must state 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 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 the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. 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.

Under the requirements of the Open Government Sunset Review Act, 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.<sup>2</sup>

As part of the review process, s. 119.15(6) (a), F.S., requires the consideration of the following specific questions:

- (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

<sup>2</sup> s. 119.15(2), F.S.

alternative means? If so, how?

The Committee Substitute for Senate Bill 1144 amended the act so that consideration also must be given to whether a record or meeting is protected by another exemption and whether it would be appropriate to merge the exemptions.<sup>3</sup>

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
2. Protects 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; 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 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(8), 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. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

<sup>3</sup> The CS for SB 1144 takes effect October 1, 2005, and therefore, does not technically apply to reviews conducted prior to that time.

## **2001 Legislative Findings**

In creating s. 395.1056, F.S., the Legislature found the public necessity to exempt plan components of a hospital's response to terrorism because those portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism are vital plan components that affect the health and safety of the public.<sup>4</sup> The finding further stated that if security systems or plans, vulnerability analyses, emergency evacuation transportation, sheltering arrangements, post-disaster activities (including provisions for emergency power), communications, food, and water, post-disaster transportation, supplies (including caches), staffing, emergency equipment, individual identification of residents, transfer of records, and methods of responding to family inquiries were made publicly available for inspection or copying, they could be used to hamper or disable the response of a hospital to a terrorist attack. If a hospital's response to an act of terrorism were hampered or disabled, an increase in the number of Floridians subjected to fatal injury would occur.

While some skill would be required to use knowledge of plan components to disable a hospital's response to an act of terrorism, there is ample existing evidence of the capabilities of terrorists to plot, plan, and coordinate complicated acts of terror. The hijacking and crashing of planes, the destruction of the World Trade Center, the attack on the Pentagon on September 11, 2001, as well as the continued and purposeful spread of anthrax in Washington, D.C., other states, and communities within this state, which has resulted in the death of at least one Floridian, provide evidence of such skill.

The aftermath of these events has also showed the importance of viable plans by which hospitals can respond to acts of terror. As a result, the Legislature finds that those portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism and which are filed with the Agency for Health Care Administration, a state or local law enforcement agency, a local emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs must be confidential and exempt and that the emergency management plans of a public hospital are in the custody of a public hospital also must be exempt.

Recent events illustrate the point that international terrorists are as capable and motivated today as they were at the time the Legislature found the exemption necessary in 2001. The bombing of four crowded commuter trains in Madrid on March 11, 2004 left at least 1,800 injured in addition to 191 dead. On July 7, 2005, three subway trains and a bus were bombed in London resulting in 59 dead and over 700

injured. Both attacks were carried out during morning commute hours where crowded conditions would produce maximum casualty effect.

Prior terrorist knowledge of hospital emergency response plans could be used in an attack similar to Madrid or London to disrupt injured transportation and treatment leading to even greater death tolls.

## **Exempted Hospital Emergency Plan Information**

Section 395.1056, F.S., exempts from public disclosure, those portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism as defined by s. 775.30, F.S., and which are filed with or are in the possession of the agency, a state or local law enforcement agency, a county or municipal emergency management agency, the Executive Office of the Governor, the Department of Health, or the Department of Community Affairs. The section also gives the public access exemption to those portions of a comprehensive emergency management plan related to terrorism response that are in the custody of a public hospital.

The public access exemption extends to portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism including those portions addressing security systems or plans; vulnerability analyses; emergency evacuation transportation; sheltering arrangements; post-disaster activities including provisions for emergency power, communications, food and water; post-disaster transportation; supplies, including drug caches; staffing; emergency equipment; and individual identification of residents, transfer of records, and methods of responding to family inquiries.

Any portion of a public meeting which would reveal information contained in a comprehensive emergency management plan which addresses the response of a hospital to an act of terrorism is exempt from the provisions of s. 286.011, F.S., and s.24(b), Art. I of the State Constitution.

## **Emergency Preparedness is Fundamental in Responding to a Terrorist Act**

The goal of Florida's preparedness operation is to help ensure a timely and effective response to, recovery from, and mitigation of the impacts and consequences associated with an emergency/disaster situation.<sup>5</sup>

Effective use of the state's hospital resources in the event of an emergency or terrorist act requires the close cooperation of state, local, and private sector entities. At the state level, the Departments of Health and Community Affairs' Division

<sup>4</sup> Chapter 2001-362, L.O.F.

<sup>5</sup> State of Florida, *Comprehensive Emergency Management Plan 2004*, (February 2004).

of Emergency Management perform disaster planning and direct response roles. The Agency for Health Care Administration (AHCA), as a result of its hospital regulatory mission, performs an associate role in emergency preparedness. While the Agency does not hold individual copies of hospital comprehensive emergency response plans, it does ensure through its regulatory and inspection program that those plans are completed and that required emergency response exercises are conducted.

County and municipal emergency management entities perform liaison and coordination roles in an emergency. These entities have direct contact with the public and private hospitals in their respective regions and assist in coordinating requests for and procurement and distribution of necessary resources. During the conduct of a disaster response, the local emergency operations centers are capable of monitoring available bed spaces in their areas of responsibility and directing transportation of victims to the most appropriate facility.

The final component of the system is the state's public and private sector hospitals that provide the vital medical services needed by disaster victims.

AHCA rules require each hospital to develop and adopt a written comprehensive emergency management plan for emergency care during an internal or external disaster or an emergency, which is reviewed and updated annually. This plan is submitted to the county office of emergency management for review and approval.<sup>6</sup>

These comprehensive emergency management plans contain detailed information about available medical resources and facilities, location of pharmaceutical stores, and other information such as the capabilities of medical, storage, and laboratory facilities throughout the state. Just as the Legislature found in 2001, such information could still be used today by potential terrorists to the detriment of Floridians.

A discussion with nursing home industry personnel indicated that nursing homes, while not included in the exemption, also have a role to play in hospital response to terrorist attacks. Nursing homes have the ability to accept certain patient overflow from hospitals in the event of an emergency.

#### **Freedom of Information Act - Exemption of Security Sensitive Information**

In 1966, Congress passed the Freedom of Information Act (FOIA) to increase public access to federal government documents. All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the

nine exemptions and three exclusions of the FOIA. However, the FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records.<sup>7</sup> Records of federal agencies in Florida are not covered by the state's Public Records Law.<sup>8</sup>

#### **Cooperative Efforts between Florida and Other States, Agencies, and Private Sector Entities**

Florida has a history of cooperation with federal agencies and adjacent states in sharing information about safety and security planning and disaster preparedness. For example, multi-state and federal security and response teams have worked together in Florida for the Super Bowl, the Free Trade Area of the Americas (FTAA) and Organization of American States (OAS) meetings while Florida has provided support to Georgia and the federal government for the G-8 Conference in Savannah. Events such as these have bio-terrorism and chemical weapon components that must be considered in venue security planning. Local hospital resources and availability of medical specialty disaster response teams such as the federal and state Disaster Medical Assistance Teams, which include staffing from statewide hospital personnel resources, are important components in event security planning

During the hurricanes of 2004, Florida received assistance from over 35 other states and Florida regularly sends firefighting teams to assist western states during the wildfire season. Florida has already dispatched several Disaster Medical Assistance Teams and Urban Search and Rescue Teams to assist our neighboring states in response to Hurricane Katrina through an Emergency Management Assistance Compact with these states. These cooperative efforts are critical to the state's successful management of major events and require the sharing of infrastructure and security information in order to be effective.

FDLE and DOH staff reported that without the ability to keep certain security information protected, cooperative efforts with outside agencies and other states would be hampered.

#### **Efforts to Limit Disclosure**

Prior to the September 11, 2001 events, widespread public access existed to information that is now routinely protected. For example, precise locations of hazardous chemicals stored on university campuses was published on the Internet to afford first responders ready access in case of emergency. Public school diagrams likewise are another example of

<sup>7</sup> U.S. Department of Justice, *Freedom of Information Act Reference Guide*, (April 2005).

<sup>8</sup> Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide*.

<sup>6</sup> Chapter 59A-3.078, F.A.C.

formerly readily obtainable information that is now limited in publication. The need to protect similar information related to domestic security was recognized and efforts have been undertaken by custodians to remove it from public access.

As a result, hospital comprehensive emergency management plan component information exempted by s. 395.1056, F.S., is no longer readily obtainable through other public access means.

## **METHODOLOGY**

To complete this review, committee staff researched applicable statutory provisions and federal laws and regulations. Additionally, staff interviewed and surveyed, in conjunction with House of Representatives staff, the Department of Law Enforcement, the Department of Health, and the Agency for Health Care Administration, concerning the use and need for the exemption. In addition, staff spoke with hospital and nursing home industry personnel and a representative of the First Amendment Foundation.

## **FINDINGS**

The 2001 Legislature found that the exemption for hospital comprehensive emergency management plan component information maintained for terrorism response purposes is a public necessity because it contains information that address public safety and security. The exemption allows the State or its political subdivisions to effectively and efficiently provide protections against terrorist attacks and prepare for response to such attacks, the effectiveness of which would be significantly impaired without the exemption. The exemption from public disclosure for those portions of a hospital's emergency management plan addressing a response to terrorism includes security systems or plans; vulnerability analyses; emergency evacuation transportation; sheltering arrangements; post-disaster activities including provisions for emergency power, communications, food and water; post-disaster transportation; supplies, including drug caches; staffing; emergency equipment; and individual identification of residents, transfer of records, and methods of responding to family inquiries.

As discussed in the "Background" section of this report, the Open Government Sunset Review Act prescribes that a public records exemption may be maintained only if it serves an identifiable public purpose, and the statute provides conditions supporting a public purpose finding. It is found that the exemption contained in s. 395.1056, F.S., meets the specified criteria set forth in s. 119.15(6)(b)1, F.S., as it protects confidential information concerning entities, disclosure of which could be detrimental to the safety and security of the public.

During the course of the review, nursing home industry personnel noted that other related entities also have comprehensive emergency management plan components that could be affected by a terrorist act. This suggests that

consideration of additional entity inclusion in the section may be appropriate.

## **RECOMMENDATIONS**

Committee staff recommends the exemption found in s. 395.1056, F.S., be reenacted. The exemption provided for portions of a comprehensive emergency management plan which address the response of a public or private hospital to an act of terrorism and any portion of a public meeting which would reveal information in such a plan continues to be sufficiently compelling to override the strong public policy of open government.

Staff further recommends that the portion of the reenacted statute pertaining to public records be renumbered and included in s. 119.071, F.S., along with other security related public records exemptions. Likewise, the portion of the reenacted statute pertaining to public meetings be renumbered and included in s. 286.1003, F.S., along with other security related public meetings exemptions.