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Committee on Health Care

Senator Durell Peaden, Jr., Chair

## OPEN GOVERNMENT SUNSET REVIEW OF S. 400.119, F.S., LONG-TERM CARE FACILITIES

### SUMMARY

The 2001 Legislature required nursing homes, and encouraged assisted living facilities, to implement internal risk management and quality assurance programs to investigate and analyze the frequency and causes of specific types of adverse incidents. Both types of facilities are required to maintain adverse incident reports and submit reports of adverse incidents to the Agency for Health Care Administration (AHCA). The 2001 Legislature also enacted a public records and public meetings exemption for nursing home and assisted living facility risk management and quality assurance committees' meetings and records related to their work. Under s. 400.119, F.S., records of committee meetings, incident reports filed with the facility's risk manager, notifications to AHCA of the occurrence of an adverse incident, and adverse incident reports submitted to AHCA from the facility are confidential and exempt from the provisions of s. 119.07, F.S., and s. 24(a), Art. I of the State Constitution. The meetings of an internal risk management and quality assurance committee are exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. This statute also specifies that the exemptions are subject to the Open Government Sunset Review Act of 1995 (2004), in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S. (2004), provides that an exemption may be maintained only if the exemption: protects information of a sensitive, personal nature concerning individuals; allows the state or its political subdivisions to effectively and efficiently administer a governmental program; or protects confidential information concerning an entity. The Open

Government Sunset Review Act of 1995 (2004) also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law or Public Meetings Law.

Senate staff has reviewed the exemptions in s. 400.119, F.S., pursuant to the Open Government Sunset Review Act of 1995 (2004), and finds that the exemptions meet the requirements for reenactment. The exemptions allow AHCA to oversee the quality of care provided by the nursing homes and assisted living facilities it licenses, and they allow the Department of Veteran's Affairs to effectively administer the 5 nursing homes and one assisted living facility it operates. The exemptions also protect information of a sensitive personal nature concerning residents and practitioners who may be involved in an adverse incident. Accordingly, staff recommends that the exemptions in s. 400.119, F.S., be reenacted and thereby saved from repeal.

### BACKGROUND

#### *Constitutional Access to Public Records and Meetings*

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.<sup>1</sup> Over the following decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967.<sup>2</sup> These statutes have been amended numerous times since their enactment. In November 1992, the public affirmed the tradition of government-in-the-

<sup>1</sup> Section 1, ch. 5945, 1909; RGS 424; CGL 490.

<sup>2</sup> Chapters 67-125 and 67-356, L.O.F.

sunshine by enacting a constitutional amendment, which guaranteed and expanded the practice.

Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

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 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.<sup>3</sup> Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.<sup>4</sup>

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

- Must state with specificity the public necessity justifying the exemption;
- Must be no broader than necessary to accomplish the stated purpose of the law;

<sup>3</sup> *Shevin v. Bryon, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>4</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

- Must relate to one subject;
- Must contain only exemptions to public records or meetings requirements; and
- May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida’s citizens to discover the actions of their government.<sup>5</sup> The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.<sup>6</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>7</sup> If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances.<sup>8</sup>

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.10, F.S., also provides a first-degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

Under s. 286.011(3), F.S., any public officer violating any provision of the Public Meetings Law is guilty of a noncriminal infraction, punishable by a fine not

<sup>5</sup> *Christy v. Palm Beach County Sheriff’s Office*, 698 So.2d 1365, 1366 (Fla. 4<sup>th</sup> DCA 1997).

<sup>6</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4<sup>th</sup> DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

<sup>7</sup> Attorney General Opinion 85-62.

<sup>8</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

exceeding \$500. In addition, any person who is a member of a board or commission who knowingly violates any provision of the Public Meetings Law is guilty of a second-degree misdemeanor, punishable by potential imprisonment not exceeding 60 days and a fine not exceeding \$500. Section 286.011, F.S., also provides a second-degree misdemeanor penalty for conduct, which occurs outside the state, which would constitute a knowing violation of the Public Meetings Law.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.<sup>9</sup> For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.<sup>10</sup> The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records.<sup>11</sup>

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

Section 119.15, F.S. (2004), 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)(a), F.S. (2004), 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. 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 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.

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 s. 119.15, F.S. 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.

Under the requirements of the Open Government Sunset Review Act of 1995 (2004), 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.

As part of the review process, s. 119.15(4)(a), F.S. (2004), requires the consideration of the following specific questions:

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

Further, under the Open Government Sunset Review Act of 1995 (2004), an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of

<sup>9</sup> *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1<sup>st</sup> DCA 1985).

<sup>10</sup> *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4<sup>th</sup> DCA 1999).

<sup>11</sup> *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

which would be significantly impaired without the exemption;

- 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
- 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.

***Public Records and Meetings Exemptions for Nursing Home and Assisted Living Facility Risk Management and Quality Assurance Committee Meetings, Records, and Reports***

The 2001 Legislature required nursing homes to implement an internal risk management and quality assurance program to investigate and analyze the frequency and causes of specific types of adverse incidents. In that same year, the Legislature authorized assisted living facilities to voluntarily establish a risk management and quality assurance program. Both nursing homes and assisted living facilities are required to report adverse incidents to AHCA.

The 2001 Legislature also enacted public records and public meetings exemptions for nursing home and assisted living facility risk management and quality assurance committees' meetings and records related to their work. Under s. 400.119, F.S., records of committee meetings, incident reports filed with the facility's risk manager, notifications to AHCA of the occurrence of an adverse incident, and adverse incident reports submitted to AHCA from the facility are confidential and exempt from the provisions of s. 119.07, F.S., and s. 24(a), Art. I of the State Constitution. The meetings of an internal risk management and quality assurance committee are exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

***Nursing Home Reporting Requirements***

Under s. 400.147, F.S., every nursing home must establish an internal risk management and quality assurance program to assess resident care practices; review facility quality indicators, facility incident reports, deficiencies cited by AHCA, and resident

grievances; and develop plans of action to correct and respond quickly to identified quality deficiencies. The program must include:

- A designated person to serve as risk manager, who is responsible for implementation and oversight of the facility's risk management and quality assurance program.
- A risk management and quality assurance committee consisting of the facility risk manager, the administrator, the director of nursing, the medical director, and at least three other members of the nursing home's staff.
- Policies and procedures to implement the internal risk management and quality assurance program, which must include the investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents to residents.
- The development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and all agents and employees of the nursing home to report adverse incidents to the risk manager, or to his or her designee, within 3 business days after their occurrence.
- The development of appropriate measures to minimize the risk of adverse incidents to residents.
- The analysis of resident grievances that relate to resident care and the quality of clinical services.

The internal risk management and quality assurance program is the responsibility of the nursing home administrator. Each program must include the use of incident reports to be filed with the risk manager and the facility administrator. The risk manager must have free access to all resident records of the nursing home. As a part of each internal risk management and quality assurance program, the incident reports must be used to develop categories of incidents which identify problem areas. Once identified, procedures must be adjusted to correct the problem areas.

For purposes of reporting to AHCA, the term "adverse incident" means:

- An event over which facility personnel could exercise control and which is associated in whole or in part with the facility's intervention, rather than the condition for which such intervention occurred, and which results in one of the following:
  - Death;

- Brain or spinal damage;
  - Permanent disfigurement;
  - Fracture or dislocation of bones or joints;
  - A limitation of neurological, physical, or sensory function;
  - Any condition that required medical attention to which the resident has not given his or her informed consent, including failure to honor advanced directives; or
  - Any condition that required the transfer of the resident, within or outside the facility, to a unit providing a more acute level of care due to the adverse incident, rather than the resident's condition prior to the adverse incident;
- Abuse, neglect, or exploitation as defined in s. 415.102, F.S.;
  - Abuse, neglect and harm as defined in s. 39.01, F.S.;
  - Resident elopement; or
  - An event that is reported to law enforcement.

The incident reports are part of the workpapers of the attorney defending the nursing home in litigation relating to the facility and are subject to discovery, but are not admissible as evidence in court. A person filing an incident report is not subject to civil suit by virtue of such incident report.

The nursing home must initiate an investigation and notify AHCA within 1 business day after the risk manager or his or her designee has received a report. The notification must be made in writing and be provided electronically, by facsimile device or overnight mail delivery. The notification must include information regarding the identity of the affected resident, the type of adverse incident, the initiation of an investigation by the facility, and whether the events causing or resulting in the adverse incident represent a potential risk to any other resident. The notification is confidential as provided by law and is not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by AHCA or the appropriate health care practitioner regulatory board. AHCA may investigate, as it deems appropriate, any such incident and prescribe measures that must, or may, be taken in response to the incident.

AHCA must review each incident and determine whether it potentially involved conduct by a health care professional who is subject to disciplinary action, in which case the provisions of s. 456.073, F.S., will apply. Under s. 456.073, F.S., the report remains

confidential and exempt from public records requirements until a finding of probable cause is made. If the case is dismissed prior to a finding of probable cause, the report remains confidential and exempt.

Each nursing home must complete the investigation and submit an adverse incident report to AHCA for each adverse incident within 15 calendar days after its occurrence. If, after a complete investigation, the risk manager determines that the incident was not an adverse incident, the facility must include this information in the report. AHCA must develop a form for reporting this information. The report submitted to AHCA must also contain the name of the risk manager of the facility.

The adverse incident report is confidential as provided by law and is not discoverable or admissible in any civil or administrative action, except in disciplinary proceedings by AHCA or the appropriate health care practitioner regulatory board.

AHCA must annually submit to the Legislature a report on nursing home adverse incidents. The report must include the following information arranged by county:

- The total number of adverse incidents.
- A listing, by category, of the types of adverse incidents, the number of incidents occurring within each category, and the type of staff involved.
- A listing, by category, of the types of injury caused and the number of injuries occurring within each category.
- Types of liability claims filed based on an adverse incident or reportable injury.
- Disciplinary action taken against staff, categorized by type of staff involved.

#### ***Assisted Living Facility Reporting Requirements***

Under s. 400.423, F.S., assisted living facilities are authorized to establish a risk management and quality assurance program to assess resident care practices, facility incident reports, deficiencies cited by AHCA, adverse incident reports, and resident grievances and to develop plans of action. Every assisted living facility must maintain adverse incident reports. The definition of adverse incident is the same as that for a nursing home with one exception: abuse, neglect and harm, as defined in s. 39.01, F.S., is not included in the definition. When an adverse incident occurs, an assisted living facility is required to send AHCA a preliminary report within 1 business day and a full report within 15 days. AHCA must annually report to

the Legislature concerning assisted living facility adverse incident reports.

***Annual Report on Adverse Incidents at Nursing Homes and Assisted Living Facilities***

For the period, July 1, 2004 to June 30, 2005, AHCA reported:

- 4,528 reported adverse incidents occurring with associated outcomes. (2,389 reports were from nursing homes and 2,139 were from assisted living facilities.)
- 51 on-site visits to nursing homes and 44 on-site visits to assisted living facilities specifically in response to a reported adverse incident requiring investigations.
- 115 health care practitioner cases opened by the Department of Health in response to adverse incident reports with 39 license revocations or suspensions.<sup>12</sup>

***Statement of Public Necessity***

The 2001 Legislature provided the following statement of public necessity for the exemption to the public records and public meetings laws in s. 400.119, F.S.:

*The Legislature finds that it is a public necessity that information pertaining to the operation of internal risk-management and quality-assurance programs in long-term care facilities licensed under part II or part III of chapter 400, Florida Statutes, be confidential and exempt from public records requirements, and that meetings of quality-assurance committees be closed to the public. The Legislature finds that it is in the interests of the health and safety of the public to require long-term care facilities to operate internal risk-management programs and for the Agency for Health Care Administration to review the operation of these programs. The Legislature finds that these programs are effective in reducing risk to residents and improving quality when facility staff have frank and open internal communication regarding potential resident risks and quality-assurance problems and that public access to these discussions or agency records of these discussions will inhibit this frank and open internal communication.*

<sup>12</sup> Florida Agency for Health Care Administration. *Nursing Home and Assisted Living Facility: Adverse Incidents and Notices of Intent*. July 2005.

***Federal Requirements for Nursing Home Risk Management Records***

Under s. 42 CFR 483.75(o), a nursing home that participates in the Medicare and Medicaid programs must maintain a quality assessment and assurance committee, and the state and the Secretary of Health and Human Services may not require disclosure of the records except as the disclosure relates to compliance with the requirements of this section of federal law. This federal law is narrower than Florida's statute because it does not apply to assisted living facility records, and while the federal law makes the records of a committee meeting confidential it does not close the meeting to the public.

**METHODOLOGY**

Staff reviewed the provisions and applicable law pursuant to the criteria specified in the Open Government Sunset Review Act of 1995 (2004), to determine if the provisions of s. 400.119, F.S., making meetings and specified records of nursing home internal risk management and quality assurance programs exempt from the Public Meetings Law and Public Records Law, should be continued or modified. Staff sent questionnaires to AHCA, the Department of Veterans Affairs, and public nursing homes and assisted living facilities. Staff consulted with representatives of the Florida Health Care Association, the Florida Association of Homes for the Aging, the Florida Long-Term Health Care Association, and The Florida Assisted Living Affiliation, and other interested parties in conducting the Open Government Sunset Review of s. 400.119, F.S.

**FINDINGS**

Section 119.15(4)(a), F.S. (2004), requires that certain questions be answered as part of the review process for a public records or meetings exemption. The review must address the nature of the records, the affected individuals, the public purpose for the exemption, and the availability of the records by alternative means.

***What Specific Records or Meetings Are Affected by the Exemption?***

The exemption affects meetings and records of risk management and quality assurance committees for public nursing homes and assisted living facilities; incident reports filed with the public facility's risk manager; notifications of the occurrence of an adverse incident and adverse incident reports that all nursing homes and assisted living facilities must send to

AHCA; and records held by the Department of Veterans' Affairs concerning the risk management and quality assurance programs in the facilities it operates.

***Whom Does the Exemption Uniquely Affect, as Opposed to the General Public?***

The exemption uniquely affects nursing homes and assisted living facilities and their employees and residents, as well as AHCA and the Department of Veterans' Affairs in their administrative duties. If a health care practitioner were involved in an adverse incident, the exemption would keep the adverse incident report confidential until such time as there was a finding of probable cause by a panel convened by the Department of Health under s. 456.073, F.S.

***What Is the Identifiable Public Purpose or Goal of the Exemption?***

The goal of the exemption is to enable a nursing home or assisted living facility, AHCA, and the Department of Veterans' Affairs to investigate an adverse incident in an environment that is not open to public scrutiny. Many adverse incidents are attributable to procedures in the system rather than to a single individual's error. Thus, if the facility's risk manager could conduct an inquiry in a blamefree environment where all parties involved could communicate without fear that what they said would immediately become a public record, the investigator would be more likely to gather complete information about the incident. Both AHCA and the Department of Veterans' Affairs recommend that the exemption be reenacted.

***Can the Information Contained in the Records Be Readily Obtained by Alternative Means?***

According to AHCA and the Department of Veterans' Affairs, the information cannot readily be obtained by other means.

***Continued Necessity for the Exemptions***

The public purpose for the exemptions is to permit nursing homes and assisted living facilities to operate internal risk-management programs and for AHCA and the Department of Veterans' Affairs to review the operation of these programs. In order for such programs to receive information that could lead to improvements in quality, staff must be able to have frank and open internal communication regarding potential resident risks and quality-assurance problems. Public access to these discussions or agency records of these discussions will inhibit this frank and open internal communication. The exemptions also protect information of a sensitive personal nature concerning residents and practitioners who may be involved in an

adverse incident. For these reasons, the exemption should be reenacted and thereby saved from repeal.

## RECOMMENDATIONS

Senate staff has reviewed the exemptions in s. 400.119, F.S., pursuant to the Open Government Sunset Review Act of 1995 (2004), and finds that the exemptions meet the requirements for reenactment. The exemptions allow AHCA to oversee the quality of care provided by the nursing homes and assisted living facilities it licenses, and they allow the Department of Veteran's Affairs to effectively administer the 5 nursing homes and one assisted living facility it operates. The exemptions also protect information of a sensitive personal nature concerning residents and practitioners who may be involved in an adverse incident. Accordingly, staff recommends that the exemptions in s. 400.119, F.S., be reenacted and thereby saved from repeal.