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Committee on Health Regulation

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## OPEN GOVERNMENT SUNSET REVIEW OF SECTION 381.0273, F.S., PUBLIC RECORDS AND MEETINGS EXEMPTIONS FOR THE FLORIDA PATIENT SAFETY CORPORATION

### Issue Description

Section 381.0273, F.S., makes confidential and exempt from the public records requirements certain information that is contained in patient safety data as defined in s. 766.1016, F.S., or in other records held by the Florida Patient Safety Corporation (corporation or FPSC) and its subsidiaries, advisory committees, or contractors, with certain exceptions. This law makes confidential and exempt information that identifies a patient, the person or entity that reports patient safety data, and a health care practitioner or health care facility, as well as any portion of a meeting held by the corporation or its subsidiaries, advisory committees, or contractors during which information that is confidential and exempt from disclosure pursuant to this law is discussed. Section 381.0273, F.S., will be repealed on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature.

### Background

#### Public Records and Meetings

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection. The term "public record" is broadly defined to mean:

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<sup>1</sup> Section 1390, 1391 Florida Statutes. (Rev. 1892).

<sup>2</sup> Article I, s. 24 of the State Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word "agency" is defined in s. 119.011(2), F.S., to mean "... any state, county, district, authority, or municipal officer,

. . . 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. In addition, the Public Meetings Law, s. 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 Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

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

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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.”

<sup>5</sup> s. 119.011(11), F.S.

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

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

<sup>8</sup> Art. I, s. 24(c) of the State Constitution.

<sup>9</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

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

<sup>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</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).

<sup>14</sup> s. 119.15, F.S.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>15</sup>

The Act also requires the Legislature to consider the following:

- 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?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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

### **The Florida Patient Safety Corporation**

The corporation was created by s. 18 of ch. 2004-297, Laws of Florida, as a not-for-profit corporation. The purpose of the corporation is to serve as a learning organization dedicated to assisting health care providers in this state to improve the quality and safety of health care rendered and to reduce harm to patients. Furthermore, the corporation is to promote the development of a culture of patient safety in the health care system in this state, but it is not to regulate health care providers.<sup>17</sup> The corporation is a patient safety organization as defined in s. 766.1016, F.S.<sup>18</sup>, for purposes of establishing a privilege for patient safety data in civil and administrative actions.

The Legislature assigned several powers and duties to the corporation. The corporation is required to:

- Collect, analyze, and evaluate patient safety data and quality and patient safety indicators, medical malpractice closed claims, and adverse incidents reported to the Agency for Health Care Administration (AHCA) and the Department of Health (DOH) for the purpose of recommending changes in practices and procedures for health care practitioners and facilities;
- Establish a “near-miss”<sup>19</sup> patient safety reporting system;

<sup>15</sup> s. 119.15(6)(b), F.S.

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

<sup>17</sup> s. 381.0271(3)(a), F.S.

<sup>18</sup> Section 766.1016, F.S., defines a patient safety organization as any organization, group, or other entity that collects and analyzes patient safety data for the purpose of improving patient safety and health care outcomes and that is independent and not under the control of the entity that reports patient safety data.

<sup>19</sup> Section 381.0271(7)(a)3.a., F.S., defines “near-miss” as any potentially harmful event that could have had an adverse result, but through chance or intervention in which, harm was prevented.

- Develop and recommend core competencies in patient safety that can be incorporated into undergraduate and graduate health care curricula;
- Develop and recommend programs to educate the public about the role of health care consumers in promoting patient safety; and
- Provide recommendations for interagency coordination of patient safety efforts in the state.

The corporation has engaged contractors to assist in accomplishing its statutory responsibilities. The corporation is subject to the public records and meetings requirements of s. 24, Art. I of the State Constitution, ch. 119, F.S., and s. 286.011, F.S.;<sup>20</sup> however, the Legislature established certain exemptions as provided in s. 381.0273, F.S.

### **Public Records and Public Meetings Exemptions for Patient Safety Data**

Section 381.0273, F.S., also enacted in 2004,<sup>21</sup> specifies that information that identifies a patient or the person or entity that reports patient safety data, as defined in s. 766.1016, F.S.,<sup>22</sup> and that is contained in patient safety data or other records held by the corporation and its subsidiaries, advisory committees, or contractors is confidential and exempt from the Public Records Act and s. 24(a), Art. I of the State Constitution. Additionally, s. 381.0273, F.S., specifies that information that identifies a health care practitioner or health care facility which is held by the corporation and its subsidiaries, advisory committees, or contractors is confidential and exempt from the Public Records Act and s. 24(a), Art. I of the State Constitution. Patient identifying information, information that identifies the person or entity that reports patient safety data or information that identifies a health care practitioner or health care facility made confidential and exempt from disclosure under s. 381.0273, F.S., may be disclosed only:

- With the express written consent of the patient or the patient's legally authorized representative in compliance with any federal or state law, for the patient identifying information;
- With the express written consent of the person or entity reporting the patient safety data to the corporation, with respect to the information that identifies the person or entity that reports patient safety data;
- With the express written consent of the health care practitioner or health care facility, with respect to the information that identifies a health care practitioner or health care facility;
- By court order upon a showing of good cause; or
- To a health research entity if the entity seeks the records or data pursuant to a research protocol approved by the corporation, maintains the records or data in accordance with the approved protocol, and enters into a purchase and data-use agreement with the corporation. The corporation is authorized to deny a request for records or data that identifies the patient, or the person or entity reporting patient safety data if the protocol provides for intrusive follow-back contacts, has not been approved by a human studies institutional review board, does not plan for the destruction of confidential records after the research is concluded, or does not have scientific merit. The agreement must prohibit the release of any information that would permit the identification of any patient or persons or entities that report patient safety data, must limit the use of records or data in conformance with the approved research protocol, and must prohibit any other use of the records or data. Copies of records or data issued according to this provision remain the property of the corporation.<sup>23</sup>

<sup>20</sup> s. 381.0271(2)(c), F.S.

<sup>21</sup> Chapter 2004-70, Laws of Florida (L.O.F.).

<sup>22</sup> Section 766.1016, F.S., defines patient safety data as reports made to patient safety organizations, including all health care data, interviews, memoranda, analyses, root cause analyses, products of quality assurance or quality improvement processes, corrective action plans, or information collected or created by a health care facility licensed under ch. 395, F.S., or a health care practitioner as defined in s. 456.001(4), F.S., as a result of an occurrence related to the provision of health care services which exacerbates an existing medical condition or could result in injury, illness, or death.

<sup>23</sup> Section 381.0273(3)(c), F.S., appears to contain a drafting error since it duplicates s. 381.0273(2)(c), F.S., and does not authorize the corporation to deny a request from a health research entity for records or data that identifies a health care practitioner or health care facility or specify that the purchase and data-use agreement must prohibit release of information that would permit the identification of a health care practitioner or health care facility.

In addition, any portion of a meeting held by the corporation and its subsidiaries, advisory committees, or contractors during which information that is confidential and exempt from disclosure under s. 381.0273, F.S., is discussed is exempt from the Public Meetings Law and s. 24(b), Art. I of the State Constitution.

The Legislature determined that these exemptions were a public necessity because:<sup>24</sup>

- The information that identifies a patient in patient safety data is of a sensitive and personal nature and the release of that information could be defamatory to the patient or could cause unwarranted damage to the name or reputation of the patient,
- The information that identifies the person or entity reporting patient safety data and the information that identifies the health care practitioner and health care facility should be protected because health care practitioners and health care facilities would be unlikely to voluntarily submit patient safety data if their identity were made public and such information could be defamatory to the person or entity or could cause unwarranted damage to the name or reputation of the person or entity, and
- The effectiveness of the corporation would be seriously jeopardized and the ability of the corporation to assist health care practitioners and health care facilities in reducing and preventing injury to patients in the future would be significantly impaired.

## Findings and/or Conclusions

### Constitutional Amendment 7

In 2004, Floridians adopted an amendment to the State Constitution titled “Patients’ Right to Know About Adverse Medical Incidents,” commonly known as Amendment 7.<sup>25</sup> This amendment, in part, provides that patients have a right to access any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident. The identity of patients involved in the incidents must not be disclosed, and any privacy restrictions imposed by federal law must be maintained.

The amendment defines the term “adverse medical incident” to mean medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider<sup>26</sup> that caused or could have caused injury to or death of a patient, including but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

The Florida Supreme Court issued its first opinion on March 6, 2008, in the *Buster Case*<sup>27</sup> related to the application of Amendment 7 and s. 381.028, F.S.,<sup>28</sup> to two malpractice cases. As a part of the Court’s discussion regarding the application of Amendment 7 to existing records and its retroactivity, the Court quoted the amendment’s statement and purpose which was put before the electorate:

The Legislature has enacted provisions relating to a patients’ bill of rights and responsibilities, including provisions relating to information about practitioners’ qualifications, treatment, and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning a particular health care provider’s or facility’s investigations, incidents or history of acts, neglects, or defaults that have injured patients or had the potential to injure patients. This information may be important to a patient. The purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility’s or provider’s adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient’s rights to privacy and dignity, so

<sup>24</sup> See s. 3 of ch. 2004-70, L.O.F.

<sup>25</sup> Article X, s. 25 of the Florida Constitution.

<sup>26</sup> For purposes of Amendment 7, a health care facility includes hospitals, ambulatory surgical centers, and mobile surgical facilities, and a health care provider includes medical doctors, osteopathic physicians, and podiatric physicians.

<sup>27</sup> *Florida Hospital Waterman, Inc., v. Teresa M. Buster, etc., et al.*, 984 So.2d 478 (Fla. 2008).

<sup>28</sup> The Florida Legislature enacted s. 381.028, F.S., in ch. 2005-265, L.O.F., to implement Amendment 7.

that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

The Supreme Court further stated in the *Buster Case*, “Because the statutory restrictions constituted the only barrier to production of this information, doing away with the restrictions by constitutional amendment effectively removed the lone obstacle to access.”

The patient safety data that the corporation, its subsidiaries, advisory committees, or contractors hold pursuant to s. 381.0271, F.S., appears to be a subset of the records to which Amendment 7 applies. Amendment 7 does not appear to limit a patient to acquiring the information directly from a health care facility or provider. Although the Florida Supreme Court did not specifically address the exemptions contained in s. 381.0273, F.S., Amendment 7 seems to override the provisions in s. 381.0273, F.S., that make information that identifies the person or entity that reports patient safety data as defined in s. 766.1016, F.S., and information that identifies a health care practitioner or health care facility which is held by the corporation and its subsidiaries, advisory committees, or contractors pursuant to s. 381.0271, F.S., confidential and exempt, at least from a patient as defined in Amendment 7. Amendment 7 defines a patient as an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

The courts have held that the Public Records Act contains no requirement that simply because the information contained in certain public records might be available from other sources, the person seeking access to those records must first show that he has unsuccessfully sought the information from these sources.<sup>29</sup> It is reasonable to assume that the courts would hold similarly if the corporation attempted to require a patient to first request patient safety data from a health care facility or provider, the AHCA, or the DOH since Amendment 7 does not specify from whom the information may be obtained.

On July 10, 2008, The Florida Hospital Association, the Florida Medical Association, and others filed suit in federal court seeking declaratory and injunctive relief barring enforcement of Amendment 7 as violative of the Constitution of the United States.<sup>30</sup> The suit alleges among other things, that federal laws preempt Amendment 7.

### **The Health Care Quality Improvement Act**

Congress adopted the Health Care Quality Improvement Act of 1986 (HCQIA)<sup>31</sup> to address the overriding national need to provide incentives and protections for physicians to engage in effective professional peer review to help eliminate incompetent medical practice. The HCQIA established federal standards for professional credentialing and peer review and required health care entities, state medical boards, and others such as insurance carriers to report to a National Practitioner Data Bank on activities adversely affecting clinical privileges, licensure, or medical malpractice claims. Hospitals must consult this data bank to learn whether reports have been filed concerning a physician who applies to be on medical staff or for clinical privileges and every two years for physicians on staff or with clinical privileges at the hospital. Congress made the information reported to state and federal authorities under HCQIA confidential and explicitly preempted state laws that provide for lesser incentives, immunities, or protections.

### **Protection of Patient Identifying Information**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>32</sup> and the Privacy Rule<sup>33</sup> establish a set of national standards for the protection of an individual’s health information – called “protected health information.” Broadly, HIPAA defines and limits the circumstances in which an individual’s protected health information may be used or disclosed by covered entities. A covered entity may not use or disclose protected

<sup>29</sup> *Warden v. Bennett*, 340 So. 2d 977, 979 (Fla. 2d DCA 1976).

<sup>30</sup> *Florida Hospital Association; Florida Medical Association; et. al., v. Ana Viamonte, Surgeon General and Secretary of the Florida Department of Health, et. al*, Case No. 4:08cv312-RH/WCS in the United State District Court for the Northern District of Florida Tallahassee Division.

<sup>31</sup> Public Law 99-660.

<sup>32</sup> Public Law 104-191.

<sup>33</sup> 21 C.F.R. Parts 160, 162, and 164, implementing HIPAA.

health information, except either: (1) as the Privacy Rule permits or requires; or (2) as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing. Under these provisions, a covered entity may use and disclose protected health information without the individual's authorization, for the following purposes or situations: (1) to the individual; (2) for treatment, payment and health care operations (this includes activities such as quality assessment and improvement and competency assurance); (3) pursuant to situations where the individual has an opportunity to agree, acquiesce, or object; (4) for incidental use and disclosure; and (5) for public interest and benefit activities (for example, as required by law). The HIPAA and the Privacy Rule contain elaborate provisions to ensure that any other disclosures are de-identified in such a manner as to prevent any type of identification of a patient.

## The Patient Safety and Quality Improvement Act

The federal Patient Safety and Quality Improvement Act of 2005<sup>34</sup> (PSQIA) establishes a structure to improve patient safety and reduce the incidence of events that adversely affect patient safety by facilitating Patient Safety Organizations (PSOs) and other entities collecting, aggregating, and analyzing confidential information reported by health care providers. The federal PSQIA also provides for legal privilege and confidentiality protections to information that is assembled and reported by providers to a PSO or developed by a PSO, which is referred to as patient safety work product,<sup>35</sup> for the conduct of patient safety activities notwithstanding any other provision of federal, state, or local law.

On August 15, 2007, the corporation submitted an initial certification application to the federal Agency for Healthcare Research and Quality to be listed as a PSO under the PSQIA despite the fact that final regulations relating to criteria and procedures for initial certification have not been promulgated yet. The corporation has indicated that it will file additional certification materials immediately upon the federal rules becoming final.<sup>36</sup> If the corporation receives certification as a PSO, it appears that the federal supremacy clause<sup>37</sup> would override any state constitutional or statutory provisions that would make patient safety work product releasable under a public records request or otherwise available to a patient or any other person.

## Similar Statutory Exemptions

Current state laws provide that information collected and discussed as a part of credentialing, peer review, patient safety, medical review committees, and adverse incident reporting are not subject to discovery or introduction into evidence.<sup>38</sup> Furthermore, this information is confidential and exempt from the public records and meetings laws when provided to the AHCA and the DOH when complying with regulatory reporting. However, the Florida Supreme Court's opinion in the *Buster Case* leads one to believe that these protections are no longer constitutional.<sup>39</sup>

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<sup>34</sup> Public Law 109-41.

<sup>35</sup> Patient safety work product is defined in this act to mean any data, reports, records, memoranda, analyses (such as cause analyses), or written or oral statements which: are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization, or are developed by a patient safety organization for the conduct of patient safety activities, and which could result in improved patient safety, health care quality, or health care outcomes; or identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

<sup>36</sup> The Florida Patient Safety Corporation's response to the House and Senate Survey Questionnaire related to this open government sunset review.

<sup>37</sup> Article 6 of the Constitution of the United States, (doctrine of conflict preemption).

<sup>38</sup> See for example ss. 395.0191, 395.0193, 395.0197, 766.1016, and 766.101, F.S.

<sup>39</sup> The Court in the *Buster Case* determined, among other things, that s. 381.028(6)(a), F.S., was unconstitutional.

Section 381.028(6)(a), F.S., states that this section does not repeal or otherwise alter any existing restrictions on the discoverability or admissibility of records relating to adverse medical incidents otherwise provided by law, including, but not limited to, those contained in ss. 395.0191, 395.0193, 395.0197, 766.101, and 766.1016, F.S., or repeal or otherwise alter any immunity provided to, or prohibition against compelling testimony by, persons providing information or participating in any peer review panel, medical review committee, hospital committee, or other hospital board otherwise provided by law, including, but not limited to, ss. 395.0191, 395.0193, 766.101, and 766.1016, F.S. However, the Court did not actually hold that ss. 395.019, 395.0193, 395.0197, 766.101, and 766.1016, F.S., were unconstitutional, although that is a reasonable application of the Court's opinion.

## Comments from Interested Parties

The Florida Hospital Association believes that it is essential that the confidentiality and public record exemptions found in s. 381.0273, F.S., be maintained. They state that the importance of confidentiality has been repeatedly demonstrated by safety systems ranging from military aviation safety programs to the NASA – Aviation Safety Reporting System. Confidentiality is the common element that enables a safety system to be effective.<sup>40</sup> The corporation also believes that the provisions in s. 381.0273, F.S., should be retained as a safety net if the PSQIA or Amendment 7 is construed in such a way as to make its provisions necessary.<sup>41</sup>

## Conclusion

The exemptions in s. 381.0273, F.S., are intended to protect from disclosure identifying information related to a patient, persons and entities reporting information, and health care practitioners or health care facilities that is in the possession of the corporation and its subsidiaries, advisory committees, or contractors. These exemptions are intended to protect the identity of the persons and entities involved in adverse incidents, near-miss occurrences, and medical malpractice claims, whether the information is in a document held by or discussed during a meeting of the corporation and its subsidiaries, advisory committees, or contractors, to encourage the unfettered submission of the data to the corporation.

The federal HCQIA and the PSQIA provisions that protect information related to credentialing, peer review, and health care provider patient safety endeavors and preempt state disclosure provisions, create legal uncertainty regarding the effect of Amendment 7 on disclosure of adverse medical incident information in the possession of the corporation. This uncertainty may not be resolved until specifically addressed in the courts. In addition, the full extent of the application of Amendment 7 to provisions in state law, such as those related to credentialing, peer review, patient safety, medical review committees, and adverse incident reporting likewise remain legally uncertain.

Amendment 7, even if determined constitutional and not preempted by federal law, only applies to patients accessing a limited set of adverse incident records. The scope of responsibility for the corporation is broad enough to include analysis of adverse incidents and near-miss incidents of a wider range of health care facilities and health care providers than those subject to Amendment 7. Therefore, reenacting the exemptions would protect the release of patient safety data to other persons, perhaps competitors, and would protect the release of patient safety data related to the larger group of health care facilities and practitioners.

By protecting these identities, the corporation will have access to more extensive data, analyses, and reports from a variety of sources. This will facilitate assimilating the data and analyzing recurring occurrences or trends in order to recommend changes in practices and procedures to improve patient safety efforts in the state. Without access to the data, the corporation's mission is thwarted.

## Options and/or Recommendations

Senate professional staff recommends that the exemptions from the public records and meetings laws in s. 381.0273, F.S., be reenacted in light of the legal uncertainty concerning the application of Amendment 7 and potential federal preemption related to disclosure of patient safety data. The drafting error discussed in footnote 23 in s. 381.0273(3)(c), F.S., should also be corrected.

<sup>40</sup> Correspondence to the Florida Senate Health Regulation Committee and the Florida House of Representatives Committee on State Affairs from the Florida Hospital Association dated August 11, 2008.

<sup>41</sup> The Florida Patient Safety Corporation's response to the Survey from the Florida Senate Health Regulation Committee and the Florida House of Representatives Committee on State Affairs dated July 21, 2008.