

CHAPTER 98-330

Committee Substitute for House Bill No. 3585

An act relating to public records and meetings; creating s. 395.3036, F.S.; providing that when a public lessor complies with the public finance accountability provisions of s. 155.40(5), F.S., with respect to the transfer of any public funds to a private lessee, the records of a private corporation that leases a public hospital or other public health care facility are confidential and exempt from public records requirements, and the meetings of the governing board of such corporation are exempt from public meeting requirements if the corporation meets specified criteria; providing for future review and repeal; providing a finding of public necessity; providing for the continued applicability of the Florida Rules of Civil Procedure and statutory provisions relating to discoverability in civil actions to records and information made exempt in the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 395.3036, Florida Statutes, is created to read:

395.3036 Confidentiality of records and meetings of corporations that lease public hospitals or other public health care facilities.—The records of a private corporation that leases a public hospital or other public health care facility are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and the meetings of the governing board of a private corporation are exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution when the public lessor complies with the public finance accountability provisions of s. 155.40(5) with respect to the transfer of any public funds to the private lessee and when the private lessee meets at least three of the five following criteria:

(1) The public lessor that owns the public hospital or other public health care facility was not the incorporator of the private corporation that leases the public hospital or other health care facility.

(2) The public lessor and the private lessee do not commingle any of their funds in any account maintained by either of them, other than the payment of the rent and administrative fees or the transfer of funds pursuant to subsection (2).

(3) Except as otherwise provided by law, the private lessee is not allowed to participate, except as a member of the public, in the decisionmaking process of the public lessor.

(4) The lease agreement does not expressly require the lessee to comply with the requirements of s. 119.07(1) and s. 286.011.

(5) The public lessor is not entitled to receive any revenues from the lessee, except for rental or administrative fees due under the lease, and the lessor is not responsible for the debts or other obligations of the lessee.

Section 2. (1) The Legislature finds that it is a public necessity that all records of a private corporation and all meetings of the governing board of the private corporation be confidential and exempt from the public records and public meeting laws of this state when the private corporation leases a public hospital or other public health care facility from a public entity in accordance with the terms of this act. The Legislature further finds that private corporations have entered into such leases in reliance on the legal standard governing the application of the public records and open meeting laws to such lease agreements which was set forth in case law existing at the time of the transaction. That standard provided that such private lessees were not "acting on behalf of" the public entity and, therefore, not subject to the state's public records laws so long as the public entity did not retain control over the private lessee. No one factor was used to determine whether the public entity exerted control; instead a "totality of factors" was analyzed and the decision made on the balance of those factors. In a recent decision, however, the Fifth District Court of Appeal has now applied the standard in a manner that may cause more lessees to be subject to public records and meetings requirements. The Legislature finds that the effect of the decision has been:

(a) To create uncertainty with respect to the status of records and meetings under existing lease arrangements; and

(b) To create a disincentive for private corporations to enter into such lease agreements in the future.

(2) Public entities have chosen to privatize the operations of their public hospitals and public health care facilities in order to alleviate three problems that pose a significant threat to the continued viability of Florida's public hospitals:

(a) A financial drain on the facilities from their forced participation in the Florida Retirement System;

(b) The competitive disadvantage placed on these facilities vis a vis their private competitors resulting from their required compliance with the state's public records and public meeting laws; and

(c) State constitutional restrictions on public facility participation in partnerships with private corporations as a result of the limitations contained in the State Constitution. For years, the Legislature has approved and encouraged these leases, first through special acts that it has adopted authorizing the lease agreements and, more recently, through the adoption of section 155.40, Florida Statutes, which provides for the conversion of public hospital facilities to private operation by lease, as a means to provide public entities with the necessary flexibility to use these public assets in a manner that best serves the interests of the public. Through such lease arrangement, public entities have been able to obtain substantial and oftentimes desperately needed private capital investment into these facilities and to relieve the oftentimes burdensome drain on public tax revenues which resulted from public operation.

(3) In the absence of a defined and, therefore, predictable statewide standard for determining when the public records and public meetings laws apply to future lease agreements, public entities may find it difficult, if not impossible, to find a private corporation that is willing to enter into a lease to operate the public hospital or other public health care facility. This, in turn, could force the public entity:

(a) To close the hospital or other health care facility, which would result in a reduction in health care services to the public;

(b) To sell the hospital or other health care facility, which sale, if the facility has deteriorated because of inadequate capital investments over time, will likely be at a loss; or

(c) To continue operating the hospital or other health care facility using public tax dollars to subsidize recurring losses. None of these options is in the best interest of the public.

(3) The Legislature, therefore, finds that it is a public necessity for it, through this act, to clarify when the public records and public meeting laws apply to private lessees of public hospital or other public health care facilities. The Legislature further finds that it is a public necessity for these private lessees to be exempt from the public records and public meetings laws of the state so long as, applying the standard codified by this act, the public entity does not retain control over the private entity.

Section 3. This act does not change existing law relating to discovery of records and information that are otherwise discoverable under the Florida Rules of Civil Procedure or any statutory provision allowing discovery or pre-suit disclosure of such records and information for the purpose of civil actions.

Section 4. This act shall take effect upon becoming law and shall apply to existing leases and future leases of public hospitals and other health care facilities.

Became a law without the Governor's approval May 30, 1998.

Filed in Office Secretary of State May 29, 1998.