Public Records -- Public Hospitals -- Sunshine Law

Number: AGO 2014-10

Date: November 14, 2014

Subject:
Public Records -- Public Hospitals -- Sunshine Law

Mr. Marlin M. Feagle
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Post Office Box 1653
Lake City, Florida 32056-1653

RE: GOVERNMENT IN THE SUNSHINE – PUBLIC RECORDS – STRATEGIC PLANS – PUBLIC HOSPITALS – whether evaluation of public hospital for possible sale or lease would qualify as "strategic plan" which would be confidential and exempt for open meetings and public records laws. ss. 119.07, 155.40, 286.011, and 395.3035, Fla. Stat.

Dear Mr. Feagle:

As attorneys for Lake Shore Hospital Authority of Columbia County, you have been directed by the board of trustees of the authority to request my opinion on substantially the following questions:

1. Would evaluations conducted pursuant to section 155.40(5), Florida Statutes, constitute a "strategic plan" as described in section 395.3035(5), Florida Statutes, for the purpose of keeping the plan confidential and exempt from section 119.07(1), Florida Statutes, the Public Records Law, and Article I, section 24(a) of the Florida Constitution?

2. Would evaluations conducted pursuant to section 155.40(5), Florida Statutes, constitute a "strategic plan" as described in section 395.3035(4)(a), Florida Statutes, for the purpose of holding a closed meeting exempt from section 286.011, Florida Statutes, the Government in the Sunshine Law, and Article I, section 24(b) of the Florida Constitution?

In sum:

An evaluation conducted pursuant to section 155.40(5), Florida Statutes, for purposes of the sale or lease of a public hospital may not be characterized as a "strategic plan" for the operation of a hospital as that term is used in section 395.3035, Florida Statutes, for purposes of confidentiality and exemption from the Government in the Sunshine Law and the Public Records Law.

According to information you have submitted, the Lake Shore Hospital Authority board of trustees is involved in the evaluation process legislatively required by section 155.40(5), *et seq.*, Florida Statutes. That statute requires the governing board of the hospital to perform an evaluation of the possible benefits to an affected community of the sale or lease of hospital facilities owned by the board to a not-for-profit or for-profit entity. The authority has complied with

the statute and desires to hold a meeting to discuss the evaluations and information received by the board including how the board should proceed to make and receive offers regarding the possible sale or lease of the authority's facilities. The board of trustees asks whether these evaluations undertaken pursuant to section 155.40, Florida Statutes, would constitute a "strategic plan" as that term is described in section 395.3035(4)(a), Florida Statutes, such that the portions of the meeting to discuss the strategic plan would be exempt from the Government in the Sunshine Law and whether, under section 395.3035(5), Florida Statutes, any public records of such meetings would be confidential and exempt. Thus, I understand your question to be whether evaluations conducted pursuant to section 155.40(5), Florida Statutes, could be considered "strategic plans" as that term is used in section 395.3035, Florida Statutes.

Section 155.40, Florida Statutes, provides for the sale or lease of county, district, or municipal hospitals to a profit-making or a non-profit entity for the purpose of operating the hospital and its facilities. Subsection (5) of the statute requires the governing board of the hospital to commence an evaluation of the possible benefits of such a sale to the community no later than December 31, 2012. The governing board of the hospital must find that the sale, lease, or contract of the hospital is in the best interests of the affected community and is required to substantiate its finding.[1]

Specifically, subsection (5) states that in the course of evaluating the benefits of the sale or lease of hospital facilities, the board shall:

"(a) *Conduct a public hearing* to provide interested persons the opportunity to be heard on the matter.
(b) *Publish notice* of the public hearing in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital or health care system are located and in the Florida Administrative Register at least 15 days before the hearing is scheduled to occur.
(c) Contract with a certified public accounting firm or other firm that has substantial expertise in the valuation of hospitals to render an independent valuation of the hospital's fair market value.
(d) Consider an objective operating comparison between a hospital or health care system operated by the district, county, or municipality and other similarly situated hospitals, both not-for-profit and for-profit, which have a similar service mix, in order to determine whether there is a difference in the cost of operation using publicly available data provided by the Agency for Health Care Administration and the quality metrics identified by the Centers for Medicare and Medicaid Services Core Measures. The comparison must determine whether it is more beneficial to taxpayers and the affected community for the hospital to be operated by a governmental entity, or whether the hospital can be operated by a not-for-profit or for-profit entity with similar or better cost-efficiencies or measurable outcomes identified by the Centers for Medicare and Medicaid Services Core Measures. The comparison must also determine whether there is a net benefit to the community to operate the hospital as a not-for-profit or for-profit entity and use the proceeds of the sale or lease for the purposes described in this section.
(e) *Make publicly available* all documents considered by the board in the course of such evaluation.
1. Within 160 days after the initiation of the process established in this subsection, the governing board shall publish notice of the board(s findings in one or more newspapers of general circulation in the county in which the majority of the physical assets of the hospital are located

and in the Florida Administrative Register.
2. This evaluation is not required if a district, county, or municipal hospital has issued a public request for proposals for the sale or lease of a hospital on or before February 1, 2012, for the purpose of receiving proposals from qualified purchasers or lessees, either not-for-profit or for-profit." (e.s.)

Clearly, the Legislature was concerned that this process be open and transparent to the public and sought to ensure that it was by requiring public notice and public hearings.

Chapter 395, Florida Statutes, relates to hospital licensing and regulation. Section 395.3035(1), Florida Statutes, provides that

"All meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public in accordance with s. 286.011 and s. 24(b), Art. I of the State Constitution and chapter 119 and s. 24(a), Art. I of the State Constitution, respectively, unless made confidential or exempt by law."

Thereafter, the statute provides for a number of exemptions and for the confidentiality of certain hospital records and meetings. Subsection (2)(b) makes a strategic plan "the disclosure of which would be reasonably likely to be used by a competitor to frustrate, circumvent, or exploit the purpose of the plan before it is implemented and which is not otherwise known or cannot otherwise be legally obtained by the competitor" confidential and exempt from the provisions of the Public Records Law and Article I, section 24(a) of the Florida Constitution. Any portions of a board meeting at which a written strategic plan that is confidential under subsection (2) is discussed, reported on , modified, or approved by the governing board is exempt from the open meetings law, section 286.011, Florida Statutes, and Article I, section 24(b), Florida Constitution. All portions of the board meeting which are closed must be recorded by a certified court reporter. The content of the closed meeting shall be restricted "to discussion, reports, modification, or approval of a written strategic plan."[2]

The statute specifically defines the term "strategic plan" for purposes of section 395.3035, Florida Statutes:

"(6) For purposes of this section, the term "strategic plan" means any record which describes actions or activities to:
(a) Initiate or acquire a new health service;
(b) Materially expand an existing health service;
(c) Acquire additional facilities by purchase or by lease;
(d) Materially expand existing facilities;
(e) Change all or a material part of the use of an existing facility or a newly acquired facility;
(f) Acquire another health care facility or health care provider;
(g) Merge or consolidate with another health care facility when the surviving entity is an entity that is subject to s. 24, Art. I of the State Constitution;
(h) Enter into a shared service arrangement with another health care provider; or
(i) Any combination of paragraphs (a)-(h).

The term 'strategic plan' does not include records that describe the existing operations of a

hospital or other health care facility which implement or execute the provisions of a strategic plan, unless disclosure of any such document would divulge any part of a strategic plan which has not been fully implemented or is a record that is otherwise exempt from the public records laws. Such existing operations include, without limitation, the hiring of employees, the purchase of equipment, the placement of advertisements, and the entering into contracts with physicians to perform medical services. Records that describe operations are not exempt, except as specifically provided in this section."

Thus, it appears that a "strategic plan" as described in section 395.3035(6), Florida Statutes, refers to operational business decisions necessary to market the services of public hospitals and provide them with an opportunity to compete with private for-profit hospitals.[3] The evaluation required by the Legislature in section 155.40, Florida Statutes, seeks to determine whether the sale, lease, or contract of the public hospital to another business entity would serve the best interests of the affected community. These two separate undertakings of hospital boards do not appear to be similar in focus and direction such that an evaluation conducted pursuant to section 155.40(5), Florida Statutes, would constitute a "strategic plan" as described in section 395.3035(5), Florida Statutes.

Further, section 395.3035(4)(b), Florida Statutes, specifically limits the content of a closed board meeting to consider strategic plans to "discussion, reports, modification, or approval of a written strategic plan." As an exception to the general requirement in subsection (1) that "[a]ll meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public[,]" this language must be read narrowly. Where a statute sets forth exceptions, no others may be implied to be intended.[4] Thus, I cannot extend the confidentiality provisions of section 395.3035, Florida Statutes, for a strategic plan for the operation of the hospital to cover an evaluation for purposes of the sale or lease of a public hospital under section 155.40, Florida Statutes.

Similarly, section 395.3035(5), Florida Statutes, makes public records generated at a closed meeting held to consider a strategic plan confidential and exempt from the Public Records Law only if they are "generated at [a meeting] . . . pursuant to this section[.]" A strict reading of this language would not permit the extension of the confidentiality to a meeting held to discuss an evaluation pursuant to section 155.40, Florida Statutes.

In sum, it is my opinion that an evaluation conducted pursuant to section 155.40(5), Florida Statutes, for purposes of the sale or lease of a public hospital may not be characterized as a "strategic plan" for the operation of a hospital as that term is used in section 395.3035, Florida Statutes, for purposes of confidentiality and exemption from the Government in the Sunshine Law and the Public Records Law.

Sincerely,

Pam Bondi
Attorney General

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[1] Section 155.40(1), Fla. Stat.

[2] Section 395.3035(4)(b), Fla. Stat.

[3] *See* Justice Overton's concurrence and dissent in *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 at 571 (Fla. 1999) (in which the majority found s. 395.3035, Fla. Stat., unconstitutional because it did not contain a definition of the term "strategic plan"). Justice Overton was providing his view of the meaning of the phrase "strategic plan" prior to the Legislature's amendment of s. 395.3035, Fla. Stat., to include a definition of the term.

[4] *See, e.g., Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Biddle v. State Beverage Department*, 187 So. 2d 65, 67 (Fla. 4th DCA 1966); *Williams v. American Surety Company of New York*, 99 So. 2d 877, 880 (Fla. 2d DCA 1958).