IN THE SUPREME COURT OF FLORIDA

HALIFAX HOSPITAL MEDICAL CENTER,
an independent taxing district of
the State of Florida,

Appellant,

v.

NEWS-JOURNAL CORPORATION,
a Florida corporation,

Appellee.
_____/

CASE NO: 92,047

APPELLANT'S INITIAL BRIEF

Appeal of a Final Order of the District Court
of Appeal, Fifth District of Florida
Case No. 96-3115

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PRELIMINARY STATEMENT

Halifax Hospital Medical Center, Appellant, and South East Volusia Hospital District were the co-defendants below and will be referred to herein respectively as "Halifax" and "South East Volusia Hospital." Halifax is an independent special taxing district established by the Florida Legislature to provide hospital and other health care services to Volusia County residents regardless of ability to pay. Ch 79-577, Laws of Florida, as amended. Halifax is governed by a Board of Commissioners, which will be referred to herein as the "Board." Because Halifax is a political subdivision of the State of Florida, the meetings of its Board and the records of such meetings are generally open to the public pursuant to Art. I, § 24(c) of the Florida Constitution. The public's constitutional right to access the Boards' meetings and records is referred to herein as the "public right of access." Appellee, The News-Journal Corporation, was the plaintiff below and will be referred to herein as "News-Journal." News-Journal is a daily newspaper of general circulation in Volusia County, Florida. The Record On Appeal is herein referred to as "R-" and the Appendix to Initial Brief of Appellant is herein referred to as "A-."

STATEMENT ON JURISDICTION

This appeal is from a decision of the District Court of Appeal, Fifth District, which did two things. First, the decision certified the following question to be a "critical issue of statewide concern:"

> IS THE EXEMPTION CONTAINED IN § 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE I, § 24(b) OF THE FLORIDA CONSTITUTION?

Second, the decision affirmed the Final Judgment of the trial court, which declared § 395.3035(4), Fla. Stat. unconstitutional.

By Order of December 24, 1997, this Court informed the parties that it had postponed its decision on jurisdiction, as if it had been asked simply to consider a question certified by a district court of appeal to be of great public importance. That, however, should not be the case. When the District Court of Appeal, Fifth District affirmed the trial court's Final Judgment, which declared a state statute unconstitutional, it triggered this Court's mandatory appeal jurisdiction under Article V, Section 3(b)(1) of the Florida Constitution and Rule 9.030(a)(1)(A)(ii), Fla. R. App. P. See, e.g., State v. Cohen, 568 So. 2d 49 (Fla. 1990); State v. Jenkins, 469 So. 2d 733 (Fla. 1985); Gardner v. Johnson, 451 So. 2d 477 (Fla. 1984); Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983).

STATEMENT OF THE FACTS

At issue is the constitutionality of § 395.3035(4), Florida Statutes (1995), which exempts from the public right of access those portions of public hospital board meetings at which written strategic plans are discussed or reported on.

In 1992, the Constitution of the State of Florida was amended by adoption of Article I, Section 24(c), which required all meetings of any collegial public body, such as the Halifax Hospital Board, to be open to the public. The amendment, however, permits the Legislature to provide by general law for the exemption of meetings, "provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

In 1995, the Florida Legislature enacted Chapter 95-199, Laws of Florida (§§ 395.3035(4) and (5), Florida Statutes), creating exemptions to the public right of access to allow those portions of public hospital board meetings at which written strategic plans are discussed or reported on to be closed and to allow all records generated at such closed meetings to be withheld from public access for up to three years. (Hereinafter, these exemptions will collectively be referred to as the "Exemption."). Although different commentators may use different words, they all describe "strategic planning" as a process whereby a hospital "looks at the health care industry, looks at its local market, determines where it wants to be in that market, identifies the major changes needed to achieve that position, and develops plans to accomplish those changes." R-102. When such plans are committed to writing for adoption by a public hospital's governing board, they become the type of written "strategic plans" the Legislature intended to exempt from the public right of access.

As part of enacting the Exemption, the Legislature found that it was necessary for public hospital governing boards to engage in strategic planning and that they would be unable to effectively compete with private hospitals if meetings in which they discussed their strategic plans were open to the public. The Legislature specifically stated:

> . . . it is a public necessity that portions of a public hospital's governing board meetings be closed when confidential contracts, contract negotiations, or strategic plans are discussed. If such meetings are not closed, critical confidential information regarding contracts, contract negotiations, and strategic plans regarding, for example, growth opportunities, would be revealed, making it exceptionally difficult, if not impossible, for a public hospital to effectively compete in the marketplace against private hospitals, whose records and meetings are not required to be open to the public. It is no less a public necessity that any records generated at closed public hospital board meetings, such as tape recordings, notes, and minutes, memorializing the discussions regarding such confidential contracts, documents, and strategic plans, including marketing plans, also be held confidential for a limited time as provided; otherwise, confidential proprietary and trade secret information would become public and impair a public hospital's ability to effectively and efficiently compete in the marketplace.

Ch. 95-199, Laws of Florida.

The need for the Exemption was earlier explained in the Open Government Sunset Review Act Exemption Analysis by the staff of the Senate Health Care Committee, as follows:

> Public hospitals, unlike most public agencies providing services to the public, must compete directly with their private sector counterparts, private hospitals. Since the economic survival of most Florida public hospitals is dependent upon the ability to obtain revenues from services provided in competition with private hospitals, <u>disclosure of information that may tend to put the public hospital in a disadvantaged competitive position can reduce such</u>

> revenue, resulting in reduced ability to provide services to indigent populations, or else a need to increase taxes to make up for the lost service revenues.
>
> Early announcements or early access to information about competitive moves by public hospitals could empower their private-sector competitors, assuming the competitors find merit in the activities under consideration to either frustrate, circumvent or accelerate action to exploit the business opportunity the public hospital is exploring. However, in contract, the public hospital and the public at large may not acquire similar information from a private sector hospital unless it chooses to divulge the information.

R-387-388 (emphasis added).

Recognizing that Art. I, § 24(c) of the Florida Constitution required the language of any exemption to "... be no broader than necessary to accomplish the stated purpose of the law," the Legislature was very precise in limiting the scope of the exemption. Specifically, Section 395.3035(4), Florida Statutes, provides:

> Those portions of a board meeting at which the written strategic plans, including written plans for marketing its services, are discussed or reported on are exempt from the provisions of s. 286.011 and s.s. 24(b). Art I of the State Constitution.

So that the public right of access to public hospital board meetings and records would be denied as little as practicable, the Legislature incorporated into the Exemption certain conditions and limitations. For example, the Exemption is limited to "those portions of a board meeting at which the written strategic plans are discussed or reported on." § 395.3035(4), Fla. Stat. To discourage public hospital boards from discussing matters other than their strategic plans during such closed portions of their

meetings, the Legislature required that the time of the commencement and termination of the meeting, all discussions and proceedings taking place at the meeting, the names of all persons present at the meeting and the names of all persons speaking at the meeting must be recorded by a certified court reporter. Id. To assure that board members would not discuss during closed portions of meetings matters other than written strategic plans, the Legislature also required that no portion of the closed meeting be off the record. Id. Further, the Legislature mandated that the court reporter's notes be fully transcribed and maintained within a reasonable time after the closed meeting. Id. Finally, the Legislature required that the full transcript be made available to the public three years after the date of the meeting. Id.

Thus, after making a specific finding that it was a "public necessity" to permit public hospitals to close those portions of their board meetings during which their strategic plans were discussed or reported on, the Legislature limited the Exemption as much as it considered feasible with as many safeguards as possible. In so doing, the Legislature sought to assure that § 395.3035(4), Fla. Stat., complied with Art. I, § 24(c) of the Florida Constitution, by making the Exemption no broader than necessary to accomplish the stated purpose of the law.

STATEMENT OF THE CASE

Based on its interpretation of § 395.3035(4), Fla. Stat. and accompanying documentation as to the legislative intent of that statute, Halifax's Board held several closed meetings to discuss proposed changes to its written strategic plans by which

Halifax and South East Volusia Hospital would be brought together as a multi-hospital health care network. R-33, para. 11. News-Journal demanded access to those meetings and copies of transcripts of the meetings. R-124; R-128. Halifax denied News-Journal's request. R-125; R-129-131.

On September 6, 1996, News-Journal filed suit for declaratory and injunctive relief. In its Complaint, News-Journal alleged that the closed meetings were not confined to discussions of written strategic plans but involved "[b]ilateral negotiations between distinct and independent entities." R-3. News-Journal also challenged the constitutionality of the Exemption created by § 395.035(4), Fla. Stat. as overly broad. R-18.

Following a bench trial, the trial court entered a Final Judgment on November 1, 1996. In that judgment, the trial court characterized the Legislature's statement of the public necessity for § 395.3035(4) as seeking to protect only information possessing "extremely important competitive value because it would be so sensitive that it would effectively preclude competition if it were revealed." R-430. The trial court then asked whether the Exemption "would deny public access only to that information which necessarily must be suppressed in order to preserve the ability of a public hospital to compete." R-431 (emphasis added). Having so framed the question, the trial court found that the Exemption was broader than necessary to accomplish what the court had characterized as the stated purpose of § 395.3035(4), Fla. Stat., and was, therefore, a violation of Art. I, § 24(c) of the Florida Constitution. The court further held that all actions taken or discussed at the closed meetings were void and enjoined Halifax from

implementing its written strategic plans to bring Halifax and South East Volusia Hospital together as a multi-hospital health care system. R-419-436.

Halifax, thereafter, appealed to the District Court of Appeal, Fifth District. On December 14, 1997, the district court affirmed. Halifax Hospital Medical Center v. News-Journal Corp., 22 F.L.W. D587 (5th DCA, Case No. 96-3115, Nov. 14, 1997). In its opinion, the district court held that § 395.3035(4), Fla. Stat. was unconstitutional because it was broader both in scope and duration than was permissible under the Florida Constitution. Apparently unwilling to accept the common definition used by all parties to the action, the district court also held that, at the very least, the term "strategic plan" must be defined.

The concern for overbreadth cited by the district court results largely from a misunderstanding. For example, as support for its holding the district court expressed the unfounded fear that "[a]lmost any discussion by the Board, whether it relates to director or officer benefits or salaries or severance plans, etc. could affect competition and therefore remain secret for three years if it is a part of a 'strategic plan' or even if it is raised in a meeting at which a strategic plan is discussed or reported on." The mere fact that issues such as officer benefits or salaries "could affect competition" does not, however, mean that issues can be decided behind closed doors. To the contrary, these are budget items regulated pursuant to § 200.065, Fla. Stat., which requires public hospitals to adopt their budgets at public hearings specially noticed to the public. Furthermore, § 395.3035(4) specifically provides that documents submitted to a public hospital's governing board as part of the budget approval process and the budget itself

are not confidential and not exempt, even if they are part of the hospital's strategic plans.

The district court's finding that there was no justification "for an arbitrary three year duration for the secrecy to continue" is also in part a misunderstanding. In supporting its conclusion that three years is too long, the district court asked why secrecy should continue after a contract is executed. In fact, the confidential exempt status of a contract under § 395.3035(2)(d), Fla. Stat., disappears 30 days before the contract is voted on by the public hospital's governing board, notwithstanding the fact such contract may have been discussed at a governing board meeting involving the hospital's written strategic plan. The district court also overlooked the fact that private entities are routinely permitted to protect the confidentiality of trade secrets under Chapter 542.

Having identified what it perceived to be defects in the statute, the district court proceeded to assert that it "should not be difficult," to save the statute "by 'supplying' an acceptable meaning for 'strategic plan'." The court even indicated it could find that the Legislature intended a strategic plan to be limited to those matters that involve critical confidential information "as indicated by its statement of justification" and that it could "construe the three year limitation as a maximum period of secrecy and find that the legislature intended that the information be immediately released to the public the moment the confidentiality was no longer required." However, having made that statement, the district court refused to apply such a limiting construction and simply affirmed the trial court's decision, thus declaring the statute unconstitutional. Halifax timely appealed to this Court.

SUMMARY OF THE ARGUMENT

In 1992, the people of the State of Florida voted to add Article I, Section 24 (the "Sunshine Amendment") to the Florida Constitution. In so doing, the people elevated the public right of access to constitutional stature. At the same time, however, the people recognized that under certain circumstances, the public's right of access would so impede essential activities of a public entity as to ultimately disserve the public. Therefore, the Sunshine Amendment also empowered the Legislature to create exemptions to the public right of access subject only to two conditions: that the law creating the exemption state with specificity the public necessity justifying the exemption; and that the exemption be no broader than necessary to achieve the stated purpose of the law.

This Court must now determine what judicial standard of review will be used by Florida courts to decide whether the Legislature, in creating an exemption to the public right of access, has sufficiently met these two conditions. It must be careful to avoid encroaching upon the Legislature's constitutional powers. It must recognize that the excessively narrow judicial standard of review adopted by the trial court and affirmed by the district court violates the separation of powers doctrine articulated in Article II, §3 of the Florida Constitution, because it effectively deprives the Legislature of its constitutional power to exempt public hospitals' written strategic plans and any board discussions thereof from the public right of access.

The public right of access has posed a particular dilemma for Florida's public hospitals, which were established to provide medical care for all people, regardless of their ability to pay. Though public, such hospitals receive most of their revenues, not

from taxes, but from fees paid for services they provide in competition with private hospitals. If public hospitals are to provide care for the needy, they must be able to compete successfully for paying patients. To compete successfully, they must have the same ability to plan and seize business opportunities enjoyed by private hospitals.

Because public hospitals were subject to the public right of access, however, their ability to plan and to seize business opportunities was severely restricted. Whereas private hospitals could confidentially study their local markets and present proposed strategic plans to their governing boards in closed meetings, public hospitals enjoyed no such advantages. Instead, every presentation to their governing boards of a proposed strategic plan or proposed changes to an existing strategic plan had to be conducted, not only openly, but often in the presence of representatives of private hospitals -- who could act quickly to exploit or thwart opportunities the public hospitals had determined to pursue.

To protect their strategic plans from public disclosure, public hospitals began in the early 1990's to seek statutory exemptions from the public right of access that would allow them to close meetings of their governing boards anytime written strategic plans were discussed. They also sought exemptions that would allow them to keep confidential all records generated at such closed meetings. Only by obtaining such exemptions could public hospitals prevent private hospitals from using the public right of access to learn of and then exploit a public hospital's strategic plans.

In 1995, the Legislature determined it was a "public necessity" that public hospital boards to be allowed to discuss their written strategic plans in closed meetings and to keep all records of such meetings confidential. As a result, the Legislature enacted Ch.

95-199, Laws of Florida, codified as § 395.3035(4) and (5) Fla. Stat., which permitted public hospital boards to close those portions of their meetings that involved discussions of their written strategic plans and to keep records of such meetings confidential.

The Exemption was enacted after careful consideration by the Legislature over the course of four years. In enacting the Exemption, the Legislature clearly articulated the necessity for preserving the confidentiality of a public hospital's strategic plans. The Legislature also imposed restraints on how the Exemption could be used so that it would be no broader than necessary to preserve the confidentiality of such plans.

In its decision, the district court did not challenge the specificity of the law enacting the Exemption, only its breadth. In holding that "at the very least the term 'strategic plan' must be defined," the district court ignored the definition used by all parties and refused to define the term itself. In holding that the Exemption was broader in scope than was "permissible," the district court ignored the fact that the Legislature has a specific right under Article I, § 24(c) of the Constitution of Florida to enact a broad exemption so long as the exemption is no broader than necessary to achieve the stated public purpose of the act. The fact that a written strategic plan, by its very nature, may cover a broad range of topics cannot preclude the Legislature from enacting an exemption to protect the confidentiality of such a plan so long as the Legislature states with specificity the necessity for the exemption.

Furthermore, in finding that the three year period of confidentiality was excessive, the district court ignored the fact that three year limitations on the disclosure of trade secrets are universally found reasonable by courts. Finally, just because a court can speculate as to how an exemption may be abused does not justify declaring the

exemption unconstitutional. In fact, the district court itself demonstrated how readily the statute can be policed when it found that Halifax's discussions with South East Volusia Hospital did not "qualify under any reading of the exemption."

The defects perceived by the district court, therefore, were not sufficient to justify declaring § 395.3035(4). Fla. Stat. unconstitutional. Moreover, even if such perceived defects could be construed as rendering the Exemption unconstitutional, the district court was obligated by the "separation of powers" doctrine and established principles of judicial interpretation to apply a narrowing construction to preserve the constitutionality of the statute -- particularly since the court acknowledged it "should not be difficult" to do so.

ARGUMENTS OF LAW

Pursuant to Art. I, § 24(c) of the Florida Constitution, a legislatively created exemption from the public right of access is valid so long as the Legislature "states with specificity the public necessity" justifying the exemption, and the exemption is "no broader than necessary to accomplish the stated purpose of the law." In adopting the Exemption, the Legislature specifically stated it was a public necessity to allow public hospitals to close those portions of their meetings in which written strategic plans are discussed and to keep records generated at such closed meetings confidential for three years. The Legislature also stated that the purpose of the Exemption was to protect confidential strategic plans of public hospitals from disclosure so that public hospitals could compete on an equal footing with private hospitals. Furthermore, the Legislature made the Exemption no broader than necessary to accomplish this stated purpose by

permitting the closing of only those portions of public hospital board meetings at which written strategic plans are discussed or reported on. The Legislature also required that transcripts of all closed meetings be kept and that those transcripts be made public after three years. The Exemption thus complied with all requisites of Article I, Section 24(c) of the Florida Constitution.

I. SECTION 395.3035(4), FLA. STAT. (1995), SATISFIES ALL REQUISITES OF ARTICLE I, § 24(C) OF THE FLORIDA CONSTITUTION.

A. The Legislative History of Section 395.3035(4), Fla. Stat. (1995) Evidences That It Was Enacted to Meet a Pressing Necessity.[1]

In their decisions, both the trial court and the district court ignored the extensive legislative history of the Exemption and its predecessors. Even a cursory examination of this legislative history, however, reveals the necessity for the Exemption, its reasonableness and the fact that it is no broader than necessary to achieve the Legislature's purpose of enabling public hospitals to compete fairly and on an equal footing with private hospitals.

The Exemption grew out of a public records exemption first enacted as part of Ch. 91-219, Laws of Florida. By that enactment, the Legislature created an exemption from the Sunshine Law for "negotiations of contracts with nongovernmental entities for payment of services provided by the hospital . . . when such negotiations concern services that are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital." In addition, the following documents were

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[1] This section is adopted freely from Hillsborough County Hospital Authority's Amicus Curiae Brief by permission of its author.

exempted from the Public Records Law: (a) preferred provider organization contracts; (b) health maintenance organization contracts; (c) documents that reveal a hospital's plans for marketing the hospital's services which services are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital; and (d) documents that reveal trade secrets as defined in Fla. Stat. § 688.022. The records and meetings for which these exemptions were enacted were described by the Legislature as those "which, if revealed to the hospital's competitors, would provide the competitors with an unfair business advantage." Florida House of Representatives, Committee on Governmental Operations, Final Bill Analysis & Economic Impact Statement on Chapter 91 -219 (CS/HB 719) (hereinafter referred to as "1991 House Analysis"). See App. 2 of the Amicus Brief of Hillsborough County Hospital Authority ("HCHA").

In the 1991 House Analysis, the Legislature stressed the very real competitive disadvantage facing Florida's public hospitals as follows:

> Public hospitals are subject to the provisions of ch. 119 and s.286.011, F.S., which require public access to records and meetings, respectively. Some of these records and meetings involve developing competitive bids so that the hospitals may attract certain types of business. Under current law, such records and meetings are available to the public hospitals' competitors. According to a representative of public hospitals, public hospitals have been harmed in the marketplace because public hospitals' competitors have discovered what a public hospital was planning to bid and then underbid the public hospital.

Id. at 3-4. The Legislature also noted that "this bill should provide a more level playing field for public and private sector hospitals." Id. at 7. The Legislature's recognition in 1991 that Florida's public hospitals faced a tremendous competitive disadvantage and

its stated intention -- "to level the playing field" -- foreshadowed subsequent legislative developments in the area.

However, the Legislature was equally concerned with preventing an overly broad interpretation of what it sought to protect from disclosure. In Ch. 93-87, Laws of Florida, the Legislature clarified the public records exemption it had previously created for a public hospital's marketing plans by adding a proviso that documents submitted to the hospital's governing board as part of the board's approval of the hospital's budget, and the budget itself, would not be covered by the exemption for a hospital's marketing plans.

The Legislature was still concerned in 1993 about the competitive disadvantage faced by Florida's public hospitals and expressed particular concern about Tampa General Hospital's attempt in 1991 to convert from a public hospital to a private, not-for-profit institution. HCAC, App. 4 at 2. In January, 1995, after reviewing all sunshine and public records law exemptions for public hospitals, the Legislature expressed its continued concern for the plight of Florida's public hospitals in a comprehensive report titled, Florida Senate, Committee on Health Care, Exemption Analyses Prepared Pursuant to the Open Government Sunset Review Act (hereinafter referred to as "Exemption Analyses"), HCAC, App. 5. After recounting the earlier legislative enactments in this area, the Senate Committee on Health Care made the following observation about the highly competitive health care industry in which Florida's public hospitals were struggling to survive:

> The business climate in which public hospitals operate is changing in a way that has resulted in all providers of health care goods and services competing with each other for their

customers (patients or clients). This change in competitive environment can be explained to some extent as a consequence of state and federal efforts at health care reform, as well as growth in enrollment in managed care plans in the private sector. In Florida, the state has been debating altering the manner in which Medicaid and other public dollars will be spent on health care coverage in attaining a goal of broadened access. However, prior to governmental policy debates aimed at enacting legislation that would reform the health care delivery system, the private sector health care delivery industry (operating in the broader corporate environment of "downsizing" and improving efficiencies) has become increasingly more competitive through a series of mergers and acquisitions. Such industry activity involves various strategic actions, such as contract negotiations or discussions relating to buying a competitor or a supplier, as industry participants such as hospitals, work to reconfigure their operational structures.

Id. at 6. The committee further observed that:

> Public hospitals, unlike most public agencies providing services to the public, must compete directly with their private sector counterparts, private hospitals. Since the economic survival of most Florida public hospitals is dependent on their ability to obtain revenues from services provided in competition with private hospitals, disclosure of information that may tend to put the public hospital in a disadvantaged competitive position can reduce such revenue, resulting in reduced ability to provide services to indigent populations, or else a need to increase taxes to make up for lost service revenues.
>
> Early announcement or early access to information about competitive moves by public hospitals could empower their private-sector competitors, assuming their competitors find merit in the activities under consideration, to either frustrate, circumvent, or accelerate action to exploit the business opportunity the public hospital is exploring. However, in contrast, the public hospital and the public at large may not acquire similar information from a private sector hospital, unless it chooses to divulge the information.

Id. at 6-7. The committee recommended that the then existing statutory exemptions be retained, with slight modifications, concluding that "[a]llowing a public hospital's competitors any advance access to the business information at issue places public hospitals in a vulnerable and disadvantaged competitive position." Id. at 7.

Out of such concerns the current sunshine and public records exemptions for public hospitals were enacted as Ch. 95-199, Laws of Florida, upon passage of SB No. 166 in the 1995 regular legislative session. The Senate Staff Analysis of SB 166 adopted almost verbatim the findings concerning the highly competitive business climate in which public hospitals must operate that was contained in the Exemption Analyses cited above. Florida Senate, Staff Analysis and Economic Impact Statement On SB 166. HCAC, App. 7 at 3. Thus, Ch. 95-199 was enacted because the Legislature recognized that Florida's public hospitals still face the same fundamental problem -- a tremendous competitive disadvantage -- that had resulted in exemptions being first created in 1991.

In a report containing the final bill analysis for SB 166, the Legislature cited its earlier findings from 1991 concerning the competitive harm to public hospitals in the marketplace. The Legislature thereupon found that:

> This same rationale is currently valid, as confirmed by the Florida Hospital Association, the Association of Voluntary Hospitals of Florida, and numerous public hospitals responding to a survey concerning the repeal or reenactment of [the] exemptions, and thus a need exists to reenact existing public records and public meetings exemptions and even expand those exemptions ....

Florida House of Representatives, Committee on Governmental Operations. Final Bill Analysis and Economic Impact Statement On SB166. HCAC, App. 8 at 4. The report

also emphasized that the then current public records exemptions were "essential in order for public hospitals to remain competitive with private hospitals, which are not subject to the Public Records Law . . . . If public hospitals could not compete with private hospitals, because critical hospital records were made public, then public hospitals would soon be eliminated. This could ultimately reduce competition, which could have a negative impact on health care costs and indigent care." Id.

With respect to the specific existing exemption for "marketing plans," the report noted that, if such plans were revealed, "competitors could gain an unfair economic advantage." Id. at 5. "Marketing plans," according to the Legislature, "reveal a public hospital's strategy for attracting both patients and providers, which would include, for example, short-term and long-term strategies for service expansion." Id. If such plans were revealed, "competitors could gain an unfair economic advantage." Id. The Legislature determined, however, that exempting only "marketing plans" had not been sufficient to adequately protect Florida's public hospitals against the abuses of the public right of access engaged in by private competitor hospitals. "Marketing plans," the report continued, "is a bit narrow in that it would not include, for example, plans for discontinuation of certain services, although it would be necessary for such information to remain confidential in order not to, for example, undermine current patient care (especially if such plans were not actually effectuated). Accordingly, it was recommended that the exemption provide that 'strategic' plans be held confidential and exempt, which would include marketing plans." Id.

The Legislature also recognized that its proposed public records exemptions would be of little value in the absence of corresponding exemptions for board meetings

relating to the exempt documents, because an exemption from the Public Records Law does not imply an exemption from §286.011. Florida Statutes § 119.07(6); Ops. Att'y. Gen. 92-56, 91-75, 91-45. Survey responses from public hospitals had indicated a "strong need to close portions of board meetings wherein confidential contracts and strategic plans are discussed." HCAC, App. 8 at 5. As noted by the Legislature:

> Convoluted methodologies have been adopted by public hospital boards in order to consider such confidential information at a public meeting yet at the same time not reveal that information at the board meeting. Since it is a public necessity for competitive and financial reasons to keep confidential strategic plans and MCA contracts it would seem equally necessary that such information not otherwise be revealed pursuant to discussions at a board meeting. By not having a public meetings exemption, confidential contracts and strategic planning information cannot be freely discussed and debated by the board, thus the effectiveness and efficiency of the public hospital board is reportedly impeded. Accordingly, it is recommended that a public meetings exemption be created.

Id. Accordingly, the Legislature in 1995 reenacted the public records exemption for strategic plans, codifying as Section 395.3035(2)(b), Fla. Stat., a provision which exempts from disclosure:

> A public hospital's strategic plans, including plans for marketing its services, which services are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital. However, documents that are submitted to the hospital's governing board as part of the board's approval of the hospital's budget, and the budget itself, are not confidential and exempt.

Ch. 95-199, Laws of Florida. In addition, the Legislature granted the Exemption for meetings relating to strategic plans by providing in § 395.3035(4), Fla. Stat. as follows:

> Those portions of a board meeting at which the written strategic plans, including written plans for marketing its

> services, are discussed or reported on are exempt from the provision of s.286.011 and s.24(b), Art. 1 of the State Constitution. All portions of any board meeting which are closed to the public shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the meeting, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the meeting shall be off the record. The court reporter's notes shall be fully transcribed and maintained by the hospital records custodian within a reasonable time after the meeting. The transcript shall become public 3 years after the date of the board meeting.

Id. To insure that all aspects of hospital board meetings relating to strategic plans were fully protected from disclosure to the hospital's competitors, the Legislature enacted an additional public records exemption, § 395.3035(5), Fla. Stat. which provides as follows:

> Any public records, such as tape recordings, minutes, and notes, generated at any governing board meeting or portion of a governing board meeting or portion of a governing board meeting which is closed to the public pursuant to this section are confidential and exempt from the provisions of s.119.07(1) and s. 2(a), Art. I of the State Constitution. All such records shall be retained and shall cease to be exempt at the same time as the transcript of the meeting becomes available to the public.

Id. As is apparent, the Legislature's intent in enacting the Exemption was nothing less than the protection of every public hospital's written strategic plans from public disclosure for up to three years.

B. Chapter 95-199. Laws of Florida States With Specificity the Public Necessity Justifying the Exemption.

The district court appropriately did not question the specificity of Ch. 95-199, Laws of Florida. In enacting Ch. 95-199, § 2, Laws of Florida, the Legislature expressly stated:

> "Furthermore, it is a public necessity that portions of a public hospital's governing board meetings be closed when . . . strategic plans are discussed. If such meetings are not closed, . . . strategic plans regarding, for example, growth opportunities, would be revealed, making it exceptionally difficult, if not impossible, for a public hospital to effectively compete in the marketplace against private hospitals, whose records and meetings are not required to be open to the public. It is no less a public necessity that any records generated at closed public hospital board meetings, such as tape recordings, notes, and minutes, memorializing the discussions regarding such ... strategic plans, including marketing plans, also be held confidential for a limited time as provided; otherwise, confidential proprietary and trade secret information would become public and impair a public hospital's ability to effectively and efficiently compete in the marketplace."

Id. (emphasis added). In so articulating the public necessity for exempting a public hospital's written strategic plans and its board's discussions thereof from disclosure, the Legislature provided as much specificity as can be required under Article I, §24(c).

In State v. Knight, 661 So. 2d 344, 346 (Fla. 4th DCA 1995), the court found that the following language exempting notes, records and transcripts of grand jury proceedings "clearly complies with the public necessity requirement contained in Article I, Section 24(c)":

> The Legislature finds that the exemption from the public records law of stenographic records, notes and transcriptions made by a court reporter or stenographer during sessions of a grand jury is a public necessity in that release of such records would greatly hamper the proper functioning of our grand jury system by eliminating the

> secrecy surrounding grand jury proceedings and exposing the witnesses and grand jurors to potential retribution and outside influence.

By stating that disclosure of discussions by public hospital boards of their written strategic plan would make it "exceptionally difficult, if not impossible" for such hospitals to effectively compete against private hospitals, the Legislature identified the public necessity for the Exemption as clearly as it had done when it stated that releasing grand jury records would "greatly hamper" the proper functioning of the grand jury system. The Legislature's statement of public necessity supporting § 395.3035(4) must, therefore, be considered sufficient under Art. I, Section 24(c), Fla. Const.

Article I, § 24(c) grants the Legislature the express power to regulate the public right of access based on the Legislature's finding of "public necessity." Article I, §24(c) does not say the Legislature's power to regulate the public right of access is dependent on the finding of a compelling state interest or the finding of an overriding public necessity. If there is a public necessity for an exemption, the Legislature is constitutionally empowered to enact as broad an exemption as needed to meet the necessity.

It should be emphasized that, in enacting § 395.3035(4), Fla. Stat., the Legislature sought to exempt from the public right of access those portions of public hospital board meetings in which strategic plans, not just critical confidential information regarding strategic plans, were discussed. In its statement of necessity contained in Chapter 95-199, Laws of Florida, the Legislature recognized that if public hospitals could not close portions of their meetings, "critical confidential information regarding contracts, contract negotiations, and strategic plans regarding for example growth

opportunities would be revealed. . . ." The intent of that sentence was to articulate the Legislature's reason for exempting critical confidential information regarding contracts, as well as all contract negotiations and all written strategic plans. By enacting Ch. 95-199, the Legislature sought to protect only critical confidential information regarding contracts, because there is no particular reason to shield from the right of public access most contracts. It also sought to shield all contract negotiations, because negotiations are, almost by definition, confidential in nature and the disclosure of such negotiations could easily impede their successful conclusion. Finally, the Legislature sought to protect all "strategic plans regarding, for example, growth opportunities," because, as with contract negotiations, written strategic plans are, by definition, confidential in nature. As all legislative discussion prior to adoption of the Exemption made clear, the Legislature was seeking to protect a public hospital's entire strategic plan, not just critical confidential information regarding such a plan.[2]

Contrary to the district court's holding, there was no need for the Legislature to provide a precise definition of the term "strategic plan." All parties to the litigation below recognized that "strategic planning" is a process whereby a hospital "looks at the health care industry, looks at its local market, determines where it wants to be in that market, identifies the major changes needed to achieve that position and establishes a plan to accomplish those changes." R-102. A strategic plan is recognized as the plan

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[2] Stylistically, the Legislature would not have written a sentence which effectively read that it sought to protect "critical confidential information regarding strategic plans regarding, for example, growth opportunities." The trial court erred when it concluded that the Legislature sought to protect only "critical confidential information regarding strategic plans" and that the Exemption, which protects strategic plans per se, was, thus, unconstitutional.

prepared to accomplish the changes recognized as necessary through a strategic planning process. Phrased somewhat differently, a strategic plan is the culmination of a process of analyzing a health care institution's strengths, weaknesses, opportunities and threats in light of the national health care trends in the local health care market. R-21.

Therefore, Ch. 95-199, Laws of Florida states with ample specificity the public necessity which led the Legislature to enact the Exemption. The statute thus satisfies the "specificity" requirement of Article I, § 24(c).

C. The Exemption Is No Broader Than Necessary to Accomplish The Stated Purpose of §395.3035(4).

The second condition imposed on the Legislature's exercise of its constitutional power to regulate the public right of access is "that the exemption be no broader than necessary to accomplish the stated purpose of the law." In considering whether Section 395.3035(4) complies with this requirement, this Court must recognize that the Legislature intended nothing less than the protection of written strategic plans. To survive in our ever-changing, competitive society, almost every business must engage in some form of strategic planning. For a hospital, such planning is the process in which the "hospital looks at the health care industry, looks at its local market, determines where it wants to be in that market, identifies the major changes needed to achieve that position, and establishes a plan to accomplish those changes." R-102. Any plan prepared and adopted for that purpose is considered a "strategic plan." Contrary to the district court's assertion, there is no need for further definition. In fact, any effort to do

so would thwart the pressing necessity to accord public hospitals the right to engage in planning on a level playing field with private hospitals.

Once a hospital has committed a strategic plan to writing, that plan represents proprietary information of what the hospital intends to do in future years. The plan may contain analyses of contemplated acquisitions or mergers, new treatments to be offered, future marketing strategies, or weaknesses to be addressed -- all of which information could be exploited by competitor private hospitals who have no obligation whatsoever to disclose their own strategic plans. Knowing that a public hospital intends to expand into a particular market, for example, a private hospital can pursue that same market on an accelerated basis and capture the market before the public hospital even begins to act. Under such circumstances, the public hospital is unfairly denied revenues that otherwise could have been used to defray the costs of treating those who cannot afford the services of a private hospital. It was precisely to eliminate such inequities that the Legislature recognized a public necessity for protecting the written strategic plans of public hospitals and exempted such written strategic plans and public hospital board discussions thereof from public disclosure.

In condemning the scope of § 395.3035(4), Fla. Stat., the district court asserted: "Almost any discussion by the Board, whether it relates to director or officer benefits or salaries or severance plans, etc. could affect competition and therefore remain secret for three years if it is a part of a 'strategic plan' or even if it is raised in a meeting at which a strategic plans is discussed or reported on." The district court, however, should have had no such concern. All such matters as Halifax' "director or officer benefits or salaries or severance plans" are budgetary matters, regulated pursuant to

§ 200.065, Fla. Stat., which requires public hospitals to adopt their budgets at public hearings specially noticed to the public. Pursuant to § 395.3035(2)(b), the Legislature expressly stated that "documents that are submitted to the hospital's governing board as part of the board's approval of the hospital's budget, and the budget itself, are not confidential and exempt." Thus, information regarding director or officer benefits or salaries or severance plans would be part of a hospital's budget and would not be exempted. What is being exempted is not a hospital's budget information, but simply whatever strategic plan a public hospital may elect to commit to writing and any discussion thereof at a public hospital board meeting under the restraints imposed by the Legislature.

Moreover, the proper interpretation of § 395.3035(4), Fla. Stat., is not whether that statute might make some bit of information that is not competitively sensitive unavailable for public access. Such an interpretation, if adopted, would emasculate the Legislature's power to enact exemptions to the Public Right of Access, since no portion of a public hospital board meeting could ever be closed without some iota of noncompetitively sensitive information being withheld from public access. Only by exempting all discussions regarding a public hospital's written strategic plans can the confidentiality of such plans be preserved.

It was also reasonable for the Legislature to limit to three years the time for which public hospitals may withhold records of discussions regarding written strategic plans. In questioning the three year period of the Exemption, however, the district court asserted:

> There appears no justification for an arbitrary three year duration for the secrecy to continue. If the negotiations for a contract must be kept secret, why should the secrecy continue after the contract is executed? Why should the law presume that every aspect of a strategic plan must be confidential for three years? The legislature has not told us nor has it justified it to the people who adopted the constitution.

In raising those questions, the district court failed to recognize that preserving the secrecy of contract negotiations is not even at issue. At issue is the constitutionality of the Legislature's determination in adopting § 395.3035(4), Fla. Stat., that discussions by a public hospital board regarding a written strategic plan may be kept confidential for up to three years. The confidentiality of contracts exempted under § 395.3035(2)(d), Fla. Stat., disappears 30 days before the contract is voted on by a public hospital's governing board, even if the contract was discussed as part of the hospital's strategic plan.[3]

Although the district court compared the Exemption to § 286.011(8) Fla. Stat., which exempts discussions between employees of public agencies and their attorneys regarding pending litigation until conclusion of the litigation, the comparison is inappropriate. Unlike pending litigation, which at some time will presumably be terminated (though the time of termination can be far longer than three years in duration), the time when a written strategic plan ceases to be of value or interest to competitors of public hospitals cannot be so defined. Because no express time limitation exists, it was reasonable for the Legislature to impose an outer limit of three

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[3] The only exception is for "Managed Care Contracts" which retain their confidential status. § 395.3035(2)(d), Fla. Stat. (1995).

years, even though, in reality, most information contained within a written strategic plan will become stale or will, in some way, become public information long before the end of the three year period.

In expressing the necessity for protecting strategic plans from public disclosure, the Legislature recognized that "otherwise, confidential propriety and trade secret information would become public and impair a public hospital's ability to effectively and efficiently compete in the marketplace." Ch. 95-199 §2, Laws of Florida. Given that purpose, it would be far more appropriate to compare the Exemption with other statutes designed to protect the confidentiality of proprietary or trade secret information.

To protect trade secrets and customer lists in the private marketplace, the Legislature enacted § 542.33, Fla. Stat., which validates covenants not to compete so long as they do so for a "reasonably limited" time. Courts have upheld the constitutionality of that statute by recognizing that such covenants are permissible for up to three years. In fact, the district court itself in Dorminy v. Frank B. Hall & Co., 464 So. 2d 154 (Fla. 5th DCA 1985), held that even though there is no set time limit for enforcement of covenants not to compete, three years is a reasonable time limit for key management employees. Mathieu v. Old Town Flower Shops, Inc., 585 So. 2d 1160 (Fla. 4th DCA 1991) the court held that three years is the maximum period a lower-level employee may be restricted from competing. Moreover, in 1996, the Legislature enacted § 542.335, Fla. Stat. which provided that in determining the reasonableness of a covenant designed to protect a trade secret "a court shall presume reasonable in time any restraint of 5 years or less." Considered in light of such protections accorded private entities, the three year period of the Exemption must be recognized as a

reasonable limitation on how long discussions regarding a public hospital's written strategic plans can remain confidential.

In determining whether the exemption in § 395.3035(4), Fla. Stat. is no broader than necessary, this Court should consider that the Legislature itself limited the amount of non-competitively sensitive information that can be withheld from the public and provided safeguards against overutilization of the exemption. First, the Legislature exempted only written strategic plans. Thus, before any portion of a public hospital board meeting can be closed to discuss strategic planing, the particular planning strategy to be discussed must have already been reduced to writing. Next, the Legislature permitted the closing of only those portions of a board meeting during which a written strategic plan is actually discussed. Most importantly, the Legislature required that all portions of public hospital board meetings closed to the public under the Exemption must be recorded by a certified court reporter, that no portion of such meeting can be off the record and that the court reporter's notes must be fully transcribed within a reasonable time of the board meeting and become public no later than three years after the date of the board meeting. Finally, all records of any such closed meeting must be retained by the public hospital and lose their exemption at the same time the transcript of the meeting becomes available to the public. Thus, the exemption is narrow and the protections against its abuse are ample.

The Legislature's intent in enacting § 395.3035(4) was to protect public hospitals' strategic plans from public disclosure. The Legislature exempted only written strategic plans and board discussions relative to those written plans, and it provided ample mechanisms for preventing abuse. If a public hospital abuses the Exemption and

discusses at closed board meetings matters in addition to its written strategic plan, a transcript of such meeting will, by law, be promptly available for a court to review. If the discussions go beyond the identified written strategic plan, a court can so hold, as did the trial court in the instant case, and enter any appropriate order requiring disclosure or imposing sanctions. Thus, § 395.3035(4), Fla. Stat. is no broader than necessary. The lower tribunal's ruling to the contrary should, therefore, be reversed.

II. THE JUDICIAL STANDARD OF REVIEW ADOPTED BY THE LOWER COURTS EMASCULATES THE LEGISLATURE'S CONSTITUTIONAL POWER TO ENACT EXEMPTIONS TO THE PUBLIC RIGHT OF ACCESS, THEREBY VIOLATING THE SEPARATION OF POWERS DOCTRINE.

The public right of access created by Art. I, § 24(c) of the Florida Constitution is not absolute. While it establishes the right of every person to inspect or copy public records and requires that all meetings of any public body be open, Art. I, § 24(c) expressly grants the Florida Legislature the right to create exemptions from the public right of access.

The Legislature's constitutional power to exempt matters from the Public Right of Access was adopted by the very electorate that adopted the constitutional right of public access. Therefore, the power of the Legislature to enact an exemption to the public right of access must be accorded equal constitutional dignity as the right of the public to inspect public records or attend public meetings. If standard constitutional interpretations should be applied to preserve the rights accorded the public by Art. I, §24, then standard constitutional interpretations should also be applied to preserve the power expressly accorded the Legislature by Art. I, § 24.

In discussing the judicial standards of review that should be applied by courts when considering legislatively created exemptions to the public right of access, News-Journal has frequently referenced rights contained within the Bill of Rights of the United States Constitution or Florida's constitutional right of privacy. It should be recognized, however, that those rights are phrased in absolute terms. For example, the First Amendment to the United States Constitution states that Congress shall make no law abridging the freedom of speech. The First Amendment provides no guidelines for determining how that absolute prohibition can be reconciled with the rights of each state to exercise its inherent police powers to protect the public welfare. In grappling with conflicts that have arisen between the State's inherent police powers and the protections accorded individuals by the Florida or federal constitutions, courts have had to fashion various heightened standards of review to permit the necessary exercise of police powers while still assuring, to the maximum extent possible, the preservation of individual rights accorded by the Constitution. Cases such as Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985) (compelling state interest required to breach right of privacy); Kluger v. White, 281 So. 2d 1 (Fla. 1973) (overpowering public necessity required to abolish right of access to the courts); and Carr v. Broward County, 541 So. 2d 92 (Fla. 1989) (no alternative method of meeting such public necessity) are examples of heightened standards of judicial review applied to preserve fundamental constitutional rights.

It would be inappropriate in the instant case, however, to apply a heightened standard of review. Unlike cases in which courts had to recognize a government's implied, but limited, power to infringe upon fundamental constitutional rights, the Florida

Legislature's power to exempt matters from the public right of access is expressly granted by the Florida Constitution. Moreover, the judicial standard of review to be used by the courts when determining whether the Legislature properly exercised this power is expressly set out in Article I, §24(c), as opposed to being left to the discretion of the courts. As a result, use of a heightened standard of judicial review would improperly restrict the Legislature's power to exempt matters from the public right of access and would raise a "separation of powers" issue. To prevent such issues from arising, courts must diligently safeguard from encroachment by the judicial branch those powers vested in the Legislature by the Florida Constitution. Pepper v. Pepper, 66 So. 2d 280 (Fla. 1953).

Rather than diligently safeguarding against encroaching on the Legislature's power, the trial court used a heightened standard of review and declared that § 395.3035(4) Fla. Stat. failed the "no broader then necessary" standard simply because public hospitals' strategic plans may contain some non-confidential information. The affirmation of the lower court's decision by the district court is an affirmation of that heightened judicial standard of review.

If the district court's heightened judicial standard of review is now affirmed, this Court will virtually eliminate the Legislature's Art. I, §24(c) constitutional power to create broad exemptions from the public right of access. By its decision, the district court has effectively told the Legislature that it cannot exempt a public hospital's written strategic plans from public disclosure. In so doing it has openly encroached on the constitutional power accorded the Legislature. Art. I, §3, Constitution of Florida, therefore, requires that the trial court and district court's decisions be reversed.

III. HAVING RECOGNIZED THAT IT "SHOULD NOT BE DIFFICULT" TO DO SO, THE DISTRICT COURT ERRED IN FAILING TO ADOPT A NARROWING INTERPRETATION TO PRESERVE THE CONSTITUTIONALITY OF § 395.3035(4), FLA. STAT.

Even if § 395.3035(4) Fla. Stat. could be construed in such a way as to render it unconstitutional, the trial court and the district court should have read the statute narrowly to preserve its constitutionality. Instead, both courts violated the cardinal principle that courts must interpret statutes in favor of their constitutionality whenever possible. As this Court stressed in Falco v. State, 407 So. 2d 203 (Fla. 1981), every court "... has the duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality." Id. at 206 (emphasis added).

In its opinion, the district court stated that it "should not be difficult" to save § 395.3035(4) "by supplying an acceptable meaning for 'strategic plan.'" It even recognized:

> We could find that the legislature intended that a strategic plan would be limited to those matters that involve critical confidential information as indicated by its statement of justification. And we could construe the three year limitation as a maximum period of secrecy and find that the legislature intended that the information be immediately released to the public the moment that confidentiality was no longer required.

Nevertheless, the district court refused to save the statute and, instead, affirmed the trial court's decision holding it unconstitutional.

As stated above, it would have been inappropriate for the district court to restrict a strategic plan to one involving "critical confidential information." The Legislature

intended to protect written strategic plans, not just whatever may be deemed to be "critical confidential information" contained therein. Moreover, attempting to determine what information was critical, and thus protected, could lead to a judicial challenge to virtually every closed meeting.

Caselaw, however, provides no support for the district court's refusal to apply a limited saving interpretation. Although the trial court based its refusal to apply a narrowing construction on State v. Globe Communications Corp., 648 So. 2d 110, 114 (Fla. 1994) (R 433), the instant case and that case are significantly different. Globe Communications dealt with § 794.03 Fla. Stat. (1989), which mandated criminal sanctions against anyone who, in an instrument of mass communication, identified the victim of a sexual offense. In that case, the court could not narrowly construe the statute, which it found to be an unconstitutional infringement on freedom of speech, because to do so would require the court: (a) to effectively rewrite the statute by reading into it various affirmative defenses, (b) to adopt jury instructions to narrow the sweep of the statute and (c) to undertake such judicial revisions even though there was nothing in the statute or its legislative history to indicate that such revisions would be consistent with the legislative intent. Id. at 113, 114.

Preserving the constitutionality of § 395.3035(4) would have imposed no such burden upon the district court. In enacting § 395.3035(4), the Legislature clearly stated that it wished to protect from the public right of access a public hospital's written strategic plans and board discussions relative to those plans. It gave compelling reasons why such protections were needed. It only allowed the closing of those portions of the hospital board meetings that dealt with written strategic plans. It assured

that a transcript would be kept and preserved of any portion of a meeting that was closed, making it possible for a court to review any portion of the transcript that might be challenged as not pertaining to a strategic plan. Therefore, § 395.3035(4), Fla. Stat., unlike the statute considered in Globe Communications, did not need to be rewritten to preserve its constitutionality.

Further, unlike the intent found lacking in Globe Communications, the legislative intent in creating the Exemption is clearly identified in Ch. 95-199, Laws of Florida as protecting the strategic plans of public hospitals from being revealed to competitors. One interpretation of § 395.3035(4), Fla. Stat. consistent with this legislative intent is that if a public hospital board in closed meetings strays beyond discussions of and reports on its written strategic plans, it exceeds the Exemption and can be held accountable. There was no reason, therefore, to declare the Exemption unconstitutional. In fact, in the instant case the district court bluntly held that "[j]oint meetings between competitors simply do not qualify under any reading of the exemption." In so doing, the district court illustrated how easy it is to police any perceived abuses of the Exemption without declaring the Exemption unconstitutional.

If, however, the district court considered that a narrowing construction was still needed, it could readily have applied one. For example, it could have held that the Exemption permitted closing only those portions of public hospital board meetings at which the board received, reported on or discussed the adoption of its formal written strategic plan or a written amendment to an existing written strategic plan. Such a construction would clarify that not every public hospital board meeting can be closed at which issues of a "strategic" nature are discussed. Undoubtedly other narrowing

constructions could have been fashioned by the trial court which would have preserved the constitutionality of § 395.3035(4), Fla. Stat. in a manner that was consistent with the clearly expressed intent of the Legislature in enacting the statute.

The trial court's refusal to adopt a narrowing construction of § 395.3035(4), Fla. Stat. is contrary to all Florida law. This Court has repeatedly held that when an interpretation upholding the constitutionality of a statute is available a court must adopt that construction. Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 988 (Fla. 1981); Leeman v. State, 357 So. 2d 703, 705 (Fla. 1978). As stated in State v. Hodges, 506 So. 2d 437 (Fla.1st DCA 1987) rev. den., 515 So. 2d 229 (Fla. 1987):

> The starting point of any analysis directed to the constitutionality of a Legislative act is the principle that "legislative acts are presumed to be constitutional and . . . courts should resolve every doubt in favor of constitutionality." Bunnel v. State, 453 So. 2d 808 (Fla. 1984). This presumption of validity applies unless the legislative enactments are clearly erroneous, arbitrary, or wholly unwarranted. State v. State Board of Education of Florida, 467 So. 2d 294 (Fla. 1985). All doubts as to validity must be resolved in favor of constitutionality, Falco v. State, 407 So. 2d 203 (Fla. 1981); and if a constitutional interpretation is available, the courts must adopt that construction. Dept. of Ins. v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983). Id. at 439.

Courts have consistently adhered to these principles. For example, in State v. Elder, 382 So. 2d 687 (Fla. 1980), this Court reversed a holding that found unconstitutional a statute forbidding the making of anonymous telephone calls with the intent to annoy, abuse, threaten or harass the recipient. In that case, the trial court held that the prohibition was an unconstitutionally overbroad regulation of free speech

and specifically declined to adopt a narrowing interpretation. Id. at 689. In reversing, this Court stated:

> In dealing with statutory regulation of first amendment activity, this Court has in the past strictly construed a challenged statute to uphold it against vagueness or overbreadth attacks. See, e.g. State v. Saunders, 339 So. 2d 641 (Fla. 1976); White v. State, supra. After careful consideration we, likewise, here conclude that the language of §365.16(1)(b) is fairly susceptible to a constitutional construction that is consistent with the legislative intent. Id. at 690, 691 (emphasis added).

Just as this Court in State v. Elder reversed the trial court for declaring the statute unconstitutional, when it was fairly susceptible to a narrowing construction, so too should this Court now reverse the district court in the instant case for refusing to apply a narrowing interpretation to preserve the constitutionality of § 395.3035(4), Fla. Stat.

In Firestone v. News-Press Pub. Co., 538 So. 2d 457 (Fla. 1989), this Court again used a narrowing construction to preserve the constitutionality of a statute. In that case, this Court agreed that, as written, § 101.121, Fla. Stat. (1985) was overbroad, because it provided that no person who is not in line to vote could come within 50 feet of any polling place, even if the 50 foot area extended beyond the polling room. Id. at 459. Rather than declaring the statute unconstitutional, however, this Court examined the legislative intent and adopted a narrowing construction of the phrase "polling place" by which the statute was interpreted as applying only to persons within the "polling room". As stated by this Court:

> There remains the question of whether the statute is valid as it pertains to the area within the polling room itself. Whenever possible a statute should be construed so as not to conflict with the constitution. State v. Gale Distributors, Inc., 349 So. 2d 150 (Fla. 1977). Just as federal courts are

> authorized to place narrowing constructions on acts of congress, . . . this court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment. Brown v. State, 358 So. 2d 16 (Fla. 1978).
>
> Here the legislature obviously intended to preclude unauthorized persons from interfering with the voting process. Insofar as the statute pertains to conduct within the voting room itself, we believe that it constitutes a legitimate exercise of the state's police power. . . . Thus, we uphold the constitutionality of §1.01.121 as it pertains to persons within the polling room.

Id. at 459, 460. Just as this Court adopted a narrowing construction of the phrase "polling place" to preserve the constitutionality of the statute, the district court in the instant case could have and, therefore, should have adopted a narrowing construction of the phrase " a board meeting at which the written strategic plans are discussed or reported on" in order to preserve the constitutionality of § 395.3035(4), Fla. Stat.

A more recent example of the principle that a statute should be construed to be consistent with the Florida Constitution is State v. Stalder, 630 So. 2d 1072 (Fla. 1994). In that case, Stalder not only assaulted Cohen, but maligned Cohen's Jewish heritage during the assault. Stalder was charged with battery, but the penalty was reclassified from a misdemeanor to a third degree felony pursuant to § 775.085(1), Fla. Stat., commonly referred to as the Florida Hate Crimes Statute. The relevant portion of that statute provided:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim: . . .

Stalder contended, and the trial court agreed, that the Hate Crimes Statute was an unconstitutionally overbroad regulation of his freedom of speech.

On appeal, this Court noted that the phrase "if the commission of such felony or misdemeanor evidences prejudice" could be interpreted two ways. First, it could be narrowly interpreted as requiring the penalty for Stalder's misdemeanor to be reclassified only if the offense was committed because of prejudice. Thus, if Stalder had assaulted Cohen because of Cohen's Jewish heritage, then the statute was not infringing upon freedom of speech but was merely enhancing Stalder's punishment because he selected his victim on the basis of his prejudice against the victim's heritage. On the other hand, if Stalder assaulted Cohen because of jealousy, but during the heat of the fray Stalder maligned Cohen's Jewish heritage, the reclassification of the penalty would be unconstitutional because the targeted conduct - Stalder's expression of dislike for Jewish persons - is free speech which was only tangentially related to the underlying crime. Id. at 1076.

Thus, this Court was forced to either (a) uphold the statute by construing it narrowly as applying to only the first class of conduct (i.e. selecting one's victim based on prejudice), or (b) declare the statute unconstitutional by construing it to apply to both classes of conduct (i.e. proscribing selecting one's victim based on prejudice and proscribing giving verbal expression to one's prejudice). In determining which course to adopt, this Court affirmed that it was bound to resolve all doubts as to the validity of the statute in favor of its constitutionality. It, therefore, adopted a narrowing construction of the statute, holding that the statute applied only to bias-motivated crimes wherein the

perpetrator intentionally selected the victim because of the victim's race, color, ethnicity, religion or national origin.

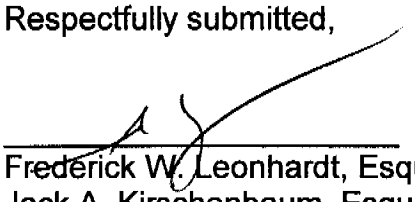
In each of the above cases, this Court acted pursuant to the fundamental principle that any act of the Legislature is presumptively valid. Village of North Palm Beach v. Mason, 167 So. 2d 721 (Fla. 1964). It further recognized that all statutes "should be construed to make effective the legislative purpose and intent rather than defeat same." State ex rel. Watson v. Bigger, 200 So. 224 (Fla. 1941). The district court's refusal to adopt a narrowing construction is directly contrary to those decisions. Therefore, if § 395.3035(4) is perceived as broader than necessary to effect its stated purpose, this Court should adopt a narrowing interpretation of the phrase "a board meeting at which the written strategic plans are discussed or reported on" to preserve the constitutionality of the statute. It should further reverse the district court and declare that § 395.3035(4), Fla. Stat. is constitutional.

CONCLUSION

Section 395.3035(4), Fla. Stat. is constitutional on its face. It was adopted for a stated public purpose in response to a specified public necessity. It was drafted as narrowly as practicable to achieve that purpose. It contains ample safeguards to prevent its abuse. The heightened judicial standard of review used by the trial court and affirmed by the district court violates the separation of powers doctrine. If any provisions of the statute are considered overly broad, they should be subjected to a narrowing construction to preserve the constitutionality of § 395.3035(4) in conformity with the Florida Legislature's intent in enacting that statute.

For all the above reasons, this Court should reverse the decision of the District Court of Appeal, Fifth District of November 14, 1997, recognize the constitutionality of Section 395.3035(4), Florida Statutes, and remand the case to the trial court for further proceedings.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U. S. Mail upon all persons listed on the attached Service Schedule this 16th day of January, 1998.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1997

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

HALIFAX HOSPITAL MEDICAL CENTER,

Appellant,

v.

CASE NO. 96-3115
CORRECTED

NEWS-JOURNAL CORPORATION, etc., et al,

Appellee.

Opinion filed November 14, 1997

Appeal from the Circuit
Court for Volusia County,
John V. Doyle, Judge.

Harold C. Hubka of Black, Crotty, Sims, Hubka, Burnett, Birch, & Samuels, L.L.P., Daytona Beach, and Frederick W. Leonhardt, Jack A. Kirschenbaum and G. Robertson Dilg, of Gray, Harris & Robinson, P.A., Orlando, for Appellant Halifax Hospital Medical Center.

Richard A. Harrison of Allen, Dell, Frank & Trinkle, Tampa, Amicus Curiae for Hillsborough County Hospital Authority d/b/a Tampa General Hospital.

Neil H. Butler of Butler & Long, and George N. Meros, Jr., of Rumberger, Kirk & Caldwell, P.A., and William A. Bell, Tallahassee, Amicus Curiae for North Brevard County Hospital District, et al.

Jonathan D. Kaney, Jr. and Jonathan D. Kaney, III, of Cobb Cole & Bell, Daytona Beach, for Appellee.

Robert Rivas of Rivas & Rivas, Boca Raton, Amicus Curiae for The First Amendment Foundation, The Florida Society of Newspaper Editors, The Palm Beach Post and Florida Today.

George K. Rahdert, Patricia Fields Anderson, Cynthia L. Hain, of Rahdert, Anderson, McGowan & Steele, P.A., St. Petersburg, Amicus Curiae for Times Publishing Company.

HARRIS, J.

The issue in this case is whether the trial court erred in determining that the exemption to Art. I, § 24(a), of the Florida Constitution contained in § 395.3035(4), Florida Statutes, is unconstitutional in that "it is broader than necessary to accomplish the stated purpose of the law." We affirm the trial court but certify the issue to the supreme court as one of exceptional statewide importance.

In analyzing the constitutionality of any act, we should first go to the source. Article I of § 24 provides for open meetings and public records but authorizes the legislature to provide exemptions if "such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

The contested exemption is contained in § 395.3035. The legislature justified the exemption as follows:[1]

> [I]t is a public necessity that portions of a public hospital's governing board meetings be closed when confidential contracts, contract negotiations, or strategic plans are discussed. If such meetings are not closed, critical confidential information regarding contracts, contract negotiations and strategic plans regarding, for example, growth opportunities, would be revealed . . ..

Notice that the first sentence in the above quoted paragraph is a statement of general necessity; it is the second sentence that attempts to meet the "specificity" requirement of the constitution. With this "specific" justification in mind, we now look at the section which grants the contested exemption:

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[1] Chapter 95-199, Laws of Florida (1995).

> (4) Those portions of a board meeting at which the written strategic plans, including written plans for marketing its services, are discussed or reported on are exempt from the provisions of s. 286.011 and s. 24(b), art. 1 of the State Constitution. . . The court reporter's notes shall be fully transcribed and maintained by the hospital records custodian within a reasonable time after the meeting. The transcript shall become a public record 3 years after the date of the board meeting.

In determining whether the exemption is so limited so that it is "no broader than necessary to accomplish the stated purpose of the law," we should look at both the scope of the exemption and the duration of the exemption. The legislature has had experience in drafting exemptions that comply fully with the constitutional mandate. In § 286.011(8), Florida Statutes, the legislature provided an exemption which permits closed meetings to discuss pending litigation. The court reporting procedure in § 286.011(8) is almost identical to the one involved in the present case but the legislature was far more careful in § 286.011(8) in defining the scope and duration of the exemption from public disclosure. Subparagraph (b) provides that "[t]he subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures." And subparagraph (e) provides that "[t]he transcript shall be made a part of the public record upon conclusion of the litigation." Thus, in § 286.011, the legislature clearly defined a limited scope and a limited duration consistent with the constitutional directive.

In contrast, the contested provision permits the closure of any portion of a meeting in which a "written strategic plan" is discussed or reported on. Another exemption applies to all written plans for "marketing its services." If, for example, they wished to discuss a written plan concerning holidays, employee work schedules, etc., they could close the meeting. And there is no statutory limit of what can then be discussed during that "portion"

of the closed meeting. There is no definition of, and therefore no limitation on, what can be included in a strategic plan. The hospital contends that the exemption is limited only to strategic plans that might affect competition. But even that is broader than the legislature's "specific" justification. The media submits , and the trial court found, that an exempt strategic plan should be limited to only that portion of the strategic plan which contains critical confidential information as set out in the justification in order to meet the constitutional requirement. We agree with the trial court. Almost any discussion by the Board, whether it relatés to director or officer benefits or salaries or severance plans, etc. could affect competition and therefore remain secret for three years if it is a part of a "strategic plan" or even if it is raised in a meeting at which a strategic plan is discussed or reported on. In order to comply with the limitations imposed by the constitution, at the very least the term "strategic plan" must be defined. It is not. Further, there appears no justification for an arbitrary three year duration for the secrecy to continue. If the negotiations for a contract must be kept secret, why should the secrecy continue after the contract is executed? Why should the law presume that every aspect of a strategic plan should be confidential for three years? The legislature has not told us nor has it justified it to the people who adopted the constitution.

Perhaps it is possible to save the statute by "supplying" an acceptable meaning for "strategic plan." It should not be difficult. We could find that the legislature intended that a strategic plan would be limited to those matters that involve critical confidential information as indicated by its statement of justification. And we could construe the three year limitation as a maximum period of secrecy and find that the legislature intended that

the information be immediately released to the public the moment that confidentiality was no longer required. But even if we did so, the result in this case would be the same. Joint meetings between competitors simply do not qualify under any reading of the exemption.

Because this is a critical issue of statewide concern, we certify the following issue to the supreme court:

> IS THE EXEMPTION CONTAINED IN § 395.3035(4), FLORIDA STATUTES, UNCONSTITUTIONAL UNDER THE PROVISIONS OF ARTICLE 1, § 24(b) OF THE FLORIDA CONSTITUTION?

AFFIRM but withhold mandate pending review by the supreme court.

COBB, J., and BRIGGS, D., Associate Judge, concur.