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 REPLY 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 District". 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(a) and (b) 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-". The Answer Brief of News-Journal Corporation is herein referred to as "NJAB-".

ARGUMENT OF LAW

Halifax agrees with News-Journal that the standard of review that should be applied by this Court "is neither rational basis nor strict scrutiny but rather the express standard written into the constitution. Because it is explicit, the standard is *sui generis.* The Court should enforce it according to its terms." NJAB-12. Halifax also agrees that this Court "must accord deference to the findings contained in a well formed statement of public necessity". NJAB-13.

Contrary to the arguments raised by the Florida Society of Newspapers Editors et al. in their amicus brief, the public right of access provided by the Sunshine Amendment, Art. I, §24(a), (b) and (c), Fla. Const., is totally distinct from Florida's privacy amendment, Art. I, §23. The privacy amendment is cast in absolute terms with no rights accorded the Legislature to make exemptions thereto. In contrast, Art. I, § 24(c) expressly accords the Legislature the power to enact exemptions to the public right of access, provided only "that such laws shall state with specificity the public necessity which justifies the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." Any exemption that complies with these two requisites must be found constitutional. Any effort by a court to impose a "compelling state interest standard," like that applied to protect such absolute rights as the right of privacy, would represent an infringement on the constitutional right accorded the Legislature to enact exemptions to the public right of access.

Therefore, this Court must ask only two questions:

1. Does Chapter 95-199, Laws of Florida, state with specificity the public necessity which justifies exempting from the public right of access "[t]those portions of a [public hospital's] governing board meetings at which the written strategic plans, including written plans for marketing its services, are discussed or reported on"? and

2. Is the actual exemption that was enacted broader than necessary to accomplish the stated purpose of the law?

Under Art. I, §24(c), the Legislature is required to "state with specificity the public necessity which justifies the exemption". The reason for that requirement is obvious. It is to give the public a means of challenging any exemption that is broader than necessary to accomplish the stated purpose of the exemption. Contrary to implications in News-Journal's Answer Brief, the purposes of Art. I, §24(c) is not to accord the judiciary an opportunity to redefine the public necessity or to reconsider whether the stated purpose justifies the exemption. Rather, the judiciary's function is limited to assuring that the exemption is not broader than necessary to satisfy the public necessity for which it was created.

In asking whether Chapter 95-199 states with specificity the public necessity which justifies the exemption, the answer can only be "yes". The law expressly states that if those portions of a public hospital's governing board meetings during which strategic plans are discussed 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 market place against private hospitals, whose records and meetings are not required to be open to the public". In enacting Chapter 95-199, §2, the Legislature expressly stated:

> "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, . . .[1] 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."

In so stating the public necessity for exempting strategic plans from the public right of access, the Legislature provided as much specificity as can be required under Article I, Section 24. See State v. Knight, 661 So.2d 344 (Fla. 4th DCA 1995).

As discussed at length in Halifax's Initial Brief, the Florida Legislature long grappled with the problem posed by private hospitals using the public right of access to obtain the strategic plans of public hospitals and then seizing opportunities presented therein. This posed a serious threat to public hospitals, whose ability to provide care for indigents depends in large part upon their ability to take advantage of such opportunities themselves. Without the right to close

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[1]The deleted portion is as follows: "critical confidential information regarding contracts, contract negotiations and". The exemption of contracts and contract negotiations is not at issue.

portions of the their board meetings in which strategic plans were discussed, public hospital boards were forced to either risk losing business opportunities or never discuss their strategic plans. If they adopted the latter course, their effectiveness was curtailed because they could never engage in meaningful discussions regarding the hospital's most sensitive plans. NJAB, App. 12, p. 5. As a result, the effectiveness, efficiencies and competitive abilities of public hospitals were unfairly curtailed. Id. There was, accordingly, a public necessity that public hospital boards be allowed to meet in private to discuss and debate their hospital's written strategic plan.

Section 395.3035(4), Fla. Stat., thus states succinctly and with ample specificity the public necessity which justifies the exemption. That being the case, one must next ask whether §395.3035(4), Fla. Stat., is broader than necessary to accomplish the Legislature's desire to preserve the confidentiality of written strategic plans. The answer can only be, "no".

Despite News-Journal's efforts to twist Halifax's straight forward statements into a "vacuous tautology", Halifax is in no way saying "strategic plan discussions should be secret because strategic plan discussions should be secret". Halifax is, however, asserting that the Legislature, by enacting Chap. 95-199, clearly stated that those portions of a public hospital's governing board meetings during which written strategic plans are discussed may be closed to the public in order to prevent competitor hospitals from gaining information of the hospital's strategic plans and then exploiting that information to the detriment of the public hospital. The issue, therefore, is whether §395.3035(4), Fla. Stat., (1995) is broader than necessary to accomplish the necessity of allowing public hospital boards to freely

discuss their written strategic plans without telegraphing those plans to private competitor hospitals.

In its statement of public necessity, the Legislature said:

> "If such [hospital governing board] 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 market place against private hospitals, whose records and meetings are not required to be open to the public." (*emphasis added*).

News-Journal takes the position that the phrase "critical confidential information regarding" applies not only to contracts, but also to contract negotiations and strategic plans. To that end, News-Journal resorts to a hypertechnical grammatical analysis of the statement of public necessity. News-Journal's analysis of the statement of public necessity is questionable because it ascribes to the Legislature the clumsily worded double prepositional phrase "regarding, regarding". In other words, the News-Journal's interpretation in effect reads: "If such meetings are not closed, critical confidential information regarding strategic plans regarding, for example, growth opportunities would be revealed. . .".

In contrast, Halifax asserts that the phrase "critical confidential information regarding" modifies only the next word "contracts", which are generally not confidential, but does not modify the words "contract negotiations" and "strategic plans", which are in most instances confidential. Halifax's interpretation avoids the grammatical problems of News-Journal's interpretation. Second, this less strained interpretation of the statement of public necessity makes more sense in light of the purpose of the law, i.e. allowing public hospital boards to discuss and

freely debate all aspects of their strategic plans. Finally, Halifax's interpretation is supported by the legislative history of the enactment of §395.3035(2)(b), Fla. Stat.. As early as 1995, the legislature recommended that the exemption "provide that 'strategic' plans be held confidential and exempt". NJAB-App. 12, p. 5. That recommendation became reality with the enactment of §395.3035(2)(b), Fla. Stat., which exempted strategic plans, not just critical confidential information regarding strategic plans.

In enacting Ch 95-199, Laws of Florida, the legislature recognized that public hospital boards could not have full and frank discussions of their written strategic plans unless they could close those portions of their meetings in which their written strategic plans were discussed, not just those portions in which "confidential" parts of their written strategic plan were discussed. More particularly, the Legislature recognized that one cannot schedule a public hospital board meeting to discuss only non-confidential parts of a written strategic plan and expect that no confidential information will be discussed. Ultimately, it matters little for purposes of this appeal whether the Legislature wished to protect all written strategic plans or just critical confidential information within such plans. Even if the Legislature wished to protect only critical confidential information contained in a public hospital's written strategic plan, it was still necessary to close all board discussion of the plan. How could any hospital board assure that during "free and open debate" no board member would unwittingly say something which reveals a confidential part of the strategic plan?

Despite this obvious fact, News-Journal is now asking this Court to rule that the Legislature only has the power to exempt from the public right of access

those portions of public hospital board meetings in which critical confidential information regarding strategic plans are discussed. Such a ruling, however, would vitiate the purpose of enacting §395.3035(4), Fla. Stat., and would impinge upon the Legislature's Article I, §24(c) Constitutional power to create exemptions to the public right of access.

News-Journal's argument that the exemption is unconstitutional because it might be abused must be rejected. Were such an argument accepted, virtually no exemption would be constitutional. Any time the public right of access to a document or a meeting is limited, there is a potential for abuse. The exemption in the instant case, unlike many other exemptions, contains ample safeguards to discourage public hospital boards from abusing it. Once the Legislature stated that it is a public necessity to close a public hospital board's discussions of its written strategic plans, the Legislature then created statutory protections against overly broad utilization of the exemption. The Legislature exempted only written strategic plans. Thus, before any portion of a public hospital's board meeting can be closed to discuss a strategic plan, the strategic plan must be in writing. Next, the Legislature permitted the closing of only those portions of a board meeting at which a written strategic plan is actually discussed. Most importantly, the Legislature required that all portions of board meetings closed to the public must be recorded by a certified court reports and that no portion of such meeting can be off the record. In addition, the court reporter's notes must be fully transcribed within a reasonable time of the meeting and they become public three years after the date of the board meeting. Finally, all other records of any such closed meeting have to be retained by the public hospital and lose their exemption at the

same time the transcript of the meeting becomes available to the public.

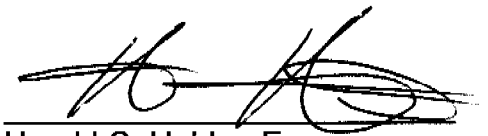
If the public suspects the exemption has been abused, there is no need to wait three years for the transcript to be made public. The substantial safeguards incorporated within §395.3035(4), Fla. Stat., permit courts to quickly resolve any alleged abuses of the exemption. If allegations of abuse are filed then early in the proceedings the court can review the transcript in camera and determine whether discussions were properly limited to the hospital's written strategic plans. Moreover, any time a court finds an abuse of the exemption, there are substantial civil and criminal sanctions available. Thus, the exemption is no broader than necessary to protect a public hospital's written strategic plans from public disclosure.

CONCLUSION

Chapter 97-199, Laws of Florida, states with ample specificity the necessity for permitting public hospitals to close those portions of their board meetings in which their written strategic plans are discussed. The exemption is no broader than necessary to prevent private competitor hospitals from using the public right of access to gather information relative to a public hospital's strategic plans and then exploiting that information to the detriment of the public hospital and all taxpayers.

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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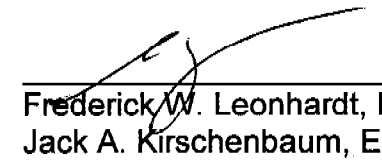

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U. S. Mail upon all persons listed on the attached Service Schedule this 2d day of April, 1998.

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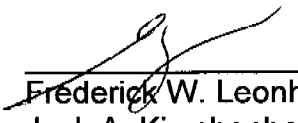

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