

**IN THE SUPREME COURT OF FLORIDA**  
Case No. SC04-1052

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Upon Request from the Attorney General  
for an Advisory Opinion as to the  
Validity of a Financial Impact Statement

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**ADVISORY OPINION TO  
THE ATTORNEY GENERAL**

RE: PATIENT'S RIGHT TO KNOW ABOUT  
ADVERSE MEDICAL INCIDENTS

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**COMBINED INITIAL AND ANSWER BRIEF  
OF FLORIDIANS FOR PATIENT PROTECTION**

IN OPPOSITION TO THE PROPOSED FINANCIAL IMPACT STATEMENT

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**STATEMENT OF THE CASE AND**  
**STANDARD FOR REVIEW**

This combined Initial and Answer brief is filed to discuss the standard for review for a proposed financial impact statement, and to demonstrate how the proposed financial impact statement in this case is inadequate. The proposed financial impact statement contains a statement about a non-existent “public records requirement” in the proposed amendment; comments about an impact from an interpretation error could mislead or confuse the voters about the amendment. Also, virtually all of the predicted costs stem from erroneously including nursing homes and similar facilities in the amendment. The proposed financial impact statement should be remanded for revision.

This matter involves the Court’s review of a proposed financial impact statement for a proposed initiative entitled “Patients’ Right to Know About Adverse Medical Incidents.” Section 100.371(6)(a), Florida Statutes (2004), provides, in relevant part, that a “Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative.” The proposed financial impact statement shall be “clear and unambiguous,” and no more than 75 words long. §

100.371(6)(b)3, Florida Statutes. The proposed financial impact statement may set forth a range of estimated costs. *Id.* If a majority of the Financial Impact Estimating Conference cannot agree on a proposed financial impact statement, the statement shall read “The financial impact of this measure, if any, cannot be reasonably determined at this time.” § 100.371(6)(b)4.

On June 25, 2004, the Financial Impact Estimating Conference submitted a proposed financial impact statement to Attorney General Charles J. Crist, Jr. The proposed financial impact statement reads:

The direct financial impact this amendment will have on state and local government revenues and expenditures cannot be determined, but is expected to be minimal. State agencies will incur some additional costs to comply with public records requirements of the amendment, but these costs will be generally offset by fees charged to the persons requesting the information.

On June 29, 2004, the Attorney General sent the proposed financial impact statement to the Court for review under Article IV, Section 10, Florida Constitution, and Section 16.061, Florida Statutes. On June 29, 2004, this Court requested interested parties to file briefs regarding this Court’s duties and responsibilities in a review of the financial impact statement under Section 100.371, Florida Statutes, and the application of those duties to the proposed initiative in this case. The substance of this proposed initiative was briefed and argued in Case No.

04-777.

The statutory standard for review by this Court is: “Any financial impact statement that a court finds not to be in accordance with this section shall be remanded solely to the Revenue Estimating Conference for redrafting.” § 100.371(6)(b)3, Florida Statutes.

This is the first opportunity for the Court to implement the new financial impact statement procedure amended this year. Nevertheless, this Court has some guidance concerning the proper implementation of this new procedure. Section 100.371(6)(b)3 requires financial impact statements to be “clear and unambiguous.”

These requirements are reinforced by similar standards for ballot title and summary under Section 101.161(1), Florida Statutes (Ballot title and summary shall be “clear and unambiguous,” and shall set forth the “chief purpose” of the proposed amendment). Thus, the chief difference between the standard for this review and for a ballot title and summary is that a title and summary need only disclose the “chief purpose” of an amendment, while the financial impact statement could disclose effects beyond the “chief purpose.” Otherwise, the clarity and ambiguity standards would seem to be similar.

This Court has a long history of jurisprudence on clarity and ambiguity in

drafting ballot titles and summaries. *See, e.g., Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982) (where an amendment does not do what its summary promises, the summary is defective); *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (quoting *Askew*, 421 So. 2d at 156) (voters must be told of “true meaning and ramifications of the amendment”).

In addition, several other states have similar procedures which can guide this Court in its review. For example, the Colorado Supreme Court has an extensive set of cases involving a financial impact statement for initiatives. *See, e.g., In re Title, Ballot Title & Submission Clause, & Summary, Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733, 742 (Colo. 1994)(the Board must present the financial impact statement in a clear, fair, and neutral manner so that the electorate is appropriately informed of the measure’s fiscal impact); *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1133 (Colo. 1996)(upholding financial impact statement which read “because the simplicity of the measure raises a question as to the scope of its interpretation, the fiscal impact of the measure is indeterminate.”); *id.*, 913 P.2d at 1137 (Mullarkey, J., concurring in part & dissenting in part) (“The Board was careless in its choice of language and violated its duty to present a neutral assessment of the Initiative’s fiscal impact.”).

In *Fremont Lumber Company v. Energy Facility Siting Council*, 936 P.2d



968, 973 (Or. 1997), the Oregon Supreme Court said “[W]ith respect to fiscal impact statements, an honest error about the law is, nevertheless, an error, and may render a statement of fiscal impact inadequate. The adequacy of a statement of fiscal impact must be assessed in terms of the actual fiscal impact of the proposed action, rather than the agency’s perception of its impact.”

This accuracy requirement is similar to this Court’s rulings in *In re Advisory Opinion to the Attorney General re Casino Authorization, Taxation & Regulation*, 656 So. 2d 466, 469 (Fla. 1995), where the summary created a false impression by suggesting it would help ban casinos when it actually authorized them, and *Armstrong v. Harris*, 773 So. 2d at 17 (citizens reading summary may have voted for amendment thinking they were protecting state rights, when in reality they were lessening them). Where the fiscal impact statement contains an error about the proposed initiative, the statement is defective.

### **SUMMARY OF ARGUMENT**

The proposed financial impact statement makes a statement concerning the “public records requirements of the amendment” which is either inaccurate or misleading. The proposed amendment has no “public records” component; it is directed entirely at records in practitioners’ and facilities’ hands.

In addition, the proposed impact statement predicts costs related to nursing

homes and assisted living facilities, neither of which are actually within the scope of the proposed adverse “medical” incidents amendment. These costs make up 94% of the predicted costs, meaning that the actual cost predictions are seriously inaccurate.

The effect of placing this erroneous financial impact statement on the ballot directly below the ballot summary is to mislead or confuse the voters. This potential confusion is not necessary to fulfill the statutory mandate for impact statements and violates the neutrality which should be required of such statements. The proposed financial impact statement should be remanded for revision.

### **ARGUMENT**

#### **I. THE PROPOSED FINANCIAL IMPACT STATEMENT IS DEFECTIVE BECAUSE IT CONTAINS A STATEMENT ABOUT A NON-EXISTENT “PUBLIC RECORDS REQUIREMENT” AND AN ERROR IN CALCULATING COSTS, BOTH OF WHICH COULD MISLEAD OR CONFUSE VOTERS ABOUT THE PROPOSED AMENDMENT.**

The proposed financial impact statement is not adequate. It is certainly true that the direct financial impact of this amendment “is expected to be minimal.” First, the direct financial impact to state and local government is minimal because there is no such “public records requirement” in the amendment.

The proposed financial impact statement first affirmatively asserts that there

are some costs associated with a “public records requirements of the amendment.” This is an incorrect reading of the amendment. There are no “public records requirements of the amendment.” The amendment, by its terms, permits Floridians to request records directly from the health care provider or facility.

The full fiscal analysis of the Financial Impact Estimating Conference explains the origin of this assertion of a public records focus:

According to the Agency for Health Care Administration (AHCA), there would be a significant increase in the number of public information requests. Although costs for public records are potentially recoverable from requestors, there may be additional changes in law to permit charges to routine overhead costs that are not currently covered and represent significant cost to the state. The Agency currently has a contractor that provides redaction and copier services for large requests. Additional staff would be required, the Florida Regulatory Administration and Enforcement System (FRAES) database would need to be modified to track whether the adverse incident met the medical incident definition, a review of all adverse incident documents would need to be performed, field office survey staff would need to investigate adverse incidents, and other changes would be necessary to keep multiple documents. AHCA estimates four staff and \$440,000 for additional records requests associated with adverse incidents for nursing homes and assisted living facilities and an additional half-time position and \$25,600 for incidents related to hospitals and ambulatory surgery centers. Public records request costs may be recovered in part by charging fees to cover the costs of storage, retrieval and duplication of documents.

INITIATIVE FINANCIAL INFORMATION STATEMENT – Patients’ Right to Know About Adverse Medical Incidents (“Information Statement”), at 5.

Unfortunately, this analysis is incorrect in several respects. As noted above,

the proposed amendment does not require, or provide for any change in, public records access. It is entirely focused on private inquiries. Thus, the additional costs for reviews of incidents and other activities are not required by the amendment.

In addition, as discussed at oral argument, the amendment does not cover “nursing homes and assisted living facilities.” These facilities are not described in the Patient’s Bill of Rights (there is a separate nursing home resident’s bill of rights) and they do not report adverse “medical” incidents. Since the costs associated with nursing home and assisted living facilities make up virtually all – approximately 94% – of the projected costs in the analysis, this error is significant.

Leaving aside the erroneous inclusion of nursing homes, what AHCA may have been trying to suggest is that, having found some information under the proposed amendment’s new private “right to know” procedures, some Floridians might be stimulated to ask for more public records. It might, therefore, be appropriate for the financial impact statement to reflect something like:

The direct financial impact of the amendment on state and local government revenues and expenditures is expected to be minimal. The amendment might increase the number of inquiries to public records maintained by state agencies, with additional costs estimated to be about \$25,600 per year.

The proposed revision suggested above does not suggest that there are “public records requirements of the amendment” and does not include costs for

nursing homes and other facilities not covered by the amendment. That difference may seem minimal, but the financial impact statement appears on the ballot directly below the ballot summary. Discrepancies between the ballot summary and impact statement can be expected to mislead or confuse the voter.

The Court should not permit language which confuses or misleads the voters in the impact statement any more than it does in a ballot title and summary. *See Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 899 (Fla. 2000) (term “bona fide qualifications based on sex” not defined and subject to broad and differing interpretations by voters); *Advisory Opinion to the Attorney General re People’s Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1309 (Fla. 1997) (“common law nuisance” and “increases in tax rates” undefined).

Neutrality is a hallmark requirement of fiscal impact statements in other states, and it should be in Florida as well. *City of Antonito*, 873 P.2d at 742 (Board must present the fiscal impact statement in a clear, fair, and neutral manner so that the electorate is appropriately informed of the measure’s fiscal impact).

The proposed financial impact statement is due some deference, but it must

not alter the ballot title or summary, either directly by error or by misleading or confusing voters. Only in that way can the impact statement be both “clear and unambiguous” to the voters. This proposed statement is neither clear nor unambiguous to the voters.

### **CONCLUSION**

The proposed statement should be remanded to the Financial Impact Estimating Conference with instructions to revise the statement regarding the “public records requirements of the amendment” and the calculation of predicted costs.

RESPECTFULLY SUBMITTED,

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## CERTIFICATE OF SERVICE

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**CERTIFICATE OF TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.210(a)(2), FLA. R. APP.

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