

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 7002

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Alzheimer's Disease Research Grant Advisory Board

DATE: February 11, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Rossitto-Van Winkle	Brown		HP Submitted as Committee Bill
1.	Ponder	McVaney	GO	Favorable
2.			RC	

I. Summary:

SB 7002 amends s. 381.82(3)(d), F.S., to save from repeal the public records exemptions for information related to the Alzheimer's Disease Research Grant Advisory Board's (the board) receipt and review of research grant applications. The documents received, and those generated by the board during the review process, except final recommendations, are designated as confidential and exempt but may be disclosed under certain circumstances.

The bill also saves from repeal the public meetings exemption for those portions of the board's meetings at which the grant applications are discussed.

The exemptions are subject to the Open Government Sunset Review Act (OGSR) and will stand repealed on October 2, 2019, unless reviewed and reenacted by the Legislature.

The bill takes effect October 1, 2019.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.² In addition to the Florida Constitution, the Florida Statutes provide that the public may access

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that:

[i]t is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements by passing a general law by a two-thirds vote of each of the House and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption, which does not meet these two criteria, may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹² Records designated “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a public records statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹³

Open Meetings Laws

The Florida Constitution also provides that the public has a right to access governmental meetings.¹⁴ Each collegial body must provide notice of its meetings to the public and permit the public to attend any meeting at which official acts are taken or at which public business is transacted or discussed.¹⁵ This applies to the meetings of any collegial body of the executive branch of state government, counties, municipalities, school districts, or special districts.¹⁶

Public policy regarding access to government meetings is also addressed in the Florida Statutes. Section 286.011, F.S., which is also known as the “Government in the Sunshine Law,”¹⁷ or the “Sunshine Law,”¹⁸ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken, to be open to the public.¹⁹ The board or commission must provide the public reasonable notice of such meetings.²⁰ Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in a manner that unreasonably restricts the public’s access to the facility.²¹ Minutes of a public meeting must be promptly recorded and open to public inspection.²²

Failure to abide by open meetings requirements will invalidate any resolution, rule, or formal action adopted at a meeting.²³ A public officer or member of a governmental entity who violates the Sunshine Law is subject to civil and criminal penalties.²⁴

The Legislature may create an exemption to open meetings requirements by passing a general law by at least a two-thirds vote of both the Senate and the House of Representatives.²⁵ The exemption must explicitly lay out the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.²⁶ A statutory

¹³ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ FLA. CONST. art. I, s. 24(b).

¹⁵ *Id.*

¹⁶ FLA. CONST. art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: “The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.”

¹⁷ *Times Pub. Co. v. Williams*, 222 So. 2d 470, 472 (Fla. 2d DCA 1969).

¹⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

¹⁹ Section 286.011(1)-(2), F.S.

²⁰ *Id.*

²¹ Section 286.011(6), F.S.

²² Section 286.011(2), F.S.

²³ Section 286.011(1), F.S.

²⁴ Section 286.011(3), F.S.

²⁵ FLA. CONST. art. I, s. 24(c).

²⁶ *Id.*

exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.²⁷

Open Government Sunset Review Act

The OGSR prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.²⁸ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. In order to save an exemption from repeal, the Legislature must reenact the exemption or repeal the sunset date.²⁹ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.³⁰ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;³¹
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;³² or
- It protects trade or business secrets.³³

The OGSR also requires specified questions to be considered during the review process.³⁴ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.³⁵ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then

²⁷ See *supra*, note 11.

²⁸ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1., F.S.

³² Section 119.15(6)(b)2., F.S.

³³ Section 119.15(6)(b)3., F.S.

³⁴ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

³⁵ FLA. CONST. art. I, s. 24(c).

a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.³⁶

Ed and Ethel Moore Alzheimer's Disease Research Program

The Ed and Ethel Moore Alzheimer's Research Program is established within the Florida Department of Health to fund research to help prevent or cure Alzheimer's disease.³⁷ Applications for research funding under the program are submitted from universities and established research institutes in the state.³⁸ Awards must be made through a competitive, peer-reviewed process in any of the following categories:

- Investigator-initiated research;
- Institutional research;
- Predoctoral and postdoctoral research fellowships; and
- Collaborative research.

The board annually provides the State Surgeon General input on the scope of the research program and its recommendations for proposals to be funded.³⁹ The State Surgeon General, in turn, awards grants, after consulting with the board, on the basis of scientific merit. The board may also advise on program priorities, assist in developing linkages with nonacademic entities, and develop and provide oversight of mechanisms for disseminating research results.

Applicants must apply through an online system that includes the following items of information:

- Principal Investigator information: name, address, telephone number, email address, suffix/academic or professional title, institution name, and mailing address;
- Names of other research personnel;
- Name, address, telephone number, and email address of the Sponsored Research Official;
- Lead organization;
- Collaborating institutions and collaborating research personnel, if any;
- Project information, including descriptive title of proposed research, research priority area, grant category, grant funds requested, general audience abstract, scientific abstract, research site, survey instruments, and disclosure of research activities involving human subjects, vertebrate animals, recombinant DNA molecules, and stem cells;
- Key words;
- Collaborator information;
- Signed approval letter from the Principal Investigator's Office of Sponsored Research;
- Budget and budget narrative; and
- Biographical sketch.⁴⁰

³⁶ Section 119.15(7), F.S.

³⁷ Section 381.82(1), F.S.

³⁸ Section 381.82(1)(b), F.S.

³⁹ Section 381.82(3), F.S.

⁴⁰ The Department of Health, *Open Government Sunset Review Questionnaire*, (Aug. 6, 2018), at p. 2 (on file with the Senate Committee on Health Policy).

The board holds an annual, in-person meeting to review and select the grant proposals by December 15 of each year to be recommended to the state surgeon general for funding.⁴¹ Those portions of the meeting are “closed” and exempt from public meeting requirements. The records generated by the board relating to review of the grant applications are also exempt from public records law and may include:

- A recommended list of research grants to receive funding;⁴²
- Assessment of Alzheimer’s disease relatedness;
- Health impact;
- Budget request and narrative; and
- Research category.⁴³

Other responsibilities of the board may include, but are not limited to, providing advice on program priorities and emphases; assisting in the development of appropriate linkages to nonacademic entities, such as voluntary organizations, health care delivery institutions, industry, government agencies, and public officials; and developing and providing oversight regarding mechanisms for the dissemination of research results.⁴⁴

The board reports annually to the Governor, President of the Senate, Speaker of the House of Representatives, and the State Surgeon General on elements of the program’s implementation, its impact on leveraging additional funding, progress towards its goals, and recommendations to further its mission.⁴⁵ The annual meetings are not publicly noticed. The only information discussed during the meetings pertains to the research grant applications for the purpose of selecting the list of recommended grant recipients.

Section 381.82(3)(d), F.S., creates a public records exemption for grant applications submitted to the board and the records generated by the board during its review, except the final recommendations. The information is confidential and exempt.⁴⁶ The records may be released, however, with the express written consent of the person to whom the information pertains or the person’s legally authorized representative, or by court order upon a showing of good cause.

Section 381.82(3)(d), F.S., also provides that those portions of the board’s meetings at which the grant applications are discussed are exempt from the public meetings law. The statute requires

⁴¹ The Department of Health, Provider and Partner Resources, *Alzheimer’s Disease Research Grant Advisory Board*, available at: <http://www.floridahealth.gov/%5C/provider-and-partner-resources/adrgab/index.html> (last visited Dec. 17, 2018).

⁴² *Id.*. This list with peer review scores and abstracts is forwarded to the state surgeon general for finalizing the research grant awards.

⁴³ *Id.*

⁴⁴ *Id.*.

⁴⁵ Section 381.82, F.S.

⁴⁶ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

that the closed portions of the meetings be recorded, and the recordings may be released under the same circumstances as apply to the exempt records.

While the Department of Health (DOH) has not received any requests for exempt records or meeting recordings from 2014 through the present, related to the Ed and Ethel Moore Alzheimer's Disease Research Grant Program, the public record and public meeting exemption ensures that the Principal Investigators' personal information is kept confidential, personal reputation is protected, and that the integrity of the research is not compromised. Research grants awarded through this program often include proprietary information such as information relating to patents, investigational new drugs, and investigational new equipment. The exemptions enable the board to openly discuss and evaluate each research grant submitted. The DOH requests the reenactment of the exemption.⁴⁷

Section 381.82(3)(d), F.S., provides for the repeal of the exemptions pursuant to the OGSR on October 2, 2019, unless reviewed and saved from repeal by the Legislature.

III. Effect of Proposed Changes:

This bill saves from repeal the public records exemption for information received by, or created by, the board relating to its review of research grant applications. Grant applications and supporting documentation provided to the board for Alzheimer's disease research, and any records generated by the board relating to review of such applications, except final recommendations, will continue to be confidential and exempt from public disclosure.

This bill also saves from repeal the public meeting exemption for those closed portions of a meeting of the board during which applications for Alzheimer's disease research grants are discussed.

The effective date of the bill is October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

⁴⁷ The Department of Health, *Open Government Sunset Review Questionnaire*, (Aug. 6, 2018), at p. 2 (on file with the Senate Committee on Health Policy).

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of this law is to maintain keep confidential research grant applications, and records generated by the board related to review of the applications, which contain information of a confidential nature, including ideas and processes, the disclosure of which could injure the affected researchers. Further, closing access to those portions of the meetings of the board during which the Alzheimer's disease research grant applications are discussed serves the purpose of ensuring decisions are based upon merit without bias or undue influence. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 381.82(3)(d), Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
