

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1414

SPONSOR: Governmental Oversight & Productivity Committee and Senator Clary

SUBJECT: Florida Institute of Human and Machine Cognition

DATE: April 14, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dormady</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>AED</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	<u>RC</u>	_____

I. Summary:

The Institute of Human and Machine Cognition is currently an interdisciplinary research unit of the University of West Florida. The bill establishes the Florida Institute of Human and Machine Cognition in law as a not-for-profit corporation.

This bill creates a new section of the Florida Statutes.

The bill is effective July 1, 2003.

II. Present Situation:

The Florida Institute of Human and Machine Cognition (IHMC) is a research institute that investigates a broad range of topics related to understanding cognition in both humans and machines, with an emphasis on building computational tools to leverage and amplify human cognitive and perceptual capacities. The IHMC, which currently has a staff of over 100 people, was established in 1990 as an interdisciplinary research unit of the University of West Florida (UWF). While it was originally housed on the campus of UWF, it is now located primarily in downtown Pensacola, Florida in two leased buildings (one of which is owned by UWF, and one of which is owned by a private party). It also has a small office at NASA ARC in Mountain View, California, which is operated on leased property. Furnishings, equipment and other personal property used in the operation of IHMC are generally owned by UWF. The IHMC currently receives annual funding from the state.

IHMC is currently an agency of the state and, as such, it is subject to all of the restrictions that govern state agencies, including guidelines regarding salary and benefits for employees and requirements regarding competitive bidding for contracts.

III. Effect of Proposed Changes:

The bill creates the IHMC as a not-for-profit corporation governed by a board of directors. The IHMC is permitted to create subsidiaries that also must be not-for-profit upon the prior approval of the State Board of Education. The corporation:

- Would be an instrumentality of the state pursuant to s. 768.28, F.S.
- Would not be an agency of the state within the meaning of s. 20.03(11), F.S.
- Would be subject to open meetings and public records requirements.
- Would have board members who are subject to the code of ethics for public officers and employees.
- Would be required to provide equal employment opportunities for all persons regardless of race, color, religion, gender, national origin, age, handicap, or marital status.
- Would have board members who are responsible for the prudent use of all public and private funds and that they will ensure that the use of funds is in accordance with all applicable laws, bylaws, or contractual requirements.

The bill requires the agreement between the SBE and the corporation to be entered into by July 1, 2003, and to contain certain provisions or requirements, some of which include:

- Approval by the SBE of the articles of incorporation of the non-profit corporation and any subsidiaries;
- Provision for use by the corporation and its subsidiaries of facilities and personnel for approved teaching/research programs conducted by the UWF or other research entities;
- Preparation of an annual postaudit of the corporation and subsidiaries' financial accounts by an independent CPA, to be submitted to the Auditor General and the SBE for review. The SBE, the Auditor General, and OPPAGA will have the authority to require supplemental information regarding operation of the corporation or any subsidiary; and
- Provision for equal employment opportunities at the corporation and subsidiaries.

The bill provides that, if the agreement between the corporation and the SBE is terminated for any reason, the SBE will assume governance and operation of any IHMC-owned property and equipment; it does not, however, make any provision for transfer of title or ownership of any such property.

IHMC is to be administered by the CEO of the non-profit corporation, who will be appointed by and serve at the pleasure of the board. The CEO is required to:

- Establish programs for IHMC (although programs in which academic credit is awarded or that culminate in conferring a degree would require prior approval of the SBE and the UWF).
- Control the money and budget of IHMC, whether appropriated, donated, or received as income (although income generated by university faculty from activities of IHMC will be shared between IHMC and the university as determined by the CEO and university officials).

- Appoint representatives of IHMC to carry out research and education and establish the compensation, benefits and terms of service of the representatives.
- Control space and equipment and establish IHMC's administrative structure;
- Annually report in writing to the Commissioner of Education with updates on the activities of IHMC and state budget allocation expenditures.
- Provide a copy of IHMC's annual report to government officials, including the Governor, the Senate President and the Speaker of the House.
- Appoint a council of scientific advisers, ratified by the board of directors, which will review programs and recommend research priorities.

A board of directors will manage the corporation. The initial board of directors will consist of the President of UWF and the chair of the SBE (or their designees); four state university representatives, two to be appointed by the governor, one by the Senate President, and one by the Speaker of the House; and nine public representatives, three to be appointed by the Governor, two by the Senate President, two by the Speaker of the House, and two by the chair of the UWF Board of Trustees. In order to provide for staggered terms, the three state university representatives each will have an initial three-year term and the nine public representatives each will have an initial two-year term. Thereafter, their terms will be for three years.

The non-profit corporation is authorized by the bill to receive and administer property and money, together with any income generated by IHMC, for the benefit of IHMC. The non-profit corporation may create subsidiaries to operate IHMC, with the prior approval of the SBE. The bill provides authority for the board of directors to purchase comprehensive general liability insurance for the corporation and subsidiaries.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 119.01(2), F.S., defines "agency" to include:

“. . . 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 [emphasis added].”

Further, Art. I, s. 24(a), of the State Constitution establishes a constitutional right of access to records, including records of the legislative, executive and judicial branches of government.

The Florida Supreme Court has established a “totality of factors” test in determining when a private entity is acting on behalf of a public agency.¹ The totality of factors that are considered by the courts are:

- < The level of public funding;
- < Commingling of funds;
- < Whether the activity is conducted on publicly-owned property;
- < Whether services contracted for are an integral part of the public agency’s chosen decision-making process;
- < Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
- < The extent of the public agency’s involvement with, regulation of, or control over the private entity;
- < Whether the private entity was created by the public agency;
- < Whether the public agency has a substantial financial interest in the private entity;
- < For whose benefit the private entity is functioning.

The Attorney General’s Office has issued numerous opinions advising that if a nonprofit entity is created by law, it is subject to ch. 119, F.S.,² as well as s. 286.011, F.S., the public meetings law.³

The bill does not explicitly state that the corporation created by the bill is subject to the requirements of ch. 119, F.S., or s. 286.011, F.S. While an explicit statement is not necessary for open records and meetings requirements to apply, an explicit statement ensures that the public, as well as the members of the board, have notice that the requirements are applicable.

C. Trust Funds Restrictions:

None.

¹ *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). See also, *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 277, 229 (Fla. 3d DCA 1998), in which a private company operating state university bookstores is an “agency” as defined in s. 119.011(2), F.S., notwithstanding the language in the contract with universities that purported to deny an agency relationship.

² Florida Windstorm Joint Underwriting Association, a private nonprofit association established pursuant to a plan adopted by rule of the Department of Insurance in accordance with statutory authorization, AGO 94-32; Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to provide assistance in the funding and administration of certain governmental programs, AGO 94-34; Rural health networks, established as nonprofit legal entities organized to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, F.S., Inf. Op. to Ellis, March 4, 1994; South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to ch., 616, F.S., AGO 95-17.

³ See, AGO 92-80 in which open meetings requirements were found to apply to Enterprise Florida, Inc.; AGO 97-17 in which open meetings requirements were applied to a not-for-profit corporation created by a city; AGO 98-55, in which a nonprofit organization incorporated pursuant to the Community Care for the Elderly Act was found to be required to comply with open meetings requirements.

D. Other Constitutional Issues:

It is not clear, in light of Art. IX, s. 7 of the Florida Constitution, that the State Board of Education is the correct entity either to enter into the governance agreement with the corporation for IHMC or to provide oversight to the corporation. Although the role of the State Board of Governors has not yet been fully defined, it is likely that, pursuant to this constitutional provision, the Board of Governors will assume university-related responsibilities previously under the jurisdiction of the SBE. Accordingly, it may be appropriate to change references to the SBE in the bill to the Board of Governors.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill changes the organizational structure of the IHMC, an existing institute which is an interdisciplinary research unit of the University of West Florida. The IHMC currently receives funding from the state through UWF (\$1,194,937 in FY 2001-2002, and approximately \$1.6 million in FY 2002-2003).

The IHMC currently is an agency of the state with a staff of over 100 people. As such, it is subject to all of the restrictions that govern state agencies, including guidelines regarding salary and benefits for employees. Re-creating the IHMC as a non-profit corporation appears to remove current staff from state employment, which includes health and other benefits, and state retirement. This would appear to have an impact on employee costs, though that amount has not been determined.

IHMC is currently an agency of the state and, and requirements regarding competitive bidding for contracts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides that the not-for-profit corporation and its subsidiaries are permitted to receive, hold, invest, and administer property and any moneys acquired from private, local, state, and federal sources, as well as technical and professional income generated or derived from practice activities of the institute for the benefit of the institute and the fulfillment of its mission. No

reference is made regarding the use of these funds for the benefit of the State or that the corporation acts in the best interest of the State.

The bill requires the State Board of Education to enter into an agreement “. . . for the utilization of the facilities of the University of West Florida . . . including all furnishings, equipment, and other chattels used in the operation of the facilities . . . “ As this provision does not specify what types of requirements must be contained in this agreement, other than for the utilization of facilities, it appears that this is a lease agreement. It is not clear whether rents may be received from the corporation for use of this property.

The bill does not clarify the status of employees of the IHMC.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
