

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/CS/SB 2216

SPONSOR: Health, Aging, and Long-Term Care Committee, Education Committee and Senator Miller

SUBJECT: H. Lee Moffitt Cancer Center and Research Institute/Public Records Exemption

DATE: April 19, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>O'Farrell</u>	<u>ED</u>	<u>Favorable/CS</u>
2.	<u>Harkey</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable/CS</u>
3.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
4.	<u> </u>	<u> </u>	<u>CM</u>	<u> </u>
5.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

The CS/CS/SB 2216 expands the public records exemption for the H. Lee Moffitt Cancer Center and Research Institute (institute), its not-for-profit corporation and its subsidiaries to include: information relating to methods of manufacture or production; potential trade secrets; potentially patentable material; proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries, and business transactions resulting from such research; and any information received by the not-for-profit corporation and its subsidiaries from a person in Florida, another state or nation, or the Federal Government which is otherwise exempted pursuant to the laws governing the sending person.

The committee substitute provides a sunset repeal on October 2, 2008, unless saved from repeal by the Legislature. In addition, the committee substitute provides a statement of public necessity for the public records exemption.

This committee substitute amends s. 1004.43, F.S., and creates two unnumbered sections of law.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, chapter 119, F.S., specifies the conditions under which public access must be provided to governmental records. While the state constitution provides that records are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, Fla. Const., governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, Fla. Const., provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act, contained in s. 119.14, F. S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review Act of 1995. This Act provides for the repeal and prior review of any public records exemptions that are created or substantially amended in 1996 and subsequently. The review cycle began in 2001. The chapter defines the term “substantial amendment” for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

The H. Lee Moffitt Cancer Center and Research Institute

Section 1004.43, F.S., establishes the H. Lee Moffitt Cancer Center and Research Institute. The institute is governed by a not-for-profit corporation run by a board of directors. The not-for-profit corporation may create, with prior approval from the State Board of Education, not-for-profit subsidiaries. The records of the not-for-profit corporation and its subsidiaries are public records unless made confidential or exempt by law.

Section 1004.43, F.S., provides a public records and public meetings exemption for proprietary confidential business information and for meetings of the board of directors, in which the expenditure of appropriated dollars is not discussed. Proprietary confidential business information is defined as information the disclosure of which would harm the entities and relates to the following:

- Internal auditing controls;
- Matters protected by attorney-client privilege;
- Contracts for managed-care arrangements, including documents relating to the negotiation, performance and implementation of the contracts;
- Bids or other contractual data, banking records, and credit agreements;
- Private contractual data;
- Personnel information;
- Credentialing information;
- Minutes of meetings except for those meetings where the expenditure of appropriated dollars is discussed;
- Plans for marketing services;

- Trade secrets as defined in s. 688.002, F.S., including reimbursement methodologies or rates; or
- Identities of donors or prospective donors who wish to remain anonymous.

Section 1004.22, F.S., authorizes a state university to create a division of sponsored research. As part of a public corporation of the state, the records of the division of sponsored research are subject to public disclosure unless specifically exempted by law. Section 1004.22(2), F.S., specifically exempts the following records from public disclosure: materials that relate to methods of manufacture or production; potential trade secrets; potentially patentable material; actual trade secrets; business transactions; or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities.

The institute has opined that the records protected under the not-for-profit corporation's public records exemption would include the records protected from public disclosure requirements under the division of sponsored research's exemption. The University of South Florida believes that the exemption from public disclosure requirements under the division of sponsored research is broader than the institute's exemption. The university believes that its public records exemption extends to cover research agreements with a third party and that the institute's exemption is more concerned with the business operations of the institute. The university maintains that the expansion of the public records exemption is needed to ensure that any exempted information transmitted from the division of sponsored research maintains its protected status when delivered to the institute. Accordingly, the University of South Florida has expressed its reservation about exchanging certain research information with the institute.

However, the differences in the exemptions between the institute and the division of sponsored research are not so apparent when the exemption for trade secrets, as defined in s. 688.002, F.S., is examined. Section 688.002, F.S., defines trade secrets as any information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, that is not readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable to maintain its secrecy. The trade secret exemption is not limited to the business operations of the institute. Accordingly, the trade secret exemption afforded the institute does not appear to require public disclosure, upon proper request, of a third party's research.

III. Effect of Proposed Changes:

The committee substitute expands the H. Lee Moffitt Cancer Center and Research Institute's public records exemption to incorporate the public record's exemption provided a division of sponsored research under s. 1004.22(2), F.S. Namely, the public records exemption excludes the following information from public disclosure requirements: information relating to methods of manufacture or production; potential trade secrets; potentially patentable material; and proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries, and business transactions resulting from such research. This public records expansion would resolve the dispute concerning protection of intellectual property between the not-for-profit corporation and the University of South Florida.

In addition, the committee substitute expands the public records exemption to include any information received by the not-for-profit corporation and its subsidiaries from a person in Florida, another state or nation, or the Federal Government which is otherwise exempted pursuant to the laws governing the sending person. This public records expansion is directed at resolving concerns over the protection of research of a third party.

The committee substitute provides a sunset repeal on October 2, 2008, unless reviewed and saved from repeal through reenactment by the Legislature, and a statement of public necessity for the expansion of the public records exemption.

The effective date of the bill is upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

Section 24, Art. 1 of the State Constitution, provides, in pertinent part, that all public records made or received in connection with the official business of any public body are subject to public disclosure unless specifically made exempt by law. The law must state with specificity the public necessity justifying the exemption and may not be broader than necessary to accomplish its purpose. In addition, the law must be approved by a two-thirds vote of each house.

The phrase “business transactions resulting from such research” in the exemption appears to be vague because it is not clear exactly what could be included within the term. This phrase, potentially, could be used to shield an entire contract from inspection, as opposed to only those portions of it that would reveal information that should be protected, i.e., trade secrets. The exemption would be clearer and more specific if the phrase were modified so as to limit what information is included within it. For example, on page 4, line 4, the phrase could be modified to read: “information in a record of a business transaction that would reveal any of the information made exempt by this section.”

The statement of public necessity provides that the exemptions from public disclosure requirements are necessary to prevent the not-for-profit corporation and its subsidiaries from being adversely affected in competition with other health care and medical research entities.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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