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: SB 2922

SPONSOR: Senator Miller

SUBJECT: Public Records Exemption

DATE: April 8, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable
2.	Rhea	Wilson	GO	Favorable
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill revises the definition of "trade secrets" for purposes of the public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries. "Trade secrets" is redefined to mean trade secrets as defined in s. 688.002, F.S., including information relating to methods of manufacture or production, potential trade secrets, potentially patentable materials, or 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 reimbursement methodologies or rates.

The public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries is substantially amended to include any information received by the not-for-profit corporation or its subsidiaries from a person in Florida or in another state or nation or the federal government which is otherwise exempt or confidential pursuant to the laws of Florida or another state or nation or pursuant to federal law.

Pursuant to the Open Government Sunset Review Act of 1995, the public records exemption as expanded by the bill to include additional information is scheduled to be repealed on October 2, 2009, unless reviewed and saved from repeal by reenactment by the Legislature. The bill provides a public necessity statement for the expansion of the records covered by the public records exemption as amended in the bill.

This bill amends section 1004.43, Florida Statutes, and creates two undesignated sections of law.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution, provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution.

The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron*, *Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption must state with specificity the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose of the law, relate to one subject, and contain only exemptions to public records or meetings requirements. The law enacting an exemption may contain provisions governing enforcement.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government. *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997). The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for their release such that their confidential status will be maintained, such information may not be released by an agency to anyone other than to the

persons or entities designated in the statute. Attorney General Opinion 85-625. If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances. *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985). For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant. *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999). The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records. *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

In *B.B.*, *infra*, at 34, the Court noted with regard to criminal discovery the following:

> In the context of a criminal proceeding, the first district has indicated that "the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure," so that a public records exemption cannot limit a criminal defendant's access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure." Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).

In a footnote, (*B.B.*, *infra*, at 34 n. 4) the Court also noted:

> We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is "not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution...."

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- 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?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is

used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The exemption must be no broader than is necessary to meet the public purpose it serves. The Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Proprietary Confidential Business Information

Section 1004.43(8), F.S., makes proprietary confidential business information, as defined in the subsection, of the not-for-profit-corporation organized pursuant to s. 1004.43(1), F.S., for the purposes of operating the H. Lee Moffitt Cancer Center and Research Institute, and the corporation's subsidiaries, confidential and exempt from disclosure, except that the Auditor General, the Office of Program Policy Analysis and Government Accountability, and the State Board of Education, pursuant to their oversight and auditing functions, must be given access to all proprietary confidential business information upon request and without subpoena. Such entities must also maintain the confidentiality of the information so received. "Proprietary Confidential Business Information" means information which is owned or controlled by the not-for-profit corporation or its subsidiaries; is intended to be and is treated by the not-for-profit corporation or its subsidiaries as private and the disclosure of which would harm its business operations; has not been intentionally disclosed by the corporation or its subsidiaries unless pursuant to law, an order of the court or administrative body, a legislative proceeding, or a private agreement that provides that the information may be released to the public; and is information concerning:

- Internal auditing controls and reports of internal auditors;
- Matters reasonably encompassed in privileged attorney-client communications;
- Contracts for managed-care arrangements, including preferred provider organization contracts, health maintenance organization contracts, and exclusive provider organization contracts, and any documents directly relating to the negotiation, performance, and implementation of any such contracts for managed-care arrangements;
- Bids or other contractual data, banking records, and credit agreements the disclosure of which would impair the efforts of the not-for-profit corporation or its subsidiaries to contract for goods or services on favorable terms;
- Information relating to private contractual data, the disclosure of which would impair the competitive interest of the provider of the information;
- Corporate officer and employee personnel information;
- Information relating to the proceedings and records of credentialing panels and committees and of the governing board of the not-for-profit corporation or its subsidiaries relating to credentialing;
- Minutes of meetings of the governing board of the not-for-profit corporation and its subsidiaries, except minutes of meetings open to the public pursuant to subsection (9);
- Information that reveals plans for marketing services that the corporation or its subsidiaries reasonably expect to be provided by competitors;
- Trade secrets as defined in s. 688.002, including reimbursement methodologies or rates; or

- The identity of donors or prospective donors of property who wish to remain anonymous or any information identifying such donors or prospective donors. The anonymity of these donors or prospective donors must be maintained in the auditor's report.

Section 688.002, F.S., defines "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- Derives independent economic value, actual or potential, from not being generally known to, and not being 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 under the circumstances to maintain its secrecy.

III. Effect of Proposed Changes:

The bill revises the definition of "trade secrets" for purposes of the public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries. "Trade secrets" is redefined to mean trade secrets as defined in s. 688.002, F.S., including information relating to methods of manufacture or production, potential trade secrets, potentially patentable materials, or 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 reimbursement methodologies or rates.

The public records exemption for proprietary confidential business information owned or controlled by the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries is substantially amended to include any information received by the not-for-profit corporation or its subsidiaries from a person in Florida or in another state or nation or the federal government which is otherwise exempt or confidential pursuant to the laws of Florida or another state or nation or pursuant to federal law.

Pursuant to the Open Government Sunset Review Act of 1995, the public records exemption as expanded by the bill to include additional information is scheduled to be repealed on October 2, 2009, unless reviewed and saved from repeal by reenactment by the Legislature. The bill provides a public necessity statement for the expansion of the records covered by the public records exemption as amended in the bill. The Legislature finds that it is a public necessity that trade secrets of the H. Lee Moffitt Cancer Center or its subsidiaries as defined in s. 688.002, F.S., be confidential and exempt from public disclosure. In accordance with that definition, a "trade secret" consists of information that derives economic value, actual or potential, from not being readily ascertainable by others and that is the subject of reasonable efforts to maintain its secrecy. The Legislature has determined that the disclosure of such information would adversely affect the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries, which are resources of the State of Florida, and would create an unfair competitive advantage to a person receiving such information. The Legislature finds that the redefinition of "trade secrets" in the bill does not substantially amend the existing exemption.

Legislative findings are expressed that information received by the not-for-profit corporation or its subsidiaries from a person in Florida or another state or nation or the federal government which is otherwise exempt or confidential pursuant to laws of Florida or another state or nation or pursuant to federal law should remain confidential because the highly confidential nature of cancer-related research necessitates that the not-for-profit corporation or its subsidiaries be authorized to maintain the status of exempt or confidential information it receives from the sponsors of research. Without the exemptions provided in the bill, the disclosure of exempt and confidential information would place the not-for-profit corporation on an unequal footing in the marketplace as compared with competitors in the private sector who are not required to make such disclosures. The Legislature finds that the disclosure of such exempt and confidential information would adversely impact the not-for-profit corporation or its subsidiaries in fulfilling their mission of cancer treatment, research, and education.

The bill provides an effective date 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, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill substantially amends an existing public records exemption and is, therefore, subject to the two-thirds vote requirement of Article I, s. 24 of the State Constitution.

Article I, s. 24(c) of the State Constitution, authorizes the Legislature to enact general laws creating exemptions provided such laws state with specificity the public necessity justifying the exemption and that such laws are no broader than necessary to accomplish the stated purpose.[1] On page 3, lines 24 and 25, the bill exempts ". . . business transactions resulting from such research . . . " This could be determined to be overbroad under the cases interpreting Article I, s. 23 of the State Constitution, as it would appear to exempt the entire contract and not just those parts for which a shield is necessary. Further, given the types of information that are already protected under other provisions of the exemption, any information within documents related to such business transactions would already be required to be redacted. Additionally, the statement of public necessity does not explain the public necessity supporting the exemption of all business transactions. As such, this portion of the exemption could be subject to challenge.

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.

[1] Memorial Hospital-West Volusia v. News-Journal Corporation, 729 So.2d 373, 380 (Fla. 1999).

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.