

# 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.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/SB 2066

INTRODUCER: Governmental Oversight and Productivity Committee and Education Committee

SUBJECT: Byrd Alzheimer's Center/OGSR

DATE: April 19, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Matthews</u>	<u>ED</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill is the result of an Open Government Sunset Review of a public records exemption for records provided to the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute that was performed by the Education Committee. The bill clarifies and standardizes the exemption and saves the exemption from repeal.

This bill substantially amends section 1004.445 of the Florida Statutes.

## II. Present Situation:

**Public Records** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

... to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

(a) Every person<sup>4</sup> has 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency<sup>5</sup> records are available for public inspection. The term “public record” is broadly defined 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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>13</sup>

The Public Records Act<sup>14</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

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<sup>4</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>5</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

<sup>10</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> Art. I, s. 24(c) of the State Constitution.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 119, F.S.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>15</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>16</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>17</sup> If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>18</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

In *Ragsdale v. State*,<sup>20</sup> the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,<sup>21</sup> a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status

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<sup>15</sup> Section 119.07(1)(b), F.S.

<sup>16</sup> Section 119.07(1)(c) and (d), F.S.

<sup>17</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>18</sup> *Ibid* at 53, *see also*, Attorney General Opinion 85-62.

<sup>19</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>20</sup> 720 So.2d 203 (Fla. 1998).

<sup>21</sup> 642 So.2d 1135, 1137 (Fla. 4<sup>th</sup> DCA 1994).

simply because it was provided to the State during the course of its criminal investigation.<sup>22</sup>

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

**The Open Government Sunset Review Act** - The Open Government Sunset Review Act<sup>23</sup> provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>24</sup>

The act also requires consideration of the following:

- 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?

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<sup>22</sup> *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So.2d at 1137) (second emphasis added by *Ragsdale* court).

<sup>23</sup> Section 119.15, F.S.

<sup>24</sup> Section 119.15(4) (b), F.S.

- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, 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?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>25</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

**Johnnie B. Byrd, Sr., Alzheimer’s Center and Research Institute** - The Legislature initially created the Alzheimer’s Center and Research Institute at the University of South Florida in 2002, and renamed it the Johnnie B. Byrd, Sr., Alzheimer’s Center and Research Institute (“Center”) in 2004.<sup>26</sup> The Legislature established the Center as a not-for-profit corporation, classified as an instrumentality of the state but not as a state agency.<sup>27</sup> The Center is authorized to create both not-for-profit, and for-profit subsidiaries, upon approval of the State Board of Education.<sup>28</sup> The State Board of Education assumes full governance and facility operation of the Center if the agreement between the Center and the State Board of Education terminates for any reason.<sup>29</sup>

A State Board of Education chair or designee holds a seat on the Center’s Board of Directors.<sup>30</sup> The board of directors is required to establish a council of scientific advisers to the chief executive officer, to include researchers, physicians, and scientists.<sup>31</sup> Additionally, the chief executive officer of the Center is required to create programs that implement the mission of the Center in the areas of Alzheimer’s research, education, treatment, prevention, and early detection.<sup>32</sup> According to the Center, its mission is to “collaborate with researchers throughout the State of Florida and the wider global research community to develop treatment to cure and prevent this disease [Alzheimer’s].”<sup>33</sup>

<sup>25</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>26</sup> Chapters 2002-387 and 2002-389, L.O.F. and Chapter 2004-2, L.O.F.

<sup>27</sup> Section 1004.445(2)(a) and (8), F.S.

<sup>28</sup> Section 1004.445(2)(a), F.S.

<sup>29</sup> Section 1004.445(5), F.S.

<sup>30</sup> Section 1004.445(2)(b), F.S.

<sup>31</sup> Section 1004.445(7), F.S.

<sup>32</sup> Section 1004.445(6)(a), F.S.

<sup>33</sup> See generally the Center’s website at: [www.byrdinstitute.org/htm\\_pages\\_OLD/about\\_intro.htm](http://www.byrdinstitute.org/htm_pages_OLD/about_intro.htm); last checked February 8, 2006.

The Legislature enacted a public records exemption in 2002 for certain information received and maintained by the Center.<sup>34</sup> Pursuant to the exemption, the following information is confidential and exempt:

- Client personal identification information which is maintained by the Center, the University of South Florida, the State Board of Education, or others who provide services through a contract with the Center;
- All patient medical and health records created or received by the Center;
- Materials that relate to manufacturing or production processes, potential or actual trade secrets, potentially patentable material, or proprietary information received, generated, or discovered during research by or through the Center and its business transactions;
- Identification information of a donor or prospective donor who requests anonymity;
- Any information received by the Center in the performance of its duties which is otherwise confidential and exempt by law; and
- Any information received by the Center from a person from another state, nation, or the Federal Government which is made confidential or exempt by the laws of that state, nation, or under Federal law.<sup>35</sup>

The exemption authorizes access to governmental entities that demonstrate a need to have the exempt information and requires them to keep the information confidential and exempt.<sup>36</sup>

The Legislature's statement of public necessity provides the following as justification for making specified information confidential and exempt:

- **Personal, medical, or health information about clients or patients:** Access would otherwise constitute an unjustified invasion of a client's or patient's right to privacy, and the misuse of this information could harm the client's or patient's health, safety, or welfare;
- **Manufacture of production methods information, actual or potential trade secrets, business transactions, and proprietary information:** Disclosure would hinder the effective operation of the Center and potentially create an unfair competitive advantage for those receiving the information;
- **Donor or potential donor identification information:** In instances where anonymity is preferred, the ability of the Center to solicit donations would otherwise be impeded, causing a chilling effect on donation flow; and
- **Information shared with the institute by entities who are not subject to this state's laws and for whom the information is confidential and exempt:** Otherwise others would be discouraged from sharing information with the Center, which would impede the efficacy of the Center.<sup>37</sup>

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<sup>34</sup> Chapter 2002-396, L.O.F.

<sup>35</sup> Section 1004.445(9)(a) through (f), F.S.

<sup>36</sup> Section 1004.445(9), F.S.

<sup>37</sup> Chapter 2002-396, L.O.F.

This public records exemption is subject to the Open Government Sunset Review Act of 1995, and is repealed on October 2, 2006, unless reviewed and reenacted by the Legislature before that date.

### **III. Effect of Proposed Changes:**

This bill is the result of an Open Government Sunset Review of a public records exemption for records provided to the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute that was performed by the Education Committee. The bill clarifies and standardizes the exemption and saves the exemption from repeal. The bill also removes unnecessary language regarding maintenance of information that is received by the center that is confidential and exempt elsewhere as the general standard requires the center to maintain the confidentiality of that information if it receives it. Further, if such information is released by the center to an authorized recipient, such recipient is also required to maintain the confidentiality of the information.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

Pursuant to Article I, s. 24(c) of the State Constitution, records may be exempted from open government requirements only where the exemption is no broader than necessary to accomplish the stated purpose of the law. In the public necessity statement creating the exemption, the Legislature indicated that personal, medical, or health information regarding clients or patients should be made confidential and exempt from disclosure as access to the information:

Would be an unwarranted invasion of a client or patient's right to privacy and because the misuse of such sensitive personal, medical, or health information could be detrimental to the health, safety, or welfare of the client or patient.<sup>38</sup>

A law creating an exemption must contain only exemptions for the public records and meetings requirements and provisions governing enforcement and must relate to one subject. This bill appears to relate to one subject and revising the exemption is consistent with this constitutional provision.

#### **C. Trust Funds Restrictions:**

None.

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<sup>38</sup> Chapter 2002-396, L.O.F.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute can continue to keep confidential and exempt personal identifying information contained in patient records, so that the privacy and health of patients of the Center will not be compromised. Indeterminate costs related to copying of records, and time spent redacting identifying information, may result, however.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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

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