

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 Commerce Committee

BILL: SB 2032

INTRODUCER: Commerce Committee

SUBJECT: OGSR/Public records and Public meetings/Scripps

DATE: March 24, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pugh	Cooper	CM	Favorable
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

As part of a major package of legislation passed in 2003 to recruit The Scripps Research Institute (TSRI) to Florida, the Legislature created exemptions to Florida’s public records and open meetings laws for four entities having access to certain TSRI documents. Those entities are: the Scripps Florida Funding Corporation (corporation), created to oversee the TSRI contract and release the state funds; the Governor’s Office of Tourism, Trade and Economic Development (OTTED), which provides staff to the corporation; TSRI; and its Florida facility, located in Jupiter.

Among the types of documents that are protected from public disclosure are research related to patentable discoveries; production methods; most grant applications; science staff recruitment; identity of donors and potential donors; and identity and medical records of participants in clinical trials.

The exemption is subject to Florida’s Open Government Sunset Review, pursuant to s. 119.15, F.S., and will be repealed October 2, 2009, unless reenacted by the Legislature.

SB 2032 deletes the provision that repeals the exemption, thus reenacting s. 288.9551, F.S.

II. Present Situation:

Background on Florida’s “Sunshine Laws”

Article I, s. 24(a), of the State Constitution provides: “Every person 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.”

In addition to the State Constitution, Florida’s Public Records Act,¹ which predates the State Constitution’s provisions, specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”

Unless specifically exempted, all agency² 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.”³

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.⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ 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.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁹

Open Government Sunset Review Process

Pursuant to s. 119.15, F.S., the exemptions created under s. 288.9551, F.S., are repealed on October 2, 2009, unless reenacted after review by the Legislature under the Open Government Sunset Review Act.

¹ Chapter 119, F.S.

² The word “agency” is defined in s. 119.011(2), F.S.

³ Section 119.011(11), F.S.

⁴ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2nd 633,640 (Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2nd 420 (Fla. 1979).

⁶ Article I, s. 24(c), State Constitution.

⁷ *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).

⁸ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Art. I, s. 24(c), State Constitution.

Florida's Open Government Sunset Review law requires the Legislature to conduct a systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from Florida's Public Records Act or the Public Meetings Law.

Senate Commerce Committee staff conducted the required review, using surveys, interviews, and document research to collect information. Interim Project Report 2009-204¹⁰ resulted from the review.

Background on the corporation and Scripps' recruitment

In a 2003 special session, the Legislature created the corporation, a nine-member, not-for-profit board that is responsible for monitoring its 20-year agreement with TSRI for the establishment of a state-of-the-art biomedical research facility in Florida, and for disbursing state funds on a schedule that coincides with the Florida facility meeting job-creation targets and other specified performance requirements.¹¹ The corporation is not a unit or entity of the state, but is subject to Florida's public records and open meetings laws.¹²

As a companion measure, the Legislature also appropriated \$310 million to the project; the source of the money was federal economic stimulus funds provided to Florida under the Jobs and Growth Tax Reconciliation Act of 2003 that had been deposited into the state's General Revenue Fund. (At least \$230 million was additionally contributed by Palm Beach County and other entities.)

The state funds are being disbursed over a 10-year-period, which began in 2004. Undisbursed funds are being invested by the State Board of Administration, and the interest earnings go to TSRI's Florida facility.

As of November 2008, the corporation had disbursed \$189.3 million, plus \$14.5 million in interest earnings, to TSRI.¹³ As of September 2008, TSRI's Florida facility had 262 employees;¹⁴ under the terms of its agreement with the corporation, the Florida facility is required to hire 545 employees by 2014.

The Florida facility is engaged in a variety of biomedical research, ranging from Alzheimer's disease, to estrogen-dependent disorders, hepatitis, and neurodegenerative diseases. Its technological discoveries have facilitated the creation of two spin-off companies, Xcovery and cuRNA.¹⁵

The Florida facility is not an independent research institute, separate from the La Jolla, California-based TSRI. Rather, the Florida facility is a division of TSRI. The state's funds are spent only on approved expenditures at the Florida facility. Even though it receives public funds,

¹⁰ Available at http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-204cm.pdf.

¹¹ Chapter 2003-420, L.O.F.

¹² Section 288.955(2)(b), F.S.

¹³ Email from Jenni Garrison, OTTED's Innovation Program Manager, sent Nov. 24, 2008. On file with the Senate Commerce Committee.

¹⁴ Ibid.

¹⁵ Power Point Presentation on the Scripps Florida facility, presented by Carol Licko, on Jan. 14, 2009, before the Senate Commerce Committee. On file with the committee.

TSRI (and by extension, its Florida facility) is a private, not-for-profit research institute, and is not subject to Florida's public records and open meetings laws.

For the first 4 years of its existence, the Florida facility operated from the Jupiter campus of Florida International University while its own facilities were under construction. Within the next month, Scripps staff expects to move into the new lab and office space.

The exemption

In concert with the appropriation and creation of the corporation in 2003, the Legislature also enacted s. 288.9551, F.S., which makes exempt and confidential specified meetings and records of TSRI or a grantee (its research facility in Palm Beach County, Florida) that are held by the corporation or OTTED.¹⁶

According to the statute, the following records are confidential and exempt:

- Materials that relate to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered by or through the grantee or TSRI.
- Agreements and proposals to receive funding, including grant applications. However, those portions of such agreements and proposals to receive funding, including grant applications, that do not contain information otherwise exempt, shall not be confidential and exempt upon issuance of the report that is made after the conclusion of the project for which funding was provided. Excluded from this exemption is the agreement between the corporation and TSRI that governs the release of the state funds.
- Materials that relate to the recruitment of scientists and researchers.
- Materials that relate to the identity of donors or potential donors.
- Any information received from a person or another state or nation or the Federal Government, which is otherwise confidential or exempt pursuant to that state's or nation's laws or pursuant to federal law.
- Personal identifying information of individuals who participate in human trials or experiments.
- Any medical or health records relating to participants in clinical trials.

Additionally, those portions of board meetings by the corporation's directors or by OTTED, during which exempt and confidential information is presented or discussed, must be closed to the public. Records (including meeting minutes and recordings) of the closed portions of the board meetings also are exempt from public disclosure.

Finally, the statute declares that TSRI or its Florida facility is a private, not-for-profit entity, and as such is not subject to ch. 119, F.S., or s. 286.011, F.S.¹⁷ But if a court determines that TSRI or its Florida facility is "acting on behalf of an agency, pursuant to the terms of its agreement with the state under s. 288.955, F.S., or otherwise is subject to s. 24, Art. I, of the State Constitution,

¹⁶ Chapter 2003-419, L.O.F.

¹⁷ Section 288.9551(6), F.S.

and to ch. 119.07(1), F.S., and s. 288.011, F.S., the same exemptions applicable for the corporation and OTTED also apply to these research institutes.’’¹⁸

Exempt and confidential information must be released to public employees, exclusively for the performance of their duties, but must remain confidential. Any public employee who violates this requirement commits a first-degree misdemeanor, punishable by a maximum of 1 year in jail and a \$1,000 fine.

The constitutionally required “public necessity statement” accompanying the exemptions asserted a number of reasons supporting the confidentiality of certain information that TSRI and its Florida facility could provide the corporation or OTTED.¹⁹ For example:

- The state is making a substantial financial investment in the TSRI project.
- Disclosure of certain TSRI information and records could create an unfair competitive advantage for persons receiving the information, in turn putting TSRI at a competitive disadvantage, and negatively impact anticipated benefits to the state, its economy, and its academic community.
- Specifically, disclosure of grant applications and proposals could put TSRI at a competitive disadvantage for receiving research funds; disclosure of materials related to staff recruitment could allow competitors to outbid TSRI for scientists and researchers; and failure to protect the identities of donors and potential donors could reduce private contributions to TSRI.

III. Effect of Proposed Changes:

SB 2032 (formerly SPB 7052) reenacts s. 288.9551, F.S., a public records/public meetings exemption, by deleting a provision that repeals the exemption.

Section 1 repeals subsection (8) of s. 288.9551, F.S.

Section 2 specifies that this act shall take effect October 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

SB 2032 retains the public records/open meetings exemption specified in s. 288.9551, F.S., for the Scripps Florida Funding Corporation, TSRI and its Florida campus, and OTTED regarding certain types of information generated by TSRI and its Florida campus.

¹⁸ Ibid.

¹⁹ Section 2 of ch. 2003-419, L.O.F.

C. Trust Funds Restrictions:

None.

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. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.