

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 Governmental Oversight and Accountability Committee

BILL: SB 1678

INTRODUCER: Higher Education Committee

SUBJECT: OGSR/Moffitt Cancer Center and Research Institute

DATE: April 3, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Matthews	HE	Favorable
2.	Naf	Wilson	GO	Favorable
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review conducted by the Higher Education Committee.

Current law establishes the H. Lee Moffitt Cancer Center Research Institute (the center) at the University of South Florida. A not-for-profit corporation governs the center in accordance with an agreement with the State Board of Education for the use of facilities on the campus of the University of South Florida. The not-for-profit corporation, acting as an instrumentality of the state, operates the center in accordance with an agreement between the Board of Governors and the not-for-profit corporation. A board of directors manages the not-for-profit corporation, and a chief executive officer, who serves at the pleasure of the board of directors, administers the center.

Section 1004.43(8)10. and 12., F.S. provide that when specified conditions are met, the following proprietary confidential business information held by the not-for-profit corporation or its subsidiaries is confidential and exempt from public-records requirements:

- Trade secrets as defined in s. 688.002;
- Reimbursement methodologies and rates; and
- Any information received by the not-for-profit corporation or its subsidiaries from an agency in this or another state or nation or the Federal Government which is otherwise exempt or confidential pursuant to the laws of this or another state or nation or pursuant to federal law.

These exemptions are subject to review under the Open Government Sunset Review Act, and will sunset on October 2, 2010, unless reenacted by the Legislature. This bill reenacts the exemptions.

This bill amends section 1004.43, Florida Statutes.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" 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. The Florida Supreme Court has interpreted this definition to encompass all

¹ Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

² Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹² 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.¹³ An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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 the safety of such individuals; or

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *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).

⁷ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Section 24(c), art. I of the State Constitution

⁹ Attorney General Opinion 85-62, August 1, 1985.

¹⁰ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(b), F.S.

¹³ *Id.*

- 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 ... would injure the affected entity in the marketplace.¹⁴

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁵

The H. Lee Moffitt Cancer Center and Research Institute

Current law establishes the H. Lee Moffitt Cancer Center Research Institute (the center) at the University of South Florida.¹⁶ A not-for-profit corporation governs the center in accordance with an agreement with the State Board of Education for the use of facilities on the campus of the University of South Florida. The not-for-profit corporation, acting as an instrumentality of the state, operates the center in accordance with an agreement between the Board of Governors and the not-for-profit corporation.¹⁷

A board of directors manages the not-for-profit corporation, and a chief executive officer, who serves at the pleasure of the board of directors, administers the center. The board of directors is comprised of:

- The President of the University of South Florida, or his or her designee;
- The chair of the Board of Governors, or his or her designee;
- Five representatives of the state universities; and
- No more than 14 or fewer than 10 directors who are not medical doctors or state employees.¹⁸

The state has created three not-for-profit subsidiaries that were approved by the Board of Regents and two for-profit subsidiaries that were approved by the Board of Governors.¹⁹

Records of the not-for-profit corporation and its subsidiaries are public records.²⁰

Public-Records Exemption for the Not-for-Profit Corporation and its Subsidiaries

Current law provides a public-records exemption for proprietary confidential business information. Such information is made confidential and exempt from public-records requirements. Such information must be provided to the Auditor General, the Office of Program Policy Analysis and Government Accountability, and the Board of Governors pursuant to their oversight and auditing functions.²¹

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S.

¹⁶ Section 1004.43, F.S.

¹⁷ Section 1004.43(1), F.S.

¹⁸ *Id.*

¹⁹ Open Government Sunset Review of s. 1004.43, F.S., relating to the H. Lee Moffitt Cancer Center and Research Institute, joint questionnaire by House and Senate staff, July 31, 2009, at question 1 and question 3 (on file with the Higher Education Committee and the Governmental Oversight and Accountability Committee).

²⁰ Section 1004.43(8)(a), F.S.

²¹ Section 1004.43(8)(b), F.S.

For purposes of the public-records exemption, “proprietary confidential business information” is defined to mean information that 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 the business operations of the not-for-profit corporation or its subsidiaries; has not been intentionally disclosed by the corporation or its subsidiaries unless pursuant to law, an order of a court or administrative body, a legislative proceeding pursuant to s. 5, art. III of the State Constitution, or a private agreement that provides that the information may be released to the public; and which is information concerning:

- Internal auditing controls and reports of internal auditors;
- Matters reasonably encompassed in privileged attorney-client communications;²²
- Contracts for managed-care²³ 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;

²² Section 119.071(1)(d), F.S., provides a general public-records exemption, which is applicable to the not-for-profit corporation and its subsidiaries, for a public records that was prepared by an agency attorney or prepared at the attorney’s express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings. The public-records exemption expires at the conclusion of the litigation or adversarial administrative proceedings. According to its questionnaire response, the not-for-profit corporation prefers the more broad public-records exemption for “matters reasonably encompassed in privileged attorney-client communications because it protects confidential attorney-client communications made during the course of general representation of the not-for-profit corporation in *all* legal matters, including transactions. According to the questionnaire response,

These differences reflect the varying nature of the attorney-client relationship contemplated by Section 119.071, and of the attorney-client relationship the corporation must maintain with its attorneys to effectively fulfill its mission and legislative mandates. Specifically, unlike the attorney-client relationship contemplated by Section 119.071, the corporation must engage its attorneys in its everyday operations and strategic planning to allow the corporation to directly compete and collaborate with non-public entities that are not subject to the public records law and that enjoy the protections set forth in Section 90.502(1)(c), Florida Statutes, of attorney-client communications. [Open Government Sunset Review of 1004.43, F.S., relating to the H. Lee Moffitt Cancer Center and Research Institute, joint questionnaire by House and Senate staff, July 31, 2009, at question 1 and question 3 (on file with the Higher Education Committee and the Governmental Oversight and Accountability Committee)]

The questionnaire response indicates that agencies do not engage with their attorneys on a daily basis; however, agencies at the state and local level have attorneys that they engage with on a regular basis, but these agencies aren’t afforded the same protections as the not-for-profit corporation or its subsidiaries.

²³ For purposes of the exemption, “managed care” means systems or techniques generally used by third-party payors or their agents to affect access to and control payment for health care services. Managed-care techniques most often include one or more of the following: prior, concurrent, and retrospective review of the medical necessity and appropriateness of services or site of services; contracts with selected health care providers; financial incentives or disincentives related to the use of specific providers, services, or service sites; controlled access to and coordination of services by a case manager; and payor efforts to identify treatment alternatives and modify benefit restrictions for high-cost patient care. Section 1004.43(8), F.S.

- Corporate officer and employee personnel information;²⁴
- 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 exempt meetings of the governing board of the not-for-profit corporation and its subsidiaries;
- Information that reveals plans for marketing services that the not-for-profit corporation or its subsidiaries reasonably expect to be provided by competitors;
- Trade secrets as defined by the Uniform Trade Secrets Act,²⁵ 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 reimbursement methodologies or rates;
- The identity of donors or prospective donors of property who wish to remain anonymous or any information identifying such donors or prospective donors; or
- Any information received by the not-for-profit corporation or its subsidiaries from an agency in this or another state or nation or the Federal Government which is otherwise exempt or confidential pursuant to the laws of this or another state or nation or pursuant to federal law.

Public-Meetings Exemption for the Not-for-Profit Corporation and its Subsidiaries

Current law also provides a public-meetings exemption for the governing board of the not-for-profit corporation and its subsidiaries. All meetings are exempt from public-meetings requirements except those meetings wherein the expenditure of dollars appropriated by the state to the not-for-profit corporation are discussed or reported.²⁶ In essence, the only time the not-for-profit corporation or its subsidiaries conducts a meeting that is open to the public is when the expenditure of dollars appropriated by the state is discussed.

Review of the Exemptions

Pursuant to the Open Government Sunset Review Act, the public-records exemption for the following information will repeal on October 2, 2010, unless reenacted by the Legislature:²⁷

- Trade secrets as defined by the Uniform Trade Secrets Act, 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 the research conducted by the not-for-profit corporation or its subsidiaries; and reimbursement methodologies and rates; and

²⁴ This exemption does not apply to the not-for-profit corporation's highest paid executives and employees as those executives and employees are required to publicly disclose their names and compensation by federal law and IRS reporting requirements.

²⁵ Chapter 688, F.S., is the Uniform Trade Secrets Act. Section 688.002(4), 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.

²⁶ Section 1004.43(9), F.S.

²⁷ Section 1004.39(8)(c), F.S.

- Any information received by the not-for-profit corporation or its subsidiaries from an agency in this or another state or nation or the Federal Government which is otherwise exempt or confidential pursuant to the laws of this or another state or nation or pursuant to federal law.

As part of the review process, staff studied the public-records and public-meetings exemptions in their entirety and compared those exemptions with similar exemptions found throughout current law.²⁸ Staff discovered the following as part of the Open Government Sunset Review process:

- Portions of the definition of “proprietary confidential business information” include information that does not meet the definition, such as, minutes of exempt meetings and information received that is otherwise confidential or exempt from public-records requirements.
- The current exemption for information that would identify a person donating property who would prefer to remain anonymous is more narrow than other public-records exemptions for donor information. Typically, such protections are provided to any donor or prospective donor who wishes to remain anonymous, whether or not the person is donating property.
- When compared with other public-meetings exemptions, including exemptions for similar not-for-profit corporations, it was found that the public-meetings exemption appeared overly broad in that *all* meetings are exempt from public-meetings requirements unless state-appropriated funds are discussed. For example, the not-for-profit corporation for the Florida Institute for Human and Machine Cognition has a more limited public-meetings exemption. Only those meetings wherein confidential and exempt information is discussed are exempt from public-meetings requirements.²⁹ Meetings of the board of directors of the Scripps Florida Funding Corporation are open to the public unless confidential and exempt information is discussed.³⁰ In addition, as part of a conference call between staff of the not-for-profit corporation and the House and Senate, staff of the not-for-profit corporation indicated that the current public-meetings exemption was not strictly adhered to by the board of directors.³¹

III. Effect of Proposed Changes:

This bill reenacts and saves from repeal the public-records exemptions for the not-for-profit corporation and its subsidiaries relating to trade secrets and information protected from public disclosure in other states, nations, or by the federal government.

²⁸ Section 119.15(6)(a), F.S., requires the Legislature to consider the following as part of the Open Government Sunset Review process:

- 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?
- *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?*

²⁹ See s. 1004.4472(4), F.S.

³⁰ See s. 288.9551(3)(a), F.S.

³¹ Conference call on February 24, 2010.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

Section 24(a), art. I of the State Constitution provides that any person has the right to inspect or copy any public record made or received in connection with the official business of any public body. Section 24(b), art. I of the State Constitution requires all meetings of a public body at which official acts are to be taken or at which public business is to be transacted or discussed to be noticed and open to the public. Section 24(c), art. I of the State Constitution requires an exemption from public-records or public-meetings requirements to state with specificity the public necessity justifying the exemption and to be no broader than is necessary to accomplish the stated purpose of the law.

The current public-meetings exemption for the not-for-profit corporation and its subsidiaries requires only meetings at which state-appropriated funds are discussed to be open to the public. Therefore, that exemption may be unconstitutionally overbroad because it does not limit closure of the meetings to portions at which confidential or exempt information is discussed, and thus is likely protecting the discussion of information there is no need to protect. The public necessity statement for the exemption provides that it is necessary to close all meetings other than those at which state-appropriated funds are discussed “in order to protect the competitive interest of the not-for-profit corporation or its subsidiaries and to guarantee the ability of the not-for-profit corporation to fulfill its ... mission ...,”³² but does not explain why protection of discussion of information that is not confidential or exempt is required to achieve those goals. In addition, under the current exemption, the not-for-profit or its subsidiaries are authorized to discuss information that would be available pursuant to a public-records request. As such, those portions of closed meetings wherein information is discussed that could be made available pursuant to a public-records request appears overly broad, thus violating the constitutional requirement that an exemption be as narrow as possible.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

³² Section 2, ch. 95-263, L.O.F.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Open Government Sunset Review Act requires the Legislature to consider an exemption under review in context and to ensure that an exemption is no broader than is necessary to meet the public purpose it serves.³³ Therefore, although only s. 1004.43(8)(b)10. and 12. are certified for review in 2010, it is appropriate to consider the following changes to the public-records and public-meetings exemptions for the not-for-profit corporation and its subsidiaries:

- Expand the public-records exemption to protect the identities of *all* donors or prospective donors who wish to be anonymous, instead of just those who donate property;³⁴
- Expand the public-records exemption for proprietary confidential business information to include patentable materials;
- Narrow the public-meetings exemption for the board of directors for the not-for-profit corporation and its subsidiaries to only protect portions of meetings at which confidential and exempt information is discussed.³⁵

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.

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

³³ See s. 119.15(6), F.S.

³⁴ This will conform the protection for donors or potential donors to that afforded other agencies or similar entities. For example, see s. 1004.4472(2)(d), F.S.

³⁵ This will conform the protection to that afforded similar entities. For example, see ss. 1004.4472(4) and 288.9551(3)(a), F.S..