

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 Higher Education Committee

BILL: SB 1678

INTRODUCER: Higher Education Committee

SUBJECT: OGSR/Moffitt Cancer Center and Research Institute

DATE: February 24, 2010 REVISED: _____

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

I. Summary:

Section 1004.43(8)10. and 12., F.S., provides a public records disclosure exemption for information held by the corporation that governs the H. Lee Moffitt Cancer Center and Research Institute. The exemption applies to information relating to methods of manufacture, potential trade secrets, potentially patentable material; reimbursement methodologies and rates; and information that is otherwise exempt under Florida law or under the laws of the state or nation from which a person provided the information to the corporation or its subsidiaries. The exemptions are subject to review under s. 119.15, F.S., 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:

Public Records

Article I, s. 24 of the State Constitution, provides that:

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.

The Public Records Law 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 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 agency 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.

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

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

The Open Government Sunset Review Act of 1995 establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

An exemption may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one the following purposes and 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:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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 their safety; or
- The exemption protects 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.

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?
- 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?

Finally, there is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. 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. If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.

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 center) at the University of South Florida. A not-for-profit corporation (the 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 corporation. A board of directors manages the corporation, and a chief executive officer, who serves at the pleasure of the board of directors, administers the center. The corporation has created three not-for-profit subsidiaries which were approved by the Board of Regents and two for-profit subsidiaries which were approved by the Board of Governors.

Public Records Exemption for Proprietary Confidential Business Information

Section 1004.43(8)(b), F.S., provides a public record exemption for “proprietary confidential business information” that is owned or controlled by the corporation or its subsidiaries. The exemption applies to information concerning internal auditing controls and reports; matters reasonably encompassed in privileged attorney-client communications; contracts for managed care arrangements; bids or other contractual data, banking records, and credit agreements; information relating to private contractual data; corporate officer and employee personnel information; information relating to the proceedings and records of credentialing panels and committees; minutes of the meetings of the governing board of the corporation and its subsidiaries, except portions of meetings at which the expenditure of dollars appropriated by the state are discussed or reported; information that reveals plans for marketing services; trade secrets; the identity of donors or prospective donors of property who wish to remain anonymous; and any information received by the corporation or its subsidiaries from an agency in Florida or another state or nation or the federal government which would be confidential or exempt under the laws of Florida or another state or nation or federal law.

The 2005 Legislature expanded the corporation's public records exemption for proprietary confidential business information in two ways:

1. The exemption for trade secrets was expanded to include "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."
2. An exemption was created for information received by the corporation or its subsidiaries from an agency in Florida or another state or nation or the federal government which would be confidential or exempt under the laws of Florida or another state or nation or federal law.

The portions of the corporation's public records exemption currently subject to an open government sunset review are the exemption for trade secrets and the exemption for information that is confidential or exempt under the laws of another state or nation or the federal government.

Trade Secrets

The corporation currently receives more than \$59.7 million per year in federal research grants, as well as additional private donations earmarked for research, private-sponsored research dollars from various pharmaceutical and biotechnology companies, and research funding from the Department of Defense. These dollars are spent on conducting clinical and basic science research to discover new drugs, treatments and devices to further the corporation's mission to contribute to the prevention and cure of cancer. These research efforts often result in the creation and discovery of methods of manufacture and production, potential trade secrets, potentially patentable material, and proprietary information.

According to the corporation, information relating to methods of manufacture or production may include scientific or mathematical algorithms, hardware or software, chemical formulas, technical designs, displays, or detailed publications outlining a process or invention.

The corporation's public records exemption for trade secrets encompasses information that fits the definition of trade secrets under s. 688.02, F.S., as well as (a) 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 (b) reimbursement methodologies or rates.

Under s. 688.02(4), F.S., trade secret is defined as "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."

A portion of the corporation's public records exemption for trade secrets is similar to the exemption in s. 1004.22, F.S., which makes certain types of information confidential and exempt

when held by divisions of sponsored research at state universities. Section 1004.22(2), F.S., provides a public records exemption for divisions of sponsored research at state universities. 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 are confidential and exempt from the provisions of s. 119.07(1), F.S., except that a division of sponsored research must make available upon request the title and description of a research project, the name of the researcher, and the amount and source of funding provided for such project.

The corporation explained its need for a public records exemption that parallels both the general exemption for trade secrets and the exemption for divisions of sponsored research at state universities. The corporation's affiliation with the University of South Florida, University of Florida, and other state universities, includes significant coordination and joint development of research discoveries, which necessitates the sharing of confidential information. Maintaining consistent wording between the exemptions granted to the state university division of sponsored research and the corporation, allows state universities to collaborate with and share research-related information with the corporation without fear that the information they share might lose its exemption. The exemption places the corporation on an equal playing field with state universities and its private peers to allow for the more effective fulfillment of the corporation's legislative mandate in the area of cancer research.

Confidential or Exempt Information Received from a Person from another State or Nation or the Federal Government

In the performance of its research mission, the corporation receives research information from numerous sources from other states, other nations, and the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. According to the corporation, the exemption protects such information while in the possession of the corporation in order to permit it to effectively perform its research mission to the same extent as its non-public peers who are not subject to the public records laws. The corporation states that the exemption assures the pharmaceutical and biotechnology companies that wish to partner with the corporation that their trade secrets and other confidential information would remain confidential and not fall into the hands of competitors or otherwise lose their commercial value.

The corporation also receives information in the performance of its duties and responsibilities that is made confidential or exempt pursuant to other Florida laws. A partial list of these statutes includes s. 395.3025, F.S., concerning hospital patient and personnel records; s. 405.03, F.S., concerning the identity of any person treated or studied in medical research; and s. 408.061, F.S., concerning specific provider contract reimbursement data submitted to the Agency for Health Care Administration (AHCA), the identity of a health care provider who submits proprietary business information to AHCA, and portions of patient records obtained or generated by AHCA.

The Purpose and Public Necessity of the Exemptions

The 2005 law creating the exemptions stated that, without the exemptions, the disclosure of confidential and exempt information would place the corporation on an unequal footing in the marketplace as compared with its private health care and medical research competitors that are not required to disclose such confidential and exempt information. The disclosure of such

confidential and exempt information would adversely impact the corporation or its subsidiaries in fulfilling their mission of cancer treatment, research, and education. The public meetings exemption protects those portions of a meeting where information that is confidential and exempt from public records requirements is discussed, thereby preventing an unfair competitive advantage for people receiving the information.

The Open Government Sunset Review of s. 1004.4472, F.S.

Senate Higher Education Committee professional staff has reviewed the exemptions in section 1004.43(8)(b)10. and 12., F.S., and finds that the exemptions meet the requirements for reenactment. The exemptions, viewed against the Open Government Sunset Review criteria, protect information concerning entities and are no broader than is necessary to allow the H. Lee Moffitt Cancer Center and Research Institute to carry out its statewide mission as a center for research, education, treatment, prevention, and early detection of cancer. Senate professional staff recommends reenactment of the public records and public meetings exemptions for trade secrets and information that is confidential or exempt under the laws of another state, nation, or the federal government.

III. Effect of Proposed Changes:

This bill reenacts and saves from repeal the public records exemptions for the H. Lee Moffitt Cancer Center and Research Institute relating to trade secrets and information protected from public disclosure in other states, nations, or by the federal government.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, section 24, of the State Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the law. The exemptions appear to meet the constitutional criteria.

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.