

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 Health Regulation Committee

BILL: SB 1856

INTRODUCER: Senator Flores

SUBJECT: Public Records

DATE: January 23, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-------------|----------------|-----------|--------------------|
| 1. | O'Callaghan | Stovall | HR | Pre-meeting |
| 2. | | | GO | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

The bill amends the James and Esther King Biomedical Research Program (King Program) and the William G. "Bill" Bankhead, Jr., and David Coley Cancer Research Program (Bankhead-Coley Program) to prohibit any member of the Biomedical Research Advisory Council (the council) or peer review panel from participating in any council or panel discussion or decision concerning a research proposal by any entity with which the member is associated. The bill also deletes provisions that peer review panels be subject to public records laws.

The bill provides a statement of public necessity for the exemption from public record of information discussed by a peer review panel regarding the funding of a biomedical grant proposal. Because this bill creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill is linked to SB 616 and will take effect on the same date that SB 616 or similar legislation becomes a law.

This bill amends ss. 215.5602 and 381.922, F.S., and creates one undesignated section of law.

II. Present Situation:

The James and Esther King Biomedical Research Program

The purpose of the King Program¹ is to provide an annual and perpetual source of funding to support research initiatives that address the health care problems of Floridians in the areas of tobacco-related cancer, cardiovascular disease, stroke, and pulmonary disease.² The long-term goals of the program are to:

- Improve the health of Floridians by researching better prevention, diagnoses, treatments, and cures for cancer, cardiovascular disease, stroke, and pulmonary disease;
- Expand the foundation of biomedical knowledge relating to the prevention, diagnosis, treatment, and cure of diseases related to tobacco use;
- Improve the quality of the state's academic health centers by bringing the advances of biomedical research into the training of physicians and other health care providers;
- Increase the state's per capita funding for research by undertaking new initiatives in public health and biomedical research that will attract additional funding from outside of Florida; and
- Stimulate economic activity in the state in areas related to biomedical research, such as the research and production of pharmaceuticals, biotechnology, and medical devices.

The King Program offers competitive grants to researchers throughout Florida. Grant applications from any university or established research institute³ in Florida will be considered for biomedical research funding. All qualified investigators in the state, regardless of institutional affiliation, have equal access and opportunity to compete for the research funding.

The State Surgeon General, after consultation with the council, is authorized to award grants and fellowships on the basis of scientific merit⁴ within the following three categories:

- Investigator-initiated research grants;
- Institutional research grants; and
- Predoctoral and postdoctoral research fellowships.⁵

¹ The Florida Legislature created the Florida Biomedical Research Program in 1999 within the department (ch. 99-167, L.O.F.). The Florida Biomedical Research Program was renamed the James and Esther King Biomedical Research Program during Special Session B of the 2003 Legislature (ch. 2003-414, L.O.F.).

² Section 215.5602, F.S.

³ An "established research institute" is any Florida non-profit or foreign non-profit corporation covered under ch. 617, F.S., with a physical location in Florida, whose stated purpose and power is scientific, biomedical or biotechnological research or development and is legally registered with the Florida Department of State, Division of Corporations. This includes the federal government and non-profit medical and surgical hospitals, including veterans' administration hospitals. See James & Esther King Biomedical Research Program, *Call for Grant Applications: Biomedical, Biotechnological, and Social Scientific Research and Development, Fiscal Year 2009-2010*, page 7, available at: http://forms.floridabiomed.com/jek_call/King%20Call%2009-10.pdf (Last visited on January 23, 2012).

⁴ See the "Grant Application Review and Processing" section of Senate Interim Report 2010-219, page 7, for more information about assessing scientific merit. The report is available at: http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-219hr.pdf (Last visited on January 23, 2012).

⁵ Section 215.5602(5)(b), F.S.

The King Program was to expire on January 1, 2011, pursuant to s. 215.5602, F.S. However, the Legislature continued the program in 2010 by enacting HB 5311.⁶

The William G. “Bill” Bankhead, Jr., and David Coley Cancer Research Program

The 2006 Legislature created the Bankhead-Coley Program within the Department of Health (the department).⁷ The purpose of the program is to advance progress toward cures for cancer through grants awarded for cancer research.

Applications for funding cancer research from any university or established research institute in the state will be considered under the Bankhead-Coley Program. All qualified investigators in the state, regardless of institutional affiliation, have equal access and opportunity to compete for the research funding. The State Surgeon General, after consultation with the council, is authorized to award grants and fellowships on the basis of scientific merit⁸ within the following three categories:

- Investigator-initiated research grants;
- Institutional research grants; and
- Collaborative research grants, including those that advance the finding of cures through basic or applied research.

As with the King Program, the Bankhead-Coley Program was to expire on January 1, 2011, pursuant to s. 215.5602, F.S. However, the Legislature also continued this program in 2010 when it enacted HB 5311.⁹

Biomedical Research Advisory Council¹⁰ and Peer Review Panel¹¹

The purpose of the council is to advise the State Surgeon General as to the direction and scope of the King Program. The council is also required to consult with the State Surgeon General concerning grant awards for cancer research through the Bankhead-Coley Program.¹² Currently there are 11 members on the council, authorized to serve no more than two consecutive, 3-year terms.

In order to ensure that proposals for research funding within the King Program and the Bankhead-Coley Program are appropriate and evaluated fairly on the basis of scientific merit, a peer review panel of independent, scientifically qualified individuals is appointed to review the scientific content of each proposal to establish a “scientific”¹³ priority score.¹⁴ To eliminate

⁶ Chapter 2010-161, L.O.F.

⁷ Section 381.922, F.S., (ch. 2006-182, L.O.F.).

⁸ *Supra* fn. 5.

⁹ Chapter 2010-161, L.O.F.

¹⁰ Section 215.5602(3), F.S.

¹¹ Section 215.5602(6) and (7), and s. 381.922(3)(b), F.S.

¹² Section 381.922(3)(a), F.S. However, s. 215.5602(11), F.S., contains an inconsistency with respect to the responsibility of the Council concerning awarding grants for cancer research.

¹³ The King Program requires a *scientific* priority score in s. 215.5602(6), F.S. The Bankhead-Coley Program requires a priority score in s. 381.922(3)(b), F.S.

¹⁴ A Bridge Grant application is ranked solely by the priority score or percentile assigned to its qualifying federal proposal in an eligible federal review process.

conflicts of interest, peer reviewers come from outside the state of Florida. Reviewers are experts in their fields from universities, government agencies, and private industry who are matched according to application topic and area of expertise. The priority scores must be considered by the council in determining which proposals will be recommended for funding to the State Surgeon General.

Meetings of the council and the peer review panel are subject to ch. 119, F.S., relating to public records; s. 286.011, F.S., relating to public meetings; and s. 24, Art. I of the State Constitution relating to access to public meetings and records.

Public Records

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

(a) 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, commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,¹⁵ which pre-dates the current State Constitution, 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 agency¹⁶ records are available for public inspection¹⁶. 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.¹⁷

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,

¹⁵ Chapter 119, F.S.

¹⁶ 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.”

¹⁷ s. 119.011(12), F.S.

communicate, or formalize knowledge.¹⁸ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁹

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.²⁰ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.²¹

The Open Government Sunset Review Act (the Act)²² provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act. 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 is 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. The three statutory criteria are that 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;
- 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
- 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.²³

The Act also requires the Legislature to consider 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?

¹⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹⁹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

²⁰ Attorney General Opinion 85-62.

²¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²² s. 119.15, F.S.

²³ s. 119.15(6)(b), F.S.

Companion Bill

SB 616 is a companion to this bill and revises several provisions relating to the King Program and the Bankhead-Coley Program.

III. Effect of Proposed Changes:

Section 1 amends s. 215.5602, F.S., relating to the King Program, to prohibit any member of the council or peer review panel from participating in any council or panel discussion or decision concerning a research proposal by any entity with which the member is associated. The bill also deletes a provision that peer review panels are subject to Art. I, s. 24 of the State Constitution, ch. 119, F.S., and s. 286.011, F.S.

Section 2 amends s. 381.922, F.S., relating to the Bankhead-Coley Program, to make the same changes as in section 1.

Section 3 provides a statement of public necessity for the exemption from public record of information discussed by a peer review panel regarding the funding of a biomedical grant proposal. Specifically the statement provides that the Legislature finds that confidentiality is a hallmark of scientific peer review when awarding grants and that such confidentiality is practiced by the National Science Foundation and the National Institutes of Health. In addition, the confidentiality of the peer review panel's discussions allows for candid exchanges between the reviewers critiquing proposals submitted for funding and serves a public good by ensuring that decisions are based upon merit without bias or undue influence.

Section 4 states that the bill will take effect on the same date that the linked bill or similar legislation takes effect, if such a bill is adopted during the same legislative session or extension thereof and becomes 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, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

This bill provides a statement of public necessity for a public records exemption for information disclosed by a peer review panel regarding the funding of a biomedical grant proposal.

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.

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

None.

B. Private Sector Impact:

Information discussed by a peer review panel regarding the funding of a biomedical grant proposal will be made confidential and exempt from public record.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

No bill number is stated in line 63. Without specifying the number of the linked bill which must pass in order for this bill to become law, this bill will never take effect.

Art. I, s. 24 of the State Constitution states that a general bill exempting records or meetings from public access must contain only provisions for such exemptions in the bill text. Sections 1 and 2 of the bill, which provide amendments to current statute, do not fulfill this provision and invalidate any public records exemption proposed therein.

Art. I, s. 24 of the State Constitution also requires that the bill state with specificity the public necessity justifying any public records exemption and that the bill be no broader than necessary to accomplish this justification. Further, s. 119.15, F.S., (the Act) provides specific criteria which must be met to be considered an “identifiable public purpose” which cannot be accomplished without a public records exemption. The reasons for exemption listed in this bill may not be specific or substantive enough to meet statutory or constitutional criteria.

The Act provides for the one-time review of each newly created or expanded exemption from public records law. Bills that create or expand public records exemptions must specify the date by which exemption must be reinstated by the Legislature and should specifically require legislative review of the exemption in accordance with s. 119.15, F.S. SB 1856 does not mention these provisions.

Finally, though the bill gives a statement of intent as to why certain peer research panel information should be considered confidential and exempt from public record, there is no provision in the bill that explicitly exempts such information or provides specific circumstances under which this information may be disclosed.

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.

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