

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 Committee on Commerce and Tourism

BILL: SPB 7032

INTRODUCER: For consideration by the Commerce and Tourism Committee

SUBJECT: OGSR/Scripps Florida Funding Corporation

DATE: February 7, 2014

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Malcolm</u>	<u>Hrdlicka</u>		Pre-meeting

I. Summary:

In 2003, the Legislature appropriated \$310 million for the California-based Scripps Research Institute (SRI) to open a Florida research facility (Scripps Florida),¹ the Legislature also created the Scripps Florida Funding Corporation (the Funding Corporation) to release the funds to Scripps Florida according to a 20-year agreement.² Additionally, the Legislature created public records and public meeting exemptions for certain records and information provided by SRI or Scripps Florida to the Funding Corporation.³ These exemptions are codified in s. 288.9551, F.S., which is set to expire on October 2, 2014.

The bill repeals the public records and public meetings exemptions in s. 288.9551, F.S. because the Funding Corporation has indicated that it operates in the sunshine and does not receive such confidential and exempt information.⁴

¹ Chapter 2003-420, s. 5, L.O.F.

² *Id.* at s. 1.

³ Chapter 2003-419, s. 1, L.O.F. The 2009 reenactment of s. 288.9551, F.S., removed reference to records and meetings held by the former Office of Tourism, Trade, and Economic Development (OTTED). Chapter 2009-236, L.O.F.

⁴ The Funding Corporation's response to the joint Senate and House questionnaire regarding the open government sunset review of s. 288.9551, F.S., response completed by Sara Misselhorn, Project Director, received Sept. 10, 2013, questions 13 and 19. SRI, Scripps Florida, and the Department of Economic Opportunity have also indicated to committee staff that the exemptions are no longer necessary. Telephone conversation with Tom Northrup, General Counsel for SRI and Scripps Florida (Aug. 28, 2013); E-mail from Karl Blischke, Chief, Bureau of Compliance and Accountability, Department of Economic Opportunity, (Nov. 1, 2013) (on file with the Committee on Commerce and Tourism).

II. Present Situation:

Public Records in Florida

Florida has a long history of providing public access to government records. In 1992, the State Constitution was amended to provide the public a broad right to access government records.⁵ Article I, s. 24, provides in part:

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.

In addition to the State Constitution, the Public Records Law,⁶ which pre-dates article I, s. 24, specifies conditions under which an agency must grant public access to government records.⁷ It 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.⁸

Unless specifically exempt, all agency records are available for public inspection.⁹ The term “public record” is broadly defined 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.¹⁰

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business that are used to perpetuate, communicate, or formalize knowledge.¹¹ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹²

⁵ Fla. Const. art. I, s. 24.

⁶ Chapter 119, F.S.

⁷ 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 . . . 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.”

⁸ Section 119.07(1)(a), F.S.

⁹ See Fla. Const. art. I, s. 24(a).

¹⁰ Section 119.011(12), F.S.

¹¹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹² *Wait v. Florida Power & Light Company*, 372 So.2d 420, 424 (Fla.1979).

Only the Legislature is authorized to create exemptions to open government requirements.¹³ Exemptions must be created by general law, must specifically state the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the law.¹⁴ A bill enacting an exemption¹⁵ may not contain other substantive provisions, but it may contain multiple exemptions that relate to one subject.¹⁶

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.¹⁷ If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.¹⁸

Open Government Sunset Review Act¹⁹

The Open Government Sunset Review Act (the Sunset Act) provides for the systematic, 5-year review of any exemption from the Public Records Law or the Public Meetings Law.²⁰

Under the Sunset Act, an exemption may be created, expanded, or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves.²¹ An identifiable public purpose is served if the exemption meets one of three specified criteria and the Legislature finds the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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.²²

¹³ Fla. Const. art. I, s. 24(c); *see Wait*, 372 So.2d at 424.

¹⁴ Fla. Const. art. I, s. 24(c).

¹⁵ Under s. 119.15(4)(b), F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁶ Fla. Const. art. I, s. 24 (c).

¹⁷ Attorney General Opinion 85-62.

¹⁸ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁹ Section 119.15, F.S.

²⁰ *Id.* at (3).

²¹ *Id.* at (6)(b).

²² *Id.* at (6)(b)1.-3.

The Sunset Act also requires consideration of the following issues:

- 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?²³

Scripps Florida Funding Corporation

In 2003, the Legislature created the Funding Corporation, a nine-member, not-for-profit entity, to enter into and monitor a 20-year agreement with SRI to establish a biomedical research facility in Florida (Scripps Florida) and to disburse state funds on a schedule that coincides with Scripps Florida meeting job-creation and other contractual targets.²⁴

The Legislature provided a one-time appropriation of \$310 million for Scripps Florida with the funds to be disbursed over a 7-year period.²⁵ Due to site-selection and permitting delays, the disbursement period was extended to 10 years.²⁶ As of September 2013, the Funding Corporation had disbursed \$349 million (including \$40.3 million in interest earnings) to Scripps Florida.²⁷ The final disbursement occurred in December 2013.²⁸

Because the Funding Corporation is a public body it would be subject to Florida's public records and open meetings laws but for the public records and public meetings exemptions in s. 288.9551, F.S.

Scripps Florida

Scripps Florida is a division of the California-based, non-profit SRI. State funds provided to Scripps Florida are spent only on approved expenditures. Though it receives public funds, SRI (and by extension, Scripps Florida) is a private, not-for-profit research institute, and is not subject to Florida's public records and open meetings laws.²⁹

²³ *Id.* at 6(a); While the standards in the Sunset 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. *See Neu v. Miami Herald Pub. Co.*, 462 So.2d 821, 824 (Fla. 1985). Accordingly, the Legislature is only limited in its review process by constitutional requirements. Moreover, s. 119.15(8), F.S., states that the failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

²⁴ Chapter 2003-420, s. 1, L.O.F.

²⁵ Section 288.955(11)(a), F.S.

²⁶ Amendment to Operating and Funding Agreement, Nov. 28, 2006 (on file with the Committee on Commerce and Tourism).

²⁷ Scripps Florida Funding Corporation, *2013 Annual Report*, 36, available at http://www.scripps.edu/florida/about/scientificreports_pdfs/2013SFFCAnnualReport_20140108133315_659841.pdf (last visited Jan. 16, 2014).

²⁸ *Id.* at 43.

²⁹ *See* s. 288.955(1)(c), F.S.

Scripps Florida is a biomedical research facility located on 30 acres adjoining the Florida Atlantic University campus in Jupiter, Florida. There are 528 scientists, technicians, and administrative staff employed in the 345,000 square-foot, biomedical research facility.³⁰ Scripps Florida research targets include neurobiology (Alzheimer's, Parkinson's, autism, schizophrenia, anxiety/depression and addiction), cancer biology, immune system studies (asthma and rheumatoid arthritis), cardiovascular and metabolic research (heart disease, diabetes, obesity and metabolic syndrome), and infectious diseases (Creutzfeldt-Jakob disease, malaria, tuberculosis, hepatitis C, and HIV/AIDS).³¹

Scripps Florida Public Records Exemption

As part of the establishment of the Funding Corporation, s. 288.9551, F.S., was enacted to provide a public records exemption for certain records and meetings of Scripps Florida that are held by the Funding Corporation.³² In 2009, the exemption was modified and extended for another 5 years.³³ The following records are confidential and exempt from public disclosure:

- Materials that relate to methods of manufacture or production, potential and actual trade secrets,³⁴ patentable material, or proprietary information received, generated, ascertained, or discovered by or through Scripps Florida.
- Agreements and proposals to receive funding, including grant applications.³⁵
- Materials relating to the recruitment of scientists and researchers.
- The identity of donors or potential donors who wish to remain anonymous.
- 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.³⁶

³⁰ Funding Corporation *2013 Annual Report* at 36. Under the terms of its amended agreement, Scripps Florida is required to hire 545 employees by the end of 2014. Amendment to Operating and Funding Agreement, Nov. 28, 2006 (on file with the Committee on Commerce and Tourism).

³¹ Scripps Florida, *Research Overview – Florida Campus*, <http://www.scripps.edu/florida/research/index.html> (last visited Jan. 21, 2014).

³² The 2009 extension of s. 288.9551, F.S., removed reference to records and meetings held by the former OTTED. Ch. 2009-236, s. 2, L.O.F.

³³ Chapter 2009-236, s. 2, L.O.F.

³⁴ "Trade secret" is defined in s. 688.002, F.S.

³⁵ However, the portions of such agreements and proposals to receive funding, including grant applications, that do not contain information made confidential and exempt by s. 288.9551, F.S., 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 Funding Corporation and SRI that governs the release of the state funds. Section 288.9551(2)(b), F.S.

³⁶ Section 288.9551(2), F.S.

Additionally, those portions of board meetings by the Funding Corporation's directors during which exempt and confidential information is presented or discussed must be closed to the public, and records of the closed portions of the meetings are exempt and confidential.³⁷

Exempt and confidential information must be released to public employees exclusively for the performance of their duties.³⁸ Violating the exemption is a second-degree misdemeanor³⁹

When originally enacted in 2003, the constitutionally required public necessity statement accompanying the exemptions asserted a number of reasons supporting the confidentiality of certain information that Scripps Florida could provide the Funding Corporation.⁴⁰ For example:

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

Originally, the exemptions created under s. 288.9551, F.S., were scheduled for repeal on October 2, 2009, unless reenacted after review by the Legislature under the Sunset Act.⁴¹ In 2009, following review pursuant to the Sunset Act, the Legislature renewed the exemptions for a period of 5 years to October 2, 2014, unless reenacted after legislative review under the Sunset Act.⁴²

The Funding Corporation recommends repealing the public records and public meeting exemptions because the Funding Corporation does not receive or collect the exempt information listed in the statute and does not hold any exempt meetings.⁴³ Scripps Florida, SRI, and DEO are neutral on whether the exemptions are repealed or extended.⁴⁴

III. Effect of Proposed Changes:

Section 1 of the bill repeals s. 299.9551, F.S., which provides a public record exemption for proprietary business information and certain financial and research information held by the

³⁷ *Id.* at (3).

³⁸ *Id.* at (4).

³⁹ *Id.* at (5).

⁴⁰ Chapter 2003-419, s. 2, L.O.F.

⁴¹ *Id.* at s. 1.

⁴² Chapter 2009-236, s. 2, L.O.F.

⁴³ The Funding Corporation's response to the joint Senate and House questionnaire regarding the open government sunset review of s. 288.9551, F.S., response completed by Sara Misselhorn, Project Director, received Sept. 10, 2013, questions 13 and 19 (on file with Committee on Commerce and Tourism).

⁴⁴ Telephone conversation with Tom Northrup, General Counsel for SRI and Scripps Florida (Aug. 28, 2013); E-mail from Karl Blischke, Chief, Bureau of Compliance and Accountability, Department of Economic Opportunity, (Nov. 1, 2013) (on file with Committee on Commerce and Tourism).

Scripps Florida Funding Corporation and provides a public meetings exemption for meetings where such information is discussed.

Section 2 of the bill provides an effective date of October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill repeals the public records exemption and the public meeting exemption for the Scripps Florida Funding Corporation. The bill complies with the requirement of article I, s. 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

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. Statutes Affected:

The bill repeals s. 288.9551, F.S.

IX. Additional Information:

- A. **Committee Substitute – Statement of 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.
