

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 Governmental Oversight and Accountability

BILL: CS/SB 840
INTRODUCER: Health Policy Committee and Senator Richter
SUBJECT: Public Records and Meetings/Alzheimer's Disease Research Grant Advisory Board
DATE: April 2, 2014 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peterson</u>	<u>Stovall</u>	<u>HP</u>	Fav/CS
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Favorable
3.	_____	_____	<u>RC</u>	_____

<p>Please see Section IX. for Additional Information:</p> <p>COMMITTEE SUBSTITUTE - Substantial Changes</p>
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I. Summary:

CS/SB 840, which is tied to CS/SB 872, creates a public records exemption for information related to the Alzheimer's Disease Research Grant Advisory Board's (board) receipt and review of research grant applications. The information is designated confidential and exempt, but may be disclosed under certain circumstances. The bill also exempts from the public meetings laws those portions of the Board's meetings at which the grant applications are discussed. The bill requires that the closed meetings be recorded and disclosed under specified circumstances.

The exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal by the Legislature.

The bill contains a public necessity statement as required by the Florida Constitution.

Because this bill creates new public records and public meetings exemptions, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

II. Present Situation:

Ed and Ethel Moore Alzheimer's Disease Research Program

CS/SB 872, which is tied to CS/SB 840, creates the Ed and Ethel Moore Alzheimer's Disease Research Program to fund research to help prevent or cure Alzheimer's disease. Awards must be made through a competitive, peer-reviewed process in any of the following categories:

- Investigator-initiated research.
- Institutional research.
- Predoctoral and postdoctoral research fellowships.
- Collaborative research.

The bill creates an 11-member Alzheimer's Disease Research Grant Advisory Board to provide the State Surgeon General input on the scope of the research program and its recommendations for proposals to be funded. The State Surgeon General, in turn, awards grants, after consulting with the board, on the basis of scientific merit. The board may also advise on program priorities; assist in developing linkages with nonacademic entities; and develop and provide oversight of mechanisms for disseminating research results.

The board reports annually to the Governor, President of the Senate, Speaker of the House of Representatives, and the State Surgeon General on elements of the program's implementation, its impact on leveraging additional funding, progress towards its goals, and recommendations to further its mission.

Implementation of the program is contingent upon an appropriation.

Public Records and Public Meetings Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

The Florida Constitution also requires that all meetings of any board or commission of any agency or authority of the state or of any county, municipal corporation, or political subdivision at which official acts are to be taken or public business of such body is to be transacted or discussed be open and noticed to the public.⁶ In addition, the Sunshine Law⁷ requires all meetings of any board or commission of any local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

Only the Legislature may create an exemption to public records or public meetings requirements.⁹ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹⁰ 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 provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹³ It

⁴ Section 119.011(12), F.S., defines “public records” 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.” Section 119.011(2), F.S., defines “agency” 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.” The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)). But, *see* s. 11.0431, F.S. (Providing public access to records of the Senate and the House of Representatives, subject to specified exemptions.)

⁵ Section 119.07(1)(a), F.S.

⁶ Article I, Section 24(b), of the Florida Constitution.

⁷ Section 286.011, F.S. Section 286.011, F.S., has been construed to apply to any gathering, formal or informal, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by that board or commission. *See generally Hough v. Stembridge*, 278 So.2d 288 (Fla. 3rd DCA 1973).

⁸ Section 286.011(1)-(2), F.S. The intent of the Legislature is to “extend application of the ‘open meeting’ concept so as to bind every ‘board or commission’ of the state, or of any county or political subdivision over which it has dominion or control.” *City of Miami Beach v. Berns*, 245 So.2d 38, 40 (Fla. 1971).

⁹ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see* Attorney General Opinion 85-62, August 1, 1985).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ The bill may; however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c).

¹³ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the

requires the automatic repeal of such exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁴ The Act provides that a public records or open meetings exemption may be maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹⁵ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- It protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- It protects trade or business secrets.¹⁶

The Act also requires specified questions to be considered during the review process.¹⁷

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is expanded.¹⁸ A public necessity statement and a two-thirds vote for passage are not required if the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception¹⁹ to the exemption is created.²⁰

III. Effect of Proposed Changes:

The bill creates a public records exemption for grant applications submitted to the Alzheimer's Disease Research Grant Advisory Board and the records, except the final recommendations, generated by the board during its review. The information is confidential and exempt.²¹ The

act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁴ Section 119.15(3), F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

¹⁷ Section 119.15(6)(a), F.S. The specified questions are:

- 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 An exemption is expanded when it is amended to include more records, information, or meetings or to include meetings as well as records, or records as well as meetings.

¹⁹ An example of an exception to a public records exemption would be allowing an additional agency access to confidential and exempt records.

²⁰ *See State of Florida v. Ronald Knight*, 661 So.2d 344 (Fla. 4th DCA 1995) (holding that nothing in s. 24, art. I of the Florida Constitution requires exceptions to a public records exemption to contain a public necessity statement).

²¹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. *See supra* note 9.

records may be released; however, with the express written consent of the person to whom the information pertains or the person's legally authorized representative, or by court order upon a showing of good cause.

The bill further provides that those portions of the board's meetings at which the grant applications are discussed are exempt from the public meetings law. The bill requires that the closed portions of the meetings be recorded and the recordings may be released under the same circumstances as apply to the exempt records—with the express written consent of the person to whom the information pertains or the person's legally authorized representative, or by court order upon a showing of good cause.

The bill provides for repeal of the exemptions pursuant to the Open Government Sunset Review Act on October 2, 2019, unless reviewed and saved from repeal by the Legislature.

The bill provides a public necessity statement, which is required by the Florida Constitution. The bill states that the public records exemption is necessary to protect the intellectual property of the applicants, to promote scientific innovation, and to ensure a peer review process that conforms to national practices. It states that the public meetings exemption is necessary to ensure candid exchanges among reviewers, thereby ensuring that decisions are based on merit and not subject to bias or undue influence.

The bill takes effect on the same date CS/SB 872 or similar legislation takes effect, if adopted during the 2014 Session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly created or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), Art. I of the Florida Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. This bill creates a new public records exemption; therefore, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

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

None.

B. Private Sector Impact:

CS/SB 840 protects sensitive, intellectual data, which if released, could result in economic harm to the applicants if it were obtained and used by others who might be competing for similar grants or to develop pharmaceuticals or other treatments of a proprietary nature.

C. Government Sector Impact:

The impact would be the same for applications from public institutions as described above for applications from private researchers.

In addition, the bill could create a minimal fiscal impact for the DOH, because staff responsible for complying with public records requests may need training related to the new public records exemption.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 381.82(3) of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on March 19, 2014:

- Amends the directory and the effective date to add references to CS/SB 872, which is the substantive tied bill.
- Requires that closed portions of meetings at which applications are discussed be recorded and released in accordance with the procedures applicable to the exempt records.

B. Amendments:

None.

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