

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GAP 10-20 OGSR H. Lee Moffitt Cancer Center and Research Institute

SPONSOR(S): Governmental Affairs Policy Committee

TIED BILLS: **IDEN./SIM. BILLS:** SB 1678

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Governmental Affairs Policy Committee	14 Y, 0 N	Williamson	Williamson
1)	_____	_____	_____	_____
2)	_____	_____	_____	_____
3)	_____	_____	_____	_____
4)	_____	_____	_____	_____
5)	_____	_____	_____	_____

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law establishes the H. Lee Moffitt Cancer Center and 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.

Current law provides public record and meeting exemptions for the not-for-profit corporation and its subsidiaries.

The bill reenacts and expands the public record exemption for the not-for-profit corporation and its subsidiaries. It expands the current exemption to include the identity of a donor or prospective donor to the not-for-profit corporation or a subsidiary who wishes to remain anonymous, and to include patentable materials. As such, the bill extends the repeal date from October 2, 2010, to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.

In addition, the bill narrows the public meeting exemption for the board of directors for the not-for-profit corporation and its subsidiaries. It provides that meetings may be closed to the public only to discuss information the Legislature has deemed confidential and exempt from public records requirements. This change conforms the public meetings requirements for the board of directors for the not-for-profit corporation and its subsidiaries to that of other similar entities.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public record or public meeting exemption. The bill expands the current exemption under review; thus, it requires a two-thirds vote for final passage.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 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.
- Protects trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.² If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created³ then a public necessity statement and a two-thirds vote for passage are not required.

The H. Lee Moffitt Cancer Center and Research Institute

Current law establishes the H. Lee Moffitt Cancer Center and Research Institute (the center) at the University of South Florida.⁴ A not-for-profit corporation governs the center in accordance with an

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

⁴ Section 1004.43, F.S.,

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.⁵

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.⁶

The corporation 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.⁷

Records of the not-for-profit corporation and its subsidiaries are public records.⁸

Public Record Exemption for the Not-For-Profit Corporation and its Subsidiaries

Current law provides a public record exemption for proprietary confidential business information. Such information is made confidential and exempt⁹ 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.¹⁰

For purposes of the public record 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;¹¹

⁵ Section 1004.43(1), F.S.

⁶ *Id.*

⁷ 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 Governmental Affairs Policy Committee).

⁸ Section 1004.43(8)(a), F.S.

⁹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems 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, 53 (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 1994); *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 Section 1004.43(8)(b), F.S.

¹¹ Section 119.071(1)(d), F.S., provides a general public record exemption, which is applicable to the not-for-profit corporation and its subsidiaries, for a public record 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 record 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 record 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 natures 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

- Contracts for managed-care¹² 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;
- Corporate officer and employee personnel information;¹³
- 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,¹⁴ 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 Meeting Exemption for the Not-For-Profit Corporation and its Subsidiaries

Current law also provides a public meeting 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

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 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 Governmental Affairs Policy 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 yet, these agencies are not afforded the same protections as the not-for-profit corporation or its subsidiaries.

¹² 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.

¹³ 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 publically disclose their names and compensation by virtue of Federal law and IRS reporting requirements.

¹⁴ 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.

corporation are discussed or reported.¹⁵ 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 record exemption for the following information will repeal on October 2, 2010, unless reenacted by the Legislature:¹⁶

- 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 research conducted by the not-for-profit corporation or its subsidiaries; and reimbursement methodologies or 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.

As part of the review process, staff studied the public record and public meeting exemptions in their entirety and compared those exemptions with similar exemptions found throughout current law.¹⁷ Staff discovered the following as part of the Open Government Sunset Review process:

- Portions of the definition of proprietary confidential business information included information that did 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 record 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 meeting exemptions, including exemptions for similar not-for-profit corporations, it was found that the public meeting 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 meeting exemption. Only those meetings wherein confidential and exempt information is discussed are exempt from public meetings requirements.¹⁸ Meetings of the board of directors of the Scripps Florida Funding Corporation are open to the public unless confidential and exempt information is discussed.¹⁹ 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 meeting exemption was not strictly adhered to by the board of directors.²⁰

Effect of Bill

The bill reenacts the public record exemption for the not-for-profit corporation of the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries.

¹⁵ Section 1004.43(9), F.S.

¹⁶ Section 1004.39(8)(c), F.S.

¹⁷ 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?*

¹⁸ See s. 1004.4472(4), F.S.

¹⁹ See s. 288.9551(3)(a), F.S.

²⁰ Conference call on February 24, 2010.

The bill expands the current exemption to create a public record exemption for the identity of a donor or prospective donor to the not-for-profit corporation or a subsidiary who wishes to remain anonymous. This expansion creates the same protections afforded other agencies or similar entities.²¹ It further expands the current exemption to provide a public record exemption for patentable materials, which is added to the definition of proprietary confidential business information.²²

The bill narrows the public meeting exemption for the board of directors for the not-for-profit corporation and its subsidiaries. It provides that meetings may be closed to the public *only* to discuss information the Legislature has deemed confidential and exempt from public records requirements. This change conforms the public meetings requirements for the board of directors for the not-for-profit corporation and its subsidiaries to that of other similar entities.

The bill reorganizes the exemption and revises the definition of proprietary confidential business information.

Because the bill expands the current public record exemption, it extends the repeal date for the exemption from October 2, 2010, to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.²³

B. SECTION DIRECTORY:

Section 1 amends s. 1004.43, F.S., to reenact and expand the public record exemption for the not-for-profit corporation of the H. Lee Moffitt Cancer Center and Research Institute and its subsidiaries, and to narrow its public meeting exemption.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

²¹ For example, see s. 1004.4472(2)(d), F.S.

²² Section 1004.4472(2)(a), F.S., provides the same protection for the Florida Institute for Human and Machine Cognition, Inc.

²³ Section 24(c), Art. I of the State Constitution.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public record or public meeting exemption. The bill expands the current exemption under review; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemption under review; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.