

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: SB 7024

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Information Held by the Florida Center for Brain Tumor Research

DATE: January 8, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Looke</u>	<u>Stovall</u>		HP Submitted as Committee Bill
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	<u>_____</u>	<u>_____</u>	<u>RC</u>	<u>_____</u>

I. Summary:

SB 7024 eliminates the scheduled repeal of the current public records exemption for personal identifying information held by the Florida Center for Brain Tumor Research. As a result, this information continues to be confidential and exempt from public disclosure.

A simple majority vote is required for passage. The bill goes into effect on July 1, 2016.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that:

¹ FLA. CONST. art. I, s. 24(a).

² FLA. CONST. art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹⁴

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” 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 as “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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ FLA. CONST. art. I, s. 24(c).

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁴ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject a new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁵ The OGSR provides that an exemption automatically repeals on October 2 of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁷

- 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁸ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.¹⁹

The Florida Center for Brain Tumor Research

Section 381.853, F.S., creates the Florida Center for Brain Tumor Research (Center). The Center is established within the Evelyn F. and William L. McKnight Brain Institute of the University of Florida (Institute) and is intended to establish a coordinated effort among the state's public and private universities and hospitals and the biomedical industry to discover brain tumor cures and develop brain tumor treatment modalities. The Institute is required to develop and maintain a brain tumor registry that is an automated, electronic, and centralized database of individuals with

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one Legislature cannot bind a future Legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(a), F.S.

¹⁸ FLA. CONST. art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

brain tumors. The registry is a central repository for brain tumor biopsies from individuals throughout the state.²⁰

Additionally, in furthering its goal of finding cures for brain tumors, the Center is required to:

- Award funds appropriated by the Legislature in a competitive grant process;
- Hold an annual brain tumor biomedical technology summit;
- Encourage clinical trials on research that holds the promise of curing brain tumors; and
- Facilitate the formation of partnerships between researchers, physicians, clinicians, and hospitals for the purpose of sharing new techniques, sharing new research findings, and coordinating the voluntary donation of brain tumor biopsies.

Section 381.853, F.S., requires that the Center be funded through private, state, and federal sources and also establishes a scientific advisory council within the Center which includes biomedical researchers, physicians, clinicians, and representatives from public universities, private universities, and hospitals.

The Registry

The Center maintains a collaborative, statewide registry of banked cancerous and non-cancerous brain tumor specimens, matched samples of DNA, plasma, serum and cerebrospinal fluid, clinical and demographic information, and quality-of-life assessments obtained from patients. Patients are asked to participate in the Center's bio-repository and registry, which has been approved by an Institutional Review Board, to provide valuable specimens and data for future research. The banked materials are made available to researchers in Florida and beyond who are investigating improved treatments and cures for brain tumors. A web-based database stores demographic, clinical and quality-of-life data, creates a registry of participants, and bar-codes and tracks the samples. This clinical database contains information available (in unidentifiable format) to researchers who study brain tumors.²¹

Information Protected from Disclosure

Section 381.8531, F.S., makes confidential and exempt from Florida's public records laws any personal and identifying information held by the Center which relates to donors to either the central repository for brain tumor biopsies or registrants on the brain tumor registry. Additionally, the exemption protects any information received by the Center from an individual from another state or nation, or from the Federal Government, if that information is confidential or exempt pursuant to the laws of the state or nation from which the information is transmitted. The only exception to the confidentiality of the protected information is for persons who are engaged in bona fide research and who agree to submit a research plan to the Center, sign a

²⁰ The individual, or the parent or guardian of the individual if the individual is a minor, may refuse to participate in the brain tumor registry by signing a form obtained from the Department of Health or from the health care practitioner or entity that provides brain tumor care or treatment which indicates that the individual does not wish to be included in the registry. The decision to not participate in the registry must be noted in the registry. Section 381.853(2), F.S.

²¹ Florida Center for Brain Tumor Research, Annual Report for 2014-2015, Jan. 15, 2015, pp. 16-17 (on file with the Senate Committee on Health Policy.)

confidentiality agreement, maintain the confidentiality of the information received, and destroy any confidential information received after the research is completed.²²

As of August 12, 2015, the Center has not received any requests for records protected under s. 381.8531, F.S., nor has the public records exemption been the subject of litigation.²³ The Center has received requests for information from other states but has only sent limited Health Insurance Portability and Accountability (HIPAA) compliant data sets. Although other state and federal laws may protect the information made confidential and exempt²⁴ under s. 381.8531, F.S., the Center relies on the public records exemption as it is “clearly applicable to the data contained in the [Center’s] database.”²⁵

III. Effect of Proposed Changes:

SB 7024 saves from repeal the public records exemption in s. 381.8531, F.S., which makes confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the State Constitution information held by the Florida Center for Brain Tumor Research which is:

- Personal identifying information of donors to the central repository for brain tumor biopsies;
- Personal identifying information of registrants on the brain tumor registry; or
- Any information that is received by the Center from an individual from another state or nation, or from the Federal Government, if that information is confidential or exempt pursuant to the laws of the state or nation from which the information is transmitted.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

²² This public records exemption was amended in 2011 with the following changes: added personal identifying information, provided disclosure mechanisms and a retroactivity clause. The exemption was also subject to a new OGSR, which provided the current sunset date. Ch. 2011-203, Laws of Fla.

²³ See survey response by Barbara Frentzen, Administrator for the Florida Center for Brain Tumor Research, August 12, 2015, (on file with the Senate Committee on Health Policy staff.)

²⁴ Examples of such laws include the Federal HIPAA Pub. L. No. 104-191; s. 456.057, F.S.; and the Federal Genetic Information Nondiscrimination Act (Pub. L. No.110-343) and s. 760.40, F.S. Survey response from the Florida Center for Brain Tumor Research at p. 4. Federal law forbidding disclosure, however, supersedes Florida’s open records laws only when there is an absolute conflict between the two. Office of the Attorney General, *Government-in-the-Sunshine Manual*, 2015 Edition, p. 153. The Legislature may wish to continue this public records exemption because federal law may change or a court may find that the federal protections do not apply to some aspect of this program. For example in *Wallace v. Guzman*, 687 So. 2d, 1341, 1353 (Fla. 3d DCA 1997), a court found that federal protection of documents held by federal agencies do not apply to state agencies that hold the same documents. See also *Housing Authority of the City of Daytona Beach v. Gommillion*, 639 So. 2d 117 (Fla. 5th DCA 1994).

²⁵ Survey response from the Florida Center for Brain Tumor Research at p. 5.

B. Public Records/Open Meetings Issues:

None.

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:

This bill substantially amends section 381.8531 of the Florida Statutes.

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.