

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 78-E

SPONSOR: Governmental Oversight & Productivity Committee and Senator Lee

SUBJECT: Public Records Exemption - Florida Alzheimer's Center and Research Institute

DATE: May 7, 2002                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill makes confidential and exempt certain information relating to clients of the Florida Alzheimer’s Center and Research Institute (FACRI) that is held by the FACRI, the University of South Florida, the State Board of Education or by service providers. The records made confidential and exempt by the bill include patient medical or health records created or received by the FACRI; trade secret materials and proprietary information; the identity of donors who wish to remain anonymous; any other information that is received by the FACRI in the performance of its duties that is otherwise confidential and exempt by law, including information received from a person, another state or nation, or the Federal Government.

The bill is made subject to the Open Government Sunset Review Act and will be repealed October 2, 2006, unless reviewed and reenacted by the Legislature prior to that date.

This bill creates an undesignated section of the Florida Statutes.

## II. Present Situation:

**Access to Public Records** - Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.<sup>1</sup> Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state’s Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.<sup>2</sup> The act has been amended numerous times since its enactment.

<sup>1</sup> Section 1, ch. 5942, 1909; RGS 424; CGL 490.

<sup>2</sup> Chapter 67-125 (1967 L.O.F.).

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

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, and commission, or entity created pursuant to law or this Constitution.<sup>3</sup>

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level, making it a substantive right,<sup>4</sup> and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment “grandfathered” exemptions that were in effect on July 1, 1993, until they are repealed.<sup>5</sup> Rules of court that limit access to records, and that were in effect on November 3, 1992, remain in effect until repealed.<sup>6</sup>

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

**Exemptions to Access to Public Records** - Article I, s. 24 (c) of the State Constitution authorizes only the Legislature to create exemptions from the public access provisions of the law and constitution. Exemptions must be enacted by *general* law. Any law that creates an exemption must:

- < State with specificity the public necessity that justifies the exemption;
- < Be no broader than necessary to comport with the stated public necessity; and
- < Relate only to exemptions and their enforcement.<sup>7</sup>

Exemptions to open government requirements are strictly construed and are interpreted narrowly so that they are limited to their stated purpose.<sup>8</sup>

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<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001).

<sup>5</sup> Article I, s. 24(d) of the State Constitution.

<sup>6</sup> *See*, Rule 2.051, Public Access to Judicial Records, Fla. R. Jud. Admin.

<sup>7</sup> Article I, s. 24(c) of the State Constitution includes within “enforcement” maintenance, control, destruction, disposal, and disposition of records.

<sup>8</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla 4<sup>th</sup> DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> DCA 1987), *review denied*, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2<sup>d</sup> DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

**Sunset and Review of Exemptions** - The Open Government Sunset Review Act of 1995<sup>9</sup> provides for the systematic repeal of exemptions to the Public Records Law and Public Meetings Law five years after the creation of, or substantial modification to, an exemption. The repeal cycle began in 2001. The 1995 act also specifies the conditions under which a public records or public meetings exemption may be created.

By law, an exemption may be created or expanded only if the exemption:

- 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.<sup>10</sup>

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

**Florida Alzheimer's Center and Research Institute** – Senate Bill 20-E provides for the creation of the Florida Alzheimer's Center and Research Institute in s. 1004.445, F.S. The bill passed the Senate by a vote of 27-7 and passed the House of Representatives by a vote of 76-39. It was ordered enrolled May 2, 2002.

### III. Effect of Proposed Changes:

**Public Records Exemption** – This bill makes confidential and exempt certain information relating to clients of the Florida Alzheimer's Center and Research Institute (FACRI) that is held by the FACRI, the University of South Florida, the State Board of Education or by service providers. The records made confidential and exempt by the bill include:

- < Identifying information relating to clients of programs created or funded through the FACRI which is held by FACRI, the University of South Florida, the State Board of Education, by service providers to clients of programs created or funded by FACRI;
- < Patient medical or health records created or received by the FACRI;
- < Materials relating to methods of manufacture or production;

<sup>9</sup> Sections 119.15 and 286.0111, F.S.

<sup>10</sup> Section 119.15(4)(b), F.S.

- < Potentially patentable material;
- < Actual trade secrets as defined in s. 688.002, F.S.;<sup>11</sup>
- < Business transactions;
- < Proprietary information received, generated, ascertained, or discovered during the course of research conducted by or through the FACRI;
- < The identity of donors who wish to remain anonymous or information identifying such donor or prospective donor; and
- < Any other information that is received by the FACRI in the performance of its duties that is otherwise confidential and exempt by law, including information received from a person, another state or nation, or the Federal Government.

The bill also authorizes any other governmental entity that demonstrates a need to access the confidential and exempt information in order to perform its duties and responsibilities to have access to such information. A governmental entity that obtains access is required to keep such information confidential and exempt.

**Open Government Sunset Review Act** – The bill makes the exemption subject to the requirements of s. 119.15, F.S., the Open Government Sunset Review Act of 1995. As a result, the exemption will be subject to review during the 2005 legislative interim and will be repealed October 2, 2006, unless reenacted by the Legislature during the 2006 legislative session.

**Statement of Public Necessity** – The basis for the exemption is that personal, medical or health information of this nature, if made publicly available, would be an unwarranted invasion of a client's or patient's right to privacy and because the misuse of that information could be detrimental to the health, safety, or welfare of the client or patient. Further, information relating to methods of manufacture or production, actual trade secrets, business transactions, or proprietary information received, generated, ascertained, or discovered during the course of research conducted through the FACRI is made confidential and exempt because it would impede the effective and efficient operation of FACRI and would create an unfair competitive advantage for persons or entities receiving such information. Finally, donor identity information is made confidential and exempt when requested by the donor because failure to protect donor identity could have a chilling effect on donations.

**Contingent Effective Date** – The effective date of the bill is July 1, 2002, contingent upon passage of Senate Bill 20-E, the Florida K-20 Education Code, by Senator Villalobos. The bill passed the Senate by a vote of 27-7 and passed the House of Representatives by a vote of 76-39. It was ordered enrolled May 2, 2002.

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<sup>11</sup> Section 688.02(4), F.S., defines "trade secret" to mean ". . . information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) 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 (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

Pursuant to Art. I, s. 24 of the State Constitution, a law creating an exemption must state with specificity the public necessity that justifies the exemption and be no broader than necessary to comport with the stated public necessity.<sup>12</sup> Further, exemptions to open government requirements are strictly construed and are interpreted narrowly so that they are limited to their stated purpose.<sup>13</sup> The committee substitute corrects a portion of the exemption that was overbroad under the constitutional standard. The original bill made exempt “business transactions” of the FACRI. “Business transactions” could include purchases of office supplies, or employee or property leases, which are not business transactions that would provide competitors an unfair advantage if they were made public. The committee substitute modifies the section to clarify that the intent of the section is to limit the exemption to those business transactions that are related to the course of research conducted by or through the institute.

The first part of the exemption extends to identifying information held by the FACRI, the University of South Florida, the State Board of Education or by service providers. In the original bill, the statement of public necessity failed to include all of these entities within the purpose for the exemption and, therefore, was deficient. The committee substitute amends the statement of public necessity to include the University of South Florida, the State Board of Education and service providers.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Unknown.

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<sup>12</sup> Article I, s. 24(c) of the State Constitution includes within “enforcement” maintenance, control, destruction, disposal, and disposition of records.

<sup>13</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla 4<sup>th</sup> DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> DCA 1987), *review denied*, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2<sup>d</sup> DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

**C. Government Sector Impact:**

Unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Senate Bill 20-E provides for the creation of the Florida Alzheimer's Center and Research Institute in s. 1004.445, F.S. The bill passed the Senate by a vote of 27-7 and passed the House of Representatives by a vote of 76-39. It was ordered enrolled May 2, 2002.

House Bill 43-E, which is similar to this bill, passed the House of Representatives May 3, 2002, by a vote of 107-1, and is in messages.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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