

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: SB 3030

SPONSOR: Senator Crist

SUBJECT: Public Records Exemption/Moffitt Center and Alzheimer Center

DATE: April 5, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	O'Farrell	ED	Favorable
2.	_____	_____	HC	_____
3.	_____	_____	GO	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill expands the public records exemption for the H. Lee Moffitt Cancer Center and Research Institute (Moffitt Center), its not-for-profit corporation and its subsidiaries to include:

- Information relating to methods of manufacture or production;
- Potential trade secrets;
- Potentially patentable material;
- Proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries, and business transactions resulting from such research; and
- Any information received by the not-for-profit corporation and its subsidiaries from a person in Florida, another state or nation, or the Federal Government which is otherwise exempted pursuant to the laws governing the sending person.

This bill expands the public records exemption for the Florida Alzheimer's Center and Research Institute¹ (Alzheimer's Center) to include:

- Proprietary confidential business information which the Alzheimer's Center:
 - Owns or controls;
 - Treats as private and disclosure of which would harm the center; and
 - Has not intentionally disclosed the information unless required by law, an order of a court, a legislative proceeding, or a private agreement that provides for the disclosure of the information.

¹ Section 5, ch. 2004-2, L.O.F., names the Florida Alzheimer's Center and Research Institute as the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute.

- Reimbursement methodologies and rates.
- Systems or techniques used by third-party payors or their agents to access and control health care service payments.
- Financial incentives or disincentives related to the use of specific providers, services, or service sites.
- Methods of access to and coordination of services by a case manager.
- Information relating to private contractual data if the board of directors determines that, the disclosure of the information would impair the competitive interest of the provider of the information.
- The salary or benefits paid to an employee of the Alzheimer's Center who performs scientific research and whose salary and benefits are not paid from public funds.
- Minutes of a meeting of the board of directors, which contain information that is exempt from public disclosure.

The bill expands the public meetings exemption by closing portions of a meeting of the board of directors at which confidential and exempt information is disclosed.

The bill provides that the expansion of the public records and public meetings exemptions repeal on October 2, 2009, unless saved from repeal by the Legislature. In addition, the bill provides statements of public necessity for the public records exemptions and the public meetings exemption.

This bill amends s. 1004.43, F.S., and s. 1004.445, F.S., and creates five unnumbered sections of law.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level.

The Public Records Law, chapter 119, F.S., specifies the conditions under which public access must be provided to governmental records. While the state constitution provides that records are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Section 24, Art. I of the State Constitution governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must contain a statement of the public necessity that justifies the exemption. In addition, the constitution provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Chapter 95-217, Laws of Florida, repealed the Open Government Sunset Review Act, contained in s. 119.14, F. S., and enacted in its place s. 119.15, F.S., the Open Government Sunset Review

Act of 1995. This Act provides for the repeal and prior review of any public records exemptions that are created or substantially amended in 1996 and subsequently. The review cycle began in 2001. The chapter defines the term “substantial amendment” for purposes of triggering a repeal and prior review of an exemption to include an amendment that expands the scope of the exemption to include more records or information or to include meetings as well as records. The law clarifies that an exemption is not substantially amended if an amendment limits or narrows the scope of an existing exemption.

The H. Lee Moffitt Cancer Center and Research Institute

Section 1004.43, F.S., establishes the H. Lee Moffitt Cancer Center and Research Institute at the University of South Florida. A not-for-profit corporation managed by a board of directors governs the Moffitt Center. The not-for-profit corporation may create, with prior approval from the State Board of Education, for-profit² or not-for-profit subsidiaries. The records of the not-for-profit corporation and its subsidiaries are public records unless made confidential or exempt by law.

Section 1004.43, F.S., provides a public records and public meetings exemption for proprietary confidential business information and for meetings of the board of directors, in which the expenditure of appropriated dollars is not discussed. Proprietary confidential business information is defined as information the disclosure of which would harm the entities and relates to the following:

- Internal auditing controls;
- Matters protected by attorney-client privilege;
- Contracts for managed-care arrangements, including documents relating to the negotiation, performance and implementation of the contracts;
- Bids or other contractual data, banking records, and credit agreements;
- Private contractual data;
- Personnel information;
- Credentialing information;
- Minutes of meetings except for those meetings where the expenditure of appropriated dollars is discussed;
- Plans for marketing services;
- Trade secrets as defined in s. 688.002, F.S., including reimbursement methodologies or rates; or
- Identities of donors or prospective donors who wish to remain anonymous.

Section 1004.22, F.S., authorizes a state university to create a division of sponsored research. As part of a public corporation of the state, the records of the division of sponsored research are subject to public disclosure unless specifically exempted by law. Section 1004.22(2), F.S., specifically exempts the following records from public disclosure: materials that relate to methods of manufacture or production; potential trade secrets; potentially patentable material;

² Section 4, ch. 2004-2, L.O.F., authorizes the Moffitt Center to create for-profit subsidiaries.

actual trade secrets; business transactions; or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities.

The Moffitt Center has opined that the records protected under the not-for-profit corporation's public records exemption would include the records protected from public disclosure requirements under the division of sponsored research's exemption. The University of South Florida believes that the exemption from public disclosure requirements under the division of sponsored research is broader than the Moffitt Center's exemption. The university believes that its public records exemption extends to cover research agreements with a third party and that the Moffitt Center's exemption is more concerned with the business operations of the center. The university maintains that the expansion of the public records exemption is needed to ensure that any exempted information transmitted from the division of sponsored research maintains its protected status when delivered to the Moffitt Center. Accordingly, the University of South Florida has expressed its reservation about exchanging certain research information with the Moffitt Center.

However, the differences in the exemptions between the Moffitt Center and the division of sponsored research are not so apparent when the exemption for trade secrets, as defined in s. 688.002, F.S., is examined. Section 688.002, F.S., defines trade secrets as any information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, that is not 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 to maintain its secrecy. The trade secret exemption is not limited to the business operations of the Moffitt Center. Accordingly, the trade secret exemption afforded the Moffitt Center does not appear to require public disclosure, upon proper request, of a third party's research.

The Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute

Section 1004.445, F.S., establishes the Florida's Alzheimer's Center and Research Institute³ at the University of South Florida. A not-for-profit corporation managed by a board of directors governs the Alzheimer's Center. The not-for-profit corporation may create, with prior approval from the State Board of Education, for-profit⁴ or not-for-profit subsidiaries. The records of the not-for-profit corporation and its subsidiaries are public records unless made confidential or exempt by law.

Section 1004.445(9), F.S., exempts the following records of the Alzheimer's Center from public disclosure:

- Personal identifying information relating to clients of programs created or funded through the Alzheimer's Center, University of South Florida, State Board of Education, or by persons who provide services to the above clients through contracts with the Alzheimer's Center;

³ Section 5, ch. 2004-2, L.O.F., renames the Alzheimer's Center as the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute.

⁴ Section 5, ch. 200402, L.O.F., authorizes the Alzheimer's Center to create for-profit subsidiaries.

- Medical or health records relating to patients which may be created or received by the Alzheimer's Center;
- Materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained, or discovered during the course of research conducted by or through the Alzheimer's Center and business transactions resulting from the research;
- Identity of a donor or prospective donor to the Alzheimer's Center who wishes to remain anonymous, and all information identifying the donor or prospective donor;
- Information received by the Alzheimer's Center in the performance of its duties and responsibilities, which is otherwise confidential and exempt by law; and
- Information received by the Alzheimer's Center from a person from another state, nation, or federal government that is otherwise confidential and exempt pursuant to that state, nation, or federal laws.

Section 1004.445(9), F.S., additionally provides that any governmental entity that demonstrates a need to access the confidential and exempt information in order to perform its duties and responsibilities shall have access to such information and shall keep such information confidential and exempt.

III. Effect of Proposed Changes:

Section-by-Section Analysis

Section 1

This bill expands the public records exemption for the H. Lee Moffitt Cancer Center and Research Institute (Moffitt Center), its not-for-profit corporation and its subsidiaries to include:

- Information relating to methods of manufacture or production;
- Potential trade secrets;
- Potentially patentable material;
- Proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries, and business transactions resulting from such research; and
- Any information received by the not-for-profit corporation and its subsidiaries from a person in Florida, another state or nation, or the Federal Government which is otherwise exempted pursuant to the laws governing the sending person.

This public records expansion would resolve the dispute concerning protection of intellectual property between the Moffitt Center and the University of South Florida by expanding the Moffitt Center's public records exemption to include those items protected from disclosure in a division of sponsored research under s. 1004.22(2), F.S.

In addition, the bill expands the public records exemption to include any information received by the Moffitt Center and its subsidiaries from a person in Florida, another state or nation, or the Federal Government, which is exempted pursuant to the laws governing the sending person. This

public records expansion is directed at resolving concerns over the protection of research of a third party.

The bill provides that the expansion to the public records exemption repeals on October 2, 2009, unless saved from repeal by the Legislature.

Section 2

The bill provides statements of public necessity for the expansion of the public records exemption.

Section 3

This bill expands the public records exemption for the Florida Alzheimer's Center and Research Institute⁵ (Alzheimer's Center) to include:

- Proprietary confidential business information which the Alzheimer's Center:
 - Owns or controls;
 - Treats as private and disclosure of which would harm the center; and
 - Has not intentionally disclosed the information unless required by law, an order of a court, a legislative proceeding, or a private agreement that provides for the disclosure of the information.
- Reimbursement methodologies and rates.
- Systems or techniques used by third-party payors or their agents to access and control health care service payments.
- Financial incentives or disincentives related to the use of specific providers, services, or service sites.
- Methods of access to and coordination of services by a case manager.
- Information relating to private contractual data if the board of directors determines that, the disclosure of the information would impair the competitive interest of the provider of the information.
- The salary or benefits paid to an employee of the Alzheimer's Center who performs scientific research and whose salary and benefits are not paid from public funds.
- Minutes of a meeting of the board of directors, except those minutes open to the public.

The bill expands the public meetings exemption by closing portions of a meeting of the board of directors at which confidential and exempt information is disclosed.

The bill aligns the public records exemption and public meetings exemption with the exemptions provided to other research institutes around the state, most specifically, the Moffitt Center. Although construction of the Alzheimer's Center has not been completed, the center has already granted approximately \$1.8 million in grants for Alzheimer's research.⁶ Accordingly, the bill would purport to give the Alzheimer's Center some protection from competition by allowing an entity to share research with the center without public disclosure.

⁵ Section 5, ch. 2004-2, L.O.F., names the Florida Alzheimer's Center and Research Institute as the Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute.

⁶ St. Pete Times, *USF Alzheimer's center gives \$1.8 million in grants*, January 16, 2004.

The bill provides that the expansion of the public record and public meeting exemptions repeals on October 2, 2009, unless saved from repeal by the Legislature.

Section 4

The bill provides statements of public necessity for the expansion of the public record and the public meeting exemption.

Section 5

The bill contains a severability clause.

Section 6

The effective date of the bill is upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Public Records

Section 24, Art. 1 of the State Constitution, provides, in pertinent part, that all public records made or received in connection with the official business of any public body are subject to public disclosure unless specifically made exempt by law. The law must state with specificity the public necessity justifying the exemption and may not be broader than necessary to accomplish its purpose. In addition, the law must be approved by a two-thirds vote of each house.

The statement of public necessity provides that the exemptions from public disclosure requirements are necessary to prevent the not-for-profit corporation and its subsidiaries from being adversely affected in competition with other health care and medical research entities and to protect the identities of donors and patients.

Open Meetings

Section 21, Art. I of the State Constitution, provides, in pertinent part, that all meetings of a public body at which official acts are to be taken or at which public business of the body is to be transacted or discussed, shall be open and noticed to the public unless specifically made exempt by law. The law must state with specificity the public necessity justifying the exemption and may not be broader than necessary to accomplish its purpose. In addition, the law must be approved by a two-thirds vote of each house.

The statement of public necessity provides that the exemptions from public meeting requirements are necessary to prevent the not-for-profit corporation and its subsidiaries from being adversely affected because the records exemption would otherwise be eviscerated if the Alzheimer Center were required to notice and conduct the meetings at which exempted information is discussed.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Research entities may be more likely to share research information with the Moffitt Center and the Alzheimer's Center if the information is protected from public disclosure. Accordingly, these research entities may benefit from the shared knowledge between the entities. The fiscal benefit to the private sector entity is indeterminate.

C. Government Sector Impact:

Research entities may be more likely to share research information with the Moffitt Center and the Alzheimer's Center if the information is protected from public disclosure. Accordingly, the Moffitt Center and Alzheimer's Center may benefit from the shared knowledge between the entities. The fiscal benefit to the state is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

SB 2922 revises the public records exemption for the Moffitt Center. Although the public records exemption is substantially similar to this bill, there are minor differences between the two bills, including the public necessity statement, that should be reconciled to avoid a differing interpretation of the exemption should both bills pass.

VIII. Amendments:

None.