

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 Governmental Oversight and Accountability Committee

BILL: CS/SB 1856

INTRODUCER: Committee on Health Regulation and Senator Flores

SUBJECT: Public Meetings and Public Records

DATE: February 3, 2012 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-------------|----------------|-----------|------------------|
| 1. | O'Callaghan | Stovall | HR | Fav/CS |
| 2. | Jenkins | Roberts | GO | Favorable |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The committee substitute (CS) exempts from Florida’s public records and public meetings laws information related to a peer review panel’s review of applications for biomedical research grants under the James and Esther King Biomedical Research Program (King Program) and the William G. “Bill” Bankhead, Jr., and David Coley Cancer Research Program (Bankhead-Coley Program).

The CS authorizes the disclosure of the exempted information under certain circumstances.

The CS provides for the repeal of the public records and public meetings exemption in accordance with the Open Government Sunset Review Act, and provides a statement of public necessity for the exemption.

Because this CS creates a new public records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This CS is linked to CS/SB 616 and will take effect on the same date that CS/SB 616 or similar legislation becomes a law.

This CS creates two undesignated sections of law.

II. Present Situation:

The James and Esther King Biomedical Research Program

The purpose of the King Program¹ is to provide an annual and perpetual source of funding to support research initiatives that address the health care problems of Floridians in the areas of tobacco-related cancer, cardiovascular disease, stroke, and pulmonary disease.² The long-term goals of the program are to:

- Improve the health of Floridians by researching better prevention, diagnoses, treatments, and cures for cancer, cardiovascular disease, stroke, and pulmonary disease;
- Expand the foundation of biomedical knowledge relating to the prevention, diagnosis, treatment, and cure of diseases related to tobacco use;
- Improve the quality of the state's academic health centers by bringing the advances of biomedical research into the training of physicians and other health care providers;
- Increase the state's per capita funding for research by undertaking new initiatives in public health and biomedical research that will attract additional funding from outside of Florida; and
- Stimulate economic activity in the state in areas related to biomedical research, such as the research and production of pharmaceuticals, biotechnology, and medical devices.

The King Program offers competitive grants to researchers throughout Florida. Grant applications from any university or established research institute³ in Florida will be considered for biomedical research funding. All qualified investigators in the state, regardless of institutional affiliation, have equal access and opportunity to compete for the research funding.

The State Surgeon General, after consultation with the council, is authorized to award grants and fellowships on the basis of scientific merit⁴ within the following three categories:

- Investigator-initiated research grants;
- Institutional research grants; and
- Predoctoral and postdoctoral research fellowships.⁵

¹ The Florida Legislature created the Florida Biomedical Research Program in 1999 within the department (ch. 99-167, L.O.F.). The Florida Biomedical Research Program was renamed the James and Esther King Biomedical Research Program during Special Session B of the 2003 Legislature (ch. 2003-414, L.O.F.).

² Section 215.5602, F.S.

³ An "established research institute" is any Florida non-profit or foreign non-profit corporation covered under ch. 617, F.S., with a physical location in Florida, whose stated purpose and power is scientific, biomedical or biotechnological research or development and is legally registered with the Florida Department of State, Division of Corporations. This includes the federal government and non-profit medical and surgical hospitals, including veterans' administration hospitals. *See James & Esther King Biomedical Research Program, Call for Grant Applications: Biomedical, Biotechnological, and Social Scientific Research and Development, Fiscal Year 2009-2010*, page 7, available at: http://forms.floridabiomed.com/jek_call/King%20Call%2009-10.pdf (Last visited on January 23, 2012).

⁴ *See* the "Grant Application Review and Processing" section of Senate Interim Report 2010-219, page 7, for more information about assessing scientific merit. The report is available at: http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-219hr.pdf (Last visited on January 23, 2012).

The King Program was to expire on January 1, 2011, pursuant to s. 215.5602, F.S. However, the Legislature continued the program in 2010 by enacting HB 5311.⁶

The William G. “Bill” Bankhead, Jr., and David Coley Cancer Research Program

The 2006 Legislature created the Bankhead-Coley Program within the Department of Health (the department).⁷ The purpose of the program is to advance progress toward cures for cancer through grants awarded for cancer research.

Applications for funding cancer research from any university or established research institute in the state will be considered under the Bankhead-Coley Program. All qualified investigators in the state, regardless of institutional affiliation, have equal access and opportunity to compete for the research funding. The State Surgeon General, after consultation with the council, is authorized to award grants and fellowships on the basis of scientific merit⁸ within the following three categories:

- Investigator-initiated research grants;
- Institutional research grants; and
- Collaborative research grants, including those that advance the finding of cures through basic or applied research.

As with the King Program, the Bankhead-Coley Program was to expire on January 1, 2011, pursuant to s. 215.5602, F.S. However, the Legislature also continued this program in 2010 when it enacted HB 5311.⁹

Biomedical Research Advisory Council¹⁰ and Peer Review Panel¹¹

The purpose of the council is to advise the State Surgeon General as to the direction and scope of the King Program. The council is also required to consult with the State Surgeon General concerning grant awards for cancer research through the Bankhead-Coley Program.¹² Currently there are 11 members on the council, authorized to serve no more than two consecutive, 3-year terms.

In order to ensure that proposals for research funding within the King Program and the Bankhead-Coley Program are appropriate and evaluated fairly on the basis of scientific merit, a peer review panel of independent, scientifically qualified individuals is appointed to review the scientific content of each proposal to establish a “scientific”¹³ priority score.¹⁴ To eliminate

⁵ Section 215.5602(5)(b), F.S.

⁶ Chapter 2010-161, L.O.F.

⁷ Section 381.922, F.S., (ch. 2006-182, L.O.F.).

⁸ *Supra* fn. 5.

⁹ Chapter 2010-161, L.O.F.

¹⁰ Section 215.5602(3), F.S.

¹¹ Section 215.5602(6) and (7), and s. 381.922(3)(b), F.S.

¹² Section 381.922(3)(a), F.S. However, s. 215.5602(11), F.S., contains an inconsistency with respect to the responsibility of the Council concerning awarding grants for cancer research.

¹³ The King Program requires a *scientific* priority score in s. 215.5602(6), F.S. The Bankhead-Coley Program requires a priority score in s. 381.922(3)(b), F.S.

conflicts of interest, peer reviewers come from outside the state of Florida. Reviewers are experts in their fields from universities, government agencies, and private industry who are matched according to application topic and area of expertise. The priority scores must be considered by the council in determining which proposals will be recommended for funding to the State Surgeon General.

Meetings of the council and the peer review panel are subject to ch. 119, F.S., relating to public records; s. 286.011, F.S., relating to public meetings; and s. 24, Art. I of the State Constitution relating to access to public meetings and records.

Public Records

Article I, s. 24 of the State Constitution, provides that:

(a) 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, commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,¹⁵ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency¹⁶ records are available for public inspection. The term “public record” is broadly defined 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.¹⁷

¹⁴ A Bridge Grant application is ranked solely by the priority score or percentile assigned to its qualifying federal proposal in an eligible federal review process.

¹⁵ Chapter 119, F.S.

¹⁶ The word “agency” is defined in s. 119.011(2), F.S., 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.”

¹⁷ s. 119.011(12), F.S.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.¹⁸ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.²⁰ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.²¹

The Open Government Sunset Review Act (the Act)²² provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act. The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- 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 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
- 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.²³

The Act also requires the Legislature to consider the following:

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

¹⁹ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

²⁰ Attorney General Opinion 85-62.

²¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²² s. 119.15, F.S.

²³ s. 119.15(6)(b), F.S.

Linked Bill

SB 616 is linked to this CS and revises several provisions relating to the King Program and the Bankhead-Coley Program.

III. Effect of Proposed Changes:

The CS exempts from Florida's public records and public meetings laws information related to a peer review panel's review of applications for biomedical research grants under the King Program and the Bankhead-Coley Program.

Specifically, the CS:

- Exempts that portion of a meeting of a peer review panel in which applications for biomedical research grants under the King Program and the Bankhead-Coley Program are discussed.
- Makes confidential and exempt any records generated by the peer review panel relating to the review of applications for biomedical research grants, except final recommendations.
- Makes confidential and exempt research grant applications provided to the peer review panel.

Information made confidential and exempt from Florida's public records laws by the CS may be disclosed with the express written consent of the individual to whom the information pertains or the individual's legally authorized representative, or by court order upon showing good cause.

The CS makes the exemption subject to the Open Government Sunset Review Act, which requires the repeal of the exemption on October 2, 2017, unless the Legislature reviews the exemption and saves it from repeal through reenactment.

The CS also provides a statement of public necessity for the exemption. The statement provides that research grant applications contain information of a confidential nature, including ideas and processes, which could injure the affected researcher if such information was disclosed. In addition, the statement provides that maintaining confidentiality is a hallmark of scientific peer review, as practiced by the national Science Foundation and the National Institutes of Health, when awarding grants and allows for candid exchanges between reviewers critiquing proposals. Furthermore, closing access to meetings of the scientific peer review panels in which biomedical research applications are discussed and protecting the records generated during such meetings ensures that decisions are based upon merit without bias or undue influence.

The CS will take effect on the same date that the linked bill or similar legislation takes effect, if such a bill is adopted during the same legislative session or extension thereof and becomes law.

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

The provisions of this CS have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

This CS exempts portions of meetings of a peer review panel in which applications for biomedical research grants under the King Program and the Bankhead-Coley Program are discussed from Florida's public meetings laws. The CS makes confidential and exempt from Florida's public records laws any records generated by the peer review panel relating to the review of such applications, except final recommendations. The CS also makes confidential and exempt from public records laws research grant applications provided to the peer review panel.

The CS authorizes the disclosure of the confidential and exempt public records if the person to whom the confidential and exempt information pertains, or his or her legal representative, provides express written consent to the disclosure or if a court orders the disclosure upon a showing of good cause.

C. Trust Funds Restrictions:

The provisions of this CS have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

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

None.

B. Private Sector Impact:

Information discussed by a peer review panel, related records, and applications for biomedical research grants will be made confidential and exempt from public record.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. 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 Regulation on January 31, 2012:

Creates a public records exemption relating to peer review panels, which is linked to the substantive bill CS/SB 616, concerning biomedical research.

Specifically, the CS:

- Exempts the portion of a meeting of a peer review panel in which applications for biomedical research grants are discussed.
- Exempts any records generated by the peer review panel relating to the review of such applications, except records of the panel's final recommendations.
- Exempts research grant applications provided to the panel.
- Provides for the disclosure of the exempted information under certain circumstances.
- Provides a sunset review of the public records exemption.
- Expands the public necessity statement.
- Revises the effective date of the bill, to make the effective date contingent on the passing of CS/SB 616 or similar legislation.

- B. **Amendments:**

None.