

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 7004

INTRODUCER: Health Policy Committee

SUBJECT: OGSR/Peer Review Panels/Department of Health

DATE: February 20, 2017 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Rossito-Van Winkle</u>	<u>Stovall</u>		<u>HP Submitted as Committee Bill</u>
1.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7004 continues existing public records and public meetings exemptions for:

- Biomedical research grant applications provided to a peer review panel for 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);
- Records generated by a peer review panel relating to the review of a biomedical research grant application; and
- That portion of a meeting of a peer review panel in which biomedical research grant applications are discussed.¹

The bill removes the scheduled repeal and provides an effective date of October 1, 2017.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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 of persons acting on their behalf.² The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.³

¹ Sections 215.56021 and 381.92201, F.S.

² FLA. CONST. art. I, s. 24(a).

³ FLA. CONST. art. I, s. 24(b).

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹²

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹³ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the

⁴ Chapter 119, F.S.

⁵ 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 "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." The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁸ FLA. CONST. art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. 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). 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).

⁹ FLA. CONST. art. I, s. 24(c).

¹⁰ FLA. CONST. art. I, s. 24(c).

¹¹ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 section 119.15(2), F.S.

¹² Section 119.15(3), F.S.

¹³ Section 119.15(6)(b), F.S.

Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁴
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁵ or
- It protects trade or business secrets.¹⁶

The OGSR also requires specified questions to be considered during the review process.¹⁷ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, 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 provided for by law.¹⁹

Biomedical Research Programs

The Department of Health (department) administers two grant funding programs that fund research on cancer and tobacco-related diseases in the state: 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 Legislature created the Florida Biomedical Research Program in 1999 within the department.²⁰ The Florida Biomedical Research Program was renamed the James and Esther King Biomedical Research Program during Special Session B of the 2003 Legislature.²¹ The purpose of the King Program "is to provide an annual and perpetual source of funding in order 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."²²

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹⁸ FLA. CONST. art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

²⁰ Chapter 99-167, s. 2, Laws of Fla.

²¹ Chapter 2003-414, Laws of Fla..

²² Section 215.5602(1), F.S.

The 2006 Legislature created the Bankhead-Coley Program within the department.²³ The purpose of the program is “to advance progress toward cures for cancer through grants awarded” for cancer research.²⁴

The King Program and the Bankhead-Coley Program offer competitive grants to researchers throughout Florida. Grant applications from any university or established research institute in Florida are considered for biomedical research funding.²⁵ All qualified investigators in the state, regardless of institutional affiliation, have equal access and opportunity to compete for the research funding.²⁶

The department uses a multi-step evaluation process²⁷ for making award determinations for all applications submitted in response to a Funding Opportunity, before making final recommendations to the State Surgeon General. Under the multi-step evaluation process, the department conducts an Administrative Review and Peer Review, and then in conjunction with the Biomedical Research Advisory Council (council) conducts a Programmatic Review to eliminate or manage any conflicts of interests.

The State Surgeon General, after consultation with the council, is authorized to award grants and fellowships on the basis of scientific merit²⁸ 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.

Biomedical Research Advisory Council and Peer Review Panel

The purpose of the council²⁹ is to “advise the State Surgeon General as to the direction and scope of the biomedical research program.”³⁰ The council is also required to consult with the State Surgeon General concerning grant awards under the King Program and the Bankhead-Coley Program.³¹

²³ Section 381.922, F.S.; Ch. 2006-182, Laws of Fla.

²⁴ Section 381.922(1), F.S.

²⁵ Sections 381.922(3)(a), and 215.5602(5)(b), F.S.

²⁶ *Id.*

²⁷ See Department of Health, James and Ester King Biomedical Research Program. *Funding Opportunity Announcement FY 2016-2017*, page 28, available at: <http://www.floridahealth.gov/provider-and-partner-resources/research/FINAL%20FY%2016-17%20King%20Program%20FOA.pdf> and Department of Health, Bankhead-Coley Cancer Research Program, *Funding Opportunity Announcement FY 2016-17*, page 27, available at: <http://www.floridahealth.gov/provider-and-partner-resources/research/FINAL%20FY%2016-17%20BC%20Program%20FOA.pdf> (Last visited on February 15, 2017).

²⁸ Section 215.5602(5)(b) and (6), F.S.; s. 381.922(3)(a) and (b), F.S.

²⁹ Section 215.5602(3), F.S.

³⁰ Section 215.5602(4), F.S.

³¹ 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. Section 215.5602(11), F.S., expressly provides that the council must award grants for cancer research through the Bankhead-Coley Program.

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 panel³² of independent, scientifically qualified individuals is appointed to review the scientific content of each proposal to establish a “scientific”³³ priority score.³⁴ To eliminate 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.

Public Records and Public Meeting Exemptions for Peer Review Panel Activities

In 2012, the Legislature created exemptions from Florida’s public records and public meetings laws for research grant applications provided by the department to peer reviewers; records generated by the peer review panel (except final recommendations); and 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.³⁵ In accordance with the OGSR, both exemptions sunset on October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

The exemptions authorize the information that is held confidential and exempt to be disclosed with the express written consent of the individual, or the individual’s legally authorized representative, to whom the information pertains, or by court order upon showing good cause.

When enacting these exemptions, the Legislature found that the research grant applications under these programs contain information of such a confidential nature, including ideas and processes, that the disclosure of which could injure the affected researcher; and that maintaining confidentiality is paramount to scientific peer review and allows for a candid exchange between reviewers. The Legislature also found it a public necessity to close access to the peer review panel meetings where the grant applications were discussed and close access to the records generated at those meetings, to ensure that decisions were based on merit, without bias or undue influence.³⁶

OGSR of Open Meetings and Public Records Exemption Under Review

During the Interim, Senate and House of Representatives professional staff jointly sent a survey to the department regarding these public records exemptions in compliance with the OGSR Act. The department’s response was both detailed and informative about the grant and fellowship

³² Section 215.5602(6) and (7); s. 381.922(3)(b), F.S.

³³ 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.

³⁴ 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.

³⁵ Sections 215.56021 and 381.92201, F.S.

³⁶ Chapter 2012-15, s. 2., Laws of Fla.

application process for the King Program and Bankhead-Coley Program.³⁷ The department's vendors send the applications to qualified, individual peer reviewers to evaluate the merits of grant and fellowship applications. The vendors then consolidate the peer reviewers' scores and then submit them to the council. The council reviews the vendor's consolidated peer review panel reports and then meet to discuss the merits of the applications and make recommendations to the State Surgeon General.

Researchers have submitted 640 applications or proposals since March 23, 2012. The department has funded 87 of those projects.³⁸

The department recommends that the public records and meetings exemptions not be repealed, however, the department also states that only one section is necessary since they are identical.³⁹

III. Effect of Proposed Changes:

The bill reenacts and removes the scheduled repeal date of October 2, 2017, for the public records and public meeting exemptions in ss. 215.56021 and 381.92201, F.S., relating to the King Program and the Bankhead-Coley Program, respectively.

The public records exemptions apply to biomedical research grant applications provided to the peer review panel and any records generated by the peer review panel in reviewing the grant applications, except final recommendations. These records are confidential and exempt from s. 119.071(1), F.S., and Article I, section 24(a) of the Florida Constitution.

The public meeting exemptions apply to portions of peer review panel meetings when grant applications are discussed and make them exempt from s. 286.011, F.S., and Article I, section 24(b) of the Florida Constitution.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill reenacts existing public records and meeting exemptions pertaining to applications for biomedical research grants and meetings of the peer review panel under the King Program and the Bankhead-Coley. Therefore, a simple majority vote of the members present in each house of the Legislature is required for passage.

³⁷ *House Government Operations Subcommittee Senate Committee on Health Policy Open Government Sunset Review Questionnaire* completed by the Florida Department of Health and returned on August 10, 2016, on file with the Senate Committee on Governmental Oversight and Accountability.

³⁸ *Id.* at 5.

³⁹ *Id.* at 9.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Continued protection of research grant applications and peer review activities will help ensure integrity of the state-funded biomedical research grant program.

C. Government Sector Impact:

Continued protection of research grant applications and peer review activities will help ensure integrity of the state-funded biomedical research grant program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature passed these public records and meetings exemptions as a single, unnumbered section in Ch. 2012-15, Laws of Fla. The statement of public necessity, as well as the first subsection in Ch. 2012-15, Laws of Fla., clearly state that meetings and records exemptions apply to both research grant programs under s. 215.5602, F.S., (the King Program) and s. 381.922, F.S. (the Bankhead-Coley Program). Accordingly, Ch. 2012-15, Laws of Fla., also has only one sunset date.

The exemptions are published twice, however, in the Florida Statutes, and are co-located with each research program. The bill also includes both ss. 215.56021 and 381.9221, F.S., with individual sunset dates.

Section 119.15(6)(a), F.S., requires the Legislature consider the following questions during a sunset review:

- “Is the record or meeting protected by another exemption?” [and]
- “Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?”

Under normal circumstances after an OGSR, one of these exemptions might be repealed since both exemptions protect the same information. It appears as though removing one exemption would not open the peer review records or grant applications to public inspection, nor allow public access to the meetings.

Repealing either s. 215.56021 F.S., or 381.92201, F.S., however, may make it appear as though one grant program did not have a public meetings and records exemption. Subparagraph (1) of each exemption specifically provides that the meetings exemption applies to grants under ss. 215.5602 and 381.922, F.S. Subparagraphs (2) and (3), however, reference the peer review panels in subparagraph (1), but do not specifically state that the exemptions for meetings records and grant applications apply to grants under ss. 215.5602 and 381.922, F.S. If the Legislature repeals one exemption, a court could find that there was Legislative intent to remove application of the exemptions in subparagraphs (2) and (3) to the non-co-located grant program.

In addition, if one public records exemption is repealed, the “orphaned” grant program’s exemption would be codified in a completely different title and chapter of the Florida Statutes.⁴⁰ This may diminish the utility of the exemptions only because the exemptions would be difficult to find.

If the Legislature wishes to repeal or consolidate these exemptions, it may also wish to consider amending the cross-references to clarify that the exemptions apply to both grant programs.

VIII. Statutes Affected:

This bill substantially amends the following sections of Florida Statutes: 215.56021 and 381.92201.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

⁴⁰ The King Program is codified in Ch. 215, Title XIV, Tax and Finance, and the Bankhead-Coley Program is located in Ch. 381, F.S., in Title XXIX, Public Health.