



The Florida Senate

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Committee on Higher Education

OPEN GOVERNMENT SUNSET REVIEW OF FLORIDA INSTITUTE FOR HUMAN AND MACHINE COGNITION, INC.

Issue Description

The 2004 Legislature (ch. 2004-358, L.O.F.) enacted a public records disclosure exemption for information held by the Florida Institute for Human and Machine Cognition, Inc. The exemption applies to information relating to methods of manufacture, identification of a donor, and information that is otherwise exempt under Florida law or under the laws of the state or nation from which a person provides the information to the institute. The statute, s. 1004.4472, F.S., also provides a public meetings exemption for that portion of a meeting at which information is presented or discussed that is confidential or exempt from public disclosure requirements. In accordance with the Open Government Sunset Review Act of 1995 under s. 119.15, F.S., this exemption shall be repealed on October 2, 2009, unless saved from repeal through reenactment by the Legislature.

Background

Public Records

Florida has a long history of providing public access to governmental records. The Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

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.

The Public Records Act³ 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 agency⁴ records are available for public inspection. The term "public record" is broadly defined to mean:

¹ Sections 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Chapter 119, F.S.

⁴ 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."

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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

The Open Government Sunset Review Act of 1995¹² establishes a review process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption.

An exemption may be created or expanded only if it serves an identifiable public purpose and is no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and 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 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;
- 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
- The exemption 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.¹³

The act also requires consideration of 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?

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Article I, s. 24(c) of the State Constitution.

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

Finally, 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.¹⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁵

The Florida Institute for Human and Machine Cognition, Inc.

The Florida Institute for Human and Machine Cognition, Inc., (IHMC) is a research institute where scientists and engineers investigate topics related to understanding cognition in both humans and machines. Established in 1990 as an interdisciplinary research unit of the University of West Florida, the institute was created as a Florida not-for-profit corporation by the 2003 Legislature.¹⁶

The IHMC has formal affiliation agreements with the University of West Florida, Florida Atlantic University, the University of Central Florida, and the Florida Institute of Technology. In addition to these formal affiliations, the IHMC has established research partnerships with the University of North Florida and the University of South Florida. The institute's research activities are funded by government agencies such as the Defense Advanced Research Project Agency (DARPA), the U.S. Army, the National Aeronautics and Space Administration (NASA), and the U.S. Navy, and by private corporations such as the design consulting firm IDEO, the communications firm Nokia, the aerospace company Boeing, the aerospace and technology company Lockheed Martin Corporation, and the technology applications firm Science Applications International Corporation (SAIC).

The 2008 Legislature appropriated \$1.6 million for the institute in fiscal year 2008-2009. The institute reports that approximately ten percent of its budget comes from state funding, and historically less than five percent of its budget has been funded by private funds. Thus, the majority of the institute's competitive contract and research projects are funded by federal dollars.

The institute's current research activities include: knowledge modeling and sharing, adjustable autonomy, robotics, advanced interfaces and displays, communication and collaboration, computer-mediated learning systems, intelligent data understanding, software agents, expertise studies, work practice simulation, knowledge representation, and other related areas. The institute also conducts educational outreach programs.

The IHMC is authorized to create not-for-profit corporate subsidiaries upon prior approval of the Board of Governors. The institute has not created subsidiaries.

The IHMC and any of its subsidiaries are:

- Instrumentalities of the state pursuant to s. 768.28, F.S.;
- Not an agency of the state within the meaning of s. 20.03(11), F.S.; and
- Subject to open meetings and public records requirements of s. 24, Art. I of the State Constitution, ch. 119, F.S., and s. 286.011, F.S.

Public Records and Public Meetings Exemptions

Under s. 1004.4472, F.S., the following information held by the IHMC or an authorized subsidiary is exempt from public records requirements:

- Material relating to methods of manufacture or production;
- Potential trade secrets;
- Patentable material;

¹⁴ Attorney General Opinion 85-62.

¹⁵ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹⁶ Chapter 2003-294, L.O.F., codified in s. 1004.447, F.S.

- 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 Florida Institute for Human and Machine Cognition, Inc., and its subsidiaries;
- Business transactions resulting from such research;
- Any information received by the corporation or a subsidiary from a person from another state or nation or the Federal Government which is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law;
- Any information received by the corporation or a subsidiary in the performance of its duties and responsibilities which is otherwise confidential and exempt by law; and
- All identifying information of a donor or prospective donor to the corporation or a subsidiary who wishes to remain anonymous.

That portion of a meeting of the IHMC or a subsidiary at which information is presented or discussed which is confidential and exempt from public records requirements under s. 1004.4472(1), F.S., is exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

Findings and/or Conclusions

Florida Senate Higher Education Committee professional staff worked in consultation with professional staff of the Senate Committee on Governmental Operations and the Florida House of Representatives Committee on State Affairs to determine whether the exemptions in s. 1004.4472, F.S., meet the criteria for retention of the exemption. Senate professional staff surveyed the director of the institute concerning the use of the public records and public meetings exemptions and the records protected from public disclosure. Professional staff also interviewed a representative of the Florida First Amendment Foundation to identify any concerns or suggested changes.

Under s. 24(c), Art. I, of the State Constitution, the exemption must be no broader than necessary to accomplish the stated purpose of the law. The Open Government Sunset Review Act¹⁷ provides that a public records exemption shall be maintained only if the exempted record is of a sensitive, personal nature concerning individuals; is necessary for the effective and efficient administration of a governmental program; or affects confidential information concerning an entity. The Act requires the legislative review of the exemption to consider which specific records or meetings are affected by the exemption, whom the exemption uniquely affects, the identifiable public purpose of the exemption, whether the protected information could be obtained by alternative means, whether the record or meeting is covered by another exemption, and whether there are multiple exemptions for the same type of record or meeting.

The Specific Records Affected by the Exemption

The institute receives, generates, ascertains, discovers, or otherwise collects:

- Methods of manufacture or production, which may include scientific or mathematical algorithms, hardware or software, technical designs, displays, or detailed publications outlining a process or innovation;
- Potential trade secrets;
- Patentable material;
- Actual trade secrets as defined in s. 688.002, F.S.;¹⁸ and
- Proprietary information which can include financial information (production and overhead costs, profit margins, sales and order volumes prior to quarterly release, budgets, quotas and targets, information on a particular product's sales, orders or projections), marketing information (product introduction plans and dates, market share and competitive position, short- and long-term market strategy or customers), research and development information (technical and performance specifications, technical reports, product plans, projects in progress, project problems

¹⁷ Section 119.15, F.S.

¹⁸ A trade secret is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process that 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 that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

or product code names) and manufacturing information (vendor names and relationships, production and inventory levels, future plans and sites, material cost, product failure rates, chemical formulas, or manufacturing processes).

Business transactions resulting from the institute's research are confidential and exempt from public records requirements. The institute reports the exemption for business transactions is necessary because:

IHMC makes it a priority to protect its intellectual property developed through its research initiatives through confidentiality agreements with third parties and through patent and trademark protections. IHMC then seeks to commercialize its intellectual property through business transactions that include marketing to and negotiating with commercial entities regarding licenses, options and other agreements to exploit this intellectual property for economic value. Often, successful business transactions require collaboration of multiple research entities, companies and investors.

Business transactions need to remain confidential and exempt from public disclosure in order to maintain an economic value and to encourage private sector companies and investors to participate in discussions. A third party would be unwilling to provide value for information that is readily accessible by all or to risk public disclosure of its own confidential information by participating in a business transaction with a public entity that could not agree to provide confidentiality.¹⁹

The institute has recently started its fundraising initiative. Potential donors are notified that they may request anonymity. The exemption for the identity of a donor or prospective donor has not been used because no donor or prospective donor has requested anonymity.

The institute frequently receives information that is confidential pursuant to laws of another state or nation or federal law. The institute sometimes receives information that is confidential and exempt pursuant to other Florida laws when it collaborates with Florida universities and research entities that have confidentiality requirements. The contractual agreement between IHMC and such entities addresses the information and the requirements and responsibilities of the parties for maintaining confidential and exempt information.

Those Uniquely Affected by the Exemption

The exemptions affect the institute; those entities with whom it conducts research, including private corporations, federal governmental agencies, state universities, and research laboratories; and donors or potential donors.

The Purpose and Public Necessity for the Exemptions

The 2004 law creating the exemptions stated that, without the exemptions, the disclosure of confidential and exempt information would place the corporation in an unequal footing in the marketplace as compared with its private research competitors that are not required to disclose confidential and exempt information.²⁰ Disclosure of such information would adversely affect the institute's ability to fulfill its mission of research and education.²¹ The 2004 Legislature also found that the identity of a donor or prospective donor who wishes to remain anonymous, should remain confidential and exempt from public disclosure in the same manner provided to direct support organizations at state universities.²² The public meetings exemption protects those portions of a meeting where information that is confidential and exempt from public records requirements is discussed, thereby preventing an unfair competitive advantage for people receiving the information.²³

Under s. 119.15(6)(b), F.S., an identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivision to effectively and efficiently administer a government program;
2. Protects information of a sensitive personal nature concerning individuals;

¹⁹ Ford, K. IHMC response to Open Government Review Questionnaire, July 15, 2008.

²⁰ Chapter 2004-358, L.O.F.

²¹ *Id.*

²² *Id.*

²³ *Id.*

3. Protects information of a confidential nature concerning entities, including a formula, patent, device, combination of devices, or compilation of information which 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.

The public records and public meetings exemptions in s. 1004.4472, F.S., meet the third criterion above in that they protect information of a confidential nature concerning entities which is used to further a business advantage over those who do not know or use the information. The institute reports that it frequently receives such information. The institute enters into contractual agreements for all of its research and collaborative efforts, and those agreements address the requirements and responsibilities of the parties for maintaining confidential and exempt information. The institute reports that most of the agreements provide time frames, often encompassing a period between 2 and 5 years, after which time period the disclosed information is no longer required to be held confidential.

The confidential and exempt records relate to research conducted by the IHMC in fulfillment of its statutory mission as an information-technology-related research organization engaged in research, education, scientific advancement, and economic development.²⁴ The public records and public meetings exemptions appear to be no broader than is necessary to accomplish the purpose of furthering the IHMC's business advantage in the marketplace.

Regarding the pending repeal of the exemptions, the institute's director stated, "If the public records exemption is repealed, IHMC would be at a distinct disadvantage in its research and role as one of the nation's premier information-technology-related research organizations and IHMC would no longer be competitive in its statewide mission as set forth in Section 1004.447(7)(a), F.S."²⁵

Alternative Means for Obtaining the Records

The protected information contained in the records could not be readily obtained by alternative means.

Other Exemptions Pertaining to the Records

All of the public records exemptions for the IHMC are contained in s. 1004.4472, F.S. Sometimes the institute receives records from a state university or research entity that are confidential and exempt under a separate statute.

Possibly Combining Multiple Exemptions

A number of statutes create public records exemptions for the identity of donors and potential donors and for records relating to trade secrets. In the future, the Legislature might consider combining such exemptions into a single one for each type of record, such as a general exemption for the identity of donors or for trade secrets.

Public Meetings Exemption

That portion of a meeting of the IHMC or a subsidiary at which information is presented or discussed which is confidential and exempt from public records requirements under s. 1004.4472(1), F.S., is exempt from the public meetings requirements of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. The institute reports that it has not yet needed to use the public meetings exemption because there have not been specific discussions in a public meeting concerning patentable material, proprietary research information or donor-identifying information such as to require a closed portion of a meeting.

Options and/or Recommendations

Senate professional staff has reviewed the exemptions in s. 1004.4472, F.S., and finds that the exemptions meet the requirements for reenactment. The exemptions, viewed against the Open Government Sunset Review criteria, protect information concerning entities and are no broader than is necessary to allow the Florida Institute for Human and Machine Cognition, Inc., to carry out its statewide mission as an information-technology-related research organization. While the institute has not used the open meetings exemption thus far, should the board

²⁴ Section 1004.447(7)(a), F.S.

²⁵ Ford, K. Response to Open Government Review Questionnaire, July 15, 2008.

discuss confidential and exempt information at a meeting, the exemption would be necessary to protect the information from public disclosure. Accordingly, professional staff recommends that the public records and public meetings exemptions in s. 1004.4472, F.S., be reenacted.