



The Florida Senate

Interim Report 2010-221

September 2009

Committee on Higher Education

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 1004.43(8)10. AND 12., F.S., H. LEE MOFFITT CANCER CENTER AND RESEARCH INSTITUTE TRADE SECRETS AND INFORMATION EXEMPT OR CONFIDENTIAL UNDER THE LAWS OF ANOTHER STATE, NATION, OR THE FEDERAL GOVERNMENT

Issue Description

The 2005 Legislature enacted a public records disclosure exemption for information held by the corporation that governs the H. Lee Moffitt Cancer Center and Research Institute. The exemption in section 1004.43(8)10. and 12., F.S., applies to information relating to methods of manufacture, potential trade secrets, potentially patentable material; reimbursement methodologies and rates; and information that is otherwise exempt under Florida law or under the laws of the state or nation from which a person provided the information to the corporation or its subsidiaries. In accordance with the Open Government Sunset Review Act, the exemption sunsets on October 2, 2010, unless reenacted 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 H. Lee Moffitt Cancer Center and Research Institute

Section 1004.43, F.S., establishes the H. Lee Moffitt Cancer Center and Research Institute (the center) at the University of South Florida. A not-for-profit corporation (the corporation) governs the center in accordance with an agreement with the State Board of Education for the use of facilities on the campus of the University of South Florida. The not-for-profit corporation, acting as an instrumentality of the state, operates the center in accordance with an agreement between the Board of Governors and the corporation.¹⁶ A board of directors manages the corporation, and a chief executive officer, who serves at the pleasure of the board of directors, administers the center. The corporation has created three not-for-profit subsidiaries which were approved by the Board of Regents and two for-profit subsidiaries which were approved by the Board of Governors.

Public Records Exemption for Proprietary Confidential Business Information

Section 1004.43(8)(b), F.S., provides a public record exemption for “proprietary confidential business information” that is owned or controlled by the corporation or its subsidiaries. The exemption applies to information concerning internal auditing controls and reports; matters reasonably encompassed in privileged attorney-client communications; contracts for managed care arrangements; bids or other contractual data, banking records, and credit agreements; information relating to private contractual data; corporate officer and employee personnel information; information relating to the proceedings and records of credentialing panels and committees; minutes of the meetings of the governing board of the corporation and its subsidiaries except portions of meetings at which the expenditure of dollars appropriated by the state are discussed or reported; information that reveals plans for marketing services; trade secrets; the identity of donors or prospective donors of property who wish to remain anonymous; and any information received by the corporation or its subsidiaries from an agency in Florida or another state or nation or the federal government which would be confidential or exempt under the laws of Florida or another state or nation or federal law.

The 2005 Legislature expanded the corporation’s public records exemption for proprietary confidential business information in two ways:

1. The exemption for trade secrets was expanded to include “information relating to methods of manufacture or production, potential trade secrets, potentially patentable materials, or proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries.”
2. An exemption was created for information received by the corporation or its subsidiaries from an agency in Florida or another state or nation or the federal government which would be confidential or exempt under the laws of Florida or another state or nation or federal law.

The portions of the corporation’s public records exemption addressed in this open government sunset review are the exemption for trade secrets and the exemption for information that is confidential or exempt under the laws of another state or nation or the federal government.

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 Under transfer provisions made by chs. 2002-387 and 2007-217, L.O.F., the original agreement between the Board of Regents and the center is now overseen by the Board of Governors.

Findings and/or Conclusions

Trade Secrets

In response to a survey by professional staff of the Senate Higher Education Committee and the House Governmental Affairs Policy Committee, the corporation provided the following information concerning the types of trade secret information it receives:

The corporation currently receives more than \$59.7 million per year in federal research grants, as well as additional private donations earmarked for research, private-sponsored research dollars from various pharmaceutical and biotechnology companies, and research funding from the Department of Defense. These dollars are spent on conducting clinical and basic science research to discover new drugs, treatments and devices to further the corporation's mission to contribute to the prevention and cure of cancer. These research efforts often result in the creation and discovery of methods of manufacture and production, potential trade secrets, potentially patentable material, and proprietary information.

According to the corporation, information relating to methods of manufacture or production may include scientific or mathematical algorithms, hardware or software, chemical formulas, technical designs, displays, or detailed publications outlining a process or invention."

The corporation's public records exemption for trade secrets encompasses information that fits the definition of trade secrets under s. 688.02, F.S., as well as (a) information relating to methods of manufacture or production, potential trade secrets, potentially patentable materials, or proprietary information received, generated, ascertained, or discovered during the course of research conducted by the not-for-profit corporation or its subsidiaries; and (b) reimbursement methodologies or rates.

Under s. 688.02(4), F.S., 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
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

A portion of the corporation's public records exemption for trade secrets is similar to the exemption in s. 1004.22, F.S., which makes certain types of information confidential and exempt when held by divisions of sponsored research at state universities. Section 1004.22(2), F.S., provides a public records exemption for divisions of sponsored research at state universities. Materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets, business transactions, or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities are confidential and exempt from the provisions of s. 119.07(1), F.S., except that a division of sponsored research must make available upon request the title and description of a research project, the name of the researcher, and the amount and source of funding provided for such project.

The corporation explained its need for a public records exemption that parallels both the general exemption for trade secrets and the exemption for divisions of sponsored research at state universities as follows:

The corporation's affiliation with the University of South Florida, University of Florida, and other state universities, includes significant coordination and joint development of research discoveries, which necessitates the sharing of confidential information. Maintaining consistent wording between the exemptions granted to the state university division of sponsored research and the corporation, allows state universities to collaborate with and share research-related information with the corporation without fear that the information they share might lose its exemption. The exemption places the corporation on an equal playing field with state universities and its private

peers to allow for the more effective fulfillment of the corporation's legislative mandate in the area of cancer research."

Potential Trade Secrets

The corporation considers a "potential" trade secret to be "any in-progress research or information that may qualify as a trade secret in the future." The corporation further explains:

One of the ultimate goals of the corporation's research includes the eventual invention or discovery of a trade secret that will further the corporation's research and cancer treatment missions. The process of creating or discovering a trade secret requires the corporation to first perform research that will lead to the creation or discovery of a potential trade secret that, through additional research process, eventually becomes a trade secret. Public disclosure of this "in progress" research and any potential trade secrets resulting from the in progress research would place the corporation at an competitive disadvantage by allowing others to usurp the discovery of trade secrets and benefit from the corporation's research without compensation.

Effective and successful research often requires the collaboration of multiple public and private research institutions, pharmaceutical companies, biotechnology companies, and investors. Without this exemption, private entities, that are not otherwise subject to the public records law, would be forced to risk public disclosure of their own potential trade secrets by virtue of transacting business with the corporation. This, in turn, will cause many entities to refuse to collaborate with the corporation, place the corporation at an unfair disadvantage, and suppress the corporation's research progress and the state's economic growth and job creation. As such, it is imperative that the corporation's in-progress research efforts and resulting potential trade secrets are protected to avoid stifling its research and its ability to remain competitive in the research community; and to support its efforts to treat, prevent and cure cancer.

Regarding the length of time an item could remain a potential trade secret, the corporation explained:

A potential trade secret is no longer a potential trade secret when it no longer presents a possibility of becoming a trade secret. This can occur when the potential trade secret is broadly discovered by or disseminated to the public through the normal course of business, or when the potential trade secret becomes obsolete. Typically, the time an item remains a potential trade secret is directly related to the time needed to protect the item through the traditional methods such as trademark, copyright, or patent prosecution.

A potential trade secret could become a public record if it was never classified as an actual trade secret, provided that the potential trade secret was not protected by any other exemption. The potential trade secret would become a public record upon losing the required characteristics of a potential trade secret, such as becoming known to the public through the normal course of business.

Reimbursement Methodologies or Rates

The corporation explained the importance of including a reimbursement methodology or rate in the definition of trade secret as follows:

A reimbursement methodology or rate refers to payment terms for health care services provided by the corporation to its patients that are negotiated between the corporation and third party payors, such as health maintenance organizations, preferred provider organizations, exclusive provider organizations, and any other organizations involved in managed care arrangements.

A reimbursement methodology or rate is included in the definition of trade secret because it can satisfy both criteria of a trade secret in that it derives independent economic value from not being generally known or accessible to the public, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Specifically, a reimbursement methodology or rate derives independent economic value by not being known or accessible to the public in that such confidentiality provides the hospital with leverage in negotiating and setting the

methodologies and rates. If such methodologies and rates were available to the public, competitors would be able to underbid the corporation for provider service contracts at will thereby creating a competitive disadvantage for the corporation and providing unfair economic value to the competitor. Further, such methodologies and rates are subjects of efforts that are reasonable under the circumstances to maintain its secrecy as evidenced by the fact that a confidentiality provision is typically included in any contract with a third party payor which requires the secrecy of the rates and methodologies, and by the fact that public hospitals have a similar managed care contract exemption as set forth in section 395.3035(2)(a)[, F.S.]

Confidential or Exempt Information Received from a Person from another State or Nation or the Federal Government

In the performance of its research mission, the corporation receives research information from numerous sources from other states, other nations, and the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. According to the corporation:

This exemption protects such information while in the possession of the corporation in order to permit the corporation to effectively perform its research mission to the same extent as its non-public peers who are not subject to the public records laws. Similarly, the corporation frequently receives information and engages in discussions with potential partners who can help the corporation further develop and ultimately commercialize technologies developed by the corporation's research efforts. This exemption assures pharmaceutical and biotechnology companies who wish to partner with the corporation that their trade secrets and other confidential information would remain confidential and not fall into the hands of competitors or otherwise lose their commercial value. Without this protection, these companies would likely refuse to collaborate or partner with the corporation, which would interfere with the corporation's mission to contribute to the prevention, treatment, early detection and cure of cancer.

...The corporation can be made aware that the information is confidential or exempt: (i) by entering into a confidentiality agreement with the disclosing party; (ii) by being made aware of the information's confidential nature by the disclosing party; (iii) through the disclosing party physically marking the information as "confidential"; and/or (iv) by common knowledge of the confidentiality of the information, such as in the case of patient records.

The corporation also receives information in the performance of its duties and responsibilities that is made confidential or exempt pursuant to other Florida laws. A partial list of these statutes includes s. 395.3025, F.S., concerning hospital patient and personnel records; s. 405.03, F.S., concerning the identity of any person treated or studied in medical research; and s. 408.061, F.S., concerning specific provider contract reimbursement data submitted to the Agency for Health Care Administration (AHCA), the identity of a health care provider who submits proprietary business information to AHCA, and portions of patient records obtained or generated by AHCA.

The Corporation's Recommendation Regarding the Exemption

The corporation recommends reenacting the exemption in order for the corporation to remain competitive in its statewide mission as set forth in s.1004.43, F.S. The corporation's reasons are as follows:

If the exemption was repealed, the corporation would not be able to effectively and efficiently carry out its mission of providing research, education, treatment, prevention and early detection of cancer. The corporation believes the Legislature bestowed upon it a unique combination of public and private characteristics to aid in the corporation's mission. Exemptions from public disclosure of records and information is an important aspect of the Center's ability to carry out its mission, exempt purposes, and Legislative mandates. The unique and competitive nature of the health care industry and research community, and the need to compete with private health care providers and researchers who are not required by law to publicly disclose their records is critical to the corporation's mission and continued operation as the only Florida-based NCI¹⁷ Designated Comprehensive Cancer Center. Overall, the interference with the corporation's mission and the costs associated with requiring the corporation to comply with

¹⁷ National Cancer Institute

public disclosure laws coupled with the fact that the corporation is required to operate and manage the corporation in accordance with its Legislative mandate and report to and disclose its records and information to the Board of Governors, the Auditor General, and the Office of Program Policy Analysis and Governmental Accountability, more than balances any benefit that would be achieved by requiring public disclosure of the corporation's records and information.

Constitutional Requirements for Public Records and Meetings Exemptions

Under s. 24(c), Art. I of the State Constitution, a public records or meetings exemption must be no broader than necessary to accomplish the stated purpose of the law. The Open Government Sunset Review Act 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.¹⁸ 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 Exemptions

The corporation's records that are affected by the exemptions in section 1004.43(8)(b)10. and 12., F.S., include: methods of manufacture or production; potential trade secrets; patentable material; actual trade secrets as defined in s. 688.002, F.S., proprietary information; reimbursement methodologies or rates; and information received by the corporation or its subsidiary which is confidential or exempt under other Florida laws or the laws of another state or nation.

Those Uniquely Affected by the Exemptions

The exemption affects the center and the corporation that governs it, the subsidiary corporations, and those entities with whom they conduct research including private corporations, federal government agencies, state universities and research laboratories.

The Purpose and Public Necessity of the Exemptions

The 2005 law creating the exemptions stated that, without the exemptions, the disclosure of confidential and exempt information would place the corporation on an unequal footing in the marketplace as compared with its private health care and medical research competitors that are not required to disclose such confidential and exempt information. The disclosure of such confidential and exempt information would adversely impact the corporation or its subsidiaries in fulfilling their mission of cancer treatment, research, and education. 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.

Under section 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; or
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 section 1004.43(8)(b)10. and 12., 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.

¹⁸ Section 119.15(6)(b), F.S.

The confidential and exempt records relate to research conducted by the center in fulfillment of its statutory mission as a center for research, education, treatment, prevention and the early detection of cancer.¹⁹ The public records and public meetings exemptions appear to be no broader than is necessary to accomplish the purpose of furthering the center's business advantage in the marketplace.

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 corporation are contained in s. 1004.43, F.S. Sometimes the corporation receives records that are confidential and exempt under a separate statute, federal law, or law of another state or nation.

Possibly Combining Multiple Exemptions

A number of statutes create public records exemptions for records relating to trade secrets. In the future, the Legislature might consider combining such exemptions into a single one for trade secrets.

Options and/or Recommendations

Senate Higher Education Committee professional staff has reviewed the exemptions in section 1004.43(8)(b)10. and 12., 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 H. Lee Moffitt Cancer Center and Research Institute to carry out its statewide mission as a center for research, education, treatment, prevention, and early detection of cancer. Senate professional staff recommends reenactment of the public records and public meetings exemptions for trade secrets and information that is confidential or exempt under the laws of another state, nation, or the federal government.

¹⁹ Section 1004.43(2)(c), F.S.