

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 8-E
 SPONSOR: Senator Atwater
 SUBJECT: Public Records and Meetings
 DATE: October 20, 2003 REVISED: 10/21/03 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gillespie</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 8-E creates a public records exemption for specified information held by the Scripps Florida Funding Corporation or the Governor’s Office of Tourism, Trade, and Economic Development. This information includes certain information of The Scripps Research Institute or its Florida-based grantee of the state’s economic development incentive funds under s. 288.955, F.S., as created by SB 6-E or similar legislation. The bill also exempts from being open to the public those portions of meetings of the Scripps Florida Funding Corporation’s board of directors at which confidential information is presented or discussed. The bill allows confidential information to be released to public employees exclusively for the performance of their duties and provides criminal penalties for a person who fails to maintain the confidentiality of the information. These exemptions are repealed on October 2, 2009, unless reenacted after review by the Legislature under the Open Government Sunset Review Act (s. 119.15, F.S.).

This bill creates s. 288.9551, Florida Statutes.

II. Present Situation:

Scripps Florida Funding Corporation

Senate Bill 6-E creates the Scripps Florida Funding Corporation in order to distribute state funds to a Florida-based division, subsidiary, affiliate, or entity in Palm Beach County of The Scripps Research Institute. These state funds are provided as an economic development incentive for The Scripps Research Institute to establish a state-of-the-art biomedical research institution and campus in the state. The funding corporation is established as a not-for-profit corporation, but is subject to the public records and meetings requirements of s. 24, Art. I of the State Constitution, ch. 119, F.S., and s. 286.011, F.S.

Under SB 6-E, Scripps Florida must enter into a contract with the funding corporation and meet certain performance measures as a condition of the continued disbursement of the incentive funds. Consequently, Scripps Florida would likely be required to submit to the funding corporation certain information about the institute's operations in order to receive the incentive funds. In addition, the Governor's Office of Tourism, Trade, and Economic Development (OTTED) must enter into a contract with the funding corporation for the disbursement of the incentive funds and is responsible for administrative support to the funding corporation. Thus, information about the institute would likely be held also by OTTED.

Current Public Records Exemptions for Economic Development

In 2002, the Legislature enacted public records exemptions for the state's economic development incentive programs (ch. 2002-68, L.O.F.). These incentive programs included the following:

- Capital Investment Tax Credit Program (CITC Program) under s. 220.191, F.S.;
- Qualified Defense Contractor Tax Refund Program (QDC Program) under s. 288.1045, F.S.;
- Qualified Target Industry Tax Refund Program (QTI Program) under s. 288.106, F.S.;
- High-Impact Business Performance Incentive Grants Program (HIPI Program) under s. 288.108, F.S.; and
- Quick Action Closing Fund Awards Program (QAC Program) under s. 288.1088, F.S.

The exemptions created by the 2002 law were comparable to public records exemptions that were repealed on October 2, 2001, under the Open Government Sunset Review Act (s. 119.15, F.S.). Under current law, the public records exemptions for these economic development programs and incentives shield specified business information (e.g., certain proprietary, trade-secret, and personal data) from public disclosure (s. 288.1067, F.S.). These exemptions apply to the business information of qualified businesses in these incentive programs which is held by:

- The Governor's Office of Tourism, Trade, and Economic Development (OTTED);
- Enterprise Florida, Inc. (EFI), the state's principal economic development organization (s. 288.901, F.S.);
- County or municipal governmental entities; or
- Employees or agents of OTTED, EFI, or the local governmental entities.

These public records exemptions expire on October 2, 2007, unless they are reenacted after review by the Legislature under the Open Government Sunset Review Act (s. 288.1067(4), F.S.).

Despite these exemptions, current law allows economic development program administrators to publish statistics in the aggregate, if these statistics are classified as to prevent the identification of a single qualified business (s. 288.1067(3), F.S.), and authorizes OTTED and EFI to release the following information:

- The names of qualified businesses, the total number of jobs each business expects to create, the total number of jobs created by each business, and the amount of tax refunds awarded to and claimed by each business under the QTI Program or the QDC Program;

- The amount of incentives awarded and claimed by each business under the HIPI Program or the QAC Program; and
- The names of qualified businesses, the total number of jobs each business expects to create, and the total number of jobs created by each business under the CITC Program (s. 288.1067(2), F.S.).

Government in the Sunshine

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, the people of Florida voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides:

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, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Law (ch. 119, F.S.) specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The term “public records” has been defined by the Legislature in s. 119.011(1), F.S., to include:

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.

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.¹ Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.²

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under s. 24(c), Art. I of the State Constitution, the Legislature may provide by general law passed by a two-thirds vote of each house for the exemption of records, if: (1) the law creating the exemption states with specificity

¹ *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

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

the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must only contain exemptions to public records or meetings requirements and must relate to one subject.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995 (s. 119.15, F.S.) establishes a review and repeal process for exemptions to public records or meetings requirements. 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 of the fifth year, unless the Legislature reenacts the exemption.

Current law requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date (s. 119.15(3)(a), F.S.). An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption” (s. 119.15(3)(b), F.S.).

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption.

An exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year’s certification after the determination. An exemption shall be created or maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity (s. 119.15(2), F.S.).

The legislative review process must consider the following specific questions (s. 119.15(4)(a), F.S.):

- 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?

An exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves (s. 119.15(4)(b), F.S.).

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 information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this provision, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The failure of the Legislature to comply strictly with the Open Government Sunset Review Act does not invalidate an otherwise valid reenactment. Further, one session of the Legislature cannot bind a future Legislature. Consequently, a new session of the Legislature may preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act, if the requirements of s. 24, Art. I of the State Constitution are not violated.

III. Effect of Proposed Changes:

Public Records and Meetings Exemptions for Scripps Florida

The bill creates public records exemptions for The Scripps Research Institute and the “grantee,” shielding specified information from public inspection. The term “grantee,” has the same meaning ascribed in s. 288.955, F.S., as created by SB 6-E or similar legislation:

“Grantee” means Scripps Florida or a division, subsidiary, affiliate, or entity formed by The Scripps Research Institute to establish a state-of-the-art biomedical research campus in Palm Beach County.

These public records exemptions apply to specified information held by the Scripps Florida Funding Corporation or the Governor’s Office of Tourism, Trade, and Economic Development under s. 288.955, F.S., as created by SB 6-E or similar legislation. The exemptions apply to the following information of the grantee or The Scripps Research Institute:

- Methods of manufacture or production, potential trade secrets, patentable material, or proprietary information.
- Proprietary business information, including, but not limited to, actual trade secrets, federal employer identification numbers, unemployment account numbers, Florida sales tax registration numbers, agreements and proposals to receive funding, personnel recruitment materials, identity of donors, and building design plans.

- Information received from any person or another state or nation, or the Federal Government, which is confidential or exempt under that state's or nation's laws, or under federal law.
- Information received which is otherwise confidential or exempt.

The bill creates a public meetings exemption, providing that those portions of board meetings for the board of directors of the Scripps Florida Funding Corporation at which confidential information is presented or discussed must be closed to the public. The bill also exempts records of the closed portions of the board meetings from public disclosure.

Interagency Exchange of Confidential Information

The bill allows information made confidential by the bill to be released to public employees exclusively for the performance of their duties, including, but not limited to, the exchange of information between the Scripps Florida Funding Corporation and the Office of Tourism, Trade, and Economic Development to administer s. 288.955, F.S., as created by SB 6-E or similar legislation.

The bill also requires public employees receiving confidential information to maintain the confidentiality of the information. The bill provides criminal penalties for a person who fails to maintain the confidentiality of the information, punishable as a misdemeanor of the first degree (up to 1 year in jail or up to a \$1,000 fine).

Open Government Sunset Review Act

The bill provides that the public records and meetings exemptions created by the bill are repealed on October 2, 2009, unless reenacted after review by the Legislature under the Open Government Sunset Review Act (s. 119.15, F.S.).

Statement of Public Necessity

The bill provides a legislative statement of public necessity for the public records exemption, as required under s. 24(c), Art. I of the State Constitution.

Contingent Effective Date

The bill provides that it takes effect on the effective date of SB 6-E (upon becoming a law) or similar legislation, if SB 6-E or similar legislation becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. The bill appears to relate to one subject and contain only provisions creating exemptions and providing for enforcement.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

By protecting sensitive business information, the public records and meetings exemptions created by the bill may help prevent The Scripps Research Institute from being injured in the marketplace through the disclosure of insights about its finances and strategies to competitors. In addition, to the extent the public records and meetings exemptions make the institute less reluctant to establish a state-of-the-art biomedical research institution and campus in Palm Beach County, they may help facilitate economic development activities that benefit the state.

C. Government Sector Impact:

The Scripps Florida Funding Corporation and the Governor's Office of Tourism, Trade, and Economic Development are responsible for maintaining the security of records generated through their administration of economic development incentives provided to The Scripps Research Institute or its Florida-based grantee. The administrative costs associated with maintaining such confidentiality are estimated to be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Commerce, Economic Opportunities & Consumer Services:

Specifies that the bill's contingent effective date is linked to SB 6-E, which is an act relating to the establishment of a biomedical research institution and campus.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
