

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB OTA 17-02 OGSR/Peer Review Panels
SPONSOR(S): Oversight, Transparency & Administration Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 7004

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|--------|---------|--|
| Orig. Comm.: Oversight, Transparency & Administration Subcommittee | | Toliver | Harrington |

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The James and Esther King Biomedical Research Program was created to provide an annual and perpetual source of funding to support research initiatives that address the healthcare problems of Floridians in the areas of tobacco-related cancer, cardiovascular disease, stroke, and pulmonary disease. The William G. "Bill" Bankhead, Jr., and David Coley Cancer Research Program was created to advance progress towards cures for cancer through grants awarded through a peer-reviewed, competitive process. Both programs award competitive grants and fellowships for biomedical research. The grants are awarded based on criteria and standards developed by the Biomedical Research Advisory Council and are reviewed by independent peer review panels.

Current law provides that when the peer review panels convene to evaluate grant or fellowship applications submitted to the James and Esther King Biomedical Research Program or to the William G. "Bill" Bankhead, Jr., and David Coley Cancer Research Program, the portion of the meeting in which applications for biomedical research grants are discussed, is exempt from public meeting requirements. In addition, any records generated relating to research grant applications or the review of those applications, except final recommendations, are confidential and exempt from public record requirements. Information held confidential and exempt may be disclosed with the express written consent of the individual to whom the information pertains or the individuals legal guardian or by court order.

The bill reenacts the public meeting and public record exemptions, which will repeal on October 2, 2017, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

James and Esther King and Bankhead-Coley Research Programs

The James and Esther King Biomedical Research Program (King Program) is established within the Florida Department of Health (DOH) and is funded by the proceeds of the Lawton Chiles Endowment Fund, cigarette surcharge, and the General Revenue Fund.⁶ 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 healthcare problems of Floridians in the areas of tobacco-related cancer, cardiovascular disease, stroke, and pulmonary disease.⁷ The funds appropriated to the King Program are to be used to award research grants and fellowships.⁸

The William G. "Bill" Bankhead, Jr., and David Coley Cancer Research Program (Bankhead-Coley Program) is established within DOH and is funded by an annual appropriation from the General Revenue Fund.⁹ The purpose of the Bankhead-Coley Program is to advance progress towards cures for cancer and cancer-related illnesses through grants awarded through a peer-reviewed process.¹⁰

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I, FLA. CONST.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 215.5602(1) and (12), F.S.

⁷ Section 215.5602(1), F.S.

⁸ Section 215.5602(2), F.S.

⁹ Sections 381.922(5) and 215.5602(12), F.S.

¹⁰ Section 381.922(1), F.S.

Research grants and fellowships are awarded based on criteria and standards developed by the Biomedical Research Advisory Council (Council),¹¹ an entity created within DOH.¹² Each grant or fellowship application is evaluated by a peer review panel to ensure that all proposals for research funding are appropriate and are evaluated fairly on the basis of scientific merit.¹³ The peer review panel reviews the content of each proposal and establishes a scientific priority score.¹⁴ The score must be considered in the review process by the Council¹⁵ which then makes recommendations to the State Surgeon General as to what grants or fellowships should be awarded.¹⁶ The Council and peer review panels are directed to establish and follow rigorous guidelines for ethical conduct and adhere to a strict policy with regard to conflict of interest.¹⁷

Public Record and Public Meeting Exemptions under Review

In 2012, the Legislature created a public meeting exemption for portions of meetings of peer review panels under the King and Bankhead-Coley Programs.¹⁸ The Legislature also created a public records exemption that provides that any research grant applications provided to the panel¹⁹ or any records generated by the panel relating to the review of those applications, except final recommendations,²⁰ are confidential and exempt²¹ from public record requirements. The information may only be disclosed with the express written consent of the individual to whom the information pertains or the individual's legal guardian or by court order.²²

The 2012 public necessity statement for the exemptions provides that:²³

The research grant applications contain information of a confidential nature, including ideas and processes, the disclosure of which could injure the affected researcher. Maintaining confidentiality is a hallmark of scientific peer review when awarding grants, is practiced by the National Science Foundation and the National Institutes of Health, and allows for candid exchanges between reviewers critiquing proposals. The Legislature further finds that closing access to meetings of scientific peer review panels in which biomedical research applications are discussed serves a public good by ensuring that decisions are based upon merit without bias or undue influence. Further, the Legislature finds that records generated during meetings of the peer review panels related to the review of applications for biomedical research grants must be protected for the same reasons that justify the closing of such meetings.

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2017, unless reenacted by the Legislature.²⁴

¹¹ Section 215.5602(4)(f), F.S.

¹² Section 215.5602(3), F.S.

¹³ Sections 215.5602(6) and 381.922(3)(b), F.S.

¹⁴ Sections 215.5602(6) and 381.922(3)(b), F.S.

¹⁵ Sections 215.5602(6) and 381.922(3)(b), F.S.

¹⁶ Section 215.5602(5)(b) and 381.922(3)(a), F.S.

¹⁷ Sections 215.5602(7) and 381.922(3)(c), F.S.

¹⁸ Sections 215.56021(1) and 318.92201(1), F.S.; *see also* ch. 2012-15, L.O.F.

¹⁹ Sections 215.56021(3) and 318.92201(3), F.S.

²⁰ Sections 215.56021(2) and 381.92201(2), F.S.

²¹ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

²² Sections 215.56021(4) and 381.92201(4), F.S.

²³ Chapter 2012-15, L.O.F.

²⁴ Sections 215.56021(5) and 381.92201(5), F.S.

During the 2016 interim, subcommittee staff sent DOH a questionnaire as part of its review under the Open Government Sunset Review Act. DOH recommended reenactment of the exemptions as is, noting that "[g]rant applications contain novel research ideas, can be considered intellectual property, and should not be made available."²⁵ The department also explained that "[p]eer review exemptions for meetings and records are supported by the Biomedical Research Advisory Council and the Alzheimer's Disease Research Grant Advisory Board."²⁶

Effect of the Bill

The bill removes the repeal date thereby reenacting the public meeting exemption for portions of a meeting of a peer review panel in which applications for biomedical research grants are discussed. The bill also reenacts the public record exemptions for research grant applications provided to a peer review panel and any records generated by the panel relating to the review of those applications, except final recommendations.

In 2012, the public meeting and public record exemptions were cross published in two different statutes. The bill repeals the duplicative provision from law. As such, the repeal of the duplicative provision does not have a substantive effect.²⁷

B. SECTION DIRECTORY:

Section 1 repeals a duplicative statute.

Section 2 amends s. 381.92201, F.S., to save from repeal the public meeting and public record exemptions for peer review panels under the King and Bankhead-Coley Programs.

Section 3 provides an effective date of October 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

²⁵ Open Government Sunset Review of ss. 215.56021 and 381.92201, F.S., relating to Peer Review Panels, questionnaire by House and Senate Staff, August 10, 2016, at question 11 (on file with the Oversight, Transparency & Administration Subcommittee).

²⁶ *Id.* at question 12.

²⁷ DOH confirmed in the questionnaire that one section of law would be sufficient to cover both the King and Bankhead-Coley Programs as both "statutory provisions are the same." *Id.* at question 9.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.