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 Higher Education Committee

BILL: SB 1902

INTRODUCER: Higher Education Committee

SUBJECT: Open Government Sunset Review/Florida Institute for Human and Machine Cognition, Inc.

DATE: March 14, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Matthews	HE	**Favorable**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

Section 1004.4472, F.S., provides a public records exemption for the Florida Institute for Human and Machine Cognition, Inc., for information relating to methods of manufacture, potential trade secrets, patentable material, actual trade secrets, business transactions, identification of a donor or prospective 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 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. The exemptions will sunset on October 2, 2009, unless they are reenacted by the Legislature.

This bill would reenact the public records and public meetings exemptions for the Florida Institute for Human and Machine Cognition, Inc.

This bill amends s. 1004.4472, Florida Statutes.

II. Present Situation:

Public Records

Article I, s. 24 of the State Constitution,[1] 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 Act[2] 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 agency[3] records are available for public inspection. The term "public record" is broadly defined 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.[4]

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

Only the Legislature is authorized to create exemptions to open government requirements.[7] 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.[8] A bill enacting an exemption[9] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10]

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[1] Article I, s. 24 of the State Constitution.
[2] Chapter 119, F.S.
[3] 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."
[4] Section 119.011(11), F.S.
[5] *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[6] *See Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).
[9] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover

The Open Government Sunset Review Act of 1995[11] 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 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.[12]

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?

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

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

additional records.
[10]Article I, s. 24(c) of the State Constitution.
[11] Section 119.15, F.S.
[12] Section 119.15(6)(b), F.S.
[13] Attorney General Opinion 85-62.
[14] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

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.[15]

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 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.[16]

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 for the IHMC

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;
- 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.

[15] Chapter 2003-294, L.O.F., codified in s. 1004.447, F.S.
[16] Institute for Human and Machine Cognition website. Readable at http://www.ihmc.us/about.php

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.

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.[17] Disclosure of such information would adversely affect the institute's ability to fulfill its mission of research and education.[18] 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.[19] 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.[20]

The Open Government Sunset Review

Senate professional staff reviewed the public records and public meetings exemptions in s. 1004.4472, F.S., and found that the exemptions meet the requirements for reenactment 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 exemptions 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 discuss confidential and exempt information at a meeting, the exemption would be necessary to protect the information from public disclosure. Accordingly, professional staff recommended[21] that the public records and public meetings exemptions in s. 1004.4472, F.S., be reenacted.

III. Effect of Proposed Changes:

This bill would reenact the public records and public meetings exemptions for the Florida Institute for Human and Machine Cognition, Inc.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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[17] Chapter 2004-358, L.O.F.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] The Florida Senate, *Interim Report 2009-213, Open Government Sunset Review of Florida Institute for Human and Machine Cognition, Inc*., September 2008. Readable at http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-213he.pdf

B. Public Records/Open Meetings Issues:

Article I, section 24 of the State Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.[22]

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[22] *See*, *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).