

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 Governmental Oversight and Accountability Committee

BILL: CS/SB 1328

INTRODUCER: Criminal Justice Committee and Senator Hays

SUBJECT: Public Records/Office of Financial Regulation

DATE: April 7, 2011

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Arzillo	Burgess	BI	Favorable
2. Erickson	Cannon	CJ	Fav/CS
3. Naf	Roberts	GO	Favorable
4.			
5.			
6.			

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Current law provides public-records exemptions for the Office of Financial Regulation (OFR or office) for certain information obtained or created by OFR pursuant to its involvement in the charter, examination, or investigation of financial institutions. The exemptions vary among OFR's regulatory programs. Currently, the office does not have a public-records exemption that would allow it to receive information from another state or federal government that is confidential or exempt pursuant to the laws of that state or pursuant to federal law.

This bill creates a public-records exemption for the following information held by OFR:

- Information received from another state or federal regulatory, administrative, or criminal justice agency that is otherwise confidential or exempt pursuant to the laws of that state or pursuant to federal law.
- Information that is received or developed by OFR as part of a joint or multiagency investigation or examination.

The bill authorizes OFR to obtain and use information in accordance with the requirements imposed as a condition of participating in a joint or multiagency examination or investigation. The bill provides for retroactive application of the exemption.

The exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and stands repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a statement of public necessity as required by the State Constitution.

Because this bill creates a public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends section 119.0712, Florida Statutes.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.¹ Article I, s. 24(a), of the Florida Constitution, provides that:

Every person² 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 access must be provided to agency⁴ records. Unless specifically exempted, all agency 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended to perpetuate, communicate, or

¹ FLA CONST. Art. I, Section 24.

² Section 1.01(3) F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), 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.”

⁵ Section 119.011(12), F.S.

formalize knowledge.⁶ Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.⁷ Exemptions can only be created by the Legislature,⁸ and must be created in general law, state the public necessity justifying it, and may not be broader than necessary to meet that public necessity.⁹

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.¹⁰ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² sets forth a legislative review process for newly created or substantially amended public-records or public-meetings exemptions. It requires an automatic repeal of the exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public-records or public-meetings 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.¹³

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

⁷ *Wait v. Florida Power & Light Co.*, 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, 568-69 (Fla. 1999).

¹⁰ Attorney General Opinion 85-62.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).

¹² Section 119.15, F.S.

¹³ Section 119.15(6)(b), F.S.

Office of Financial Regulation

The Office of Financial Regulation (OFR or office) has regulatory oversight of banks, credit unions, trust companies, securities brokers, investment advisers, mortgage loan originators, money services businesses, retail installment sellers, consumer finance companies, debt collectors, and other financial service providers. The office has licensing authority and the authority to conduct examinations and investigations.

Other states and federal agencies also have regulatory oversight of many of these entities and individuals. In addition, many of the regulated entities operate in multiple states, making interstate cooperation essential to achieving comprehensive, efficient, and effective regulatory oversight.

OFR's Current Public-Records Exemptions

Current law exempts certain information obtained or created by the office when it is involved in the charter, examination, or investigation of financial institutions.¹⁴ However, the exemptions vary among the office's regulatory programs. Nevertheless, there are three areas where confidentiality and exemptions are currently disallowed, but would assist the office in performing its investigatory and examination duties more diligently and efficiently.

The first instance in which the office is impeded from gathering information is when a federal or out-of-state regulatory agency maintains confidentiality requirements of certain information obtained through investigations or examinations. In this instance, the office is required to keep the information confidential, but cannot do so because there is no confidentiality provision for the information under current Florida law. Therefore, valuable information that could be obtained from other agencies is not accessible by the office.

Furthermore, the office is limited in its capacity to become involved in out-of-state or federal investigations due to limited confidentiality and exemptions. Currently, if the office is involved in a multi-agency examination or investigation, the office cannot accept information from other agencies if the information is confidential under the federal or out-of-state laws. The office is also inadvertently limited in the supply of information in multi-jurisdictional investigations. Several of the office's exemptions are only effective for the time of the investigation or examination. Specifically, information used in multi-jurisdictional investigations or examinations may become public record under current Florida law after the examination or investigation is complete. If the federal or out-of-state laws provide for a continuing confidentiality, then the office is limited in its ability to provide information in these instances.

Additionally, the office is limited in the gathering of information from out-of-state and federal agencies that treat certain information as confidential. In these cases, the office is required to sign confidentiality agreements with the appropriate regulatory agency. However, the office cannot sign these agreements if Florida law does not exempt the information from public records requirements. Therefore, the office is inhibited in its investigative capacity to gather information from other regulatory agencies.

¹⁴ See s. 560.129, F.S. (Money Services Businesses exemptions), s. 494.00125, F.S. (mortgage brokering and lending), s. 517.2015, F.S. (securities), s. 520.9965, F.S. (retail installment sales), s. 655.057, F.S. (financial institutions).

III. Effect of Proposed Changes:

This bill makes the following information held by OFR confidential and exempt from s. 119.07(1), F.S., and s. 24(1), Art. I of the State Constitution:

- Information received from another state or federal regulatory, administrative, or criminal justice agency that is otherwise confidential or exempt pursuant to the laws of that state or pursuant to federal law.
- Information that is received or developed by OFR as part of a joint or multiagency investigation or examination.

The bill authorizes OFR to obtain and use information in accordance with the requirements imposed as a condition of participating in a joint or multiagency examination or investigation.

The bill provides for retroactive application of the exemption.¹⁵

The exemption is subject to the provisions of the Open Government Sunset Review Act and will repeal on October 2, 2016, unless reviewed and saved from repeal by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution.¹⁶

The bill specifies an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I of the State Constitution requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public-records or public-meetings exemption. Therefore, this bill requires a two-thirds vote for passage.

Public Necessity Statement

Section 24(c), Art. I of the State Constitution requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. Therefore, this bill includes a public necessity statement.

C. Trust Funds Restrictions:

None.

¹⁵ The Supreme Court of Florida ruled that a public-records exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).

¹⁶ Section 24(c), Art. I of the State Constitution.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate.

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.)

CS by Criminal Justice on April 4, 2011:

Provides that an exemption created for information received or developed by the office as a part of a joint or multiagency examination with another state or federal regulatory, administrative, or criminal justice agency does not apply to information obtained or developed by the office which would otherwise be available for public inspection if the office had conducted an independent examination or investigation under Florida law.

B. Amendments:

None.