

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 1838

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Social Security Numbers

DATE: April 21, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Wilson	GO	Fav/CS
2.			RC	
3.				
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:

Section 119.071(4), F.S., provides that social security numbers (SSNs) of current and former agency employees held by the employing agency in employment records are exempt from the public records requirements of s. 119.07(1), F.S. and s. 24, Art. I of the State Constitution.

Section 119.071(5), F.S., provides a general exemption for social security numbers held by an agency, making them confidential and exempt from s. 119.07(1), F.S. and s. 24, Art. I of the State Constitution.

The bill amends the exemption in s. 119.071(4), F.S., to make the SSNs of current and former agency employees confidential and exempt from public records requirements, raising the standard from merely exempt. As such, the repeal date is extended to October 2, 2014, and a public necessity statement is included.

The bill also amends s. 119.071(4), F.S., to remove from current law the process by which current or former agency employees may file a written notice with a non-employing agency to notify the agency that the employee's SSN is exempt from public records requirements.

The bill amends s. 119.071(5), F.S., to modify agency notice requirements and to modify the exceptions to the exemption. It also amends the definition of “commercial activity” by including permissible uses established under federal law and to clarify that a commercial activity is for the verification of the accuracy of personal information received by a commercial entity.

This bill expands the scope of an existing public records exemption and therefore requires a two-thirds vote of each house of the Legislature for enactment.

This bill substantially amends ss. 119.071(4) and 119.071(5), F.S.

II. Present Situation:

Florida’s Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. 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.

Section 24(a), Art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

¹ s. 119.011(1), F.S., defines “public record” to include “all documents, papers, letters, maps, books, tapes, photographs, film, 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.”

² s. 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, 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.”

Section 119.011(12), F.S., defines the term “public record” 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. 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 “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ 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.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act (s. 119.15, F.S.)

The Open Government Sunset Review Act (act) establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, expanded, or maintained only if: (1) it serves an identifiable public purpose; and (2) if it is not broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three statutory purposes and if 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 three statutory purposes are:

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *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).

⁷ s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Article 1, s. 24(c) of the State Constitution

⁹ Attorney General Opinion 85-62, August 1, 1985.

¹⁰ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

- If 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.
- If 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.
- If 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.

Social Security Numbers

Current law provides a public records exemption for social security numbers (SSNs) contained in agency employment records of current or former agency employees.¹¹ The term “agency employment records” is not defined by the section.

The SSNs of agency employees may be held by the employing agency and other agencies for a variety of purposes that are not related to employment. Those employee SSNs, however, are still protected, under the general exemption for SSNs,¹² which makes all SSNs confidential and exempt, the highest level of protection.

The general exemption for SSNs was created in order to provide a general protection for such numbers when a specific exemption for SSNs does not exist. It *does not supersede*¹³ any other applicable public records exemption for social security numbers existing prior to May 13, 2002, or created thereafter. This includes federal laws specifically prohibiting the release of SSNs.¹⁴ If a federal law requires specific records to be closed and the state *clearly* is subject to the provisions of that law, then, pursuant to the Supremacy Clause of the United States Constitution,¹⁵ the state must keep the records confidential.

The general exemption contains a limited exception to the public records exemption, which grants access to a commercial entity¹⁶ that is performing a commercial activity. “Commercial activity” means “the provision of a lawful product or service by a commercial entity ...”¹⁷ This

¹¹ Section 119.071(4)(a)1, F.S.

¹² Section 119.071(5)(a), F.S.

¹³ Black’s Law Dictionary (sixth edition) defines “supersede” to mean “obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend, or stay.”

¹⁴ See, for example, *Florida Department of Education v. NYT Management Services, Inc.*, 895 So.2d 1162, 1164 (federal law prohibits public disclosure of SSNs in state teacher certification database).

¹⁵ Article VI of the United States Constitution.

¹⁶ Section 119.071(5)(a)7.a.(II), F.S., defines “commercial entity” to mean “any corporation, partnership, limited partnership, proprietorship, sole proprietorship, firm, enterprise, franchise, or association that performs a commercial activity in this state.”

¹⁷ Commercial activity includes verification of the accuracy of personal information received by a commercial entity in the normal course of its business; use for insurance purposes; use in identifying and preventing fraud; use in matching, verifying,

limited exception for commercial entity access *does not apply* if a more specific public records exemption exists for SSNs.

If an agency does not have a more specific public records exemption for SSNs, then, under the commercial entity exception, such entity must submit a written request for access. The written request must:

- Be verified as provided in s. 92.525, F.S.;¹⁸
- Be legibly signed by an authorized officer, employee, or agent of the commercial entity;
- Contain the commercial entity's name, business mailing and location addresses, and business telephone number; and
- Contain a statement of the specific purposes for which it needs the social security numbers and how the social security numbers will be used in the performance of a commercial activity.¹⁹

Any person who makes a false representation in order to obtain a SSN under the provision or who willingly and knowingly violates it commits a felony of the third degree.²⁰

The protection in s. 119.071(4)(a)2., F.S., modifies the limited exception to the general exemption by authorizing an employee of one agency to notify another agency, in writing, that his or her SSN must be protected at the agency being notified. Upon provision of this notice, if that agency receives a request for the SSN from a commercial entity, the commercial entity will not receive that employee's entire SSN but only the last four digits of the SSN.²¹ If the SSN is in a lien filed with the Department of State, however, then the agency must release the entire number. This written notification process is subject to the Open Government Sunset Review Act and will repeal on October 2, 2009, unless reenacted by the Legislature.

III. Effect of Proposed Changes:

The bill amends s. 119.071(4), F.S., to make the social security numbers (SSNs) of current and former agency employees *confidential* and exempt from public records requirements, raising the

or retrieving information, and use in research activities. It does not include the display or bulk sale or social security numbers to the public or the distribution of such numbers to any customer that is not identifiable by the commercial entity. (Section 119.071(5)(a)7.a.(I), F.S.) In addition to the limited commercial exemption, the section permits disclosure of SSNs to another agency or governmental entity if necessary for the receiving entity to perform its duties and responsibilities. (Section 119.071(5)(a)6., F.S.)

¹⁸ Verification may be accomplished in the following manner: under oath or affirmation taken or administered before an officer to administer oaths, or by the signing of the written declaration. A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration. The penalty for perjury by false written declaration is a felony of the third degree.

¹⁹ Section 119.071(5)(a)7.b., F.S.

²⁰ Section 119.071(5)(a)8.a., F.S. A felony of the third degree is punishable by a term of imprisonment not to exceed five years and a fine not to exceed \$5,000. (See ss. 775.082 and 775.083, F.S.)

²¹ The SSN is divided into three parts. The area numbers (the first three numbers of a SSN) reflect the state in which the number was issued. The group numbers (the middle two numbers) indicate the order in which the SSN was issued in each area. The serial numbers (the last four numbers) are randomly generated.

standard from merely exempt. As such, the repeal date is extended to October 2, 2014, and a public necessity statement is included.

Under current law, current or former agency employees may file a written notice with a non-employing agency to notify the non-employing agency that the employee's SSN is exempt from public records requirements.²² This bill removes that process.

The bill amends s. 119.071(5)(a), F.S., to prohibit an agency from collecting SSNs unless the agency identifies in writing the specific federal or state law governing the collection, use, or release of the SSN for each purpose for which that agency collects the number. The notice must also state whether collection of the SSN is mandatory or authorized under federal or state law.

The bill also amends the general public records exemption for SSNs held by an agency²³ by modifying the exceptions to the exemption. Social security numbers held by any agency may be disclosed only for the following reasons:

- The disclosure of the SSN is expressly required by state law, federal law, or a court order.
- The disclosure of the SSN is necessary for the receiving agency or governmental entity to perform its duties and responsibilities.
- The individual expressly consents in writing to the disclosure of the his or her SSN.
- The disclosure of the SSN is made in order to comply with the USA Patriot Act of 2001²⁴ or Presidential Executive Order 13224.
- The disclosure of the SSN is made to a commercial entity for the permissible uses set forth in the Drivers Privacy Protection Act,²⁵ the Fair Credit Reporting Act,²⁶ or the Financial Modernization Act of 1999,²⁷ or for verification of the accuracy of personal information received by a commercial entity in the normal course of its business.²⁸
- The disclosure of the SSN is for the purpose of the administration of a state agency employee's or the state agency employee's dependent's health benefits.
- The disclosure of the SSN is for the purpose of the administration of a pension fund administered for the public employee's retirement fund, a deferred compensation plan, or defined contribution plan.
- The disclosure of the SSN is for the purpose of the administration of the Uniform Commercial Code by the office of the Secretary of State.

²² Section 119.071(4)(a)2., F.S.

²³ Section 119.071(5), F.S.

²⁴ The USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) was passed shortly after September 11, 2001. This law is meant to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and other purposes. (Public Law 107-56)

²⁵ The Driver's Privacy Protection Act sets the standards followed by states to protect personal information contained in an individual's motor vehicle record. (18 U.S.C. 2721, et seq.)

²⁶ The Fair Credit Reporting Act regulates the disclosure of personal information to consumer reporting agencies when the information is used to evaluate an application for credit, employment, insurance, license, or government benefit. (15 U.S.C. 1681, et seq.)

²⁷ The Financial Services Modernization Act of 1999 (commonly known as the Gramm-Leach-Bliley Act, or GLBA) permits banks, insurance firms, and brokerage companies to act as one entity. In return, there are requirements on financial institutions, such as mandatory privacy notices and consumer opt-out from third-party marketing. GLBA requires financial institutions to develop policies to prevent fraudulent access to confidential financial data. (15 U.S.C. 6801, et seq.)

²⁸ The commercial entity must comply with the verified written requirement process provided under current law.

This general exemption and the above list of exceptions to that exemption *do not control* if a more specific public records exemption applies for SSNs held by an agency.

The bill amends the definition of “commercial activity” by including permissible uses established under federal law and to clarify that a commercial activity is for the verification of the accuracy of personal information received by a commercial entity.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill complies with the requirements of s. 24, Art. I of the State Constitution that an expansion of a public records exemption include a public necessity statement.

Because this bill expands the scope of an existing public records exemption, it requires a two-thirds vote of each house of the Legislature for passage and enactment.

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.)

CS by Governmental Oversight and Accountability on April 21, 2009:

The committee substitute removes the process in current law by which a current or former agency employee may file a written notice with a non-employing agency to notify the agency that the employee's social security number is exempt from public records requirements. The committee substitute also makes organizational changes.

- B. **Amendments:**

None.