

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7051 PCB GAP 09-04 OGSR/Social Security Numbers

SPONSOR(S): Economic Development & Community Affairs Policy Council, Governmental Affairs Policy Committee and Ford

TIED BILLS: IDEN./SIM. BILLS: SB 1838

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. It lists the original committee and five numbered items with their respective actions and assigned staff.

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.

Current law provides a public record exemption for social security numbers (SSNs) contained in agency employment records of current or former agency employees. Current law also provides a general exemption for SSNs. The general exemption contains a limited exception to the public record exemption that grants access to a commercial entity that is performing a commercial activity. Under the exception, a commercial entity must submit a written request for access that must: be verified; 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. This general exemption and exception to that exemption for commercial entity access does not control if a more specific public record exemption applies for SSNs held by an agency.

The exemption for SSNs contained in agency employment records 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. 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.

The bill makes 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.

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

The bill amends the general exemption for SSNs 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.

The bill requires a two-thirds vote of the members present and voting for passage.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ 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.

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:

- 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.

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.² 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 created³ then a public necessity statement and a two-thirds vote for passage are not required.

Social Security Numbers

Current law provides a public record exemption for social security numbers (SSNs) contained in agency employment records of current or former agency employees.⁴ The term "agency employment records" is not defined by the section.

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

⁴ Section 119.071(4)(a)1., F.S.

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,⁵ which makes all SSNs confidential and exempt,⁶ 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 supersede⁷ any other applicable public record exemption for social security numbers⁸ existing prior to May 13, 2002, or created thereafter.⁹ This includes federal laws specifically prohibiting the release of SSNs.¹⁰ 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,¹¹ the state must keep the records confidential.

The general exemption contains a limited exception to the public record exemption, which grants access to a commercial entity¹² that is performing a commercial activity. "Commercial activity" means ". . . the provision of a lawful product or service by a commercial entity . . ."¹³ This limited exception for commercial entity access does not apply if a more specific public record exemption exists for SSNs.

If an agency does not have a more specific public record 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.;¹⁴

⁵ Section 119.071(5)(a), F.S.

⁶ There is a difference between records the Legislature designates as 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)

⁷ 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."

⁸ *See, for example*, ss. 61.052(8), 61.13(8), 379.352(3), 402.308(3)(a), 409.2576(3)(c), 455.213(9), 456.013(12), 497.141(8), 548.021(2), 559.79(3), 626.171(6), and 1012.56(1), F.S. (federal and state laws prohibit public disclosure of SSNs for purposes other than child support enforcement); s. 97.0585(1), F.S. (public record exemption for SSNs of voters); s. 119.071(4)(a), F.S. (public record exemption for SSNs of agency employees); s. 119.0714, F.S. (public record exemption for SSNs contained in court files, court records, or official records); s. 193.114(5), F.S. (public record exemption for SSNs contained in property tax records); ss. 517.2015 (1) and 520.9965(1), F.S. (public record exemption for SSNs of complainant, customer, or account holder); and s. 717.117(8)(b), F.S. (public record exemption for SSNs contained in reports of unclaimed property).

⁹ Section 119.071(5)(a)11., F.S.

¹⁰ *See, for example, Florida Department of Education v. NYT Management Services, Inc.*, 895 So.2d 1151, 1154 (federal law prohibits public disclosure of SSNs in state teacher certification database).

¹¹ Article VI of the United States Constitution.

¹² 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."

¹³ 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, or retrieving information; and use in research activities. It does not include the display or bulk sale of 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.)

¹⁴ 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.

- 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.¹⁵

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.¹⁶

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.¹⁷ 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.

EFFECT OF BILL

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 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. 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 also must state whether collection of the SSN is mandatory or authorized under federal or state law.

The bill also amends the general public record exemption for SSNs held by an agency 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 federal or state 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 his or her SSN.
- The disclosure of the SSN is made in order to comply with the USA Patriot Act of 2001¹⁸ or Presidential Executive Order 13224.
- The disclosure of the SSN is made to a commercial entity for the permissible uses set forth in the Driver's Privacy Protection Act,¹⁹ Fair Credit Reporting Act,²⁰ or Financial Services

¹⁵ Section 119.071(5)(a)7.b., F.S.

¹⁶ 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.*)

¹⁷ 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.

¹⁸ 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)

¹⁹ 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.)

Modernization Act of 1999²¹ or for verification of the accuracy of personal information received by a commercial entity in the normal course of its business.²²

- The disclosure of the SSN is for the purpose of the administration of health benefits for an agency employee or the dependents of that employee.
- The disclosure of the SSN is for the purpose of the administration of a pension fund administered for the agency employee's retirement fund, a deferred compensation plan, or a 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.

This general exemption and the above list of exceptions to that exemption do not control if a more specific public record 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, including identification or prevention of fraud or matching, verifying, or retrieving information. It removes from current law the remaining uses as they are redundant of matching, verifying, or retrieving information.

B. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to reenact the public record exemption for social security numbers.

Section 2 reenacts s. 119.0714, F.S., to incorporate amendments made to s. 119.071, F.S.

Section 3 reenacts s. 1007.35, F.S., to incorporate amendments made to s. 119.071, F.S.

Section 4 provides a statement of public necessity (public necessity statement).

Section 5 provides an effective date of October 1, 2009.

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.

²⁰ 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.)

²¹ 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.)

²² The commercial entity must comply with the verified written requirement process provided under current law.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

State and local agencies could see a fiscal impact associated with the review of their collection and use of SSNs and whether such collection and use is mandatory or authorized under federal or state law. The impact, however, should be absorbed as part of the agency's daily responsibilities.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public record or public meeting exemption. The bill expands the current exemption under review; thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemption under review; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 14, 2009, the Economic Development & Community Affairs Policy Council adopted an amendment to HB 7051 and reported the bill favorably with Council Substitute. The amendment merely reorganized the exemption and removed redundant language. It relocated the provision that provides that the general public record exemption for social security numbers does not supersede any other state or federal protections. In addition, it modified the definition of "commercial activity" by removing redundant examples of verification of information.