

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 Committee on Governmental Oversight and Accountability

BILL: SB 7050

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Investigations and Examinations by the Office of Financial Regulation

DATE: March 11, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Johnson</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>Hackett</u>	<u>McVane</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7050 continues the public records exemption for information collected in connection with an investigation or examination conducted by the Office of Financial Regulation (OFR), pursuant to the Florida Consumer Collection Practices Act (act), by removing the October 2, 2019, repeal date.

Currently, s. 559.5558, F.S., provides that any information held by the OFR pursuant to an investigation or examination of a violation of the act is confidential and exempt from s. 119.07(1), F.S., and article I, section 24 of the Florida Constitution. Information made confidential and exempt may be disclosed by the OFR to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities. Once the investigation or examination is completed or ceases to be active, such information is no longer confidential and exempt unless certain circumstances exist.

Pursuant to the Open Government Sunset Review, the public records exemption is scheduled to repeal October 2, 2019, unless reenacted by the Legislature. Since the bill continues the exemption and does not expand the scope of the public records exemption, the bill requires a majority vote of each chamber for passage.

This bill takes effect October 1, 2019.

II. Present Situation:

Florida's Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including state and local governmental entities, and any person acting on behalf of the government.² In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.⁴ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements by passing a general law by a two-thirds vote of each of the House and the Senate.⁹ The exemption must explicitly explain the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption that does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” as “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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws and penalties for violation of these laws are found throughout the Florida Statutes.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d

An exemption may provide that a record is “confidential and exempt” or “exempt.”¹² Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” may be released at the discretion of the records custodian.¹³

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records or open meetings exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR Act). The OGSR Act prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ The OGSR Act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects trade or business secrets.¹⁹

Further, the OGSR Act requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR Act asks the Legislature to question carefully the purpose and necessity of reenacting the exemption.

189 (Fla. 1st DCA 2004), the court found that the intent of a public records statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹³ *Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²²

Regulation of Consumer Collection Agencies and Debt Collectors

Consumer debt covers non-business debt such as mortgages, credit cards, medical debts, and other debts primarily for personal, family, or household purposes. If a borrower defaults on a consumer debt, the lender may initiate collection efforts, usually through the sale or assignment of the asset to a third-party debt collector.

The Florida Consumer Collection Practices Act²³ (act) regulates consumer collection agencies. The act gives primary oversight authority to the Office of Financial Regulation (OFR).²⁴ The act defines the term, “consumer collection agency,” to mean any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of collecting consumer debts that is not exempted by the act.²⁵ The term, “debt collector,” is defined to mean any person who uses any instrumentality of interstate commerce in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due to asserted to be owed or due another.²⁶ The act contains registration²⁷ and recordkeeping²⁸ requirements and prohibits certain collection practices. According to the OFR, there are 1,283 licensed consumer collectors.²⁹

The OFR may conduct examinations and investigations to determine whether a person has violated the provisions of the act. Section 559.5558, F.S., provides that any information held by the OFR pursuant to an investigation or examination of a violation the act is confidential and

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- 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?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Part VI of Ch. 559, F.S., Section 559.551, F.S.

²⁴ The Office of Financial Regulation is established within the Financial Services Commission, which is composed of the Governor, the Attorney General, and Chief Financial Officer, and the Commissioner of Agriculture. Commission members serve as the agency head of the OFR. The Financial Services Commission is created within the Department of Financial Services and is not subject to control, supervision, or direction by the Department of Financial Services. Section 20.121(3), F.S.

²⁵ Section 559.55(3), F.S.

²⁶ Section 559.55(7), F.S.

²⁷ Sections 559.553 and 559.555, F.S.

²⁸ Section 559.5556, F.S.

²⁹ Correspondence from the Office of Financial Regulation, dated January 7, 2019. On file with Senate Banking and Insurance Committee.

exempt from s. 119.07(1), F.S., and article I, section 24 of the Florida Constitution. Information made confidential and exempt may be disclosed by the office to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities. Once the investigation or examination is completed or ceases to be active, such information is no longer confidential and exempt, unless disclosure of the information would:

- Jeopardize the integrity of another active investigation or examination.
- Reveal the personal identifying information of a consumer, unless the consumer is also the complainant. The complainant's personal identifying information is subject to disclosure after the investigation or examination is completed or ceases to be active. However, the complainant's personal financial and health information remains confidential and exempt.
- Reveal the identity of a confidential source.
- Reveal investigative or examination techniques or procedures.
- Reveal trade secrets, as defined in s. 688.002, F.S.

Further, s. 559.5588, F.S., is subject to the Open Government Sunset Review Act and shall stand repealed on October 2, 2019, if not reenacted.

OGSR Survey and Results

In 2018, Senate professional staff sent out a survey to the Office of Financial Regulation and other stakeholders to ascertain if s. 559.5558, F.S., remains necessary, pursuant to the OGSR Act.³⁰ Subsequent meetings were held with the OFR staff. The OFR provided the following information to professional staff concerning public record requests for information relating to s. 559.5558, F.S. The OFR stated that it had received 684 public records requests related to s. 559.5558, F.S., which may contain exempt information. According to the OFR, those requests were received from attorneys (201 or 29.4 percent), industry (196 or 28.7 percent), administrative agencies (167 or 24.4 percent), law enforcement (55 or 8 percent), consumers (48 or 7 percent), and media (17 or 2.5 percent). The OFR indicated that documents were provided in 679 (or 99.3 percent) of those requests, and in the remainder of the requests, six were withdrawn, four were closed when documents were not available and in two cases, the requests were closed due to documents being exempt or confidential. These two cases were exempt or confidential due to possible disclosure of personal health information or due to the entity being under investigation.

The OFR recommends reenacting the public records exemption without changes. Further, the OFR indicates that this exemption is vital to protecting the public from phishing and other types of identity theft. The release of financial or medical records collected during an examination or investigation could result in the release of personal financial and medical information.

III. Effect of Proposed Changes:

Section 1 amends s. 559.5558, F.S., to continue the public records exemption relating to OFR investigations and examinations of consumer collection practices to continue, as they currently exist.

³⁰ See OFR survey correspondence, dated July 13, 2018, on file with the Senate Committee on Banking and Insurance.

Section 2 provides an effective date of October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce the ability of counties and municipalities to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public meetings requirements. This bill continues a current public meetings exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public meetings requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public meetings exemption without expansion.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public meetings requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect proposals seeking research funding from the organization or a plan or program for either initiating or supporting research. This bill exempts from the public records information collected in connection with an investigation or examination conducted by the OFR. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

The continuation of the public records exemption would prevent the release of sensitive personal medical information and financial information of individuals. The private sector will continue to be subject to any cost associated with the OFR making redactions in response to a public records request.

C. Government Sector Impact:

The OFR will continue to incur costs related to the redaction of records in responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 559.5558 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.