

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 Banking and Insurance

BILL: SPB 7052
INTRODUCER: Banking and Insurance Committee
SUBJECT: OGSR/Informal Enforcement Actions/Trade Secrets/Office of Financial Regulation
DATE: February 19, 2019 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Knudson	Knudson		BI Submitted as Comm. Bill/Fav

I. Summary:

SPB 7052 reenacts and saves from repeal the exemptions to public record requirements in s. 655.037(3), F.S., for informal enforcement actions performed by the Office of Financial Regulation, and s. 655.037(4), F.S., for trade secrets held by the Office of Financial Regulation in accordance with its statutory duties under the financial institutions codes.

These exemptions are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2019, unless re-enacted and saved from repeal by the Legislature.

The effective date of the bill is October 1, 2019.

II. Present Situation:

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 all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that

[i]t 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.⁴

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

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

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹¹ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions¹² and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹³

When creating or expanding a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁴ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the

⁵ *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995).

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 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Id.*

¹² The bill may, however, contain multiple exemptions that relate to one subject.

¹³ FLA. CONST., art. I, s. 24(c)

¹⁴ 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 Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004).

Legislature or pursuant to a court order. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁵

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁸ The 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 to meet such public purpose.¹⁹

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.²⁰ 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.²¹ 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.²² 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;²³
- 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;²⁴ or

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁷ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ 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.

²¹ Section 119.15(3), F.S.

²² Section 119.15(6)(b), F.S.

²³ Section 119.15(6)(b)1., F.S.

²⁴ Section 119.15(6)(b)2., F.S.

- It protects trade or business secrets.²⁵

Further, the OGSR Act requires specified questions to be considered during the review process.²⁶ In examining an exemption, the OGSR Act asks the Legislature to question carefully the purpose and necessity of reenacting 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.²⁷ 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.²⁸

Regulation of State-Chartered Financial Institutions

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes (Codes) in chapter 655 through chapter 667 of the Florida Statutes. Section 655.032 of the Codes authorizes the OFR to make investigations and examinations pursuant to its authority to ensure compliance with, and prevent violations of, the Codes and the administrative rules adopted pursuant to the Codes.²⁹ The Codes direct the OFR to take into account the appropriateness of an administrative remedy or penalty provided for the Codes with respect to the size of the financial resources and good faith of the person charged, the gravity of the violation, the history of previous violations, and other matters as justice may require.³⁰ Accordingly, the OFR will sometimes impose an “informal enforcement action” which the public records exemption in s. 655.057, F.S., defines to mean a board resolution, document of resolution, or an agreement in writing between the OFR and a financial institution which the OFR imposes when it determines that a formal enforcement action is not an appropriate administrative remedy.³¹ The informal enforcement action must set forth a program of corrective action to address safety and soundness deficiencies or violations of law or rule of the institution. Informal enforcement actions are not subject to enforcement by imposition of an administrative fine under s. 655.041, F.S.

²⁵ Section 119.15(6)(b)3., F.S.

²⁶ Section 119.15(6)(a), F.S. The specified questions are:

- 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?

²⁷ FLA. CONST. art. I, s. 24(c).

²⁸ Section 119.15(7), F.S.

²⁹ See s. 655.032, F.S., and s. 655.045, F.S.

³⁰ Section 655.031(1), F.S.

³¹ Section 655.057(12)(b), F.S.

Public Records Exemptions for Informal Enforcement Actions and Trade Secrets

Chapter 655.057, F.S., exempts from public records requirements various records held by the OFR related to its authority and duties to enforce the Codes, including records related to investigations and examinations. The Legislature in 2014 created a public records exemption for informal enforcement actions of the OFR and trade secrets as defined by s. 688.002, F.S., held by the OFR in accordance with its statutory duties with respect to the financial institutions codes.³² A trade secret is defined by s. 688.002(4), F.S., to mean information,³³ that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. Such information must also be the subject of efforts that are reasonable under the circumstances to maintain its secrecy to be a trade secret.

The public records exemption for “informal enforcement actions” continues to hold informal enforcement actions confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution after the investigation relating to the informal enforcement action is completed or ceases to be active if the disclosure would:

- Jeopardize the integrity of another active investigation.
- Impair the safety and soundness of the financial institution.
- Reveal personal financial information.
- Reveal the identity of a confidential source.
- Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual.
- Reveal investigative techniques or procedures.

The Legislature stated that the exemption was necessary because disclosure of informal enforcement actions could erode public confidence in financial institutions in this state and would place Florida-chartered institutions at a competitive disadvantage because financial institutions chartered federally or in other states are generally protected by the laws of those jurisdictions from the disclosure of informal enforcement actions. The Legislature stated that the public records exemption for trade secrets was necessary to prevent disclosures that could result in a competitive disadvantage and economic loss to a financial institution.

Professional Staff of the Banking and Insurance Committee submitted a questionnaire to the OFR regarding the public records exemptions for informal enforcement actions and trade secrets held by the office.³⁴ The OFR reported that it uses informal enforcement actions to address weak operating practices, deteriorating financial conditions, violations of the Codes, or activity that impairs the safety and soundness of a financial institution. The OFR receives public records requests for information that would include informal enforcement actions and that the OFR responds to such requests by redacting all information deemed confidential and exempt under s. 655.057, F.S. The OFR indicated that the public records exemption for informal enforcement actions remains necessary and that its repeal is necessary to ensure that new financial

³² Chapter 2014-99, L.O.F.

³³ Including a formula, pattern, compilation, program, device, method, technique, or process

³⁴ *Open Government Sunset Review Questionnaire for Subsection (3) and (4) of Section 655.057, F.S.*, Senate Banking and Insurance Committee (November 16, 2018). On file with the Senate Banking and Insurance Committee.

institutions are willing to be chartered in Florida and to prevent existing Florida-chartered or licensed entities from converting to an entity regulated by a different state or the federal government. The OFR also indicated that the public records exemption for trade secrets is also necessary to allow the agency to perform its statutorily mandated regulatory oversight, some of which requires the OFR to collect trade secret information. Entities regulated by the office may claim a trade secret in order to keep proprietary information private.

III. Effect of Proposed Changes:

SPB 7052 reenacts and saves from repeal the public records exemptions in s. 655.037(3), F.S., for informal enforcement actions performed by the Office of Financial Regulation, and s. 655.037(4), F.S., for trade secrets held by the Office of Financial Regulation in accordance with its statutory duties under the financial institutions codes.

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IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 records requirements. This bill reenacts and does not create or expand an existing exemption, thus the bill only requires a majority of the members present to re-enact the public records exemption.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill does not create or expand an exemption to public records requirements and thus does not require a public necessity statement.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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. Statutes Affected:

This bill substantially amends section 655.057 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.