

STORAGE NAME: h0711.go
DATE: March 14, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 711

RELATING TO: Public records (creates an exemption for certain personal financial records)

SPONSOR(S): Representative Tobin

STATUTE(S) AFFECTED: Creates s. 159.6085

COMPANION BILL(S): SB 666 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS
- (2) FINANCIAL SERVICES
- (3)
- (4)
- (5)

I. SUMMARY:

HB 711 creates a public records exemption for personal financial records of the members of a housing finance authority or the board of directors of "a savings and loan association or bank" which are submitted in order for the housing finance authority to obtain a charter for a federal or state "savings and loan association or bank". It is unclear from the bill's language whether this exemption runs to any entity subject to this state's public records law (Ch. 119, F.S., and Art. I, s. 24(a), Fla. Const.) or whether the exemption is solely applicable to records held by a housing finance authority.

HB 711 subjects the personal financial records described above "to all applicable bank secrecy requirements". What "bank secrecy requirements" these are is uncertain.

HB 711 also provides a public necessity statement which states, in part, that

- members of a housing finance authority already have to provide public disclosure of certain limited personal financial information pursuant to ss. 112.3145 and 112.3146, F.S.;
- housing finance authorities would be unable to operate if they could not attract qualified, civic-minded persons to serve as members; and
- protecting the personal financial information of such persons from public disclosure will help attract and retain such persons.

Concerns regarding the scope of the exemption are addressed in the "Effect of Proposed Changes" section of this bill analysis.

The exemption created in HB 711 is made subject to the Open Government Sunset Review Act of 1995, and will automatically repeal on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Housing Finance Authorities

Sections 159.601 through 159.623, F.S., are known as the "Florida Housing Finance Authority Law." The purpose of this law is to provide low-cost loans for persons to purchase affordable housing. Section 159.602(2), F.S. The Florida Housing Finance Authority Law does not provide any public records exemptions for housing finance authorities.

Each county may create by ordinance "a separate public body corporate and politic" to be known as the "Housing Finance Authority". Section 159.604(1), F.S. Each housing finance authority must be composed of not less than five members appointed by the county's governing body. Section 159.605(1), F.S. No member or employee of a housing finance authority is allowed to acquire any interest, direct or indirect, in any qualifying housing development or in any property included or planned to be included in such a development. Furthermore, no such member or employee can have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any qualifying housing development. Section 159.606, F.S.

Section 159.608, F.S., lists the powers of a housing finance authority which includes the power

[t]o own, maintain, operate, control, and capitalize **a limited-purpose savings and loan association** to provide low-cost loans and related services to eligible persons to obtain affordable housing pursuant to this part. The *bank* may acquire deposits, which must be federally insured, sell mortgages in the secondary market, and issue mortgage-backed securities. The proceeds from loans and the sale of mortgages or mortgage-backed securities must be reinvested in mortgage loans. However, this subsection does not prohibit the temporary reinvestment of such proceeds in other securities and investments. The *bank* must have a minimum of \$10 million in capital and must comply with all applicable state and federal banking and regulatory requirements and any other requirements imposed by the county. (emphasis added)

This section only authorizes a housing finance authority to own, maintain, operate, control, and capitalize a "limited-purpose savings and loan association". There is no express authority to own, maintain, operate, control, and capitalize a "bank". Unfortunately, this section interchangeably uses the term "bank" to refer to a limited-purpose savings and loan association. This is confusing because the Banking Code specifically excludes from the definition of "bank" a credit union or an association:

"Bank" means any person having a subsisting charter or other lawful authorization, under the laws of this or any other jurisdiction, authorizing such person to conduct a general commercial banking business. The term "bank" does not include a credit union or an association. Section 658.12(2), F.S.

However, Chapter 665, F.S., which governs Associations including savings and loan associations, does recognize the interchangeability of the term "savings and loan association" and "savings bank". See s. 665.0211, F.S.

Members of a Housing Finance Authority must provide a statement of financial interests pursuant to the requirements set forth in s. 112.3145, F.S. This statement of financial interests is public record. Section 112.3146, F.S.

Savings and Loan Associations

Chapter 665, F.S., governs Associations, which includes savings and loan associations. Section 665.013, F.S., lists forty-five sections of Chapter 658, F.S., relating to banks and trust companies, which "are applicable to an association to the same extent as if the associations were a 'bank' operating thereunder." The most relevant of these sections is s. 658.12, F.S., relating to definitions; s. 658.16, F.S., relating to the creation of a banking or trust corporation; s. 658.19, F.S., relating to application for authority to organize a bank or trust company; s. 658.20, F.S., relating to investigations by the Department of Banking and Finance ("Department"); s. 658.21, F.S., relating to approval of applications; and s. 658.22, F.S., relating to coordination with federal agencies.

Section 658.12(2), F.S., as discussed above, among other things, defines the term "bank" to not include a credit union or an association.

Section 658.16, F.S., authorizes, pursuant to Department approval, the establishment of a corporation for the purpose of becoming a state bank or a state trust company, or as made applicable to Chapter 665, F.S., a savings and loan association.

Section 658.19, F.S., provides that a written application for authority to organize a banking corporation or a trust company, or as made applicable to Chapter 665, F.S., a savings and loan association, must be filed with the Department by the proposed directors, and such application must include:

- (a) The name, residence, and occupation of each proposed director.
- (b) The proposed corporate name.
- (c) The total initial capital, the number of shares of each class of the capital stock to be authorized, and the par value of the shares of each class.
- (d) The community, including the street and number, if available, or if not available, the area within the community, where the principal office of the proposed bank or proposed trust company [or savings and loan association] is to be located.
- ...
- (f) *Such detailed financial, business, and biographical information as the department may reasonably require for each proposed director, president, chief executive officer (if other than the president) and trust officer (if applicable).* (emphasis added)

Section 658.20, F.S., provides, in pertinent part, that upon filing of an application, the Department must investigate the character, reputation, financial standing, business experience, and business qualifications of the proposed officers and directors of, as made applicable to Chapter 665, F.S., a savings and loan association.

Section 658.21, F.S., sets forth the requirements that must be met in order for the Department to approve an application for, as made applicable to Chapter 665, F.S., a savings and loan association. One such requirement is that the "proposed officers have sufficient financial institution experience, ability, standing, and reputation and the proposed directors have sufficient business experience, ability, standing, and reputation to indicate reasonable promise of successful operation"

Section 658.22, F.S., provides that upon approval by the Department of an application for authority to, as applied to Chapter 665, F.S., organize a savings and loan association, the Department must forward a copy of its final order to the appropriate federal regulatory agencies. The failure of an applicant to apply for membership in the Federal Reserve System or apply for the insurance of accounts by the Federal Deposit Insurance Corporation ("FDIC") within 3 months after approval by the Department or a final order by the FDIC denying an applicant's application for insurance of accounts, terminates and revokes the final order issued by the Department approving the application.

When the Department investigates a charter application for a savings and loan association (or bank) pursuant to s. 658.20, F.S., it acquires much information regarding the proposed officers and directors, including financial information. Currently an exemption from public disclosure exists for such information held by the Department:

Except as otherwise provided in this section and except for such portions thereof which are otherwise public record, all records and information relating to an investigation by the Department are confidential and exempt from the provisions of s. 110.07(1) until such investigation is completed or ceases to be active. ... After an investigation is completed or ceases to be active, portions of such records relating to the investigation shall be confidential and exempt from the provisions of s. 119.07(1) to the extent that disclosure would:

- (a) Jeopardize the integrity of another active investigation;
 - (b) Impair the safety and soundness of the financial institution;
 - (c) *Reveal personal financial information;*
- ... s. 655.057(1), F.S., (emphasis added).

Federal Law

Federal regulations governing the charter of a savings and loan association (or other financial institution such as a bank) is complex and involves numerous federal governmental agencies. It is beyond the scope of this analysis to detail this process. Nonetheless, to understand the reason for the exemption created in HB 711 it is necessary to explain certain aspects of the federal process.

Both the FDIC and the Office of Thrift Supervision ("OTS") evaluate an application for a proposed savings association charter. 12 C.F.R. s. 303.14; 12 C.F.R. ss. 43.2 and 52. In order to do that certain information must be collected. Various forms have been developed to accomplish this task. See OTS's Biographical And Financial Report (OMB Nos. 1550-0005, 3068-0037, 1550-0047) (hereinafter "OTS Report"); OTS's Interagency Biographical And Financial Report (OMB No. for FDIC 3064-0006, for FRB 7100-0134, for OTS 1557-0014, for OTS 1550-0005/0015/0047)(hereinafter "Interagency Report").

These forms request information regarding, for example, education and professional credentials, business and banking affiliations, legal and related matters, financial reports, proprietary interests, real estate and related loans, cash flow statement, and liabilities. The older forms stated that the "entire report will be held CONFIDENTIAL". OTS Report, at 1. The most recent form provides that "[t]hese documents are considered confidential and generally are exempt from public disclosure under the authority of 5 U.S.C. s. 552, relating to a personnel, medical, or similar record, *including a financial record*, or any portion thereof, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Interagency Report, at 13 (emphasis added).

These federal confidentiality provisions only apply to federal governmental agencies. Accordingly, only the federal agencies that have in their possession copies of the application (and supporting documentation) for a savings association charter must keep such information confidential.

Public Records Exemptions

When a housing finance authority submits its charter application (and supporting documentation) for a savings and loan association to the Department, all personal financial information contained therein is confidential and exempt from public disclosure pursuant to s. 655.057, F.S. And, as discussed above, pursuant to federal law, federal agencies that review, investigate, and/or approve that application (and supporting documentation) must also keep confidential the personal financial information submitted. However, when the housing finance authority is in custody of such information, the information is public record, and there is no exemption in federal or state law that would prevent its disclosure. See *Milton J. Wallace, Patricia B. Wallace, Dade County Housing Finance Authority et al. v. Leopoldo E. Guzman*, (Fla. 1st DCA, January Term, 1997) unpublished opinion, Case Nos. 96-2571, 2754.

Public Records Law

Article I, s. 24, Florida Constitution, expresses Florida's public policy regarding access to government records in providing that:

- (a) 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.

Article I, s. 24, Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law exempting the records must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, F.S., provides:

- Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.15, F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption

meets one of the following purposes and 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:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. 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. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. 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.

B. EFFECT OF PROPOSED CHANGES:

HB 711 creates a public records exemption for personal financial records of the members of a housing finance authority or the board of directors of "a savings and loan association or bank" which are submitted in order for the housing finance authority to obtain a charter for a federal or state "savings and loan association or bank". As discussed earlier, "bank" as defined in the Florida Statutes excludes a savings and loan association. However, a savings and loan association may be referred to as a savings bank. It would be less confusing however to simply refer to a savings and loan association.

It is unclear from the bill's language whether this exemption runs to any entity subject to this state's public records law (Ch. 119, F.S. and Art. I, s. 24(a), Fla. Const.) or whether the exemption is solely applicable to records held by a housing finance authority. This bill establishes the exemption in a new section of law, s. 159.6085, F.S. The Florida Housing Finance Authority Law encompasses ss. 159.601 through 159.623, F.S. Accordingly, this new section of law would be placed within the Florida Housing Finance Law. The placement of this new exemption in that body of law could suggest that the exemption was only intended to run to housing finance authorities. Furthermore, the Department already has such an exemption, and federal agencies would not be governed by state law. Accordingly, it is unclear as to what other entity would be in possession of such information. This ambiguity could subject the exemption to criticisms of overbreadth. This problem could be remedied by a clarifying amendment expressly making the exemption applicable to housing finance authorities.

HB 711 subjects the personal financial records described above "to all applicable bank secrecy requirements". What "bank secrecy requirements" these are is uncertain. The Department's and federal agencies' exemption laws apply to only those entities as provided for in those laws. HB 711 otherwise provides an exemption for such personal

financial records in the custody of a housing finance authority. To make such personal financial records subject to all "bank secrecy requirements" wherever and whenever such should be promulgated could again subject the exemption to criticisms of overbreadth and, in addition, raise concerns regarding unlawful delegation of legislative authority. See *Detecting Constitutional Problems in Florida Legislation, 1996-1997*, Florida House of Representatives Committee on Governmental Operations, at 128 ("The Legislature may not, by reference, adopt in advance or incorporate any federal law not yet enacted. *State v. Welch*, 279 So.2d 11 (Fla. 1973); *Brazil v. Division of Administration, Department of Transportation*, 347 So.2d 755 (Fla. 1st DCA 1977). Any such action constitutes an unlawful delegation of Legislative power.") Finally, as noted above, "banks" by definition do not include savings and loan associations. Thus, to apply "bank secrecy requirements" to personal financial records submitted pursuant to an application for a savings and loan association charter could significantly broaden the body of law applicable to those savings and loan association records.

HB 711 also provides a public necessity statement which states that personal financial information, and in particular tax returns, contain highly confidential information. For example, such returns may reveal the nature of an individual's contributions to a church, a political party, or a charity. Furthermore, "disclosure of an individual's financial position may expose such person or members of the person's family to personal or physical risk." It is unclear how physical risk might reasonably occur as a result of public disclosure of financial records.

The public necessity statement further states that members of a housing finance authority already have to provide public disclosure of their personal financial information pursuant to ss. 112.3145 and 112.3146, F.S. Those sections provide for limited financial disclosure by public officers. Finally, the public necessity statement provides that unlike most public officers, members of housing finance authorities serve as volunteers and receive no compensation for their services. Housing finance authorities fulfill an important public purpose by helping to provide affordable housing loans to residents of Florida who, because of their low-income status, are otherwise unable to borrow from existing financial institutions. Housing finance authorities would be unable to operate if they could not attract qualified, civic-minded persons to serve as members. Protecting the personal financial information, including tax returns, of such persons from public disclosure will help attract and retain such persons.

The public records exemption created in HB 711 is made subject to the Open Government Sunset Review Act of 1995 and will repeal automatically on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

According to HB 711's public necessity statement, providing such a public records exemption "will help attract and retain" "qualified, civic-minded persons to serve as members" of housing finance authorities. Accordingly this bill may increase an individual's options as it relates to participation as a member of a housing finance authority.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

HB 711 would prevent access to personal financial records of members of a housing finance authority or the board of directors of a savings and loan association chartered by that housing finance authority. Such records when held by the housing finance authority are currently public record.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Creates s. 159.6085, F.S., provides a public records exemption for any personal financial records of housing finance authority members and of the board of directors of the savings and loan association submitted pursuant to a charter application for a federal or state savings and loan association or bank, and subjects such records to "all applicable bank secrecy requirements"; provides for repeal of the exemption on October 2, 2002, unless reviewed and saved from repeal through reenactment by the Legislature.

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Section 2 -- Provides a public necessity statement for the exemption described in section 1 above.

Section 3 -- Provides an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

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2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action which requires the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

Proponents of HB 711, more particularly the Dade County Housing Authority, argue that this exemption is critical in order that when a housing finance authority, a public entity, applies for a savings and loan association charter, personal financial records submitted pursuant to this process be held exempt from public disclosure. A private applicant's financial records are not subject to public disclosure because a private applicant is not subject to this state's public records laws as are public agencies such as a housing finance authority. (Exemptions already exist for such records when held by the Department or by federal agencies.)

Opponents of the bill, such as the Comptroller, assert that the public has the right to know everything that a public housing authority submits to federal or state regulators as part of the approval process of a state-chartered bank.

The appointed members of the Housing Authority will exercise extensive control over the operations of its state-chartered savings bank. However, as opposed to banks that are organized by private persons as private entities, none of the members of the Authority, nor any member of the bank's board of directors, will have any personal investment in the success of the financial institution. As such, safety and soundness considerations dictate **a higher level of public scrutiny** of the

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competence and fiscal responsibility of all public officials in positions of direct authority with respect to the savings bank. Private persons who invest their own money to capitalize a privately owned bank are entitled to a higher degree of confidentiality of their financial backgrounds than **public persons** who use **public money** to capitalize a **publicly owned** bank. Untitled statement from Comptroller's office, received March 14, 1997.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

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