

STORAGE NAME: h2217s1.go

DATE: April 14, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: CS/HB 2217

RELATING TO: Public Records; Lottery 1-900 Number

SPONSOR(S): Committee on Regulated Services and Representative Dennis Jones

TIED BILL(S):

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

- (1) REGULATED SERVICES YEAS 6 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

Chapter 24 of the Florida Statutes, enacted in 1987, created the "Florida Public Education Lottery Act" and established the power and authority of the Department of the Lottery. The department is required to operate the lottery as a revenue generating entrepreneurial business. Lottery revenue proceeds are deposited into the Education Enhancement Trust Fund.

The Department of the Lottery disseminates winning lottery numbers and payout information in a variety of venues and media outlets, e.g., television, newspapers, radio, the department's website and all lottery retailers. In addition, the department provides the public with copies of documents that contain this type information upon request and at cost. This information is provided both by mail and at all department offices. In addition, as a result of 1995 legislation, the department offers the public a 1-900 telephone service as an *optional* means of obtaining lottery numbers and payout information at a cost of \$0.77 per minute.

This bill creates s. 24.1075, F.S., and provides that information made available to the public by the Department of the Lottery through a 1-900 telephone service is exempt from the fee provisions of s. 119.07, F.S.

Further, the bill provides that this exemption from the fee provisions of the public records law is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2005, unless reviewed and saved from repeal through reenactment.

The bill contains a severability clause.

To the extent passage of this legislation and its retroactive application affects the outcome of ongoing litigation, the Department of the Lottery will not be required to reimburse the nearly \$8 million generated by the 1-900 number or incur the significant costs associated with actually providing those reimbursements to thousands of individuals.

The bill will take effect upon becoming law and will apply retroactively to October 1, 1995.

A number of areas of concern regarding the committee substitute were discovered by the Committee on Governmental Operations staff. **Please see "Other Comments" on page 6 of the bill analysis.**

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Article I, section 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records. This section 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.

Article I, section 24, Florida Constitution, also provides that the Legislature may, by general law, exempt public records from the requirements of section 24(a). Such a general law exempting records from public disclosure 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., the Open Government Sunset Review Act of 1995, states that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to meet that public purpose. 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 that such purpose 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.

Exemptions are analyzed using the following definition of public necessity: A public necessity justifying an exemption exists when, after considering the public good served by access to the record or meeting and the public or private harm that could be caused by allowing or denying access to the record or meeting, it is determined that the presumption in favor of open records and meetings is overcome because the public's interests are best served by denying access in whole or in part to the record or meeting; and, access is denied to as little of the record or meeting as is practicable.

The Lottery

In November, 1986, voters approved a new Article X, Section 15 to the Florida Constitution, providing for a state operated lottery. Chapter 24 of the Florida Statutes, enacted in 1987, creates the "Florida Public Education Lottery Act" and establishes the power and authority of the Department of the Lottery. The department is required to operate the lottery as a revenue generating entrepreneurial business.

Section 24.121, F.S., provides for the distribution of lottery revenue and provides that as nearly as practical: at least 50 percent of gross revenue shall be returned to players in the form of prizes; at least 38 percent of gross revenue be deposited into the Education Enhancement Trust Fund; and, the remainder of funds be used for the payment of administrative expenses of the department, including all costs incurred in the operation and administration of the lottery, and all costs resulting from any contracts entered into for the purchase or lease of goods or services including the compensation paid to retailers.

The department disseminates winning lottery numbers and payout information in a variety of venues and media outlets, e.g., television, newspapers, radio, the department's website and all lottery retailers. In addition, the department provides the public with copies of documents that contain this type information upon request and at cost. This information is provided both by mail and at all department offices. As a result of 1995 legislation, the department offers the public a 1-900 telephone service as an optional means of obtaining lottery numbers and payout information at a cost of \$0.77 per minute.

During the 1995 Regular Legislative Session, the Legislature passed SB 2800, the 1995-96 General Appropriations Act. Specific Appropriation 1893 contained proviso language which stated:

From the funds in Specific Appropriation 1893, the Department shall convert the current 1-800 telephone number to a 1-900 telephone number. The net revenue generated through the use of the 1-900 number shall be included in the revenue and transferred to the Educational Enhancement Trust Fund on a monthly basis. For the 1-900 service, the Department is authorized to operate the service internally, and if necessary based on call rates, to invest in equipment and other resources necessary to augment and enhance the current system, or contract for the service.

In 1995, the department issued Invitations to Bid and awarded a contract for the 1-900 service. The provisions of this contract require the vendor to provide daily winning numbers and other lottery information, including past winning numbers, by way of a recording at a cost of \$0.77 per minute. Of the \$0.77 per minute call, the department retains \$0.47 and \$0.30 is retained by the provider. The total cost of each call may not exceed \$2.00. Since 1995, the 1-900 number has generated approximately \$8 million in net revenue for the Educational Enhancement Trust Fund.

A class action complaint was filed in 1999, seeking damages against the state. The complaint alleges, in part, that the 1-900 number violates chapter 119, F.S., by charging more than the Lottery's actual cost for each telephone call. DeLuise vs. Department of the Lottery, et al., Second Judicial Circuit Case No. 99-3999. The complaint demands refunds for every person who has used the 1-900 service since its initiation in October 1995, as well as attorney's fees for the alleged violations of chapter 119, F.S. If granted, this would result in a refund of the \$8 million, plus attorneys' fees.

C. EFFECT OF PROPOSED CHANGES:

This bill declares a public necessity to clarify a legal ambiguity in relation to the provision of winning lottery numbers and payout information through a 1-900 telephone number. The bill submits that this act is no broader than necessary to accomplish its stated purpose because access to public records has not been impeded or restricted; and, further, that this act does not create new rights or eliminate previously established rights.

The department will continue to disseminate winning lottery numbers and payout information in a variety of venues and media outlets, e.g., television, newspapers, radio, the department's website and all lottery retailers. In addition, the department provides the public with copies of documents that contain this type information upon request and at cost. This information is provided both by mail and at all department offices.

This bill creates s. 24.1075, F.S., and provides that information made available to the public by the Department of the Lottery through a 1-900 telephone service is exempt from the fee provisions of s. 119.07, F.S. The bill provides that this exemption from the fee provisions of the public records law is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2005, unless reviewed and saved from repeal through reenactment.

This bill contains a severability clause.

This bill takes effect upon becoming law and will apply to all authorized 1-900 services of the Department of the Lottery retroactively to October 1, 1995.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Department of the Lottery receives \$0.4751 per minute billed to the caller, net of all costs associated with providing the required 1-900 service. In FY 1998-99 this service generated \$1,660,447 in revenue and as of March 22, 2000 has generated \$1,196,454 for this fiscal year. According the Department of the Lottery, this service has generated nearly \$8 million in revenue since its inception.

2. Expenditures:

To the extent passage of this legislation and its retroactive application favorably affects the outcome of ongoing litigation, the Department of the Lottery will not be required to reimburse the nearly \$8 million generated by the 1-900 number or incur the significant costs associated with actually providing those reimbursements to thousands of individuals.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent passage of this legislation and its retroactive application affects the outcome of ongoing litigation, a vendor will be allowed to provide this service at a negotiated fee through a contractual arrangement with the Department of the Lottery. Participants in the class action suit, however, will not be reimbursed for their prior use of the 1-900 number.

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 an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill will not reduce the authority of counties and municipalities to raise revenues.

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

This bill will not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill contains a retroactive effective date. Substantive enactments of legislation are presumed to operate prospectively unless there is a clear legislative expression of an intent that the enactment operates retrospectively. [See *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983).

When there is a clear expression of retroactive application the question is whether that application is constitutionally permissible, see *Florida Department of Transportation v. Knowles*, 402 So.2d 1155, 1158 (Fla. 1981). Also, in *McCord v. Smith*, 43 So.2d 704, 708-9 (Fla. 1949), when considering whether the Legislature may constitutionally apply a statute retrospectively, the court held:

“A retrospective provision of the legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed, or when a new obligation is established, in connection with transactions or considerations previously had or expiated.”

In determining whether a vested right exists, the *Knowles* court suggested a test by which it may be determined whether a statute can be given retroactive application. These considerations are: 1] the strength of the public interest served by the statute; 2] the extent to which the right affected is abrogated; and 3] the nature of the affected right.

It appears the constitutional challenge to this act may turn on the issue of what is a “vested right” and whether a person has a vested right to receive information by telephone free of charge under the provisions of chapter 119.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Comments by the Committee on Governmental Operations

This bill appears to try and establish a public records exemption for a private provider for its 1-900 telephone number service which provides winning lottery numbers and payout information. This bill also appears to provide a public necessity statement for the exemption, pursuant to s. 24, Art. I, of the State Constitution.

A private entity, through a competitively bid contract with the Department of Lottery, currently provides the 1-900 telephone number service to the public. A person may avail him or herself of this optional service, or he or she may otherwise obtain the information pursuant to a public records request to the department, or otherwise obtain the information from a participating retailer, the newspaper, or television.

It is unlikely that such a provider is an "agency" as that term is defined in Chapter 119, F.S.¹ Accordingly, the service provider would not be subject to the public records law; i.e., s. 24, Art. I, Fla. Const., and Chapter 119, F.S. See *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992) (establishing a "totality of factors" test to determine whether a private entity is "acting on behalf of a public agency" such that s. 24, Art. I, Fla. Const., and Chapter 119, F.S., would apply.); see also, *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993). If an entity is not subject to the public records law, then no need exists to address the requirements of that law.

However, even if the public records law does apply, that law does not require a public records exemption for a fee provision. See *WFTV, Inc. v. Wilken*, 675 So. 2d 674 (Fla. 4th DCA 1996) (charging a fee for records does not interfere with constitutionally protect right to access). Section 24, Art. I, of the Florida Constitution, provides for exemption of records from inspection or copying; nothing therein addresses fees, or requires an exemption for fees. Section 119.15, F.S., provides for review of public records exemptions; nothing therein addresses fees, or requires an exemption for fees. Section 119.07(1), F.S., is the only section in Chapter 119, F.S., that provides for fees: "The custodian shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law or, if a fee is not prescribed by law, for duplicated copies ... of not more than 15 cents per one-sided page". That section also authorizes a special service charge for extensive use of information technology resources or extensive clerical or supervisory assistance by personnel pursuant to request for inspection, examination or copying of public records. Nothing in s. 119.07(1), F.S., has ever or currently requires creating a public records exemption for fees.

¹Providing a convenient, but non-essential, optional service to the public for telephonically acquiring by audio means the winning lottery information does not appear to be an integral part of the department's function; and, the private entity does not appear to be performing a governmental function. The actual public records containing the winning lottery information are made available for inspection and copying by the public at department offices; and, upon request, are provided by mail.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Regulated Services met on April 10, 2000, and considered HB 2217. The committee voted unanimously, 6 Yeas and 0 Nays, to pass the bill as a committee substitute.

HB 2217, as filed, provided that winning lottery numbers and payout information was confidential and exempt from public records. Obviously, maintaining the confidentiality of winning lottery numbers would be counterproductive to their very existence. The committee substitute, therefore, clarified that the fee for access to the winning lottery numbers and payout information through the 1-900 service is exempt from the fee provisions of chapter 119.

VII. SIGNATURES:

COMMITTEE ON REGULATED SERVICES:

Prepared by:

Janet Clark Morris

Staff Director:

Paul Liepshutz

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

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