SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 290

SPONSOR: Governmental Oversight & Productivity Committee

SUBJECT: Open Government Sunset Review of Exemption for Information Related to Housing Assistance Programs

DATE: March 6, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Favorable
2.	Emrich	Deffenbaugh	BI	Favorable
3.			HC	
4.			GO	
5.			RC	
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review of s. 119.07(3)(bb), F.S. That section makes medical history records, bank account numbers, credit card numbers, telephone numbers, and information related to health or property insurance furnished to an agency pursuant to a federal, state, or local housing assistance program confidential and exempt. The bill continues the exemption, with amendments to clarify and narrow it, based upon a review conducted pursuant to the requirements of s. 119.15, F.S.

This bill amends section 119.07(3)(bb) of the Florida Statutes.

II. Present Situation:

Public Records Overview - Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.[1] Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained in ch. 119, F.S., was first enacted in 1967.[2] The act has been the subject of amendment almost annually since its inception.

In 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

[1] Section 1, ch. 5942 (1909) stated: "That all State, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."
[2] Chapter 67-125 (1967 L.O.F.)

> Every person has the right to inspect or copy any public record 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.

As a result of the adoption of this constitutional amendment, the statutory right of access contained in the Public Records Law was raised to a substantive constitutional right and the legislative and judicial branches of state government were made subject to government-in-the-sunshine requirements. The amendment also "grandfathered" exemptions that were in effect on July 1, 1993.[3]

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Article I, s. 24 (c) of the State Constitution authorizes only the Legislature to create exemptions from government-in-the-sunshine requirements. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption. The exemption may be no broader than necessary to comport with the public necessity. Further, a law that creates a public exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.

A new constitutional requirement for creating public records exemptions was adopted by the electorate in November of 2002. That amendment to Article I, s. 24 of the State Constitution requires that exemptions must be enacted by a two-thirds vote of each house.

In addition to the State Constitution, the Public Records Law[4] specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental entities. Section 119.07(1)(a), F.S., requires:

> 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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee…

The Public Records Law states that, unless specifically exempted, all agency[5] records are to be available for public inspection. The term "public record" is broadly defined to mean:

---

[3] Article I, s. 24(d) of the State Constitution.
[4] Chapter 119, F.S.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law,

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of 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.[6]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.[7] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[8]

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[9]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, that record may not be released by an agency to anyone other than to the persons or entities designated in the statute.[10] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[11]

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government.[12] The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are narrowly construed so they are limited to their stated purpose.[13]

---

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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

[6] Section 119.011(1), F.S.

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

[8] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

[9] Art. I, s.24(c) of the State Constitution.

[10] Attorney General Opinion 85-62.

[11] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[12] *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365 (Fla. 4th DCA 1997).

[13] *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

Exemptions to open government requirements are subject to repeal five years after their initial enactment unless they are reviewed and saved by the Legislature.[14] An exemption also may be subjected to this automatic review and repeal process if it has been "substantially amended." An exemption has been substantially amended if it ". . . expands the scope of the exemption to include more records or information or to include meetings as well as records."[15] The Open Government Sunset Review Act of 1995,[16] provides for the systematic review and repeal of exemptions through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The Open Government Sunset Review Act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. The three statutory criteria are if 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 would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[17]

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, as the Florida Supreme Court has ruled in a series of cases, one session of the Legislature cannot bind another. [18] The Legislature is only limited in its review process by constitutional requirements. If an exemption does not explicitly meet the requirements of the act, but if it falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act.

[14] An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.
[15] Section 119.15(3)(b), F.S.
[16] Section 119.15, F.S.
[17] Section 119.15(4)(b), F.S.
[18] As the Florida Supreme Court has ruled in a series of cases, the most recent of which is *Neu v. Miami Herald Publishing Company*, 462 So.2d 821 (Fla. 1985), one legislative body cannot bind a future Legislature to an obligation. In *Neu*, a case addressing the Public Meetings Law, the court stated "A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law." See *Neu v. Miami Herald Publishing Company*, 462 So.2d 821, 824 (Fla. 1985). In an earlier case reviewing a challenge to establishment of geographic municipal boundaries, the court stated that, "[t]he Legislature cannot prohibit a future Legislature by proper enactment changing boundaries which it [the earlier Legislature] established." *Kirklands v. Town of Bradley*, 139 So. 144, 145 (Fla. 1932).

Further, s. 119.15(4)(e), F.S., makes explicit that

> . . . notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10, F.S., any public officer violating any provision of ch. 119, F.S., is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

Exemption Under Review - During the 1998 legislative session, the Committee Substitute for House Bill 1613 by the Committee on Governmental Operations and Representative Dawson-White (similar to Senate Bill 140 by Senator Forman) passed the Legislature and became law without the Governor's signature. Section 119.07(3)(bb), F.S.,[19] provides:

> 1. Medical history records, bank account numbers, credit card numbers, telephone numbers, and information related to health or property insurance furnished by an individual to any agency pursuant to federal, state or local housing assistance programs are confidential and exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution. Any other information produced or received by any private or public entity in direct connection with federal, state, or local housing assistance programs, unless the subject of another federal or state exemption is subject to subsection (1).
> 2. Governmental agencies or their agents are entitled to access to the records specified in this paragraph for the purposes of auditing federal, state, or local housing programs or housing assistance programs. Such records may be used by an agency, as needed, in any administrative or judicial proceeding, provided such records are kept confidential and exempt, unless otherwise ordered by a court.
> 3. This paragraph is repealed effective October 2, 2003, and must be reviewed by the Legislature before that date in accordance with s. 119.15, the Open Government Sunset Review Act of 1995.

The Committee Substitute for House Bill 1613 provides that the public necessity for the exemption is that revealing such information could ". . . create the opportunity for fraud and is an unnecessary intrusion into the personal affairs of the program participants."

[19] See s. 1, ch. 98-259, L.O.F.; the provision was formerly s. 119.07(3)(cc), F.S., but the citation was modified as a result to changes to ch. 119, F.S., made during the 2002 legislative session.

The Department of Community Affairs (DCA) is designated as the agency responsible for housing and urban development in the state. As such, the DCA coordinates the state and federal efforts designed to improve, rehabilitate and build affordable housing in the state.

Section 420.504(1), F.S., creates within the DCA a public corporation known as the "Florida Housing Finance Corporation." The corporation is organized to promote the public welfare by administering the governmental function of financing or refinancing housing and related facilities in Florida. The corporation is not a department of the executive branch, though it is functionally related to the DCA in which it is placed.

There are numerous federal, state and local programs designed to provide affordable housing to families. The federal agency primarily responsible for oversight of housing initiatives is the Department of Housing and Urban Development (HUD). The DCA authorizes units of local government to administer the housing programs in their respective locales. Many local governments contract with private and not-for-profit entities to screen applications and to determine individual eligibility for low-interest loans and other programs that promote home ownership. Typically, the application for such programs requires personal information of applicants, e.g., bank account numbers, credit and debit card account numbers, employment history, etc. Under state law, such information is available for public inspection.

As part of the review process, the Open Government Sunset Review Act requires consideration of the specific records that are affected by the exemption. The exemption created in s. 119.07(3)(bb), F.S., applies to:

(1) medical history records;
(2) bank account numbers;
(3) credit card numbers;
(4) telephone numbers; and
(5) information related to health or property insurance

that is furnished by an individual to any agency pursuant to federal, state, or local housing assistance programs.

The act also requires that the persons whom are affected by the exemption be identified. According to the corporation,

> [a]ny person who applies for residency or is a current tenant of any affordable housing unit located in Florida, regardless of whether the housing unit is owned or operated by a private or government[al] entity. . . .

is affected by the exemption.

The stated goal or purpose of the exemption, based upon the statement of public necessity, is to eliminate the opportunity for fraud and to limit intrusion into the personal affairs of program participants.

Based upon a review of the exemption, it was concluded in *Senate Interim Project Report 2003-217* that the exemption has some deficiencies. For example, the exemption applies to information furnished to an "agency." The definition of "agency" found in s. 119.011(2), F.S., specifically includes ". . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." There are numerous entities that operate housing assistance programs, including private corporations that act on behalf of governmental entities, which would be included within the definition. While it would be quite difficult to designate all of the local entities that operate housing assistance programs, the report notes that it is possible to designate the state entities that hold such information.

The interim report also noted that the exemption under review is redundant of a general exemption that applies to agencies and it also provides less protection.
Section 119.07(3)(bb), F.S., only protects bank account numbers and credit card numbers. Current law provides a general exemption for bank account numbers and debit, charge, and credit card numbers. As the general exemption encompasses more financial information than the exemption under review, and as the general exemption applies to all agencies and entities acting on their behalf, it was concluded in the interim report that general exemption for financial data is preferable to the provision in s. 119.07(3)(bb), F.S.

Section 119.07(3)(bb), F.S., also makes confidential and exempt the telephone numbers of participants in housing assistance programs. The interim report noted that, as drafted, the telephone numbers that are exempt appear to include personal and other telephone numbers, such as telephone numbers at places of employment. The basis for exempting telephone numbers is unclear. The original statement of public necessity does not contain a statement that provides a basis for protecting telephone numbers. Further, the bill analyses for the original bill do not provide any information regarding the need for including telephone numbers in the exemption. Staff of the corporation was queried regarding the need for protecting participant telephone numbers. Other than a generalized statement regarding the personal privacy of applicants, the staff offered that some of its applicants are victims of domestic violence and their telephone numbers should not be available. Victims of domestic violence, however, are protected by other provisions of law. These exemptions provide protection for the address and telephone numbers of victims of domestic violence. Since these individuals are already protected elsewhere, this should not be the basis for including telephone numbers in this particular exemption. Further, it should be noted that the exemption does not exempt the address of applicants or participants. Thus, as currently drafted, the exemption would permit the physical location of a participant to be identified, but not permit discovery of less intrusive means of contact, a result that is somewhat incongruous.

As currently drafted, the interim report notes that there are some problems that could arise in the implementation of the exemption. For example, it might be argued under a facial reading of the exemption that information is exempt only if it is "furnished by an individual" to an agency. If, as the statement of public necessity reads, one purpose of the exemption is to limit ". . unnecessary intrusion into the personal affairs of the program participants . . . " it should not matter who provides information to an agency. Further, as agencies that hold this information do not limit application of the exemption based upon its source, the current language is misleading.

The interim report also notes that the exemption contains an unnecessary phrase related to the status of other information that is not made exempt. Specifically:

> [a]ny other information produced or received by any private or public entity in direct connection with federal, state, or local housing assistance programs, unless the subject of another federal or state exemption is subject to subsection (1).

It is concluded in the report that the phrase is unnecessary and could be confusing. Under Florida law, all information not made exempt by the Legislature is automatically open for public inspection and copying.

While the foregoing provision could be improved by amendment, it is concluded in the interim report that other parts of the exemption meet the requirements of the State Constitution and Open Government Sunset Review Act. For example, s. 119.07(3)(bb), F.S., also makes information related to health and property insurance confidential and exempt. Health insurance information falls within the type of information that is typically understood to be sensitive personal information as it may detail a person's health conditions and treatments. Property insurance may contain information about valuables that a participant may have in his or her residence. Publication of that information could make a resident vulnerable as a robbery target. As such, exempting these two types of information may be supported.

The exemption also makes medical history records confidential and exempt. This information is collected from some applicants because some housing assistance programs have been created for persons with illnesses or other medical problems. Historically, medical records have been considered to be sensitive personal information that should not be available for public inspection or copying. The report notes that exempting medical history records is consistent with constitutional standards and practice.

As noted previously, a record may be made exempt or it may be made exempt and confidential. When information is merely exempt, an agency has more ability to share that information in the performance of its duties or for other purposes. When information is made confidential and exempt, an agency is limited in its release of that information to those entities named in statute or upon court order. The section under review is made exempt and confidential. In its review, staff was concerned that the exemption did not permit adequate sharing of information among various agencies because the exemption also authorizes access by other agencies only for the limited purpose of performing an audit. According to staff of the corporation, this limited exception to the exemption is sufficient because the various housing assistance programs do not share information. Each time an applicant applies for a different program, the application process begins anew and the applicant provides the information. As a result, the limitation on sharing information for other purposes besides conducting an audit, does not inhibit housing assistance program implementation.

Senate Interim Project Report 2003-217 concludes that the exemption allows the state and its political subdivisions to effectively and efficiently administer a governmental program which would be significantly impaired without the exemption. Based upon the foregoing findings, the report recommends that the repeal of s. 119.07(3)(bb), F.S., be abrogated, and that the exemption

be amended to narrow and clarify it. Specifically, the report recommends that the exemption be amended to:

(1) Identify the state agencies that implement housing assistance programs;
(2) Remove references to bank account and credit card numbers as the general exemption in s. 119.07(3)(bb), F.S., applies and is more comprehensive;
(3) Eliminate telephone numbers from the exemption as they are readily available from other sources and, in the case of victims of domestic violence, other statutes provide protection for telephone numbers, as well as addresses;
(4) Remove language regarding the source of the information, i.e., an "individual" who furnishes information to an agency;
(5) Delete a provision that states that any other information that is received is subject to open government requirements because that provision reiterates the current state of the law and, as drafted, is confusing and unnecessary.

III. Effect of Proposed Changes:

The proposed committee bill makes changes to s. 119.07(3)(bb), F.S., based upon the findings and recommendations made in Senate Interim Project Report 2003-217. Specifically, the bill amends the section to:

(1) Identify the state agencies that implement housing assistance programs;
(2) Remove references to bank account and credit card numbers as the general exemption in s. 119.07(3)(bb), F.S., applies and is more comprehensive;
(3) Eliminate telephone numbers from the exemption as they are readily available from other sources and, in the case of victims of domestic violence, other statutes provide protection for telephone numbers, as well as addresses;
(4) Remove language regarding the source of the information, i.e., an "individual" who furnishes information to an agency;
(5) Delete a provision that states that any other information that is received is subject to open government requirements because that provision reiterates the current state of the law and, as drafted, is confusing and unnecessary.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.