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: CS/CS/SB 304

SPONSOR: Governmental Oversight & Productivity Committee and Comprehensive Planning Committee and Senator Argenziano

SUBJECT: Public Records Exemption

DATE: April 9, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cooper	Yeatman	CP	Favorable/CS
2.	Wiehle	Caldwell	CU	Favorable
3.	Rhea	Wilson	GO	Fav/CS
4.			RC	
5.				
6.				

I. Summary:

This committee substitute for committee substitute for Senate Bill 304 exempts from public records requirements personal identifying information held by a public water, wastewater, solid waste, natural gas, electric, or cable television which would identify a utility customer. The exemption does not apply to the personal identifying information of a utility customer who is a public officer, as defined in s. 112.061(2), F.S., or who is a member of the governing board of a water management district unless another provision of law protects that public officer's or board member's identifying information. The bill permits a court, upon a showing of good cause, to permit a person to view or copy personal identifying information. The exemption is retroactive in effect.

This committee substitute amends s. 119.07 of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies.

In November 1992, the public affirmed its approval of Florida's tradition of "government in the sunshine" by enacting a constitutional amendment to guarantee the practice. Article I, s. 24 of the State Constitution provides every person 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and special districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business that are used to perpetuate, communicate or formalize knowledge.[1] Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.[2]

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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

[1] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[2] Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979).

- 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.

The Act also establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year unless the Legislature acts to reenact the exemption.

Public Utility Customer Records

Current public records law does not provide a public records exemption for a customer's personal identifying information held by a water, wastewater, natural gas, electric, cable television, or telecommunications utility owned by a public entity.

Section 119.0721, F.S., exempts social security numbers held by an agency or its agents, employees, or contractors. However, there are several exceptions to this general exemption that could result in less protection of social security numbers than would be provided in the specific exemption established by the bill. For example, s. 119.0721(3), F.S., prohibits an agency from denying access to social security numbers by a commercial entity engaged in the performance of a commercial activity.

Section 119.07(3)(aa), F.S., provides that a person may request to have personal identification information contained in a Department of Highway Safety and Motor Vehicles motor vehicle record, including a driver identification number, made exempt from public records provisions.

Section 364.24(2), F.S., makes it a second degree misdemeanor for any officer or person in the employ of a telecommunications company to intentionally disclose customer account records except as authorized by the customer or as necessary for billing purposes, or required by subpoena, court order, other process of court, or as otherwise allowed by law. However, the section does not preclude disclosure of customers' names, addresses, or telephone numbers to the extent they are otherwise publicly available. Section 364.02, F.S., defines "telecommunications company" to include every political subdivision in the state offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility.

Correspondingly, s. 119.07(3)(r), F.S., makes confidential and exempts from public records all records supplied by a telecommunications company, as defined by s. 364.02, F.S., to a state or

local governmental agency which contain the name, address, and telephone number of subscribers.

III. Effect of Proposed Changes:

Section 1 creates s. 119.07(3)(gg), F.S., to create an exemption from public records requirements for personal identifying information held by a public water, wastewater, solid waste, natural gas, electric, or cable television which would identify a customer. The bill specifies that "personal identifying information" includes a customer's name, social security number, taxpayer identification number, address, telephone number, and driver identification number.

The committee substitute for the committee substitute explicitly exempts personal identifying information of public officers, as defined by s. 112.061(2), F.S., or members of a governing board of a water management district, though if such information is exempt pursuant to another section of law, it is still protected under the bill.

Further, the committee substitute for committee substitute for the bill permits a court, upon a showing of good cause, to permit any person to view or copy personal identifying information held by a utility and to prescribe restrictions or stipulations it deems appropriate as a prerequisite to such access. Issues that the court must consider in granting such a request for access include:

- Whether such disclosure is necessary for the public evaluation of governmental performance.
- The seriousness of the intrusion into the customer's right to privacy.
- Whether disclosure is the least intrusive means available.
- The availability of similar information in other public records.

Viewing must be under the direct supervision of the custodian of the record or his or her designee.

The customer is required to be given reasonable notice of a petition filed with the court to view such personal identifying information.

The exemption applies retroactively.

The exemption is subject to the Open Government Sunset Review Act of 1995, in accordance with s. 119.15, F.S., and is repealed on October 2, 2008, unless reviewed and reenacted by the Legislature.

Section 2 contains a statement of public necessity, as required by s. 24, Art. I of the State Constitution. The statement bases the exemption on the need to prevent identity theft and fraud, and to ease the competitive disadvantage that release of identifying information causes for public utilities.

Section 3 provides that the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a single exemption from public records requirements of s. 24(a), Art. I of the State Constitution. The bill contains a statement of public necessity. The records that are protected are made exempt but not exempt and confidential. As a result, the custodial agency is not prohibited from releasing the information in all circumstances. Further, the exemption may not follow the released record. As the records are only exempt, the custodial agency could release them to law enforcement agencies. If the records were exempt and confidential, the custodial agency could not release them to anyone other than to persons or entities designated by statute, except pursuant to court order.

In the November 2002 election, 76.5 percent of voters approved a constitutional amendment concerning public records. The amendment to Article I, s. 24 of the State Constitution requires any law after the effective date of the amendment containing exemptions to public records or public meetings be passed by a two-thirds vote of each house of the Legislature. The constitution previously required a simple majority vote to enact public records exemptions.

Article I, s. 24 of the State Constitution requires that the Legislature state the public necessity for an exemption and requires that an exemption be no broader than necessary to effectuate the underlying basis for that exemption.

The statement provides three bases for the exemption: (1) the need to prevent identity theft; (2) the need to prevent fraud; and (3) the need to ease the competitive disadvantage that release of identifying information causes for public utilities.

Identity Theft and Fraud - The exemption includes in "personal identifying information"

> . . . a customer's name; social security number; taxpayer identification number; address; telephone number; and driver identification number.

It is arguable whether exempting a customer's name is necessary to prevent identity theft when all other information about the customer (social security number; taxpayer identification number; address; telephone number; and driver ID number) is exempt. In other words, including the names of customers in the exemption could be challenged as too broad, because, standing alone, access to customers' names provide no more opportunity for identity theft or fraud than names listed in a phone book.

Competitive Disadvantage - The bill also exempts personal identifying information from public records requirements because

> ". . . this personal identifying information could be used by competitors to identify, target, contact and solicit specific types of customers. The ability of business competitors to obtain this type of information could place these public service providers at a distinct competitive disadvantage and could result in severe economic loss to those public entities, thereby placing an increased economic burden on the less profitable customers who remain with the public utility.

However, all of the listed utilities are not subject to competitive markets. Public natural gas and cable television may face competition in some markets but, under current law, water, wastewater, solid waste, and electric markets are not competitive and, thus, it could be argued that as to those entities, the exemption is overbroad under constitutional standards. It has been argued, however, that a public electric utility may have competition from a gas company, which may use the public electric utility's customer records to identify and market to high-usage customers for purposes of conversion of heating and cooling equipment from electricity to gas.

In any case, assuming that public utilities would be subject to a competitive disadvantage, the primary information that would permit a competitor to solicit customers would be names, addresses and telephone numbers.

Retroactivity –The Florida Supreme Court has ruled that a public records exemption is not to be applied retroactively unless the legislation clearly expresses intent that the exemption be applied retroactively. The bill provides for retroactive application.[3]

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:

Agencies will incur costs associated with keeping the records or information exempt.

VI. Technical Deficiencies:

None.

[3] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373 (Fla. 2001).

VII. Related Issues:

Telecommunication utilities already have an exemption for customer identifying information. Section 364.02(12), F.S., defines "telecommunications company" to include every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, *and every political subdivision in the state,* offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. Section 119.07(3)(r), F.S., provides that all records supplied by a telecommunications company, as defined by s. 364.02, F.S., to a state or local governmental agency which contain the name, address, and telephone number of subscribers are confidential and exempt. The Attorney General has issued one opinion stating that s. 119.07(3)(r), F.S., applies to the City of Lakeland in its capacity as a telecommunications company, and requires that such records be maintained as confidential and exempt by the recipient governmental agency.[4]

Further, s. 364.24, F.S., prohibits any officer or person in the employ of any telecommunications company from disclosing customer account records, except as authorized by the customer, for billing purposes, or required by subpoena, court order, other process of court, or as otherwise allowed by law.

VIII. Amendments:

None.

[4] *See*, AGO 97-05.