

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 451 w/CS Public Records Exemption/Utility Customer Information  
**SPONSOR(S):** Hogan  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 304

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| REFERENCE               | ACTION        | ANALYST    | STAFF DIRECTOR |
|-------------------------|---------------|------------|----------------|
| 1) State Administration | 6 Y, 0 N w/CS | Williamson | Everhart       |
| 2) Energy (Sub)         |               |            |                |
| 3) Business Regulation  |               |            |                |
| 4)                      |               |            |                |
| 5)                      |               |            |                |

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### SUMMARY ANALYSIS

This bill creates a public records exemption for a customer's personal identifying information held by a water, wastewater, solid waste, natural gas, electric, cable television, or telecommunications utility, which is owned or operated by an agency. Personal identifying information includes a customer's name; social security number; taxpayer identification number; address; telephone number; and driver identification number. This exemption does not, however, apply to the personal identifying information of a public officer or member of the governing board of a water management district, who is a public utility customer.

This bill also allows a court, upon a showing of good cause, to issue an order authorizing any person to view or copy such information. The customer, with whom the petition pertains, must be given reasonable notice of a petition filed with the court and of the opportunity to be present and heard at any hearing.

This bill provides for retroactive application and for future review and repeal of the exemption. It also provides a statement of public necessity as required by the State Constitution.

See "CONSTITUTIONAL ISSUES" section for possible concerns.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0451a.sa.doc  
**DATE:** April 9, 2003

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: Not applicable.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

Current law does not provide a public records exemption for a publicly-owned or operated utility customer's personal identifying information. The law does provide a number of more specific exemptions pertaining to information such as social security numbers<sup>1</sup> and bank account, debit, charge, and credit card numbers.<sup>2</sup> The public records exemption for social security numbers, however, has several exceptions, one of which allows commercial entities access to such numbers so long as certain requirements are met.

Section 367.156, F.S., provides a public records exemption for utility records in the possession of the Public Service Commission, which are shown and found by the Commission to be proprietary confidential business information. Those records may include a utility customer's personal identifying information. These exemptions do not, however, protect such information contained in records held by a publicly-owned utility. Current law also provides a public records exemption for all records supplied by a telecommunications company<sup>3</sup> to a state or local governmental agency, which contain a subscriber's name, address, and telephone number.<sup>4</sup>

##### Effect of Bill

This bill creates a public records exemption for a customer's personal identifying information held by a water, wastewater, solid waste, natural gas, electric, cable television, or telecommunications utility, owned or operated by an agency. Personal identifying information includes:

- A customer's name;
- Social security number;
- Taxpayer identification number;
- Address;
- Telephone number; and
- Driver identification number.

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<sup>1</sup> Section 119.0721, F.S.

<sup>2</sup> Section 119.07(3)(dd), F.S.

<sup>3</sup> Section 364.02(12), F.S., defines "telecommunications company" as "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."

<sup>4</sup> Section 119.07(3)(r), F.S.

This exemption does not apply to the personal identifying information of a public officer<sup>5</sup> or member of the governing board of a water management district, who is a public utility customer. It does, however, apply to such information regarding commercial entities who are customers of such utilities.

This bill also allows a court, upon a showing of good cause, to issue an order authorizing any person to view or copy such information. In determining good cause, the court must consider:

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

The customer, with whom the petition pertains, must be given reasonable notice of a petition filed with the court, and must be given reasonable notice of the opportunity to be present and heard at any hearing. It is unclear, however, why such an order is needed when the customer's personal identifying information is only made "exempt" from public disclosure rather than "confidential and exempt".<sup>6</sup>

This bill provides for retroactive application<sup>7</sup> and for future review and repeal of the exemption. It also provides a statement of public necessity as required by the State Constitution.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 119.07(3), F.S., creating a public records exemption for a utility customer's personal identifying information.

Section 2. Provides for future review and repeal.

Section 3. Provides a statement of public necessity.

Section 4. Provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: None.

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<sup>5</sup> Section 112.061(2), F.S., defines "public officer" as an "individual who in the performance of his or her official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor."

<sup>6</sup> There is a difference between information and records that the Legislature has made *exempt* from public disclosure versus those that have been made *confidential and exempt*. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5thDCA 1991), and *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4thDCA 1994). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than to the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

<sup>7</sup> On April 26, 2001, the Supreme Court of Florida ruled that a public records exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.
2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not affect municipal or county government.

2. Other:

Article I, s. 24(c) of the Florida Constitution, requires that the Legislature state the public necessity for creating a public records exemption and requires that the exemption be no broader than necessary to effectuate the underlying basis for that exemption. The public necessity statement contained in this bill provides three bases for the exemption: the need to prevent identity theft, the need to prevent fraud, and the need to ease the competitive disadvantage that release of identifying information causes for public utilities.

It is unclear how public access to the utility customer's name would contribute to identity theft or fraud without access to such customer's social security number, address, telephone number, or driver identification number. As such, exempting the customer's name could be challenged as overly broad.

The public necessity statement also provides that the exemption is necessary because release of a customer's personal identifying information could place the utility company at a competitive disadvantage. Not all of the listed utilities, however, are subject to competitive markets. Public natural gas, cable television, or telecommunication utilities may face competition in some markets, but under current law, water, wastewater, solid waste, and electric markets do not appear to be competitive. Although, it has been argued that a public electric utility may have competition from a gas company because the gas company could use such 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.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

**Public Records Law**

Article I, s. 24(a), Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature may, however, provide by general law for the exemption of records from the requirements of Article I, s. 24(a), Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995<sup>8</sup> provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

### **Other Comments**

The Florida Municipal Electric Association is a proponent of this bill and has stated that public-utility customers should receive the same privacy rights as private-utility customers. On March 12, 2003, Representative Brummer (District 38) wrote an article entitled "Public-utility records should remain open", which was published in the *Orlando Sentinel*. The article was a counter-argument to the Florida Municipal Electric Association's support of this bill. Representative Brummer stated that

the impetus for the bill to make secret public-utility records arises not from some noble purpose but from a newspaper story about water use during our most recent drought. One of the subjects of the news story was a high-paid football player who was embarrassed by the coverage . . . Florida's statutes provide for exemptions from our public-records law when there exists a public necessity. The feelings of a professional football player and the comfort of government bureaucrats are not instances of public necessity.

Further, the First Amendment Foundation has taken the position that the bill is "unconstitutionally overbroad and thus violates the standard for the creation of new exemptions".<sup>9</sup>

In response, the sponsor of the bill has stated that such exemption is necessary in order to prevent spouse abuse and identity theft. However, victims of spouse abuse are protected by exemptions found in current law.<sup>10</sup>

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On April 8, 2003, the Committee on State Administration adopted a strike-all amendment to HB 451, and reported the bill favorably with CS.

The bill with CS differs from the bill as filed in that it:

- Provides that the personal identifying information of a public officer or a member of the governing board of a water management district, who is a public-utility customer, is available for public inspection and copying.
- Allows a person to petition the court for inspection of utility records containing a utility customer's personal identifying information.
- Adds the solid waste utility to the list of publicly-owned utilities whose customer information is made exempt.

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<sup>8</sup> Section 119.15, F.S.

<sup>9</sup> Letter to Representative Mike Hogan, March 31, 2003.

<sup>10</sup> See ss. 119.07(3)(s)1. and 741.465, F.S.