

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 2178

SPONSOR: Governmental Oversight and Productivity Committee and Ethics and Elections Committee and Senator Posey

SUBJECT: Public Records; Florida Voter Registration System

DATE: April 20, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Rubinas</u>	<u>EE</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	<u>Withdrawn</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Committee Substitute for Senate Bill 2178 is linked to Senate Bill 2176, which sets out requirements for the new Florida Voter Registration System (“FVRS”) that must be operational by January 1, 2006, to comply with the Help America Vote Act of 2002 (“HAVA”).

The bill expands and creates a number of public-records exemptions:

- The bill makes a voter’s social security number, driver’s license number, and Florida identification number of a voter confidential and exempt from disclosure.
- The bill makes a voter’s signature on any document (i.e., voter registration form, absentee ballot request, absentee ballot mailing envelope, provisional ballot voter’s certificate) exempt from public records *for the purpose of copying*; voter’s signatures may still be *inspected*.

The bill also reenacts existing public records exemptions for: declinations to register to vote; and, information relating to the place where a person registered or updated a voter registration.

The exemption is specifically made retroactive in effect.

Also, the bill deletes a current exemption that bans the copying of a voter’s telephone number.

Article I, s. 24(c), Fla. Const., requires a two-thirds vote of each house for passage of a newly created public records or public meetings exemption.

This bill amends Section 97.0585 of the Florida Statutes.

II. Present Situation:

A. Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.¹ In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, expresses Florida's public policy regarding access to public records by 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.

In addition to the State Constitution, the Public Records Law³ specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

The Public Records Law states that, unless specifically exempted, all agency⁴ records are to be available for public inspection. The term "public records" is broadly defined to mean:

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 official business by any agency.⁵

¹ Ch. 5942, L.O.F. (1909).

² Article I, s. 24, Fla. Const.

³ Chapter 119, F.S.

⁴ 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 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" (emphasis added). *The Legislature, hence the Division of Legislative Information Services, is not within the scope of the term "agency" as defined in Chapter 119.*

⁵ Section 119.011(1), F.S.

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

The State Constitution grants the Legislature exclusive authority to create exemptions to public records requirements.⁸ 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 law⁹. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

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 certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹¹ 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.¹²

The Open Government Sunset Review Act of 1995¹³ 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

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c), Fla. Const.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Article I, s. 24(c), Fla. Const.

¹¹ Attorney General Opinion 85-62.

¹² *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹³ Section 119.15, F.S.

- 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.¹⁴

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. 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.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.¹⁵ The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. 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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.¹⁶ For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.¹⁷ The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.¹⁸

Under s. 119.10, F.S., any public officer violating any provision of this chapter 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

¹⁴ Section 119.15(4)(b), F.S.

¹⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

¹⁶ *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

¹⁷ *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).

¹⁸ *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2^d DCA 1990).

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.

B. Existing Voter Registration Public-Records Exemptions

Section 97.0585, F.S, currently provides a number of public-records exemptions relating to voter registration. It provides that the following items are confidential and exempt:

- Declinations to register to vote; and
- Information relating to the place where a person registered to vote or where a person updated a voter registration.

Section 97.0585, F.S., also provides that a voter's signature, social security number, and telephone number, presumably as provided in connection with voter registration, may not be *copied* and are exempt from public records for that *limited* purpose.

In addition to the exemptions in s. 97.0585, others sections of the public records law may already provide some sanctuary for voter information sought to be protected in the bill. For example, section 119.0721, F.S., contains a blanket public-records exemption for all social security numbers held by an agency or its agents, employees, or contractors. Also, s. 119.07(6)(aa) protects certain sensitive information, such as driver's license numbers and social security numbers, held by the Department of Highway Safety and Motor Vehicles. Thus, any such information submitted by a voter to the Department for voter registration purposes would maintain its exempt status upon being transmitted to the Department of State.

III. Effect of Proposed Changes:

The bill expands a number of current public-records exemptions, making confidential and exempt:

- The social security number, driver's license number, and Florida identification number of a voter registration applicant. Currently, these items may be inspected but are exempt from copying from voter registration records.
- The voter registrant applicant's signature on any document (i.e., voter registration form, absentee ballot request, absentee ballot mailing envelope, provisional ballot voter's certificate) may be inspected, but not copied. Currently, this limited copying exemption applies only to signatures on voter registration records.

Finally, the bill deletes a current exemption that prohibits the *copying* of a voter's telephone number.

The exemption is made retroactive in effect.

Senate Bill 2178 provides for automatic repeal of the exemptions in s. 98.0585, F.S., on October 2, 2010, unless reenacted by the Legislature.

If enacted by a two-thirds vote of each chamber, the bill takes effect upon becoming law, *provided* that Senate Bill 2176 or similar legislation creating FVRS is also enacted into law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

See above.

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:

This public records bill is linked to Senate Bill 2176, which creates FVRS, the statewide voter registration database that HAVA prescribes will become the *official* voter registration system for federal elections in Florida. (Because Florida has a unified voter registration system for federal and state elections, FVRS will also become the official voter registration list for state and most local elections.)

Section 119.0721, F.S., provides a general exemption from public records requirements for social security numbers held by an agency. By its terms, however, this general exemption does not override other exemptions that protect social security numbers. Further, s. 119.0721, F.S., provides an exception for commercial interests. Thus, a social security number may be released under the general exemption in s. 119.0721, F.S., under certain circumstances.

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

VIII. Summary of Amendments:

None.

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