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:	SB 1448
INTRODUCER:	Senator Margolis
SUBJECT:	Public Records Exemption; E-mail Addresses
DATE:	March 16, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	**Pre-meeting**
2.			RC	
3.				
4.				
5.				
6.				

I. Summary:

This bill creates a general public records exemption in ch. 119, F.S., for e-mail addresses of individuals which are held by an agency.

As this bill creates a new exemption, passage of the exemption is subject to the two-thirds vote requirement of s. 24, Art. I of the State Constitution.

This bill creates section 119.071(5)(g) of the Florida Statutes.

II. Present Situation:

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 1892.[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

[1] Sections 1390, 1391, F.S. (Rev. 1892).
[2] Article I, s. 24 of the State Constitution.

> 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 Law[3] 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 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[4] records are to be available for public inspection. The term "public record" 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]

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 permits only the Legislature the 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 law.[9] 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]

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

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

[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) of the State Constitution.

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

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential.[11] 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.[12] 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.[13]

The Open Government Sunset Review Act - The Open Government Sunset Review Act[14] 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:

- 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 would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- 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.[15]

Subsection (4) of the section requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting by readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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[11] WFTV, Inc. v. The School Board of Seminole, 874 So.2d 48, 53 (5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004).
[12] *Ibid*; *see also* Attorney General Opinion 85-62.
[13] *Ibid at 54; see also, Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[14] Section 119.15, F.S.
[15] Section 119.15(4)(b), F.S.

The Open Government Sunset Review Act 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.[16] 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.[17] 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.[18] 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.[19]

In *B.B.*, *infra*, at 34, the Court noted with regard to criminal discovery the following:

> In the context of a criminal proceeding, the first district has indicated that "the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure," so that a public records exemption cannot limit a criminal defendant's access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure." Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).

In a footnote, (*B.B.*, *infra*, at 34 n. 4) the Court also noted:

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[16] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)
[17] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).
[18] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).
[19] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

> We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is "not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution...."

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 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.

Mail and Electronic Mail – Letters received by a public official or employee in his or her official capacity is a public record.[20] Under Florida law, the fact that information is electronic is irrelevant to its status as a public record.[21] The definition of "public record" found in s. 119.011(1), F.S., provides:

> 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 *[emphasis added]*.

Thus, electronic mail, or "e-mail" that is received by a public official or employee in his or her official capacity is a public record, as well.[22]

A distinction can be made, however, between e-mail received by a public official or employee in his or her official capacity and personal e-mail received by that public official or employee. In *State of Florida v. City of Clearwater*,[23] the Florida Supreme Court reviewed the narrow legal issue of whether personal e-mails are considered public records merely because they were on a government-owned computer system. The court, noting that both s. 24, Art. I of the State Constitution and the Public Records Act specify that public records are those records that are in some way connected to "official business," found that "private" or "personal" e-mails ". . . fall outside the current definition of public records."

Generally, home addresses and telephone numbers of any person, including public officers and employees, held by an agency are available to the public,[24] though there are numerous

[20] *See*, AGO 77-141.
[21] Information stored in a public agency's computer ". . . is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . . " *Seigle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982), review denied, 431 So. 2d 988 (Fla. 1983).
[22] *See*, AGO 96-34.
[23] 863 So.2d 149 (Fla. 2003).
[24] *See*, AGO 96-88.

exemptions for home addresses of specific types of individuals[25] and for specific types of public officers and employees.[26]

Electronic Mail Communications Act - Part III of ch. 668, the Electronic Mail Communications Act, is

> . . . intended to promote the integrity of electronic commerce[27] and shall be construed liberally in order to protect the public and legitimate businesses from deceptive and unsolicited commercial electronic mail.

Section 668.603, F.S., provides that a person may not:

(1) Initiate or assist in the transmission of an unsolicited commercial electronic mail[28] message from a computer located in this state or to an electronic mail address that is held by a resident of this state which:
   a. Uses a third party's Internet domain name without permission of the third party.
   b. Contains falsified or missing routing information or otherwise misrepresents, falsifies, or obscures any information in identifying the point of origin or the transmission path of the unsolicited commercial electronic mail message;
   c. Contains false or misleading information in the subject line;
   d. Contains false or deceptive information in the body of the message which is designed and intended to cause damage to the receiving device of an addressee or of another recipient of the message. However, this section does not apply to electronic mail messages resulting from or created by a computer virus which are sent or retransmitted from a computer or other electronic device without the sender's knowledge or consent.

(2) Distribute software or any other system designed to falsify missing routing information identifying the point of origin or the transmission path of the commercial electronic mail message.

The remedies provided in the act are in addition to remedies otherwise available for the same conduct under federal or state law. Section 668.6075(1), F.S., provides that a violation of this section is deemed an unfair and deceptive trade practice within the meaning of part II of

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[25] Some examples of exempt addresses include: addresses of persons who provide data or other information as a response to a sales promotion effort, an advertisement, or a research project provided to a county tourism promotion agency in s.125.0104(9)(d)1., F.S.; the residence address of any Class "C," Class "CC," Class "E," or Class "EE" licensee maintained by the Department of Agriculture and Consumer Services under s. 493.6122, F.S.; and records obtained by a public safety agency or other agency for the purpose of providing services in an emergency and which reveals the name, address, telephone number or other personal information about a person requesting emergency service or reporting an emergency under s. 365.171(15), F.S.

[26] *See, for example*, s. 119.071(4)(d), F.S.

[27] Under s. 668.602(13), F.S., "trade or commerce" is defined to mean ". . . the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any goods or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated.

[28] "Commercial electronic mail message" is defined by s. 668.602(3), F.S., to mean ". . . any electronic mail message sent to promote the sale or lease of, or investment in, property, goods, or services related to any trade or commerce. This includes any electronic mail message that may interfere with any trade or commerce, including messages that contain computer viruses.

ch. 501, F.S.[29] In addition to remedies provided under that part, a violator is also subject to the penalties and remedies provided for in the Electronic Mail Communications Act. A prevailing plaintiff in an action filed under the act is entitled to:

- An injunction to enjoin future violations of s. 668.603, F.S.
- Compensatory damages equal to any actual damage proven by the plaintiff to have resulted from the initiation of the unsolicited commercial electronic mail message or liquidated damages of $500 for each unsolicited commercial electronic mail message that violates s. 668.603, F.S.
- Attorney fees and other litigation costs reasonably incurred in connection with the action.

Any person outside the state who initiates or assists in the transmission of a commercial electronic mail message received in Florida which violates the section and who knows, or should have known, that the commercial electronic mail message will be received in the state submits to the jurisdiction of this state for purposes of this part.

Under s. 817.569, F.S., a person who knowingly uses any public record or who knowingly uses information obtainable only through such public record, to facilitate or further the commission of:

1. A misdemeanor of the first degree, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, F.S.
2. A felony, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.

III. Effect of Proposed Changes:

The bill creates a general public records exemption for e-mail addresses of individuals which are held by an agency.

The stated public necessity for the exemption is that e-mail addresses, if obtained by a solicitor, can be used to send advertisements or "spam" to the e-mail addresses. The public necessity statement also provides that these e-mail addresses can be resold to other solicitors, resulting in even more solicitations. As a result, the privacy of individuals who provide their e-mail address to a state agency is invaded.

The bill is effective October 2, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[29] Part II of ch. 501, F.S., is the Deceptive and Unfair Trade Practices Act. The act prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.

B. Public Records/Open Meetings Issues:

Under the requirements of s. 24, Art. I of the State Constitution, a new exemption may only be created by the Legislature.[30] A bill creating an exemption must be provided in general law passed by a two-thirds vote of each house.

Further, s. 24, Art. I of the State Constitution requires that a bill creating an exemption must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."[31] The stated public necessity for the exemption is that e-mail addresses, if obtained by a solicitor, can be used to send advertisements or "spam" to the e-mail addresses. The public necessity statement also provides that these e-mail addresses can be resold to other solicitors, resulting in even more solicitations, thereby invading the privacy of individuals who provide their e-mail address to a state agency.

The bill does not distinguish between the *types of individuals* whose e-mail addresses are protected, i.e., it does not distinguish between private citizens, public employees, and public officials. The work e-mail addresses of public officers and employees are created by an agency, assigned to officers and employees by an agency, and are used in connection with the transaction of official business by the agency officer or employee.[32] Failing to distinguish between the private e-mail addresses of natural persons and the work e-mail of public officers and employees could result in a challenge for overbreadth under s. 24, Art. I of the State Constitution.

Article I, s. 23 of the State Constitution, provides that

> Every *natural person* has the right to be let alone and free from *governmental intrusion* into the person's private life except as otherwise provided herein. This section *shall not be construed to limit the public's right of access to public records and meetings* as provided by law [*emphasis added*].

The right of privacy under the State Constitution is expressly made subject to the right of access to public records and meetings as provided by law. In application, this section functions to limit a claim that personal information that is in a public record should not be released to the public. Further, it should be noted that the state right of privacy applies to natural persons, and that the intrusion that is prohibited is *governmental intrusion.*[33] Nevertheless, this does not preclude the Legislature from finding that protection of the privacy of a natural person is a public necessity that supports an exemption from public records.

Even if the scope of the exemption is narrowed so that the e-mail addresses of only natural persons who are not agency officers or employees, it still may be questionable

[30] *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.*, 766 So.2d 233, 237 (Fla. 4th DCA 2000).
[31] *Ibid*; see also, *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[32] It should also be noted that the e-mail addresses of these officers and employees are likely to be exposed on a daily basis as part of their official duties. Exempt information that is disseminated publicly loses its exempt status.
[33] See, Sparks v. Jay's A.C. & Refrigeration, Inc. M.D. Fla. 1997, 971 F.Supp. 1433.

whether access to an e-mail address is an invasion of privacy. Such an e-mail address may or may not be associated with an identifiable person. E-mail addresses can be created very freely and may in no way identify the user. For example, a person with an interest in stamp collecting could create the following e-mail address: Crazy4Stamps@_____(dot)com. This e-mail address does not identify the addressee. The name, home address, gender and age of the user can not be determined by this e-mail address. As a result, it would appear questionable whether access to this e-mail address invades the user's privacy. All this e-mail address, in and of itself, permits is sending of an electronic message or commercial solicitation to the address. Such a message may be blocked by a spam blocker or deleted if received by the user, much as traditional paper mail solicitations are thrown away. Commercial solicitation through the mail would not appear to be considered an invasion of privacy.

Access to public records is a substantive right.[34] As this bill does not provide for retroactive application of the exemption, it will apply prospectively only.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption could reduce the ability of certain businesses, such as data aggregators, to collect and sell information. As there are multiple methods by which data aggregators obtain personal information, and the extent to which they rely on e-mail addresses obtained by agencies is unknown, the fiscal impact of this exemption is unknown.

C. Government Sector Impact:

Agencies will have to redact e-mail addresses of individuals. The bill does not define the term "individuals." As agency officers and employees are individuals, their e-mail addresses fall within the exemption, which will make it difficult for agency officers or employees to use e-mail. Further, if e-mail address information is co-located with other information that is not exempt, this will result in some limited costs to agencies to redact the exempt information.

[34] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001). In *Memorial Hospital*, the Florida Supreme Court ruled that a statute providing an exemption from open government requirements for meetings and records of private corporations leasing hospitals from public taxing authorities did not apply to records created prior to the effective date of the statute.

VI. Technical Deficiencies:

The bill creates a general exemption for e-mail addresses held by an agency; however, the title (on page 1, line 6) and the statement of public necessity (on page 1, lines 27 and 29, and on page 2, lines 3, 10 and 13), refer to a "state agency." The term "agency" is broader than the term "state agency." Under s. 119.011(2), F.S., "agency" means

> . . . 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.

As the exemption is located in ch. 119, F.S., the broader definition contained in that chapter applies and the references to "state agency" in the title and the public necessity statement are incorrect and should be modified to reflect the applicable definition.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.