

# 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.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/CS/SB 2366

INTRODUCER: Governmental Oversight and Productivity Committee and Judiciary Committee and Senator Argenziano

SUBJECT: Court Files/Public Records

DATE: April 20, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JA</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

Court clerks and county recorders maintain court and official records. Court records include legal case files. Official records include recorded judgments, deeds, mortgages, claims or liens, death certificates, military discharge certificates and maps. These records may contain confidential and exempt information, such as social security numbers (an "SSN"), or exempt information, such as financial account numbers.

Under current law, if an SSN or financial account number is in an official record, the county recorder is authorized, but not required, to permit inspection or copying of that record without redaction of these numbers until January 1, 2007. Any person or their attorney may request that his or her SSN or financial account numbers be redacted from an official record on a publicly available website by delivering to the county recorder a signed, written request identifying the page where these numbers are located. If an SSN or financial account number is in a court file, the clerk is authorized, but not required, to permit inspection or copying of that record without redaction of these numbers until January 1, 2007. Any person or their attorney, however, may request redaction of his or her SSN or financial account numbers from a court file by delivering to the clerk a signed, written request identifying the case name, case number, document heading, and page number. After January 1, 2007, SSNs and financial account numbers must be redacted by the court clerk or county recorder without a request.

This bill:

- Extends the current deadline of January 1, 2007 by one year to January 1, 2008, by which clerks of court must automatically redact social security, bank account, credit, and debit card numbers from court records;
- Provides court clerks with immunity from liability for inadvertent release of social security numbers and financial account numbers in court records;
- Requires court clerks to post notices stating that social security, bank account, credit, and debit card numbers may not be included in court filings unless required by law;
- Requires court clerks to post notices stating that a person may request the redaction of his or her social security, bank account, credit, and debit card numbers from court records;
- Permits the county recorder to continue to allow inspection and copying of official records without redaction of SSNs and financial account numbers until January 1, 2008 unless those official records are accepted or stored in an electronic format; and
- Provides that an automated program to redact equates to “best effort” of a county recorder to redact confidential or exempt information from electronic records.

This bill substantially amends section 119.071, Florida Statutes. The bill also reenacts section 1007.35, Florida Statutes.

## II. Present Situation:

**Public Records** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>4</sup> 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. . . .

Unless specifically exempted, all agency<sup>5</sup> records are available for public inspection. The term “public record” is broadly defined to mean:

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>5</sup> 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 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.<sup>6</sup>

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.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>13</sup>

The Public Records Act<sup>14</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>15</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>16</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>17</sup> If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other

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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.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

<sup>10</sup> *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).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> Art. I, s. 24(c) of the State Constitution.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 119, F.S.

<sup>15</sup> Section 119.07(1)(b), F.S.

<sup>16</sup> Section 119.07(1)(c) and (d), F.S.

<sup>17</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

than to the persons or entities designated in the statute.<sup>18</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

In *Ragsdale v. State*,<sup>20</sup> the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,<sup>21</sup> a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.<sup>22</sup>

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

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<sup>18</sup> *Ibid* at 53, *see also*, Attorney General Opinion 85-62.

<sup>19</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>20</sup> 720 So.2d 203 (Fla. 1998).

<sup>21</sup> 642 So.2d 1135, 1137 (Fla. 4<sup>th</sup> DCA 1994).

<sup>22</sup> *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).

**Court Records** – Article V, s. 1 of the State Constitution vests the judicial power in the Supreme Court, district courts of appeal, circuit courts and county courts. Article V, s. 2 of the State Constitution provides that the Supreme Court must adopt rules for the practice and procedure in all courts. The judicial power has been interpreted to include the power to control court records. “[T]he general rule [is] that ‘[t]he judiciary has the inherent power and duty to maintain its records and to determine the manner of access to those records.’”<sup>23</sup> Nevertheless, the power of the court regarding court access to records is constrained by the requirements Article I, s. 24 of the State Constitution relating to open records.

**Clerks of Court and County Recordors** – Article V, s. 16 of the State Constitution requires a clerk of the circuit court in each county. Article VIII, s. 1 of the State Constitution requires clerks of the circuit court to be elected for each county every four years. When the clerks perform their duties related to court records and administrative court functions, they have been found to be an arm of the judicial branch and subject to oversight and control of the Supreme Court.<sup>24</sup> Clerks of court have custody of court records, which include:

the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings . . . .<sup>25</sup>

Court clerks also serve as county recordors and have custody of official records.<sup>26</sup> Official records maintained by county recordors include recorded judgments, deeds, mortgages, claims of liens, death certificates, certificates of discharge from military service, maps, and other records.<sup>27</sup>

Both court records and official records contain information that is confidential and exempt from disclosure under public records laws. Confidential or exempt information includes social security, bank account, debit, or credit card numbers.<sup>28</sup>

Under current law, on or after October 1, 2002, a person preparing or filing a document to be recorded in the official records by the county recorder may not include any person’s social security number in that document, unless otherwise expressly required by law.<sup>29</sup> If a social security number has been included in a document presented to the county recorder for recording in the official records of the county before, on, or after October 1, 2002, it may be made available as part of the official record available for inspection or copying. Any person has the right to request the county recorder to remove their social security number from an image or copy of an official record placed on a county recorder’s publicly available Internet website or a

<sup>23</sup> *Gombert v. Gombert*, 727 So.2d 355, 357 (Fla. 1<sup>st</sup> DCA 1999)(quoting *Times Publishing Co. v. Ake*, 645 So.2d 1003, 1004 (Fla. 2d DCA), approved, 660 So.2d 255 (Fla. 1995).

<sup>24</sup> *Times Publishing Co. v. Ake*, 645 So.2d 1003 (Fla. 2d DCA), approved 660 So.2d 255 (Fla. 1995).

<sup>25</sup> Rule 2.051(b)(1)(A), Fla. R. Jud. Admin.

<sup>26</sup> Section 28.222, F.S. In Orange County, however, the county comptroller serves as the county recorder.

<sup>27</sup> Sections 28.222, F.S.

<sup>28</sup> Section 119.071(5)(a)7.d. and e., F.S.

<sup>29</sup> Section 119.071(5)(a)7.a., F.S.

publicly available Internet website used by a county recorder to display public records or otherwise made electronically available to the general public. The request must be made in writing, signed by the requester and delivered to the clerk. Further, the request must specify the identification page number that contains the social security number.

Additionally, if a SSN or financial account number is included in a court file, those numbers also may be included as part of the court record available for public inspection and copying until January 1, 2007. Any person or their attorney, however, may request redaction of his or her SSN or financial account numbers from a court file by delivering to the clerk a signed, written request identifying the case name, case number, document heading, and page number.

Beginning on January 1, 2007, however, clerks must redact SSNs and financial account numbers even without a request to redact them.<sup>30</sup> As a result, the clerks will have to review and redact confidential numbers from each document requested by the public before making the document available for inspection and copying. The January 1, 2007 date for redaction was originally January 1, 2006, but was extended by the Legislature in the 2005 session.

According to the Association of Court Clerks and Comptroller (association), the records that may have to be redacted beginning January 1, 2007, are voluminous. Additionally, persons requesting to view documents will have to wait until the clerk has reviewed the document and redacted the confidential information. The association also reports that the amount of time required to review requested documents will be significant.

The Florida Supreme Court created a Committee on Privacy and Court Records (committee) to examine ways to protect the privacy of the public while assuring public access to records.<sup>31</sup> On August 15, 2005, the committee issued its report, which includes 24 recommendations.<sup>32</sup> The committee concluded “that a system which would require all court records to be inspected to redact all [confidential and exempt] information . . . would be exceedingly difficult, if not practically impossible, given . . . the foreseeable resources of the judicial branch.”<sup>33</sup> The committee, however, did not specifically address the requirements under existing law for clerks to begin to redact social security, bank account, debit, and credit card numbers on January 1, 2007. The Supreme Court will accept comments from the public on some of the recommendations of the committee until May 1, 2006.<sup>34</sup>

### III. Effect of Proposed Changes:

This bill revises the law relating to the responsibility of court clerks and county recorders to protect the confidentiality of social security, bank account, credit, and debit card numbers. Existing law requires court clerks and county recorders to redact the confidential numbers from records before making a record available to the public beginning on January 1, 2007.

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<sup>30</sup> Section 119.071(5)(a)7.g., F.S.

<sup>31</sup> *In Re: Committee on Privacy and Court Records*, Administrative Order No. AOSC04-4 (Fla. Feb. 12, 2004).

<sup>32</sup> Committee on Privacy and Court Records, Supreme Court of Florida, *Privacy, Access, and Court Records: Report and Recommendations of the Committee on Privacy and Court Records* (August 15, 2005), available at [http://www.floridasupremecourt.org/pub\\_info/index.shtml#Privacy](http://www.floridasupremecourt.org/pub_info/index.shtml#Privacy).

<sup>33</sup> *Id.* at 33.

<sup>34</sup> Florida Supreme Court, Public Information, at [http://www.floridasupremecourt.org/pub\\_info/index.shtml#Privacy](http://www.floridasupremecourt.org/pub_info/index.shtml#Privacy).

This bill extends the deadline from January 1, 2007 to January 1, 2008, by which clerks of court must automatically redact social security, bank account, credit, and debit card numbers from court records. The bill also provides court clerks with immunity from liability for inadvertent release of confidential and exempt social security numbers, or exempt bank account, debit, charge, or credit card numbers, unknown to the clerk in court records filed with the clerk of the circuit court on or before January 1, 2008.

The bill requires county recorders that store documents electronically to use an automated program to redact confidential numbers. Use of any automated program to redact is equated to using "best efforts" to redact exempt or confidential information.

This bill also provides county recorders with immunity from liability for inadvertent releases of social security numbers, or exempt bank account, debit, charge, or credit card numbers, filed with the county recorder on or before January 1, 2008.

The bill directs court clerks to post notices:

- Informing the public of their rights to request the redaction of social security, bank account, credit, and debit card numbers from court documents; and
- Stating that the inclusion of social security, bank account, credit, and debit card numbers in court documents is prohibited unless required by law.

The bill takes effect July 1, 2006.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

This bill amends custodial requirements for court records and official records. Both court records and official records contain information that the Legislature has made either confidential and exempt, such as social security numbers, or information that is only exempt, such as financial account numbers.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill extends the date for mandatory redaction of social security numbers and financial account numbers to January 1, 2008. Persons who fail to search electronic records of the county recorder and request redaction may find that their social security number and financial account numbers are available.

**C. Government Sector Impact:**

This bill will reduce the cost court clerks and county recorders would have to incur to redact information beginning on January 1, 2007, as required by existing law.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The meaning of the word “immediately” regarding the timing of the posting of the notices is unclear. The Legislature may wish to make the requirements to post notices take effect when the bill becomes a law.

The bill provides that if a county recorder accepts or stores official records in an electronic format, the county recorder must use his or her “best efforts” to redact all social security numbers, bank account, debit, charge, or credit card numbers. The use of “an automated program for redaction” is deemed by the bill to be “the best effort” and to comply with the requirement. The term “an automated program” is not specific and does not contain any standards regarding that program. As such, any automated program, whether of high quality or low, whether it has a high rate of identifying and redacting social security numbers and financial account numbers or whether it has a low rate of identifying and redacting those numbers, is deemed to be a “best effort.”



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## **VIII. Summary of Amendments:**

None.

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

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