

The Florida Senate
PROFESSIONAL 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: Banking and Insurance Committee

BILL: CS/SB 1848

INTRODUCER: Banking and Insurance Committee

SUBJECT: Open Government Sunset Review; Unclaimed Property

DATE: March 13, 2007 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|--------------------|-----------|---------------|
| 1. | <u>Knudson</u> | <u>Deffenbaugh</u> | <u>BI</u> | <u>Fav/CS</u> |
| 2. | _____ | _____ | <u>GO</u> | _____ |
| 3. | _____ | _____ | <u>RC</u> | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill amends and reenacts the public records exemption in s. 717.117(8), F.S., related to reports of unclaimed property. The bill re-enacts the public records exemption for social security numbers and exempts “property identifiers” contained in an unclaimed property report. The bill removes the exemption for financial account numbers, a term that is undefined by statute. Instead, a property identifier—the descriptor used by the property holder to identify the unclaimed property—is exempt under the bill. Representatives from the Bureau of Unclaimed Property indicate that the term “financial account numbers” has been interpreted by the Department of Financial Services to include types of account numbers that are not directly related to finances (such as patient medical records). The bill does not include a reference to bank account numbers, debit, charge, and credit card numbers because an agency has authority to hold such items exempt pursuant to s. 119.071(5)(b), F.S. Because the bill expands the public records exemption, it is subject to repeal on October 1, 2012.

This bill is based on recommendations from Senate Interim Project Report 2007-203 (Open Government Sunset Review of Section 717.117(8), F.S., Unclaimed Property). This section is subject to repeal on October 1, 2007 without legislative action to save it.

This bill substantially amends and reenacts the following section of the Florida Statutes: 717.117.

II. Present Situation:

Public Records Law

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892. In 1992, Florida adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.¹ Article I, s. 24 of the State Constitution, provides that:

(a) Every person 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. . .

The Public Records Act² 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.

Unless specifically exempted, all agency³ records are 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.⁴

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.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ 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.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

¹ Article I, s. 24 of the State Constitution.

² Chapter 119, F.S.

³ 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, or other separate unit of government created or established by law...”

⁴ Section 119.011(11), F.S.

⁵ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁶ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ *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).

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, 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 simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹²

Open Government Sunset Review Act

The Open Government Sunset Review Act¹³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.

The act 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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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 act also 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?

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Art. I, s. 24(c) of the State Constitution.

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.

¹⁴ Section 119.15(4) (b), F.S.

- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, 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?

Unclaimed Property

Generally, all property, real and personal, and every right in property of any nature are subject to escheat to the state. The reversion of such property is based on the presumption that there is no heir to assume the property upon the death of the owner. Abandoned property is also subject to escheat to the state under appropriate statutes. The escheat of abandoned property does not constitute a taking of property without due process of law in violation of the Federal Constitution.¹⁵

Unclaimed property consists of any funds or other property, tangible or intangible that has remained unclaimed by the owner for a certain period of time, (ss. 717.102, 717.1035, F.S.) Savings and checking accounts, money orders, travelers' checks, uncashed payroll or cashiers' checks, stocks, bonds, other securities, insurance policy payments, refunds, security and utility deposits, and contents of safe deposit boxes are all potentially unclaimed property, (s. 717.104 through s. 717.116, F.S.). Holders of unclaimed property, which typically include banks and insurance companies, are required to submit unclaimed property to the Department, (s. 717.119, F.S.). If the property remains unclaimed, all proceeds from abandoned property are then deposited by the Department into the Department of Education School Trust Fund (State School Fund), except for a \$15 million balance that is retained in a separate account (the Unclaimed Property Trust Fund) for the prompt payment of verified claims, (*see; generally*, s. 717.123, F.S.). Approximately \$1.5 billion has been transferred to the Florida Department of Education since the program's inception, including \$267,095,187 transferred to the State School Fund in fiscal year 2005-2006.¹⁶

Florida Disposition of Unclaimed Property Act

The Florida Disposition of Unclaimed Property Act (Chapter 717, F.S.) provides the statutory procedure for the escheat and disposition of presumed abandoned property to the state. The general purpose of the Act is to protect the interest of missing owners of property while the people of the state derive a benefit from the unclaimed and abandoned property until the property is claimed, if ever.¹⁷ The Department of Financial Services administers the Act, through its Bureau of Unclaimed Property. For fiscal year 2005-2006, the Bureau received \$354,695,271 in unclaimed property, and paid \$101,490,902 in claims.

Holders of inactive accounts (presumed unclaimed property) are required to use due diligence to locate apparent owners through at least one search for the owners within 180 days after an account becomes inactive (two years), (s. 171.117(4), F.S.). Once the allowable time period for holding unclaimed property has expired, a holder is required to file a report with the Department by May 1, for all property valued at \$50 or more and presumed unclaimed for the preceding

¹⁵ *Cockrill v. California*, 268 U.S. 258 (1925).

¹⁶ The fiscal year begins on July 1 and ends June 30th the following year.

¹⁷ Section 717.139, F.S.

calendar year. Under the provisions of s. 717.117(1)(a), F.S., the report to the Department generally must contain the name and social security number or federal employer identification number, if known, and the last known address of the apparent owner. The Department must provide information contained in a report of unclaimed property to any person who requests such information within 45 days after the report has been processed and added to the unclaimed property database.

Section 717.118, F.S., places an obligation on the state to notify owners of unclaimed property accounts valued at over \$250, in a cost-effective manner, including through attempts to directly contact the owner. Representatives from the Department indicate that the means used to find lost property owners include social security numbers, direct mailing, Department of Motor Vehicle files and state payroll records, newspaper advertisements, and a state website, www.fltreasurehunt.org, where unclaimed property can be found. The Department is responsible for receiving property, locating the rightful owners, and returning the property (or its value, in cases of sold securities) to them. Once a claim is made through filing a form with the Department, the Department has 90 days to determine the claim, (s. 717.124, F.S.).

Chapter 717, F.S., permits attorneys, Florida-certified public accountants, Florida-licensed private investigators, and Florida-licensed private investigative agencies to register with the Department in order to act as a claimant's representative, acquire ownership or entitlement to unclaimed property, and receive a distribution of fees and costs from the Department.¹⁸ Generally, a claimant's representative attempts to locate the owner of the unclaimed property and offers to assist the owner to recover the property in exchange for a fee. This is done by the exercise of a power-of-attorney agreement between the claimant's representative and the property owner whereby the claimant's representative is authorized to recover the property on behalf of the owner. Generally, the amount that a claimant's representative may charge for fees and costs related to services rendered is limited to 20 percent of the amount of the unclaimed property account held by the department that is being recovered, with total fees not to exceed \$1,000.¹⁹ Claimants' representatives utilize compact discs produced by the Bureau of Unclaimed Property that contain information describing the unclaimed property itself and identifying the owner to assist them in finding the owners of unclaimed property. Social security numbers of unclaimed property owners are included on these compact discs as permitted by the public records exemption in s. 717.117(8), F.S.

Public Records Exemption Under Review: Section 717.117(8), Florida Statutes

The statute specifies that social security numbers and financial account numbers (such as bank account numbers, consumer account numbers, credit card numbers, insurance policy numbers) contained in reports of unclaimed property required under s. 717.117, F.S., are confidential and exempt from public disclosure. The Legislature declared that the public purpose of the exemption for social security numbers and private bank account numbers is "to prevent identity theft and related crimes." The Legislature noted that access to a social security number can provide access "to an individual's personal records, whether such records are financial, educational, medical, or familial in nature." Additionally the exemption is necessary "to prevent

¹⁸ Section 717.1400, F.S.

¹⁹ Section 717.135, F.S. The fee caps do not apply if the property owner lives outside the United States, or if the claimant's representative makes a full disclosure to the property owner that the property is held by the Bureau of Unclaimed Property, and the various ways the Bureau can be contacted.

the use of such information in forged documents demonstrating entitlement to abandoned or unclaimed property and thereby defrauding the rightful property owner or the State School Fund.” However, registered claimants’ representatives are granted access to social security numbers paired with descriptions of unclaimed property for the limited purpose of finding the owners of unclaimed property.

Public Records Exemptions in Section 119.071(5), F.S.

Section 119.071, F.S., contains multiple public record exemptions that apply to each state agency. Section 119.071(5)(a), F.S., provides a public records exemption for social security numbers. Section 119.071(5)(b), F.S., exempts bank account numbers (including debit, charge and credit card numbers) from the public disclosure provisions of s. 119.07(1), F.S., and the requirements from Section 24(a), Article I of the Florida Constitution. The s. 717.117(8), F.S., exemption for social security numbers contained in an unclaimed property report is a stronger exemption than the general exemption for social security numbers. Social security numbers contained in an unclaimed property report may only be released to a registered claimant’s representative. The general exemption in s. 119.071(5)(a), F.S., states that an agency shall not deny access to social security numbers to a commercial entity performing a commercial activity. Commercial activity is defined as “an activity that provides a product or service that is available from a private source.”²⁰

Senate Interim Project Report 2007-203

Senate Interim Project Report 2007-203 (*Open Government Sunset Review of Section 717.117(8), F. S., Unclaimed Property*) reviewed the public records exemption in s. 717.117(8), F.S., for purposes of the Open Government Sunset Review Act. In the interim report, committee staff recommends reenacting the public records exemption, and amending the exemption to define the term financial account numbers, as that term is not defined in statute or rule. Maintaining the exemption is justified because of the personal nature and monetary value of the economic information involved, the revealing of which could be used to make fraudulent unclaimed property claims or be used in identity theft schemes. Additionally, the sunset of the exemption would damage the registration scheme for claimants’ representatives contained in ch. 717, F.S., which attempts to ensure that only specified parties subject to regulation may make unclaimed property claims on behalf of owners and are granted access to social security numbers paired with descriptions of unclaimed property.

III. Effect of Proposed Changes:

Section 1. Amends s. 717.117(8), F.S., to retain the current exemption for social security numbers and revise the exemption for financial account numbers. As revised, the bill exempts a “property identifier,” which is defined as “the descriptor used by the holder to identify the unclaimed property.” Representatives from the Bureau of Unclaimed Property indicate that the term “financial account numbers” has been interpreted to include many different types of account numbers. Representatives from the bureau worked in conjunction with the legislative staff to develop the term “property identifier,” to more accurately describe the information held exempt pursuant to unclaimed property reports. For instance, a medical patient account number or utility account number is more accurately described by the term property identifier, than as a

²⁰ See section 14.203(1)(a), Fla. Statutes.

financial account number. Bank account numbers and debit, charge, and credit card numbers held by an agency will continue to be held exempt pursuant to s. 119.071(5)(b), F.S.

Section 717.117(8), F.S. is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Contains a statement of public necessity that property identifiers contained in reports of unclaimed property be made confidential and exempt from public-records requirements. The exemption is justified because property identifiers could be used to fraudulently obtain unclaimed funds or property. The protection of property identifiers is a public necessity to prevent the use of such information to create false or forged documents that appear to demonstrate entitlement to unclaimed property. Such use defrauds either the rightful property owner, or the State School Fund. Further, the release of property identifiers contained in unclaimed property reports hinders the effective and efficient administration of the unclaimed property program.

Section 3. The act is effective October 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 119.15(6)(b), F.S., provides that:

“...an exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves.”

This bill is the result of an open government sunset review of s. 717.117(8), F.S. See, Interim Project Report 2007-203 by the Committee on Banking and Insurance. In that committee staff report, it was recommended that the exemption should be retained and modified.

A new public records exemption, or an amendment to the exemption that is substantially amended, must stand repealed:

“In the 5th year after enactment of a new exemption or substantial amendment of an existing exemption, the exemption shall be repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.”²¹ “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

²¹ See section 119.15(3), Fla. Statutes.

exemption is not substantially amended if the amendment narrows the scope of the exemption.”²²

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption would protect individuals from potential identity theft, prevent fraudulent claims of unclaimed property, and other misuses of social security numbers and property identifiers related to personal finances and other private information.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²² See section 119.15(4)(b), Fla. Statutes.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
