

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government-The bill creates a public records exemption.

B. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ Today, access to public records is primarily governed by the provisions of ch. 119, F.S. The Florida Supreme Court has noted that the Public Records Act in ch. 119, F.S., 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."²

In 1992, the Florida Constitution was amended to raise statutory access to public records to a constitutional level.³ Article I, section 24 of the Florida Constitution provides that:

(a) Every person⁴ 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 agency⁵ records are available for public inspection. The term "public record" is broadly defined in s. 119.011(11), F.S., 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.

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

¹ Sections 1390, 1391, F.S. (Rev. 1892)

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

³ Article I, s. 24 of the Florida Constitution

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

⁵ Section 119.011(2), F.S., defines agency as 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 private or public agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

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).

The Legislature is the only entity authorized to create exemptions to public records requirements.⁸ Any exemption must be created in general law and must specifically state the public necessity justifying the exemption. The exemption must be no broader than necessary to accomplish the law's stated purpose.⁹ A bill enacting an exemption may not contain another substantive provision, although it may contain multiple exemptions that relate to one subject.¹⁰ A bill creating a public records exemption must be passed by a two-thirds vote of both houses.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential and exempt*.¹² If the Legislature makes a record confidential and exempt, the information may not be released to anyone other than to the persons or entities designated in the statute.¹³ If a record is simply made exempt from disclosure requirements, an agency is required to redact the exempted portion of the record before its release, and the records custodian must state the basis for the exemption.¹⁴

The Open Government Sunset Review Act

Section 119.15, F.S., contains the Open Government Sunset Review Act, which provides for the systematic review of a public records exemption five years after its enactment. By June 1 of each year, 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.

Lifeline

Lifeline is part of the federal Universal Service program¹⁵ and is designed to enable low-income households to afford basic local telephone service. Under the Federal Communications Commission's (FCC) rules, there are four tiers of monthly federal Lifeline support, which are:

- A federal support credit of \$6.50 for the federal subscriber line charge, which is available to all eligible subscribers.
- A federal support credit of \$1.75 is available to all subscribers in states that have approved the credit. Florida has approved this tier of support.
- Federal support of one-half the amount of additional state support up to a maximum of \$1.75 in federal support. Since Florida carriers provide an additional \$3.50 credit to Lifeline customers' bills, Florida subscribers receive a monthly credit of up to \$13.50 (\$6.50 + \$1.75 + \$1.75 + \$3.50). Since Florida does not have a state universal service fund, the \$3.50 state credit is absorbed by the (LEC) providing service.
- An additional credit of up to \$25 per month is available only to eligible subscribers living on tribal lands.¹⁶

In Florida, a customer's eligibility for Lifeline is determined by the customer's enrollment in any one of the following programs:

- Temporary Assistance to Needy Families (TANF)

⁸ Article 1, s. 24(c) of the Florida Constitution

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999).

¹⁰ Article 1, s. 24(c) of the Florida Constitution

¹¹ Article 1, s. 24(c) of the Florida Constitution

¹² *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹³ *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004); see also, Attorney General Opinion 85-65.

¹⁴ Section 119.071, F.S.

¹⁵ In addition to Lifeline for low-income households, the Universal Service program also provides support for communications services to high cost areas, rural health care facilities, and schools and libraries.

¹⁶ Florida Public Service Commission *Report on the Number of Customers Subscribing to Lifeline Service and the Effectiveness of any Procedures to Promote Participation.*, December 2006. (*PSC Lifeline Report*)

- Supplemental Security Income
- Food Stamps
- Medicaid
- Federal Public Housing Assistance (Section 8)
- Low-Income Home Energy Assistance Plan (LIHEAP)
- National School Lunch Program's Free Lunch Program
- Bureau of Indian Affairs Programs.

Additionally, the Office of Public Council (OPC) certifies eligibility for Lifeline on income-based criteria, which, pursuant to s. 364.10(3)(a), F.S., is 135 percent of the federal poverty guidelines.¹⁷

The Public Service Commission (PSC), with its regulatory oversight over telecommunications companies, handles the state's oversight of Lifeline service. The PSC has recently engaged in some initiatives in order to increase Lifeline subscribership in Florida.¹⁸ These initiatives include a simplified certification process and an automated online application process.¹⁹ Despite these efforts and other efforts to make eligible customers aware of the Lifeline program, the participation rate of eligible households was 12.7 percent as of September 2006.²⁰ In an effort to increase this participation rate, the PSC has been working with the Department of Children and Family Services (DCF)²¹ to develop a process where potential customers certified through a DCF program will be placed on a list that is forwarded to the PSC, sorted by telephone company, and forwarded to the appropriate company for enrollment.²² The PSC also has an open docket addressing a petition from OPC and the AARP requesting that the PSC order local exchange telecommunications companies to implement procedures with DCF to automatically enroll eligible customers in the Lifeline program.²³

There is also pending Legislation addressing automatic enrollment in Lifeline.²⁴ In general, these measures would amend s. 364.10(3), F.S., to provide for automatic enrollment in Lifeline for customers who are determined eligible by a state agency. Each proposed measure provides that the agency must include an option for an eligible customer to choose not to subscribe to Lifeline services, and that the PSC is required to adopt rules, as necessary, to create procedures to automatically enroll eligible customers in Lifeline service. Under these bills, the PSC, DCF, and OPC would be required to enter into a memorandum of understanding establishing their respective duties with respect to automatic enrollment.

Treatment of Personal Identifying Information for Lifeline Participants

Currently, customers who wish to participate in Lifeline based on their participation in a qualifying public assistance program must complete a certification form identifying the qualifying program(s) in which they participate. These applicants must also provide their name, address, telephone number, service provider, and the last four digits of their social security number. The certification form expressly informs applicants that, while their social security numbers are exempt from public disclosure under s. 119.071(5), F.S., the other personal identifying information provided on the application may be subject to disclosure under a public records request.

¹⁷ The household income level for a family of four for the 135 percent threshold would be \$27,878. Office of Public Counsel website: <http://www.floridaopc.gov/lifeline.cfm> (April 5, 2007).

¹⁸ Detailed information concerning the PSC's Lifeline Outreach can be obtained from the *PSC Lifeline Report*

¹⁹ The Florida Public Service Commission's Lifeline Information is available at <http://www.floridapsc.com/>.

²⁰ *PSC Lifeline Report*, p. 11. It should be noted that the automated online application process was not launched until October 2006.

²¹ DCF is the only state agency in Florida currently determining eligibility for programs that create automatic eligibility for Lifeline service.

²² *PSC Lifeline Report*

²³ *PSC Lifeline Report*; PSC Docket No. 060677-TL.

²⁴ See CS/CS/HB 529, relating to the Regulation of Communications Media Technology Services; CS/SB 998, relating to Cable TV/Video Service Franchises; HB 1565, Relating to Lifeline Telecommunications Service; SB 2638, relating to Lifeline Telecommunications Services; and SB 2908, relating to Lifeline Telecommunications Service.

Under the automatic enrollment process contemplated in the pending Legislation, if a state agency determines that a person is eligible for Lifeline service, the agency must act immediately to ensure that the person is automatically enrolled in the Lifeline program with the appropriate telecommunications carrier, unless that person specifically opts not to be enrolled in Lifeline. This process will likely require the state agency to release personal identifying information either directly to the telecommunications carrier or to the PSC to be forwarded to the appropriate carrier.²⁵ Under either scenario, this personal identifying information may become subject to disclosure as a public record.

The PSC is concerned that under both the current "opt-in" enrollment process and the proposed "opt-out" automatic enrollment process, the potential public disclosure of personal identifying information may have a chilling effect on enrollment in the Lifeline program. Further, to the extent that a state agency administering a qualifying public assistance program is required to ensure the confidentiality of its clients' personal identifying information, the potential public disclosure of such information may hinder the effective administration of an automatic enrollment process.

Effect of Proposed Changes

The bill creates s. 364.107, F.S., creating a public records exemption for the Lifeline Assistance Plan. Subsection (1) provides that personal identifying information of a participant of a telecommunications carrier's Lifeline Assistance Plan held by the PSC shall be held confidential and exempt from public records laws.²⁶ Subsection (2) permits this confidential and exempt information to be released to the applicable telecommunications carrier for purposes directly connected with Lifeline eligibility, verification, and auditing.

Subsection (3) provides that any officer or employee of a telecommunications carrier shall not intentionally disclose this confidential and exempt information, except as:

- Authorized by the customer;
- Necessary for billing purposes;
- Required by subpoena, court order, or other process of court;
- Otherwise authorized by law.

This section does not preclude a telecommunications carrier from disclosing this confidential and exempt information to the extent it is otherwise publicly available. The telecommunications carrier may also provide a customer his or her own customer account record through telephonic means.

Any officer or employee of a telecommunications company who intentionally discloses information in violation of subsection (3) commits a misdemeanor of the second degree, which is punishable as provided in ss. 775.082 and 775.083, F.S.

Subsection (4) provides that this section is subject to the Open Government Sunset Review Act and shall be repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

Statement of Public Necessity

²⁵ Personal identifying information for persons enrolled in a public assistance program is often maintained as confidential by the state agency administering the program.

²⁶ Section 119.07(1), F.S., and Art. 1 s. 24(a) of the Florida Constitution.

The bill provides a statement of public necessity. The statement provides that the Legislature finds that it is a public necessity that personal identifying information of a participant in a Lifeline Assistance Plan held by the PSC be made confidential and exempt from s. 119.07(1), F.S, and s. 24(a), Art. I of the State Constitution.

The statement provides that the Lifeline program provides assistance to qualified, low-income households by providing a credit on their local telephone bill, and allowing them to receive this credit permits them to maintain local telephone service. The statement continues that Lifeline participation has remained at approximately 12 percent of eligible Florida households, despite extensive efforts to make eligible citizens aware of the program.

The statement continues that protecting the personal identifying information of applications for or recipients of Lifeline will encourage qualified citizens to apply. Additionally, the PSC must be able to maintain the confidentiality of that information because disclosure could create a chilling effect on participation. This statement provides that potential participants may not choose to avail themselves of the program because the information submitted would identify them as recipients of low-income program benefits. Finally, the statement indicates that without the exemption the effective and efficient administration of a government program would be hindered.

C. SECTION DIRECTORY:

Section 1 Creates s. 364.107, F.S., creating a public records exemption for personal identifying information of Lifeline program participants.

Section 2 Provides a statement of public necessity.

Section 3 Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The PSC has indicated that any expenditures can be handled with existing agency resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The confidentiality of personal identifying information may encourage more eligible consumers to apply for and obtain Lifeline telecommunications service, saving these consumers money.

Telecommunications companies will absorb a credit of \$3.50 per month for each additional Lifeline subscriber who enrolls in the program.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of state tax shared with cities or counties.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meeting exemption. The bill creates a public records exemption. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity for a newly created public records or public meetings exemption. The bill creates a public records exemption. The bill includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Not applicable.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.