

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL 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: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: SPB 7040

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Agency Employees

DATE: February 11, 2009      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson		<b>Pre-meeting</b>
2.				
3.				
4.				
5.				
6.				

**I. Summary:**

The bill provides that state employee SSNs held by employing agencies are both confidential and exempt, provides specific circumstances for their release, specifies the date by which this exemption will be repealed unless reenacted, and provides that creating the exemption is a public necessity.

This bill substantially amends section 119.071 of the Florida Statutes.

**II. Present Situation:**

**Public Records** -The Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24(a) of the State Constitution, provides that:

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. . . .

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

<sup>2</sup> Article I, s. 24 of the State Constitution.

The Public Records Act<sup>3</sup> specifies conditions under which access must be provided to agency<sup>4</sup> records. Every person who has custody of a public record must permit it to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the records custodian.<sup>5</sup> 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.<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> Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.<sup>8</sup>

Only the Legislature is authorized to create exemptions.<sup>9</sup> An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.<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>

The Open Government Sunset Review Act<sup>13</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of exemptions. By June 1, the Division of Statutory Revision of the Office of Legislative Services must 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.

Under the act, 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.

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<sup>3</sup> Chapter 119, F.S.

<sup>4</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 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.

<sup>5</sup> Section 119.071(1)(a), F.S.

<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> Section 119.15, F.S.

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.<sup>14</sup>

While the standards in the act may appear to limit the Legislature in the review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit it because one session of the Legislature cannot bind another.<sup>15</sup> The Legislature is only limited in its review by constitutional requirements.

Further, s. 119.15(8), 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.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates 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.

The Open Government Sunset Review Act provides for the review and repeal of public records exemptions in the 5th year after their enactment.<sup>16</sup> By letter dated, May 19, 2008, the Division of Statutory Revision of the Office of Legislative Services certified that s. 119.071(4)(a)2., F.S., was subject to repeal October 2, 2009, unless reenacted during the 2009 legislative session.

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<sup>14</sup> Section 119.15(6)(b), F.S.

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

<sup>16</sup> Section 1390, 1391 F.S. (Rev. 1892).

**Social Security Numbers of Current or Former Agency Employees - Section 119.071(4)(a)1., F.S.,** exempts social security numbers (SSNs) of current or former agency employees in agency *employment* records. The term “agency employment records” is not defined by the section.

The SSNs of agency employees may be held by the employing agency and other agencies for a variety of purposes that are not related to employment. Those employee SSNs are still protected under the general exemption for SSNs,<sup>17</sup> which makes all SSNs confidential and exempt, the highest level of protection. The general exemption also contains a limited exception which grants access to a commercial entity<sup>18</sup> that is performing a “commercial activity,” which is defined to mean “. . . the provision of a lawful product or service by a commercial entity . . . .”<sup>19</sup> Under the exception, a commercial entity must submit a written request for access which must: (1) be verified as provided in s. 92.525, F.S.;<sup>20</sup> (2) be legibly signed by an authorized officer, employee, or agent of the commercial entity; (3) contain the commercial entity’s name, business mailing and location addresses, and business telephone number; and (4) contain a statement of the specific purposes for which it needs the social security numbers and how the social security numbers will be used in the performance of a commercial activity. Any person who makes a false representation in order to obtain a social security number under the provision or who willingly and knowingly violates it commits a felony of the third degree.

The exemption in s.119.071(4)(a)2., F.S., modifies the limited exception to the general exemption by authorizing an employee of one agency to notify another agency in writing that his or her SSN must be protected at the agency being notified. Upon provision of this notice, if that agency receives a request for the SSN from a commercial entity, the commercial entity will not receive that employee’s entire SSN but only the last four digits of the SSN.<sup>21</sup> If the SSN is in a lien filed with the Department of State, however, then the agency must release the entire number.

### III. Effect of Proposed Changes:

The bill amends s. 119.071(4), F.S., to make the social security numbers of current and former agency employees *confidential* and exempt from public records disclosure, raising the standard from merely *exempt*, and specifies circumstances under which an employing agency may disclose the SSN of a current or former employee, as follows:

<sup>17</sup> Section 119.071(5), F.S.

<sup>18</sup> Section 119.071(5)(a)7.a.(II), F.S., defines “commercial entity” to mean “. . . any corporation, partnership, limited partnership, proprietorship, sole proprietorship, firm, enterprise, franchise, or association that performs a commercial activity in this state.”

<sup>19</sup> Commercial activity includes verification of the accuracy of personal information received by a commercial entity in the normal course of its business; use for insurance purposes; use in identifying and preventing fraud; use in matching, verifying, or retrieving information; and use in research activities. It does not include the display or bulk sale of social security numbers to the public or the distribution of such numbers to any customer that is not identifiable by the commercial entity. In addition to the limited commercial exemption, the section permits disclosure of SSNs to another agency or governmental entity if necessary for the receiving entity to perform its duties and responsibilities.

<sup>20</sup> Section 92.525, F.S., provides for verification of documents. The penalty for perjury by false written declaration is a felony of the third degree.

<sup>21</sup> The SSN is divided into three parts. The area numbers (the first three numbers of a SSN) reflect the state in which the number was issued. The group numbers (the middle two numbers) indicate the order in which the SSN was issued in each area. The serial numbers (the last four numbers) are randomly generated.

- The disclosure of the social security number is expressly required by state law, federal law, or a court order.
- The disclosure of the social security number is necessary for the receiving agency or entity to perform its duties and responsibilities.
- The individual expressly consents in writing to the disclosure of the individual's social security number.
- The disclosure of the social security number is made in order to comply with the USA Patriot Act of 2001, Pub. L. No. 107-56, Presidential Executive Order 13224.
- The disclosure is made to a commercial entity for the permissible uses set forth in the Drivers Privacy Protection Act, 18 U.S.C. 2721 et seq., the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., or the Financial Modernization Act of 1999, 15 U.S.C. 6801 et seq., or for verification of the accuracy of personal information received by a commercial entity in the normal course of its business, if the authorized commercial entity complies with the requirements of that paragraph.
- The disclosure of the social security number is for the purpose of the administration of a state agency employee's or the state agency employee's dependent's health benefits.
- The disclosure of the social security number is for the purpose of the administration of a pension fund administered for the public employees' retirement fund, a deferred compensation plan, or defined contribution plan.
- The disclosure of the social security number is for the purpose of the administration of the Uniform Commercial Code by the office of the Secretary of State.

Current or former employees may file a written notice with non-employing agencies to notify them that the individual's SSN is protected as confidential and exempt, and the non-employing agency must maintain that status, except in the circumstances provided above.

The bill amends s. 119.071(5), F.S., to require that an agency may not collect a SSN unless the agency identifies in writing the specific state or federal law governing the collection, use, and release of the SSN for each purpose for which the agency collects the SSN. The notice must also state whether collection of the SSN is mandatory under state or federal law.

The bill also provides that SSNs held by any agency may be disclosed only for the same reasons an employing agency may disclose them, as described above. The bill provides a more specific definition of "commercial activity," by tying it to federal law, to clarify when SSNs may be released to a commercial entity for commercial activity.

The bill also contains the public necessity statement required by Article I, s. 24(c) of the State Constitution.

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

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

None.

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

The bill provides that state employee SSNs held by employing agencies are both confidential and exempt, provides specific circumstances for their release, specifies the date by which this exemption will be repealed unless reenacted, and provides that creating the exemption is a public necessity.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Unknown.

**C. Government Sector Impact:**

Unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.