

**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.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: PCS/SB 2072 (413866)

INTRODUCER: Banking and Insurance Committee

SUBJECT: Public Records/Debt Relief Organizations/OFR

DATE: February 20, 2010      REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------|----------------|-----------|--------------------|
| 1. | Johnson | Burgess        | BI        | <b>Pre-meeting</b> |
| 2. | _____   | _____          | GO        | _____              |
| 3. | _____   | _____          | GA        | _____              |
| 4. | _____   | _____          | RC        | _____              |
| 5. | _____   | _____          | _____     | _____              |
| 6. | _____   | _____          | _____     | _____              |

**I. Summary:**

The Proposed Committee Substitute for SB 2072 creates a public records exemption for information held by the Office of Financial Regulation (OFR) in connection with investigations of debt relief organizations under part II of ch. 559, F.S. In general, such information would remain confidential and exempt from s. 119.07(1), F.S., and s. 24 (a), Art. I of the State Constitution until the investigation was completed or ceased to be active. However, such information would remain confidential and exempt after the investigation was completed or ceased to be active to the extent disclosure would:

- Jeopardize the integrity of another active investigation;
- Disclose the identity of a confidential source;
- Disclose investigative techniques or procedures;
- Reveal a trade secret, as defined in s. 688.002, F.S.; or
- Reveal the personal identifying information or personal financial information of a consumer unless the consumer is also the complainant. In the case of a complainant, the personal identifying information is subject to disclosure after the investigation is completed or ceases to be active.

The bill provides that the public records exemption is necessary to protect the integrity of an ongoing investigation, investigative techniques of the OFR, the identity of a confidential source, a person reporting alleged violations to the OFR, and trade secrets of a business.

A related bill, Senate Bill 1702, provides regulatory and enforcement authority for the Office of Financial Regulation to regulate debt relief organizations, including investigations of such agencies.

This bill creates the following section of the Florida Statutes: 559.1155.

## II. Present Situation:

### Background on Florida's Public Records Laws

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

Every person<sup>3</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...

The Public Records Act<sup>4</sup> specifies conditions under which access must be provided to agency<sup>5</sup> records. Unless specifically exempted, all agency 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.<sup>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended 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>

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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.

<sup>3</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>4</sup> Chapter 119, F.S.

<sup>5</sup> The word "agency" is defined in s. 119.011(2), 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."

<sup>6</sup> Section 119.011(12), 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).

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>

The Open Government Sunset Review Act<sup>11</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth 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 Public Records Act, an exemption may be created, revised, or maintained 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:

1. 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;
2. If 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
3. If the exemption 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>12</sup>

### **Oversight of Debt Relief Organizations**

In the last few years, an increasing number of disreputable companies have been capitalizing on the current economic turmoil and credit troubles of consumers. Some consumers are unable to pay their credit card obligations due to the loss of a job, overspending, divorce, or family illness and are often the subject of harassment and abuse by unethical debt collectors. Often, this pressure entices consumers to choose proffered solutions that are too good to be true. Unscrupulous entities target such consumers by engaging in deceptive and misleading marketing practices (e.g., promising the cancellation of debts for pennies on the dollar or avoiding bankruptcy) or charging egregious fees for services that are never provided.

Florida laws provide consumer protection and oversight of debt relief services (credit counseling and debt management services) under part IV, ch. 817, F.S., and part II of ch. 501, F.S. However,

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<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> Section 119.15, F.S.

<sup>12</sup> Section 119.15(6)(b), F.S.

Florida law does not assign any specific state agency with the duty of enforcing the laws governing credit counseling agencies and debt management services. However, the Department of Legal Affairs and state attorneys do protect consumers from the entities that employ unfair methods of competition or unconscionable, deceptive, and unfair practices by using several enforcement tools. In Florida, credit counseling agencies are organizations providing credit counseling services or debt management services.<sup>13</sup> The term “credit counseling services” means money management, debt reduction, and financial educational services. “Debt management services” generally means services provided for a fee to adjust or discharge the indebtedness of the debtor.<sup>14</sup> Part IV of ch. 817, F.S., prescribes fee caps, disclosures, financial reporting, and prohibited acts. A violation of any provision of part IV of ch. 817, F.S., is an unfair or deceptive trade practice under the Florida Deceptive and Unfair Trade Practices Act.<sup>15</sup>

Another bill, Senate Bill 1702, would create greater regulatory and enforcement authority by requiring entities to be registered with the OFR, authorizing the OFR to access books and records during the course of investigating a complaint, and establishing significant administrative penalties for noncompliance with the statutory provisions.

### III. Effect of Proposed Changes:

**Section 1** creates s. 559.1155, relating to the investigation of debt relief organizations that would be regulated under part I of ch. 559, F.S. This section provides that information held by the OFR is confidential and exempt from s. 119.07(1), F.S., and s. 24 (a), Art. I of the State Constitution until the investigation is completed or ceases to be active, except as otherwise provided in this section.

An investigation would be considered to be active if the OFR, law enforcement or administrative agency was proceeding with reasonable dispatch and had a good faith belief that the investigation might lead to the filing of an administrative, civil, or criminal proceeding. The OFR is authorized to provide such confidential and exempt information to a law enforcement or administrative agency or regulatory organization in the furtherance of its duties. These entities would be required to maintain the confidentiality and exempt status of information provided by the OFR as long as such information would otherwise be confidential or exempt from disclosure.

Documents compiled during an investigation would remain confidential and exempt from s. 119.07(1), F.S., and s. 24 (a), Art. I of the State Constitution after the investigation or examination was completed or ceased to be active if disclosure would:

- Jeopardize the integrity of another active investigation;
- Disclose the identity of a confidential source;
- Disclose investigative techniques or procedures;
- Reveal a trade secret, as defined in s. 688.002, F.S.; or
- Reveal the personal identifying information or personal financial information of a consumer unless the consumer is also the complainant. In the case of a complainant, the personal

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<sup>13</sup> Part IV, ch.817, F.S.

<sup>14</sup> Section 817.801, F.S.

<sup>15</sup> Part II, ch. 501, F.S.

identifying information is subject to disclosure after the investigation is completed or ceases to be active.

The section also provides that this section is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S, and will stand repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2** states the public necessity for exempting from public disclosure certain information relating to an active investigation by the OFR. The section provides that the premature release of such information prior to the completion of an investigation could jeopardize the integrity of the investigation. The section provides that the release of investigative techniques and procedures could allow a person to conceal violations of law that would otherwise have been discovered. The section also provides that the release of information identifying a confidential source could jeopardize both the integrity of a current and future investigation as well as the safety of the confidential source. The release of a consumer's personal financial information could cause unwarranted damage to the reputation of the individual. The release of a trade secret of a business could result in economic loss to the entity and place the business at a competitive disadvantage.

**Section 3** provides that this act will take effect on October 1, 2010, if Senate Bill 1702, or substantially similar legislation, is adopted in the same legislative session or an extension thereof and becomes law.

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

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

None.

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

###### **Vote Requirement**

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

###### **Subject Requirement**

Section 24(c), Art. I of the State Constitution require the Legislature to create public records or public meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

###### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created public record or public meeting exemption. This bill complies with that requirement.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**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.