

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 7135      PCB IBS 13-03      Pub. Rec./Money Services Businesses

**SPONSOR(S):** State Affairs Committee, Insurance & Banking Subcommittee, Nelson

**TIED BILLS:** CS/HB 217      **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee	13 Y, 0 N	Bauer	Cooper
1) State Affairs Committee	14 Y, 0 N, As CS	Williamson	Camechis
2) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

House Bill 217 authorizes the Office of Financial Regulation (OFR) to implement a centralized statewide database to gather transactional data from check cashers for checks exceeding \$1,000, corporate payment instruments, and third-party payment instruments. The centralization of the data will allow regulators and law enforcement to effectively target individuals who are engaging in criminal activity. In addition, the centralization of the data also will allow information to be compared on a statewide basis.

This bill, which is linked to the passage of House Bill 217, creates a public records exemption for certain information contained in the payment instrument transaction database. This exemption specifically provides that payment instrument transaction information held by OFR, which identifies a licensee, payor, payee, or conductor is confidential and exempt from public records requirements. The bill also authorizes OFR to enter into information-sharing agreements with the Department of Financial Services, law enforcement agencies, and other governmental agencies in certain circumstances, and requires those agencies to maintain the confidentiality of the information, except as otherwise required by court order.

The bill provides for repeal of the section on October 2, 2018, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act. As this bill creates a new public records exemption, it also provides a statement of public necessity as required by the State Constitution.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records Law

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida 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. 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>2</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>3</sup> 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public 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>4</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>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements. 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

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

<sup>2</sup> Chapter 119, F.S.

<sup>3</sup> Section 119.011(2), F.S., defines the term "agency" 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>4</sup> Section 119.011(12), F.S.

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

<sup>6</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

purpose of the law.<sup>7</sup> A bill enacting an exemption<sup>8</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

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.<sup>9</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>10</sup>

#### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>11</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from public records or public meetings requirements.

The Act states that an exemption may be created, revised, 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.<sup>12</sup> 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 exemption meets the three statutory criteria if it:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual under this provision.
- 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>13</sup>

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.<sup>14</sup> The Legislature is only limited in its review process by constitutional requirements.

#### House Bill 217: Payment Instrument Transaction Database

House Bill 217 (2013) authorizes the Office of Financial Regulation (OFR) to implement a centralized statewide database to gather transactional data from check cashers for checks exceeding \$1,000, corporate payment instruments, and third-party payment instruments.

Implementation of the database is aimed at targeting workers' compensation insurance fraud. In many scenarios, contractors and check cashiers have colluded on a scheme that allows contractors to hide their payroll and obtain workers' compensation coverage without purchasing such coverage. In addition to the workers' compensation fraud, these contractors are avoiding the payment of state and federal taxes. For their participation and risk, check cashers may receive a fee of seven percent of the value of the check or more for cashing the checks – which exceeds the statutory limit check cashers are allowed to charge.<sup>15</sup>

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<sup>7</sup> Section 24(c), Art. I of the State Constitution.

<sup>8</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>9</sup> Florida Attorney General Opinion 85-62.

<sup>10</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>11</sup> Section 119.15, F.S.

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

<sup>13</sup> *Id.*

<sup>14</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

<sup>15</sup> See Bill Analysis for HB 217, Insurance and Banking Subcommittee, 2013 Regular Session.

The centralization of the data will allow regulators and law enforcement to effectively target individuals who are engaging in criminal activity. In addition, the centralization of the data will also allow information to be compared on a statewide basis. With the creation of a statewide database, the database would also include personal financial information of those utilizing check cashing services and private business transaction information that is traditionally private.

### **Effect of the Bill**

This bill, which is linked to the passage of House Bill 217, creates a public record exemption for certain payment instrument transaction information held by OFR. Specifically, payment instrument transaction information held by OFR pursuant to the check cashing requirements of s. 560.310, F.S., which identifies a licensee, payor, payee, or conductor is confidential and exempt from public records requirements.

A licensee may access information that it submits to OFR for inclusion in the database. In addition, the bill authorizes OFR to enter into agreements with the Department of Financial Services, law enforcement agencies, and other governmental agencies in order to share confidential and exempt information contained in the database for purposes of detecting and deterring financial crimes and workers' compensation violations. Agencies receiving the confidential and exempt information must maintain the confidentiality of that information, unless a court order compels production of the information.

The bill provides that the section is subject to the Open Sunset Review Act and stands repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

#### **B. SECTION DIRECTORY:**

**Section 1** creates s. 560.312, F.S., providing an exemption from public records requirements for payment instrument transaction information held by OFR; providing for specified access to such information; authorizing OFR to enter into information-sharing agreements and providing access to information contained in the database to certain governmental agencies; requiring a department or agency that receives confidential information to maintain the confidentiality of the information, except as otherwise required by court order; providing for future review and repeal of the exemption.

**Section 2** provides a statement of public necessity as required by the State Constitution.

**Section 3** provides a contingent effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may benefit the private sector. By making the identities of payees and customers confidential, personal financial information will be protected. Similarly, by making the identities of payors and licensees confidential, business information will be protected.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on OFR, because staff responsible for complying with public records requests could require training related to the public records exemption. In addition, OFR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the office.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement and Public Necessity Statement for Public Records Bills

In order to pass a newly-created or expanded public records or public meetings exemption, Article I, s. 24 of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 9, 2013, the State Affairs Committee adopted an amendment and reported House Bill 7135 favorably with committee substitute. The committee substitute provides that the entire section is subject to the Open Government Sunset Review Act, instead of the exemption only.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.