

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 292

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Hays

SUBJECT: Public Records/Prepaid Wireless E911 Fee

DATE: March 6, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Caldwell	CU	Favorable
2.	Kim	McVaney	GO	Fav/CS
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 292 expands an existing public records exemption for information contained in tax returns, reports, and other documents that retail sellers of wireless communications services and devices provide to the Department of Revenue when remitting prepaid wireless E911 fees collected from customers. This bill makes proprietary confidential business information provided to the E911 Board of Directors, the Technology Program within the Department of Management Services, or to the Department of Revenue as agent of the E911 Board, confidential and exempt from public disclosure.

The exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2019, unless reviewed and reenacted by the Legislature. The bill contains a public necessity statement as required by the Florida Constitution. Because this bill expands a public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

II. Present Situation:

Florida's Public Records Law

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹¹ The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹²

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean 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 public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. 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 (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

Taxpayer Records Provided to the Department of Revenue

The Department of Revenue is currently not authorized to share information with the E911 Board, nor is the Department of Revenue authorized to share information related to E911 revenue with the Department of Management Services.¹³

Proprietary Confidential Business Information submitted to the E911 Board or the Technology Program

Section 365.174, F.S. provides that the proprietary confidential business information submitted by a provider to the E911 Board or to the Technology Program within the Department of Management Services is confidential and exempt from public disclosure.¹⁴ This section also provides that propriety confidential business information includes information about customers, usage and capacity data, technological information and trade secrets.

III. Effect of Proposed Changes:

Pursuant to s. 365.172(8), F.S., communications service providers collect E911 fees from customers who remit monthly payments and, in turn, remit those fees to the E911 Board. Until July 1, 2013, E911 fees were not assessed on or collected if an end user's service was a prepaid calling arrangement which included prepaid calling cards and prepaid wireless services sold by retailers.¹⁵ At issue was the complexity of collecting and remitting E911 fees by retailers who were not communications service providers. SB 294, the substantive bill related to this bill, creates a mechanism for collection of the E911 fees from retailers. This bill makes the information that is submitted to the Department of Revenue confidential and exempt from public record disclosure and allows the Department of Revenue, the E911 Board, and the Technology Program within the Department of Management Services to share those records.

Section 1 provides that all proprietary confidential business information submitted by a provider to the E911 Board, to the Technology Program within the Department of Management Services, or to the Department of Revenue as an agent of the E911 Board is confidential and exempt from public disclosure. This section provides that the exemption stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature through the Open Government Sunset Review Act.

Section 2 provides the legislative finding of public necessity that the disclosure of any confidential proprietary business information contained in returns, reports, accounts, or declarations received by the Department of Revenue or submitted to the E911 Board, the Technology Program within the Department of Management Services, or the Department of Revenue as an agent of the Board would adversely affect the business interests of prepaid wireless service providers or sellers who provide the information by harming them in the market

¹³ Section 213.053(8)(q), F.S., provides that the Department of Revenue is limited to providing information related to ss 175.111 and 185.09, F.S. to the Department of Management Services.

¹⁴ Section 365.174(1) provides that statistical abstracts that do not contain information which identifies subscribers or revenue attributable to a provider can be released.

¹⁵ S. 365.172(8)(a)3.

place and impair competition in the communications industry.¹⁶ The public necessity statement also provides that the disclosure of data that reveals the business interests of prepaid wireless service providers or sellers creates a competitive disadvantage and an unfair advantage for their competitors who can use the information to impair full and fair competition and impede competition in the wireless marketplace to the disadvantage of consumers of wireless service. Finally, the public necessity statement provides that the public and private harm resulting in the disclosure of the information significantly outweighs any public benefit derived from the disclosure and ability of the public to scrutinize or monitor agency action is not diminished by nondisclosure of the information.

Section 3 provides that the bill is effective at the same time that SB 294, or similar legislation, takes effect.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution provides that only the Legislature may create an exemption to the right of access to public records.¹⁷ Such an exemption must be created by general law, be passed by a two-thirds vote of each house of the Legislature, provide a statement of public necessity, and be as narrowly drafted as possible to accomplish the stated public necessity.¹⁸

Because this bill expands an existing public records exemption,¹⁹ it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage. This bill includes a public necessity statement and is narrowly tailored.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁶ Article I, Section 24(c) of the Florida Constitution requires that when a new public records exemption is enacted, a public necessity statement justifying the exemption must be included.

¹⁷ Art. I, s. 24(c) of the State Constitution.

¹⁸ *Id.*

¹⁹ S. 365.174, F.S.

B. Private Sector Impact:

Prepaid wireless providers and sellers may be more willing to provide proprietary confidential business information to the Department of Revenue, the E911 Board, and the Technology Program within the Department of Management Services with the exemption in place.

C. Government Sector Impact:

The ability of the Department of Revenue, the E911 Board, or the Technology Program within the Department of Management Services to share confidential information may improve effectiveness and efficiency in the administration of the prepaid wireless E911 fees.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 365.174 of the Florida Statutes.

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

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

CS by Governmental Oversight and Accountability on March 6, 2014:

The CS removes a redundant public records exemption expansion for the Department of Revenue under s. 213.053, F.S. The CS also inserts a missing bill number so that CS/SB 292 will take effect at the same time as SB 294.

B. Amendments:

None.