

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 415 Pub. Rec./Investigations and Examinations by the Office of Financial Regulation

**SPONSOR(S):** Government Operations Subcommittee; Insurance & Banking Subcommittee; Santiago

**TIED BILLS:** CS/HB 413 **IDEN./SIM. BILLS:** CS/SB 1002

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Government Operations Subcommittee	12 Y, 0 N, As CS	Williamson	Williamson
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

House Bill 413 strengthens the Office of Financial Regulation's (OFR) registration, examination, and investigation authority over consumer collection agencies; however, OFR has no authority to withhold from public disclosure any information relating to consumer complaints, investigations, examinations, and registrations. House Bill 413 also authorizes OFR to conduct joint or concurrent examinations with other state or federal regulatory agencies and to share examination materials.

This bill, which is linked to the passage of House Bill 413, creates a public records exemption for certain information held by OFR relating to investigations and examinations of consumer collection agencies. Information relative to an investigation or examination by OFR is confidential and exempt from public records requirements while the investigation or examination is active. For purposes of the public record exemption, "active" means OFR or a law enforcement or administrative agency is proceeding with reasonable dispatch and has a reasonable good faith belief that the case may lead to the filing of an administrative, civil, or criminal proceeding or to the denial or conditional grant of a registration. Once the investigation or examination is no longer active, a consumer complaint and other information relative to an investigation or examination remain confidential and exempt under specified conditions.

The bill also allows OFR to share confidential and exempt information with law enforcement and administrative agencies.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. 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 record or public meeting exemption. The bill creates a new public record 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

The State of Florida has a long history of providing public access to government 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.<sup>2</sup> Article I, s. 24(a) of the State Constitution states:

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>3</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>4</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:

[A]ll 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>5</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>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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

<sup>2</sup> Fla. Const. art. I, s. 24.

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

<sup>4</sup> The term "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 State 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. *See supra* fn. 2.

<sup>5</sup> Section 119.011(12), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

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>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> 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 purpose of the law.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

#### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act provide 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>15</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>16</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>17</sup> The Legislature is only limited in its review process by constitutional requirements.

#### Regulation of Consumer Collection Agencies and Debt Collectors

Part VI of ch. 559, F.S., regulates consumer collection agencies and protects consumers from certain debt collection practices that involve fraud, harassment, threats, and other unscrupulous activities. These collection agencies are required to comply with certain registration requirements administered by the Office of Financial Regulation (OFR). Part VI of ch. 559, F.S., provides penalties for noncompliance with certain statutory requirements.

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

<sup>9</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>12</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>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

## House Bill 413 (2014)

House Bill 413 strengthens OFR's registration, examination, and investigation authority over consumer collection agencies; however, OFR has no authority to withhold from public disclosure any information relating to consumer complaints, investigations, examinations, and registrations, except that which is specifically provided in ch. 119, F.S. (such as social security numbers and bank account numbers).<sup>18</sup>

House Bill 413 also authorizes OFR to conduct joint or concurrent examinations with other state or federal regulatory agencies and to share examination materials.

### **Effect of the Bill**

This bill, which is linked to the passage of House Bill 413, creates a public records exemption for certain investigative and examination information relating to consumer collection agencies and held by OFR under part VI of ch. 559, F.S. Such information is confidential and exempt from the public-records requirements of s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution until the investigation or examination is completed or ceases to be active. However, the information remains confidential and exempt after the investigation or examination is completed or ceases to be active if disclosure would:

- Jeopardize the integrity of another active investigation or examination;
- Disclose the identity of a confidential source;
- Disclose investigative or examination techniques or procedures;
- Reveal a trade secret, as defined in the Uniform Trade Secrets Act;<sup>19</sup> or
- Reveal personal identifying 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, but the complainant's personal financial and health information remains confidential and exempt.

The confidential and exempt information may be disclosed by OFR at any time to a law enforcement agency or another administrative agency in the performance of its official duties and responsibilities.

The bill provides that an investigation or examination is considered active if OFR or a law enforcement or administrative agency is proceeding with reasonable dispatch and has a good faith belief that the investigation or examination might lead to the filing of an administrative, civil, or criminal proceeding or the denial or conditional grant of an application for registration or other approval required under part VI of ch. 559, F.S. The bill also defines the term "personal financial and health information" to mean:

- Information relating to the existence, nature, source, or amount of a consumer's personal income, expenses, and debt;
- Information relating to a consumer's financial transactions of any kind;
- Information relating to the existence, identification, nature, or value of a consumer's assets, liabilities, or net worth;
- A consumer's personal health condition, disease, or injury; or
- A history of a consumer's personal medical diagnosis or treatment.

The bill provides that the section is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, 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.

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<sup>18</sup> The Public Records Act (ch. 119, F.S.) contains an agency-specific exemption for OFR, in which any information that OFR *receives* from other state or federal regulatory, administrative, or criminal justice agencies that confidential or exempt in accordance with the laws of the other agency. Additionally, this exemption provides confidentiality for any information that OFR *receives or develops* as part of a joint or multiagency examination or investigation with these other agencies and that OFR may obtain and use this information in accordance with a joint or multiagency agreement, except to any information that would otherwise be public if OFR independently conducted an investigation or examination under Florida law. Section 119.0712(3), F.S.

<sup>19</sup> The Uniform Trade Secrets Act defines the term "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Section 688.002(4), F.S.

**B. SECTION DIRECTORY:**

**Section 1** creates s. 559.5558, F.S., to create a public record exemption for information held by OFR pursuant to an investigation or examination of consumer collection agencies.

**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:

See FISCAL COMMENTS section.

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

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill's protection of trade secrets within information relating to an investigation or examination may benefit collection agencies, since disclosure of such information could result in a competitive disadvantage in the marketplace. In addition, the bill's protection of specified personal financial and health information of consumers may reduce the risk of identity theft and protect matters of personal health which are traditionally private and confidential concerns between patients and health care providers.

**D. FISCAL COMMENTS:**

The bill could create a minimal fiscal impact on OFR, because OFR staff would be responsible for complying with public records requests and may require training related to the creation of 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 OFR.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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

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, Art. I, s. 24(c) 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.

### Subject Requirement

Article I, s. 24(c) of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill creates a public records exemption for OFR in a separate, stand-alone bill.

### Breadth of the Exemption

Article I, s. 24(c) of the State Constitution, requires a newly created public records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public records exemption for information held by OFR during an active investigation or examination of consumer collection agencies. The exemption does not appear to be in conflict with the constitutional requirement that the exemption must be no broader than necessary to accomplish its purpose.

#### B. RULE-MAKING AUTHORITY:

None provided by the bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

### Insurance & Banking Subcommittee

On February 4, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment retained the provisions of the bill and made the following changes to the bill:

- Provided a clearer public necessity statement, and
- Provided a definition and limited exemption for personal health and financial information held by the OFR.

### Government Operations Subcommittee

On March 12, 2014, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with committee substitute. The amendment corrected a drafting error in the public necessity statement by inserting a word that was inadvertently omitted.

This analysis is drafted to the committee substitute as approved by the Government Operations Subcommittee.