

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 Criminal Justice

BILL: SB 686

INTRODUCER: Senator Baxley

SUBJECT: Public Records/Internet Identifiers

DATE: March 31, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------------------|
| 1. | Erickson | Hrdlicka | CJ | Pre-meeting |
| 2. | | | GO | |
| 3. | | | AP | |

I. Summary:

SB 686 provides that electronic mail addresses and Internet identifiers of sexual predators or sexual offenders reported pursuant to specified sex offender registry statutes may be used only by criminal justice agencies for criminal justice purposes and creates a public records exemption for this information. The exemption applies to records held before, on, or after the effective date of the bill.

The bill does not prohibit a law enforcement agency from confirming that an electronic mail address or Internet identifier is registered in the sex offender registry or from providing this information to commercial social network websites (as authorized in s. 943.0437, F.S.).

The bill provides for repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

The Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage because it creates a new public records exemption.

II. Present Situation:

Registration of Sexual Predators and Sexual Offenders

Florida law requires registration of any person who has been convicted or adjudicated delinquent of a specified sex offense or offenses and who meets other statutory criteria that qualify the person for designation as a sexual predator or classification as a sexual offender. The registration laws also require reregistration and provide for public and community notification of certain

information about sexual predators and sexual offenders. The laws span several different chapters and numerous statutes,¹ and are implemented through the combined efforts of the Florida Department of Law Enforcement (FDLE), all Florida sheriffs, the Department of Corrections (DOC), the Department of Juvenile Justice (DJJ), the Department of Highway Safety and Motor Vehicles (DHSMV), and the Department of Children and Families (DCF).

A person is designated as a sexual predator by a court if the person:

- Has been convicted of a current qualifying capital, life, or first degree felony sex offense committed on or after October 1, 1993;²
- Has been convicted of a current qualifying sex offense committed on or after October 1, 1993, and has a prior conviction for a qualifying sex offense; or
- Was found to be a sexually violent predator in a civil commitment proceeding.³

A person is classified as a sexual offender if the person:

- has been convicted of a qualifying sex offense and has been released on or after October 1, 1997 (the date the modern registry became effective) from the sanction imposed for that offense;
- establishes or maintains a Florida residence and is subject to registration or community or public notification in another state or jurisdiction or is in the custody or control of, or under the supervision of, another state or jurisdiction as a result of a conviction for a qualifying sex offense; or
- on or after July 1, 2007, has been adjudicated delinquent of a qualifying sexual battery or lewd offense committed when the person was 14 years of age or older.⁴

Sexual predators and sexual offenders are required to report certain information, including electronic mail addresses⁵ and Internet identifiers.⁶ The FDLE may provide information relating to electronic mail addresses and Internet identifiers maintained as part of the sexual offender registry to commercial social networking websites⁷ or third parties designated by commercial social networking websites.⁸ The commercial social networking website may use this

¹ Sections 775.21-775.25, 943.043-943.0437, 944.606-944.607, and 985.481-985.4815, F.S.

² Examples of qualifying sex offenses are sexual battery by an adult on a child under 12 years of age (s. 794.011(2)(a), F.S.) and lewd battery by an adult on a child 12 years of age or older but under 16 years of age (s. 800.04(4)(a), F.S.).

³ Section s. 775.21(4) and (5), F.S. The Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, part V, ch. 394, F.S., provides for the civil confinement of a group of sexual offenders who, due to their criminal history and the presence of mental abnormality, are found likely to engage in future acts of sexual violence if they are not confined in a secure facility for long-term control, care, and treatment.

⁴ Sections 943.0435(1)(h) and 985.4815(1)(h), F.S. Sections 944.606(1)(f) and 944.607(1)(f), F.S., which address sexual offenders in the custody of or under the supervision of the Department of Corrections, also define the term "sexual offender."

⁵ An "electronic mail address" is defined in s. 775.21(2)(g), F.S., as having the same meaning as provided in s. 668.602, F.S. Section 668.602(6), F.S., defines an "electronic mail address" as a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

⁶ Requirements to report electronic mail addresses and Internet identifiers and changes in this information are in: s. 775.21(6)(a), (e), and (g) and (8), F.S.; s. 943.0435(2)(a), (4)(e), and (14)(c), F.S.; s. 944.607(4)(a) and (13)(c), F.S.; and s. 985.4815(4)(a) and (13)(b), F.S.

⁷ For purpose of s. 943.0437, F.S., the term "commercial social networking website" means a commercially operated Internet website that allows users to create web pages or profiles that provide information about themselves and are available publicly or to other users and that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger. Section 943.0437(1), F.S.

⁸ Section 943.0437(2), F.S.

information for the purpose of comparing registered users and screening potential users of the commercial social networking website against the list of electronic mail addresses and Internet identifiers provided by the FDLE.⁹

Requirements for in-person registration and reregistration are similar for sexual predators and sexual offenders,¹⁰ but the frequency of reregistration may differ.¹¹ Registration requirements may also differ based on a special status, e.g., the sexual predator or sexual offender is in the DOC's control or custody, under DOC or DJJ supervision, or in residential commitment under the DJJ.¹²

The FDLE, through its agency website, provides a searchable database that contains information about sexual predators and sexual offenders.¹³ Further, local law enforcement agencies provide access to this information, typically through a link to the state public registry webpage.

Florida's registry laws meet minimum requirements of the federal Sex Offender Registration and Notification Act (SORNA), which is Title I of the Adam Walsh Protection and Safety Act of 2006 (AWA).¹⁴ The SORNA attempts to make all states' laws uniform with respect to requirements (or minimum standards) that Congress judged to be necessary to be included in states' registry laws. The U.S. Department of Justice (DOJ) maintains the Dru Sjodin National Sex Offender Public Website (NSOPW).¹⁵ States may choose not to substantially implement the SORNA, but the AWA penalizes noncompliance by partially reducing Byrne Justice Assistance

⁹ *Id.*

¹⁰ Sexual predator reporting requirements are in s. 775.21(6) and (8), F.S. Sexual offender reporting requirements are in ss. 943.0435(2-4), (7-8), and (14), 944.607(4), (9), and (13), and 985.4815(4), (9), and (13), F.S.

¹¹ A sexual predator is required to reregister each year during the month of the predator's birthday and during every third month thereafter. Section 775.21(8), F.S. A sexual offender convicted of any listed offense in s. 943.0435(14)(b), F.S., must reregister in the same manner as a sexual predator. Any other sex offender must reregister each year during the month of the offender's birthday and during the sixth month following the offender's birth month. Section 943.0435(14)(a), F.S.

¹² See footnote 10.

¹³ The FDLE is the central repository for registration information. The department also maintains the state public registry and ensures Florida's compliance with federal laws. The Florida sheriffs handle in-person registration and reregistration. "About Us" (updated October 1, 2016), Florida Department of Law Enforcement, *available at* <http://offender.fdle.state.fl.us/offender/About.jsp> (last visited on March 13, 2017). The FDLE maintains a database that allows members of the public to search for sexual offenders and sexual predators through a variety of search options, including name, neighborhood, and enrollment, employment, or volunteer status at a institute of higher education. Members of the public may also check whether an electronic mail address or Internet identifier belongs to a registered sexual offender or sexual predator. Offender searches and other information may be accessed from "Florida Sexual Offenders and Predators," Florida Department of Law Enforcement, *available at* <http://offender.fdle.state.fl.us/offender/Search.jsp> (last visited on March 13, 2017).

¹⁴ 42 U.S.C. Sections 16911 *et seq.* The Department of Justice issued guidelines for the implementation of the SORNA. The final guidelines (July 2008) and supplemental guidelines (January 11, 2011) may be accessed at "Guidelines," Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Office of Justice Programs, U.S. Department of Justice, *available at* <https://ojp.gov/smart/guidelines.htm> (last visited on March 13, 2017).

¹⁵ Offender searches and other information may be accessed from "NSPOW," Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Office of Justice Programs, U.S. Department of Justice, *available at* <http://www.nsopw.gov/Core/Portal.aspx> (last visited on March 13, 2017).

Grant funding.¹⁶ The DOJ has determined that Florida has substantially implemented the SORNA.¹⁷

Preliminary Injunction Precluding Enforcement of the Current Definition of Internet Identifier

As previously noted, sexual predators and sexual offenders are required to report certain information, including Internet identifiers. The requirement to report Internet identifiers was created by the Legislature in 2014.¹⁸ In 2016, the Legislature modified the original definition of “Internet identifier.”¹⁹ This modified definition, which was to take effect on October 1, 2016,²⁰ expanded the original definition to include Internet identifiers associated with a website or URL²¹ or software applications.

Section 775.21(2)(j), F.S., provides that an “Internet identifier” includes, but is not limited to, all website uniform resource locators (URLs) and application software, whether mobile or nonmobile, used for Internet communication, including anonymous communication, through electronic mail, chat, instant messages, social networking, social gaming, or other similar programs and all corresponding usernames, logins, screen names, and screen identifiers associated with each URL or application software. Internet identifier does not include a date of birth, Social Security number, personal identification number (PIN), URL, or application software used for utility, banking, retail, or medical purposes. Voluntary disclosure by a sexual predator or sexual offender of his or her date of birth, Social Security number, or PIN as an Internet identifier waives the disclosure exemption in this paragraph for such personal information.²²

Shortly before the amended definition of “Internet identifier” was slated to take effect, a group of plaintiffs in Florida who had been convicted as sexual offenders filed a lawsuit against the Commissioner of the FDLE in the United States District Court for the Northern District of

¹⁶ *Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet*, Bureau of Justice Assistance, U.S. Department of Justice (updated January 1, 2016) available at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=266685> (last visited on March 13, 2017).

¹⁷ “Jurisdictions that have substantially implemented SORNA,” Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Office of Justice Programs, U.S. Department of Justice, available at http://www.ojp.usdoj.gov/smart/newsroom_jurisdictions_sorna.htm (last visited on March 13, 2017).

¹⁸ Chapter 2014-5, L.O.F.

¹⁹ Chapter 2016-104, L.O.F. (amending s. 775.21(2)(i), F.S., and renumbering it as s. 775.21(2)(j), F.S.). The original definition of “Internet identifier” was all electronic mail, chat, instant messenger, social networking, application software, or similar names used for Internet communication, but did not include a date of birth, social security number, or personal identification number (PIN). Voluntary disclosure by a sexual predator of his or her date of birth, social security number, or PIN as an Internet identifier waived the disclosure exemption in this paragraph for such personal information. Section 775.21(2)(i), F.S. (2014).

²⁰ *Id.*

²¹ “URL stands for Uniform Resource Locator, and is used to specify addresses on the World Wide Web. A URL is the fundamental network identification for any resource connected to the web (e.g., hypertext pages, images, and sound files).” “ARCHIVED: What is a URL?”, Indiana University Information Technology Knowledge Base Repository, available at <https://kb.iu.edu/d/adnz> (last visited on March 14, 2017).

²² Sections 943.0435(1)(e), 944.607, and 985.4815, F.S., provide that “Internet identifier” has the same meaning as provided in s. 775.21, F.S.

Florida, Tallahassee Division.²³ The plaintiffs argued that the prior and amended definition of “Internet identifier” violated the First Amendment and raised a vagueness challenge. The plaintiffs also moved for a preliminary injunction, which the court treated as a challenge only to the amended definition.

The court found the current definition is “hopelessly vague, chills speech protected by the First Amendment, and is far broader than necessary to serve the state’s legitimate interest in deterring or solving online sex crimes.” The court granted the preliminary injunction.

The court stated the definition “sets no outer limit, because the term is expressly ‘not limited to’ what the definition says. Having jettisoned the ordinary understanding and replaced it with an expressly unlimited description, the definition leaves a sex offender guessing at what must be disclosed.” The court also stated that the definition, “at least on many plausible readings, is hopelessly and unnecessarily broad in scope.” One of the examples the court cited in its finding was Mr. Doe’s digital subscription to a newspaper. Mr. Doe receives an e-mail every morning with the day’s headlines and e-mails every day with additional articles or breaking news. The court continued:

He plainly must register at least the URL for the newspaper, if not the URL for every article the newspaper sends. But the State has absolutely no legitimate interest in requiring a sex offender to register the URL of the newspaper or articles the offender reads. And if Mr. Doe chooses one day to make a comment on an article, he must now figure out whether the same URL is in use, and he must make his identity available to the public. Unlike every other subscriber or member of the public, Mr. Doe cannot comment anonymously. *See White v. Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010) (holding that enforcement of a registration requirement would irreparably harm a registered sex offender “by chilling his First Amendment right to engage in anonymous free speech”).

The order states that the preliminary injunction remains in effect until entry of a final judgment in the case or until otherwise ordered. The injunction prohibits the FDLE Commissioner²⁴ from taking any action based on the current definition of “Internet identifier.” However, the injunction does not preclude enforcement of the prior definition.

Public Records Law

The Florida Constitution provides that every individual has a right of access to public records which are made or received in connection with official public business unless the records are exempt. This right applies to records of the legislative, executive, and judicial branches.²⁵

²³ The plaintiffs filed this action against current FDLE Commissioner Richard “Rick” L. Swearingen in his official capacity. Preliminary Injunction, *Doe I et al. v. Swearingen, etc.*, Case No. 4:16-00501-RH-CAS (N.D. Fla. Sept. 27, 2016) (on file with the Senate Committee on Criminal Justice). All information regarding this case is from this source.

²⁴ The injunction also binds the Commissioner’s “officers, agents, servants, employees, and attorneys - and others in active concert or participation with any of them - who receive actual notice of this injunction by personal service or otherwise.”

²⁵ Article I, s. 24(a), FLA. CONST.

The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record²⁶ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.²⁷

Only the Legislature may create an exemption to public records requirements.²⁸ Such an exemption must be created by general law and 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.

The Open Government Sunset Review Act (OGSR) requires a newly created or expanded public records exemption be repealed on October 2 of the fifth year after enactment, unless reviewed and reenacted by the Legislature.²⁹ It further provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet the public purpose it serves.³⁰

An exemption serves an identifiable purpose if it meets one of the following purposes and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption.
- The release of sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt.
- It protects trade or business secrets.³¹

In addition, the Legislature must find that the purpose of the exemption overrides Florida's public policy strongly favoring open government.

The OGSR also requires specified questions to be considered during the review process.³² In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of the exemption. These specified questions are:

- What specific records or meetings are affected by the exemption?

²⁶ Section 119.011(12), F.S., defines "public record" as 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.

²⁷ Section 119.07(1)(a), F.S.

²⁸ Article I, s. 24(c), FLA. CONST. 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 Bd. 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 1994); 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, then 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 Op. Att'y Gen, Fla. 85-62, August 1, 1985.

²⁹ Section 119.15(3), F.S.

³⁰ Section 119.15(6)(b), F.S.

³¹ Section 119.15(6)(b)1.-3., F.S.

³² Section 119.15(6)(a), F.S.

- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?³³

To enact an exemption, the bill may not contain other substantive provisions³⁴ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.³⁵

III. Effect of Proposed Changes:

The bill amends s. 119.071(5), F.S., to create a new paragraph (l), which provides the following definitions:

- “Electronic mail address” has the same meaning as provided in s. 668.602, F.S.
- “Internet identifier” has the same meaning as provided in s. 775.21, F.S.
- “Personal identifying information” means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including, but not limited to, a name, a mailing address, a telephone number, a social security number, a date of birth, a mother’s maiden name, an official state-issued or United States-issued driver license or identification number, an alien registration number, a government passport number, or an employer or taxpayer identification number.

The bill provides that electronic mail addresses and Internet identifiers of sexual predators or sexual offenders reported pursuant to ss. 775.21, 943.0435, 944.606, 944.607, 985.481, or 985.4815, F.S., may be used only by criminal justice agencies for criminal justice purposes and creates a public records exemption for this information. The exemption applies to records held before, on, or after the effective date of the bill.

The bill does not prohibit a law enforcement agency from confirming that an electronic mail address or Internet identifier is registered in the FDLE sexual offender and sexual predator registry; however, personal identifying information linked to such electronic mail address or Internet identifier may not be revealed in conjunction with the confirmation.

The bill also does not prohibit a law enforcement agency from providing this information to commercial social network websites (as authorized in s. 943.0437, F.S.).

The bill provides that the exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and stands repealed on October 2, 2022, unless reviewed and saved from repeal through reenactment by the Legislature.

³³ Section 119.15(6)(a)1.-6., F.S.

³⁴ The bill may, however, contain multiple exemptions that relate to one subject.

³⁵ Article I, s. 24(c), FLA. CONST.

The bill includes a public necessity statement as required by the Florida Constitution.³⁶ The statement includes a legislative finding that it is a public necessity to create the exemption for the following reasons:

- The requirement for sexual predators and sexual offenders to register their electronic mail addresses and Internet identifiers has been an important tool for law enforcement in combatting the exploitation of minors.
- The United States District Court for the Northern District of Florida has raised concerns that the release of Internet identifiers along with personal identifying information of sexual predators and sexual offenders could have a chilling effect on the First Amendment right to free anonymous speech.

The bill also directs the Division of Law Revision and Information to replace the phrase “the effective date of this act” whenever it occurs in this act with the date the act becomes a law.

The bill takes effect on the same date that “SB ____” or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law. The effective date of the bill will need to be linked to a specific Senate bill. SB 684 (2017) is the bill connected to this bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a new public record exemption. Therefore, the following constitutional requirements apply.

Vote Requirement

Article I, s. 24(c) of the Florida 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 requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption and includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record exemption to be no broader than necessary to accomplish the stated purpose of the law. Based on the legislative findings in the statement of public necessity, a court could find that the exception is broader than necessary to accomplish its stated purpose.

³⁶ Article I, s. 24(c), FLA. CONST.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill does not appear to have a fiscal impact on state or local governments.

VI. Technical Deficiencies:

The bill takes effect on the same date that “SB ___” or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof, and becomes law. The effective date of the bill will need to be linked to a specific Senate bill. SB 684 (2017) is the bill connected to this bill.

VII. Related Issues:

Connected Bill

A connected bill, SB 684 (2017), revises provisions requiring registered sexual predators and sexual offenders to report Internet identifiers. These revisions include modifying the definition of the term “Internet identifier” and defining a connected term “social Internet communication.” The bill also requires a sexual predator and sexual offender to report each Internet identifier’s corresponding website homepage or application software name.

Access to Sex Offender Registry Information

The bill does not affect the public’s access to information currently available on the sex offender registry. The online registry does not include sex offenders’ electronic mail addresses or Internet identifiers.

VIII. Statutes Affected:

This bill substantially amends section 119.071 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.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
