

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 701    Pub. Rec./Internet Identifiers of Sexual Predators or Offenders  
**SPONSOR(S):** Mariano  
**TIED BILLS:** HB 699    **IDEN./SIM. BILLS:** SB 686

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Merlin	White
2) Oversight, Transparency & Administration Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Sections 775.21 and 943.0435, F.S., currently require sexual offenders and sexual predators to register their names, address, and other required information, including electronic mail addresses and Internet identifiers with the Florida Department of Law Enforcement ("FDLE"). As provided in those statutes:

- The sexual predator registration list compiled by FDLE is a public record; and
- FDLE may notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not exempt or confidential and exempt from public disclosure under s. 119.071(1), F.S., and article I, section 24(a) of the State Constitution.

This bill, which is linked to the passage of CS/HB 699, amends s. 119.071(5), F.S., to provide 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 775.21, F.S.

The bill provides that electronic mail addresses and Internet identifiers of sexual predators or sexual offenders are exempt from s. 119.07(1), F.S., and article I, section 24(a) of the State Constitution, unless otherwise ordered by a court. 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 ("LEA") from confirming that an electronic mail address or Internet identifier is registered in the FDLE sexual offender and sexual predator registry.

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

The bill takes effect on the same date that bill for HB 699 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

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.

**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 or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Public Records Law**

##### Florida Constitution

Article I, Section 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may exempt records from the requirements of Article I, Section 24 of the Florida Constitution, provided the exemption is passed by two-thirds vote of each chamber and:

- States with specificity the public necessity justifying the exemption (public necessity statement); and
- Is no broader than necessary to meet that public purpose.<sup>2</sup>

##### Florida Statutes

Florida Statutes also address the public policy regarding access to government records through a variety of statutes in ch. 119, F.S. Currently, s. 119.07, F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act<sup>3</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose *and* the "[l]egislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>4</sup> However, the exemption may be no broader than is necessary to meet one of the following purposes:

- 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 may be exempted under this provision; or
- Protects trade or business secrets.<sup>5</sup>

The Open Government Sunset Review Act requires the automatic repeal of a public record exemption on October 2<sup>nd</sup> of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup> The Act also requires specified questions to be considered during the review process.<sup>7</sup>

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<sup>1</sup> FLA. CONST. art 1, s. 24(a).

<sup>2</sup> FLA. CONST. art 1, s. 24(c).

<sup>3</sup> s. 119.15, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> s. 119.15(3), F.S.

<sup>7</sup> Section 119.15(6)(a), F.S., states that the specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can 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?

## **Public Records and Sexual Predators:**

Sections 775.21 and 943.0435, F.S., currently require sexual predators and sexual offenders to register their names, address, and other required information, including electronic addresses and Internet identifiers with the Florida Department of Law Enforcement (“FDLE”).

Section 775.21(6)(k)2., F.S., provides that the sexual predator registration list compiled by FDLE is a public record.<sup>8</sup> FDLE may disseminate this public information by any means deemed appropriate, including operating a toll-free telephone number for this purpose.<sup>9</sup>

When FDLE provides information regarding a registered sexual predator to the public, FDLE personnel are required to advise the person making the inquiry that positive identification of a person believed to be a sexual predator cannot be established unless a fingerprint comparison is made, and that it is illegal to use public information regarding a registered sexual predator to facilitate the commission of a crime.<sup>10</sup>

FDLE is also required to adopt guidelines as necessary regarding the registration of sexual predators and the dissemination of information regarding sexual predators.<sup>11</sup>

Section 943.043, F.S., provides that FDLE may notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not confidential and exempt from public disclosure under s. 119.071(1), F.S., and article I, section 24(a) of the State Constitution.

Section 943.043, F.S., also provides that FDLE shall determine what information shall be made available to the public through the Internet. However, FDLE may not display on or disseminate through the Internet public registry maintained by FDLE any information regarding a vehicle that is owned by a person who is not required to register as a sexual predator or sexual offender.

## **Electronic addresses and Internet Identifiers**

The requirement to register electronic mail addresses and instant messaging names has been in place since 2007.<sup>12</sup> The requirement to register Internet identifiers was added in 2014.<sup>13</sup> Section 775.21(2)(g), F.S., and s. 943.0435(1)(c), F.S., provide that “electronic mail address” has the same meaning as provided in s. 668.602, F.S.

Section 668.02(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.”

Section 943.0437(1), F.S., defines the term “commercial social networking website” as 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.”

In 2016, the Florida Legislature amended the definition of “Internet identifier” in s. 775.21, F.S. The prior definition provides:

“‘Internet identifier’ means all electronic mail, chat, instant messenger, social networking, application software, or similar names used for Internet communication, but does not include a date of birth, social security number, or personal identification number (PIN).”<sup>14, 15</sup>

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<sup>8</sup> s. 775.21(6)(k)2., F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> s. 775.21(6)(k)3., F.S.

<sup>12</sup> Ch. 2007-143, Laws of Fla.

<sup>13</sup> Ch. 2014-5, Laws of Fla.

<sup>14</sup> s. 775.21(2)(i), F.S. (2015).

<sup>15</sup> Section 943.0435(1)(e), F.S., provides that “‘Internet identifier’ has the same meaning as provided in s. 775.21.”

The 2016 Legislature passed HB 1333/SB 1662, which included an expanded definition of Internet identifiers and also required the collection of Internet identifiers associated with website or URL<sup>16</sup> or software applications. The amended definition of “Internet identifier,” which had an effective date of October 1, 2016, provides:

- “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.<sup>17</sup>

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 FDLE in federal court.<sup>18</sup> The plaintiffs argued that the requirement to register all Internet identifiers violated the First Amendment. The plaintiffs also argued that the definition of an Internet identifier was unconstitutionally vague and sought a preliminary injunction. On September 27, 2016, the federal court issued a preliminary injunction regarding the definition of Internet identifiers. The court determined that the language regarding Internet identifiers was overbroad and vague and required an individual to either forego protected speech or run the risk of criminal prosecution.<sup>19</sup> However, the court noted that the injunction did not preclude enforcement of the prior definition of Internet identifier.<sup>20</sup>

### Effect of the Bill

The bill amends s. 119.071(5)(l)1., F.S., to provide the following definitions Under the bill, the term:

- “Electronic mail address” has the same meaning as provided in s. 668.602, F.S.
- “Internet identifier has the same meaning as provided in 775.21, F.S.

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., are exempt from the public records law set forth in s. 119.07(1), F.S. and s. 24(a), Art. I, Fla. Const. unless otherwise ordered by a court. 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 (“LEA”) from confirming that an electronic mail address or Internet identifier is registered in the FDLE sexual offender and sexual predator registry.

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

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<sup>16</sup> “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).” See Indiana University Information Technology Knowledge Base Repository, available at <https://kb.iu.edu/d/adnz> (last viewed Feb. 17, 2017).

<sup>17</sup> Ch. 2016-104, Laws of Fla. (amending s. 775.21(2)(i), F.S. and renumbering it s. 775.21(2)(j), F.S.).

<sup>18</sup> The current Commissioner of FDLE is Richard “Rick” L. Swearingen, and the lawsuit was filed against the Commissioner acting in his official capacity, in the United States District Court for the Northern District of Florida, Tallahassee Division. The style of the case is *Doe v. Swearingen*, Case No. 4:16-00501-RH-CAS (N.D. Fla. Sept. 27, 2016).

<sup>19</sup> Order Granting Preliminary Injunction, issued in *Doe v. Swearingen*. Case No. 4:16-00501-RH-CAS, at 6-11 (N.D. Fla. Sept. 27, 2016). The Order noted, in part, that the amended definition of Internet identifier “trenches on First Amendment rights and is unconstitutionally vague.” *Id.* at 11.

<sup>20</sup> *Id.* at 12.

In the bill's public necessity statement, it provides legislative findings relating to electronic mail addresses and Internet identifiers of sexual offenders and sexual predators. Specifically, the bill finds:

- It is a public necessity that the electronic mail addresses and Internet identifiers of sexual predators and sexual offenders that are required to be reported pursuant to ss. 775.21, 943.0435, 944.606, 944.607, 985.481, or 985.4815, F.S., be exempt from s. 119.07(1), F.S. and s. 24(a), Art. I, Fla. Const.
- The exemption strikes an important balance between the government's legitimate interest in protecting the public and a sexual offender or sexual offender's First Amendment right of free speech.
- The exemption maintains the ability of the public to confirm whether an Internet identifier with which they are communicating is contained in the sexual offender and sexual predator registry without providing the personal identifying information of the individual who registered the Internet identifier. This allows:
  - Public access to an important tool to make informed decisions regarding communicating with sexual offenders or sexual predators through commercial social networking sites.
  - Criminal justice agencies to maintain the ability to have the necessary tools to investigate crimes and fight against the growing epidemic of sexual offenses that occur online.

The bill also provides legislative findings regarding the importance of protecting the First Amendment rights for all citizens while ensuring criminal justice agencies have the tools necessary to protect citizens. Specifically, "[i]f the ability to collect this information was prevented, it would greatly disrupt law enforcement from using these essential tools in combatting the prevalent problem of online sexual exploitation of children."

The bill finds that:

- The requirement for sexual offenders and sexual predators to register their electronic mail addresses and Internet identifiers has been an important tool for criminal justice agencies in combatting the exploitation of minors.
- Commercial social networking websites ("CNW") are widely used among youth and adults for introduction, communication, and publication of personal details that may be exploited.
- Studies have shown a nexus between CNWs and Internet sex crimes.

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

The bill provides that it shall take effect on the same date that HB 699 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

## B. SECTION DIRECTORY:

Section 1. Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

Section 2. Provides a public necessity statement.

Section 3. Directs the Division of Law Revision and Information to replace the phrase "effective date of this act" whenever it occurs with the date the bill becomes a law.

Section 4. Provides an effective date that is the same as that of HB 699 or similar legislation, if such legislation is passed during the same session, or an extension of that session, and becomes law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: This bill does not appear to have an impact on state government revenues.
2. Expenditures: This bill does not appear to have an impact on state government expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: This bill does not appear to have an impact on local government revenues.
2. Expenditures: This bill does not appear to have an impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

### D. FISCAL COMMENTS: None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

##### Vote Requirement

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 or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

##### Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it includes a public necessity statement.

##### Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption limited to expunged criminal records of victims of human trafficking. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY: This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

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

On March 8, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute ("CS"). The CS differs from the bill as filed in that the CS:

- Deleted the definition and references to personal identifying information and made technical changes to the bill to create clearer and more consistent language.
- Revised the public necessity statement to address concerns that arose as a result of litigation in federal court regarding electronic mail addresses and Internet identifiers

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.