

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7097      PCB OTM 19-17      OGSR/Informal Enforcement Actions and Trade  
Secrets/OFR  
**SPONSOR(S):** Oversight, Transparency & Public Management Subcommittee, Plasencia  
**TIED BILLS:**            **IDEN./SIM. BILLS:** SB 7052

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee	14 Y, 0 N	Moore	Harrington
1) Commerce Committee	23 Y, 0 N	Hinshelwood	Hamon
2) State Affairs Committee			

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

In 2014, the Legislature created public record exemptions for informal enforcement actions imposed by the Office of Financial Regulation (OFR) and for trade secrets held by OFR. Except for those portions that are otherwise public record, after an investigation relating to an informal enforcement action is completed or ceases to be active, informal enforcement actions are confidential and exempt from public record requirements to the extent that disclosure would:

- Jeopardize the integrity of another active investigation.
- Impair the safety and soundness of the financial institution.
- Reveal personal financial information.
- Reveal the identity of a confidential source.
- Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual.
- Reveal investigative techniques or procedures.

In addition, trade secrets that are submitted in compliance with statutory requirements and that are held by OFR in accordance with its statutory duties with respect to the Financial Institutions Codes are confidential and exempt from public record requirements.

The bill saves from repeal the public record exemptions, which will repeal on October 2, 2019, if this bill does not become law.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>1</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>2</sup>

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created<sup>5</sup> then a public necessity statement and a two-thirds vote for passage are not required.

##### Regulation of State-Chartered Financial Institutions

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes (Codes).<sup>6</sup> Under the Codes, OFR is authorized to conduct investigations and examinations to ensure compliance with, and prevent violations of, the Codes and the administrative rules adopted pursuant to the Codes.<sup>7</sup> In imposing any administrative remedy or penalty provided in the Codes, OFR must take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the person charged, the gravity of the violation, the history of previous violations, and other matters as justice may require.<sup>8</sup> Accordingly, OFR will sometimes impose an informal enforcement action on a financial institution when it determines that a formal enforcement action is not an appropriate administrative remedy.

In the course of performing its regulatory duties, OFR often receives trade secret information from the institutions it regulates as well as institutions applying to be regulated.

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Section 24(c), Art. I of the State Constitution.

<sup>5</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

<sup>6</sup> The Codes are codified in chs. 655 through 667, F.S.

<sup>7</sup> Sections 655.032 and 655.045, F.S.

<sup>8</sup> Section 655.031(1), F.S.

### Public Record Exemption under Review

In 2014, the Legislature created public record exemptions for informal enforcement actions imposed by OFR and for trade secrets held by OFR.<sup>9</sup> An informal enforcement action includes a board resolution, a document of resolution, or an agreement in writing between OFR and a financial institution that:

- OFR imposes on an institution when OFR considers the administrative enforcement guidelines and determines that a formal enforcement action is not an appropriate administrative remedy;
- Sets forth a program of corrective action to address one or more safety and soundness deficiencies and violations of law or rule at the institution; and
- Is not subject to enforcement by imposition of an administrative fine.<sup>10</sup>

After an investigation relating to an informal enforcement action is completed or ceases to be active, the informal enforcement action is confidential and exempt<sup>11</sup> from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution to the extent that disclosure would:

- Jeopardize the integrity of another active investigation.
- Impair the safety and soundness of the financial institution.
- Reveal personal financial information.
- Reveal the identity of a confidential source.
- Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual.
- Reveal investigative techniques or procedures.

In addition, trade secrets<sup>12</sup> that are submitted in compliance with statutory requirements<sup>13</sup> and that are held by OFR in accordance with its statutory duties with respect to the Codes are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

These public record exemptions do not prevent or restrict the following:

- Publishing reports that are required to be submitted to OFR pursuant to its examination of the condition of each financial institution or required by applicable federal statutes or regulations to be published.
- Furnishing records or information to any other state, federal, or foreign agency responsible for the regulation or supervision of financial institutions.
- Disclosing or publishing summaries of the condition of financial institutions and general economic and similar statistics and data, provided that the identity of a particular financial institution is not disclosed.
- Reporting any suspected criminal activity, with supporting documents and information, to appropriate law enforcement and prosecutorial agencies.

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<sup>9</sup> Chapter 2014-99, L.O.F.

<sup>10</sup> Section 655.057(12)(b), F.S.

<sup>11</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems 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, 53 (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); *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 statute. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>12</sup> The term "trade secret" is defined in s. 688.002, F.S., to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) 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

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

<sup>13</sup> Information submitted to OFR that is claimed to contain a trade secret must be accompanied by a notice certifying under oath that the information contains a trade secret, each page or portion of the document claimed to be a trade secret must be clearly marked with the words "trade secret," and all material identified as a trade secret must be segregated from all other material. Section 655.0591(1), F.S.

- Furnishing information upon request to the Chief Financial Officer or the Division of Treasury of the Department of Financial Services regarding the financial condition of any financial institution that is, or has applied to be, designated as a qualified public depository.
- Furnishing information to Federal Home Loan Banks regarding its member institutions pursuant to an information sharing agreement between the Federal Home Loan Banks and OFR.

The 2014 public necessity statement for the exemptions provided that:<sup>14</sup>

Public disclosure of an informal enforcement action could further impair the safety and soundness of a financial institution that is subject to the action. Furthermore, the public disclosure of this information could erode public confidence in financial institutions and the financial institution system in this state and may lead to a reduced level of protection of the interests of the depositors and creditors of financial institutions. Maintaining informal enforcement actions as confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution will provide to the financial institutions that are chartered by this state the same protections as those already available to financial institutions chartered under federal law and by other states, maintain public confidence in financial institutions subject to the [Codes], protect the safety and soundness of the financial institution system in this state, protect the interests of the depositors and creditors of financial institutions, promote the opportunity for state-chartered financial institutions to be and remain competitive with financial institutions chartered by other states or the United States, and otherwise provide for and promote the purposes of the [Codes.]

The public necessity statement further provided that:<sup>15</sup>

A trade secret derives independent economic value, actual or potential, from not being generally known to, and not readily ascertainable by, other persons who can obtain economic value from the disclosure or use of the trade secret. Without an exemption for a trade secret held by [OFR], that trade secret becomes a public record when received and must be divulged upon request. Divulging a trade secret under the public records law would give business competitors an unfair advantage and destroy the value of that property, causing a financial loss to the person or entity submitting the trade secret and weakening the position of that person or entity in the marketplace.

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2019, unless reenacted by the Legislature.<sup>16</sup>

During the 2018 interim, subcommittee staff consulted with staff from OFR as part of its review under the Open Government Sunset Review Act. OFR recommended that the exemptions be reenacted in order to maintain and promote financial institution activity in the state and to ensure that Florida remains competitive in this arena.

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemptions, thereby maintaining the public record exemptions for informal enforcement actions imposed by OFR and for trade secrets held by OFR.

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<sup>14</sup> Section 2, ch. 2014-99, L.O.F.

<sup>15</sup> *Id.*

<sup>16</sup> Section 655.057(14), F.S.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 655.057, F.S., relating to records; limited restrictions upon public access.

**Section 2.** Provides an effective date of October 1, 2019.

**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:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.