

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 Banking and Insurance

BILL: SPB 7014

INTRODUCER: For consideration by the Banking and Insurance Committee

SUBJECT: OGSR/Payment Instrument Transaction Information/Office of Financial Regulation

DATE: December 9, 2019

REVISED: _____

| ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|------------|----------------|-----------|---------------------------------------|
| 1. Palecki | Knudson | | BI Submitted as Comm. Bill/Fav |

I. Summary:

SPB 7014 reenacts and removes the scheduled repeal on October 2, 2020, of s. 560.312, F.S., which makes confidential and exempt from the disclosure requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution the payment instrument transaction information held by the Office of Financial Regulation's check cashing database pursuant to section 560.310, F.S., which identifies a licensee, payor, payee, or conductor.

Pursuant to the Open Government Sunset Review, the public records exemption is scheduled for repeal on October 2, 2020, unless reenacted by the Legislature. Since this bill reenacts the exemption as is, and does not expand its scope, this bill requires the favorable majority vote of each chamber for passage.

This bill takes effect October 1, 2020.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.² Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

The Public Records Act mostly contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to section 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in section 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁷

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the exemption.¹¹ 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 provisions¹² and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹³

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). See also; *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ Section 119.011(12), F.S., defines “public record” 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Id.*

¹² The bill may, however, contain multiple exemptions that relate to one subject.

¹³ FLA. CONST., art. I, s. 24(c).

When creating or expanding a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁴ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

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,¹⁶ with specified exceptions.¹⁷ The Act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption or repeal the sunset date.¹⁸ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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.¹⁹ An exemption serves an identifiable purpose if it meets one of the following purposes and the Legislature finds that the purpose of the exemption outweighs open government policy 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;²⁰
- Releasing 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;²¹ or
- It protects trade or business secrets.²²

The Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

¹⁴ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings.

¹⁷ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

²³ Section 119.15(6)(a), F.S. 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 the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁴ If the exemption is reenacted or saved from repeal without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁵

Check Cashing Database

The Office of Financial Regulation (OFR) supervises “check cashers,” a type of money services business which the Florida Statutes defines as persons who “sell currency in exchange for payment instruments²⁶ received, except travelers checks.”²⁷ As the regulator and licensing authority, the OFR is responsible for administering and enforcing ch. 560, F.S., the Money Services Business Act. Check cashers are licensed under Part III of the Money Services Business Act, “Check Cashing and Foreign Currency Exchange.”

Prior to the institution of the check cashing database, OFR licensees engaged in check cashing were required to maintain customer files on those customers cashing corporate or third-party payment instruments exceeding \$1,000, and to maintain files for any payment instrument accepted having a face value of \$1,000 or more. These files were required to include a copy of the customer’s photo identification along with a customer thumbprint taken by the licensee. Licensees were required to maintain these files electronically, as prescribed by rule.²⁸ As regulator, the OFR reviewed these records pursuant to their examination authority.²⁹

Due to concerns about the facilitation of workers’ compensation premium fraud through money services businesses, in 2011 the Chief Financial Officer formed a Money Service Business Facilitated Workers’ Compensation Work Group. This group, comprised of regulators (including the OFR), law enforcement, and industry stakeholders, was tasked with studying the issue. The work group made a number of findings and recommendations, including the establishment of a statewide database that could be utilized by regulators and law enforcement to detect workers’ compensation insurance fraud.³⁰ While licensees were already required by rule to keep substantially similar information in an electronic format that was “readily retrievable and capable of being exported” for examination purposes, the database was expected to generate real-time data that could be used proactively to quickly identify and detect this type of fraud.³¹ The

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- 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?

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ Section 119.15(7), F.S.

²⁶ “Payment instrument” means “a check, draft, warrant, money order, travelers check, electronic instrument, or other instrument, payment of money, or monetary value whether or not negotiable. The term does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher, or a letter of credit.” Section 560.103(29), F.S.

²⁷ Section 560.103(6), F.S.

²⁸ Section 560.310(1) and (2), F.S. (2012).

²⁹ Section 560.109(1)-(3), F.S. (2012). The OFR continues to review these records pursuant to their examination authority. See Section 560.109(1)-(3), F.S. (2019).

³⁰ A Report by the Money Service Business Facilitated-Workers’ Compensation Fraud Work Group, available online at http://www.myfloridacfo.com/siteDocs/MoneyServiceBusiness/WC_MSBReport-Rec.pdf (last viewed December 2, 2019).

³¹ *Id.*

database was further expected to enable parties with a need for the information to make sound business decisions.³²

In response to these findings, the Florida Legislature enacted CS/CS/HB 217 (2013), along with a public records exemption companion, CS/HB 7135 (2013).³³ CS/CS/HB 217 (2013) required the OFR to procure a real time, online check cashing database designed to store information submitted by licensees and “combat fraudulent check cashing activity.”³⁴

Since implementation of the database, licensees are required to submit certain transactional information to the OFR in addition to independently maintaining files pursuant to the preexisting record keeping requirements.³⁵ Licensees must submit the following transactional information to the OFR for inclusion in the database:

- Transaction date
- Payor name as displayed on the payment instrument
- Payee name as displayed on the payment instrument
- Conductor³⁶ name, if different from the payee name
- Amount of the payment instrument
- Amount of currency provided
- Type of payment instrument, which may include personal, payroll, government, corporate, third-party, or another type of instrument
- Amount of the fee charged for cashing of the payment instrument
- Branch or location where the payment instrument was accepted
- The type of identification and identification number presented by the payee or conductor
- Payee workers’ compensation insurance policy number or exemption certificate number, if the payee is a business, and
- Such additional information as required by rule.³⁷

When licensees submit this information, the OFR assumes custodianship of both personal financial information and private business transaction information. The Legislature found that public availability of such payment transaction information would reveal sensitive, personal financial information about payees and conductors which is traditionally private. The Legislature also found that the public release of payment instrument transaction information identifying licensees or payors may reveal private business transaction information that could be used by competitors to harm one another in the marketplace. Thus, the Legislature found it to be a public necessity that payment transaction information held by the OFR in the database which identifies a licensee, payor, payee, or conductor be confidential and exempt from public records disclosure requirements.³⁸

³² *Id.*

³³ Chapters 2013-139 and 2013-155, Laws of Florida.

³⁴ Section 560.310(4), F.S.

³⁵ Section 560.310(1), (2)(a)-(c), F.S. Further, licensees and authorized vendors must maintain such information for 5 years unless a longer period is required by other state or federal law. Section 560.1105, F.S. Willful failure to comply with records retention requirements is a felony of the third degree. Section 560.1105(4), F.S.

³⁶ “Conductor” means “a natural person who presents himself or herself to a licensee for purposes of cashing a payment instrument.” Section 560.103(9), F.S.

³⁷ Section 560.310(2)(d), F.S.

³⁸ Chapter 2013-155, Laws of Florida.

The confidential and exempt information remains accessible under certain circumstances; licensees may access the information they submit, and the OFR is authorized to enter into information sharing agreements with the Department of Financial Services, law enforcement agencies, and other governmental agencies in order to detect and deter financial crimes and workers' compensation violations. Agencies receiving the confidential and exempt information must maintain the confidentiality of such information, unless a court order compels production. In addition, the federal Bank Secrecy Act and U.S. Treasury regulations require financial institutions, including money services businesses like check cashers, to file currency transaction reports for any cash transaction over \$10,000 a day.³⁹ Florida law requires money services businesses, and thus, check cashers, to comply with these requirements.⁴⁰

This public records exemption, as enacted in 2013, was subject to the Open Government Sunset Review Act and scheduled for automatic repeal on October 2, 2018, unless reenacted. However, in 2018 the Legislature extended this repeal date to October 2, 2020, in conjunction with an amendment to Section 560.312 which clarified that the OFR was authorized to release payment transaction information in the aggregate, so long as the information released did not reveal information identifying a licensee, payor, payee, or conductor.⁴¹ Thus, this exemption will sunset on October 2, 2020, unless saved from repeal by the Legislature.

OGSR Survey and Results

In September of 2019, Professional Staff of the Senate Banking and Insurance Committee submitted a questionnaire to the Office of Financial Regulation (OFR) to ascertain whether the public records exemption in s. 560.312, F.S., remains necessary.⁴² Section 560.312, F.S., makes confidential and exempt from the public records disclosure requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution the payment instrument transaction information held by the OFR's check cashing database which identifies a licensee, payor, payee, or conductor. Staff reviewed OFR's responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

As part of their response to the questionnaire, the OFR affirmed the legislative findings of public necessity that accompanied the enactment of the exemption. These findings indicated that public availability of payment instrument transaction information would reveal sensitive, personal financial information about payees and conductors who use check cashing programs, including paycheck amounts, salaries, and business activities, as well as information regarding the financial stability of these persons. These findings noted that such information is traditionally private and sensitive, and that protecting the confidentiality of information identifying these payees and conductors would provide adequate protection for these persons while still providing public oversight of the program. Further, public release of payment instrument transaction information would identify licensees or payors, and reveal private business transaction information that is traditionally private and could be used by competitors to harm other licensees or payors in the marketplace. The Legislature noted that if such information were publicly available, competitors could determine the amount of business conducted by other licensees or

³⁹ 31 U.S.C. ss. 5311-5330 and 31 C.F.R. s. 103.22.

⁴⁰ Section 560.123, F.S.

⁴¹ Chapter 2018-116, Laws of Florida.

⁴² See survey correspondence dated October 2, 2019, on file with the Senate Committee on Banking and Insurance.

payors. Additionally, the OFR indicated that the exemption was still necessary to protect the identities of individuals appearing in the database from undue risk to their reputations and safety, and to protect the confidential business information related to competition.

The OFR indicated it has received public records requests for the exempted records, and did not release the information. The OFR did, however, indicate that it had released such records pursuant to exceptions to the exemption, such as through information-sharing agreements with other governmental agencies and responses to subpoenas and court orders.⁴³ The OFR stated that all records released under such circumstances were released pursuant to the terms of a memorandum of understanding, and when released electronically, were sent via an encrypted connection. The OFR stated that the exempted records are not readily available via alternative means, and are not protected by another exemption.

The OFR recommends reenacting the public records exemption without changes. Additionally, the OFR indicated that this exemption protects Florida consumers' financial and identification records from potentially being used for illicit purposes, and cautioned that repeal may expose personal identifying information to a significant risk of identity theft.

III. Effect of Proposed Changes:

Section 1 reenacts and removes the scheduled repeal on October 2, 2020, of s. 560.312, F.S., which makes confidential and exempt from the disclosure requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution the payment instrument transaction information held by the Office of Financial Regulation's check cashing database pursuant to s. 560.310, F.S., which identifies a licensee, payor, payee, or conductor.

Section 2 provides an effective date of October 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution requires a public necessity statement and a two-thirds vote for passage if, in reenacting an exemption or repealing the sunset date, the exemption is expanded. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment nor does it require a public necessity statement.

The Open Government Sunset Review Act provides that a public records or open meetings exemption may be maintained only if it serves an identifiable public purpose and is no broader than is necessary. An exemption serves an identifiable purpose if it meets one of the following purposes and the Legislature finds that the purpose of the

⁴³ Section 560.312(2)(a) and (b), F.S.

exemption outweighs open government policy 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;⁴⁴
- Releasing 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;⁴⁵ or
- It protects trade or business secrets.⁴⁶

The identifiable public purpose of this law is to protect sensitive, personal financial information about payees and conductors who use check cashing programs, along with private business transaction information that could be used by competitors to harm other licensees or payors in the marketplace. Both types of records are sensitive and traditionally private. This bill exempts only payment instrument transaction information held by the Office of Financial Regulation's check cashing database pursuant to s. 560.310, F.S., which identifies a licensee, payor, payee, or conductor from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Licensees, payors, payees, and conductors would continue to have their personal financial information and business transaction information protected.

⁴⁴ Section 119.15(6)(b)1., F.S.

⁴⁵ Section 119.15(6)(b)2., F.S.

⁴⁶ Section 119.15(6)(b)3., F.S.

C. **Government Sector Impact:**

The exemption will continue to allow the OFR, other governmental agencies, and law enforcement to access real time data to aid in the prevention of fraud.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 560.312 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.