

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: CS/SB 512

INTRODUCER: Banking and Insurance Committee and Senator Burgess

SUBJECT: Public Records/Application for a De Novo Banking Charter

DATE: February 17, 2021 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Knudson	BI	Fav/CS
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 512 amends s. 655.057, F.S., to make confidential and exempt from public inspection and copying requirements certain information provided by an applicant for authorization to establish a new state bank (i.e. an application for a de novo banking charter) to the Office of Financial Regulation (OFR), except as otherwise provided in the section. The public records exemption does not apply to those portions that are public records.

The bill makes findings that the new exemption from public records disclosure is a public necessity as required by the Florida Constitution. Two-thirds vote of both the House and the Senate is required for final passage.

Pursuant to the Open Government Sunset Review Act, this public records exemption is scheduled to repeal October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

This bill takes effect July 1, 2021.

II. Present Situation:

Access to Public Records – Generally

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 The right to inspect or copy 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

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.³ Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.⁴ Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.⁵

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 the statutory definition of “public record” to include “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 public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

¹ FLA. CONST. art. I, s. 24(a).

² *Id.*

³ See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 1, (2020-2022).

⁴ *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

⁵ Section 119.01(1), F.S. 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.”

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.”

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

custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.¹⁰ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹

General exemptions from the public records requirements are contained in the Public Records Act.¹² Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.¹³

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹⁴ Custodians of records designated as “confidential and exempt” may not disclose the record, except under circumstances specifically defined by the Legislature.¹⁵

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁶ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁷ public records or open meetings exemptions, with specified exceptions.¹⁸ It requires the automatic repeal of each such exemption on October 2nd of the fifth year after it is created or substantially amended, unless the Legislature reenacts the exemption.¹⁹ However, an exemption may be reviewed under the Open Government Sunset Review Act prior to the fifth year since enactment.

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. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹² *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

¹³ *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

¹⁴ *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

¹⁵ *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ Section 119.15, F.S.

¹⁷ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁸ 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.

¹⁹ Section 119.15(3), F.S.

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.²⁰ 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;²¹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²² or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²³

The Act also requires specified questions to be considered during the review process.²⁴ In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁵ If the exemption is continued without substantive changes or if the exemption is continued and 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.²⁶

Applications for Authority to Organize New State Banks under Chapter 658, F.S.

The Office of Financial Regulation is responsible for the supervision and regulation of state-chartered financial institutions, which includes state-chartered banks.²⁷ The Office of Financial Regulation's Division of Financial Institutions carries out these duties, which include the chartering of de novo banking institutions pursuant to s. 658.19, F.S. Section 658.19, F.S.,

²⁰ Section 119.15(6)(b), F.S.

²¹ Section 119.15(6)(b)1., F.S.

²² Section 119.15(6)(b)2., F.S.

²³ Section 119.15(6)(b)3., F.S.

²⁴ 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?
- 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?

²⁵ See generally s. 119.15, F.S.

²⁶ Section 119.15(7), F.S.

²⁷ Pursuant to s. 20.121(3)(a), F.S., the Financial Services Commission (the Governor and Cabinet) serves as the OFR's agency head for purposes of rulemaking and appoints the OFR's Commissioner, who serves as the agency head for purposes of final agency action for all areas within the OFR's regulatory authority. In addition to regulating the securities industry, the OFR is responsible for regulating banks, credit unions, other financial institutions, and finance companies.

requires an applicant for authority to organize a new state bank to file with OFR an application providing:

- The name, residence, and occupation of each proposed director for the proposed institution.
- The proposed corporate name of the institution.
- The total initial capital, the number of shares of each class of the capital stock to be authorized, and the par value of the shares of each class.
- The community, including street and number (or area within the community, if street and number are not available), where the principal office of the proposed institution is to be located.
- The name and address, if known, of the proposed president, or the proposed chief executive officer if such person is other than the proposed president. Additionally, if the application is for the organization of a trust company or a bank with trust powers, the application must provide the name and address of the proposed trust officer.
- Detailed financial, business, and biographical information for each proposed director, executive officer, and, if applicable, trust officer as OFR or the Financial Services Commission may reasonably require.
- A request for trust powers if desired in connection with an application to organize a bank.

In addition to statutory requirements, OFR requires applicants to file a proposed business plan and a pro forma statement of condition, pro forma statement of income, and capital funds statement for the first three years of the proposed institution's operation.²⁸ The Office of Financial Regulation also requires, as part of the application, each proposed executive officer, director, and major shareholder to complete an Interagency Biographical and Financial Report, Form OFR-U-10.²⁹ Form OFR-U-10, adopted by reference by rule 69U-105.102(1)(c), F.A.C., requires the disclosure of significant personal information, such as name, previous names used, current and previous addresses, date and place of birth, social security number, citizenship information, passport number, work experience, educational and professional credentials, business affiliations, regulatory and legal action history, and personal financial information.

Public Availability of Application Information

Presently, s. 655.057 contains a number of public records exemptions for certain OFR records relating to OFR's regulation of financial institutions. For example:

- Section 655.057(1) makes confidential and exempt certain records and information relating to OFR investigations while said investigations are active—unless such records or information are otherwise public record. The subsection also directs some portions of these records to remain confidential after the completion of the investigation or the investigation ceases to be active.
- Section 655.057(2) makes confidential and exempt certain reports of examinations, operations, or condition, including working papers, or portions thereof, prepared by, or for the use of, the OFR or any other state agency, or federal agency, responsible for the regulation or supervision of financial institutions—unless such information is otherwise a public record. The subsection also provides that this information may, however, be released to certain parties such as the financial institution under examination (or its holding company)

²⁸ See generally Form OFR-U-1, adopted by reference by 69U-105.102(1)(a), F.A.C.

²⁹ Rule 69U-105.202(1)(a), F.A.C.

and certain proposed acquirers of a financial institution. The subsection also requires certain information be released within 1 year after the appointment of a liquidator, receiver, or conservator to the financial institution.

- Section 655.057(3) makes confidential and exempt certain OFR informal enforcement actions—except for portions of which are otherwise public record.
- Section 655.057(4) makes confidential and exempt trade secrets, as defined in s. 688.002 which comply with s. 655.0591, held by OFR in accordance with its statutory duties.

While some of the above public records exemptions, or other public records exemptions provided in ch. 119, F.S., may apply to certain records received by OFR pursuant to an application to organize a banking institution, current Florida statutes does not provide a public records exemption specifically directed at such applications. Presently, with the exception of some material for which the applicant may claim trade secret status pursuant to s. 655.0591, F.S., all of the information received by OFR on form OFR-U-1 (Application for Authority to Organize a Bank, a Savings Bank or Association Pursuant to Chapters 658 and 665, Florida Statutes) is subject to public inspection and copying. Additionally, significant portions of the information received by OFR on form OFR-U-10 (Interagency Biographical and Financial Report) would be subject to public inspection and copying, with only certain information, such as social security numbers, passport numbers, home county identification numbers, immigration file numbers, and certain financial disclosures being exempted from public records requirements.

Applications Received

In 2018, OFR received its first 2 banking applications since 2009. Three applications were received annually in 2019 and 2020. The chart below, using data provided by OFR, depicts the de novo bank application activity since 2001 for Florida.

Year	Number of De Novo Banking of Applications	Number of New Banks Opened
2001	8	11
2002	11	8
2003	13	10
2004	19	16
2005	25	18
2006	21	18
2007	12	18
2008	6	7
2009	2	2
2010	0	0
2011	0	0
2012	0	0
2013	0	0
2014	0	0
2015	0	0
2016	0	0
2017	0	0
2018	2	1

Year	Number of De Novo Banking of Applications	Number of New Banks Opened
2019	3	0
2020	3	1

III. Effect of Proposed Changes:

Section 1 amends s. 655.057 to add a new subsection (5) and redesignates present sections (5) through (14) as (6) through (15), respectively. The new paragraph (5)(a) provides that certain information received by OFR pursuant to an application for authority to organize a new state bank under ch. 658, F.S., is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Specifically, the following information would be confidential and exempt:

- Personal financial information;
- Numbers issued on a government document to verify identity (such as a driver license, passport number, or military identification number);
- The books and records of a current or proposed financial institution;
- Personal identifying information of a shareholder, subscriber, proposed officer, or proposed director of a proposed bank, if such is marked as confidential by the applicant;³⁰ and
- The proposed bank’s business plan, and any attached supporting documentation for such plan, if marked as confidential by the applicant.

Similar to present s. 655.057(1)-(3), F.S., the proposed s. 655.057(5) provides that the above public records exemptions are subject to exceptions provided elsewhere in s. 655.057, F.S., and if portions of the above are “otherwise public record,” then those portions are also excepted from the exemption. These exceptions would include publishing certain reports required to be submitted to OFR pursuant to s. 644.045(2), reports required to be published by federal statute or rule, publishing certain data where the identity of a particular financial institution is not disclosed, reporting criminal activity, and furnishing certain information Chief Financial Officer or the Division of Treasury of the Department of Financial Services.³¹

As with other information presently made confidential under s. 655.057, F.S., willful disclosure of the information made confidential pursuant to the proposed s. 655.057(5), F.S., would constitute a felony, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.³²

Paragraph (5)(b) provides that the section is subject to the Open Government Sunset Review Act, and shall stand repealed on October 2, 2026, unless reviewed and reenacted by the Legislature.

Section 2 provides a public necessity statement describing the justifications for the exemptions in Section 1. In general, the statement provides that the confidentiality and exemption from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution, proposed in **Section 1** is necessary because OFR may receive sensitive personal, financial, and business

³⁰ For the purposes of this proposed provision, the bill defines “personal identifying information” as: names, home addresses, e-mail addresses, telephone numbers, names of relatives, work experience, professional licensing and educational background, and photographs.

³¹ Section 655.057(5), F.S.

³² Section 655.057(13), F.S.

information relating to its duties to review applications for the organization of new state banks. As such, the protection of such information is necessary to prevent unwarranted damage to a proposed bank or the shareholders, subscribers, proposed officers, or proposed directors of a proposed bank other financial institutions in this state. Specifically, the statement identifies the following concerns:

- The release of information leading to the identification of individuals involved in the potential establishment of a new bank could place in jeopardy those individuals' current employment with, or participation in the affairs of, another financial institution. This has a chilling effect on the establishment of new banks.
- Public availability of financial institution (whether current or proposed) books and records presents an unnecessary risk of harm to such institutions.
- The public availability of a proposed bank's business plan may place such bank at a competitive disadvantage relative to other financial institutions that do not have to release such information.

Section 3 provides that the bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for certain records received by OFR pursuant to an application for authority to organize a new state bank, pursuant to s. ch. 658, F.S. Thus, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for justifying the exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The stated purpose of the law is to ensure the OFR's ability to administer its regulatory duties regarding applications for authority to organize a new state bank under ch. 658,

F.S., while preventing unwarranted damage to the proposed bank or the shareholders, subscribers, proposed officers, or proposed directors of the proposed bank or other financial institutions in this state. This bill exempts only potentially sensitive information that would be provided to OFR pursuant to an application for authority to organize a new state bank. These exemptions do 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:

Indeterminate. The private sector will be subject to the cost associated with an agency making redactions in response to a public records request. Applicants for authority to organize a new state bank will also be subject to the cost of marking as confidential those portions of their applications they wish to protect from public disclosure as authorized by this bill.

C. Government Sector Impact:

OFR will incur minor costs relating to the identification and redaction of exempt records. However, costs incurred by OFR in responding to public records requests regarding these exemptions should be offset by authorized fees.³³

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation (FAF) has expressed concerns regarding this bill. Specifically, FAF is concerned that a public records exemption to protect the identity of all shareholders,

³³ Section 119.07(2) and (4), F.S.

subscribers, and proposed officers or directors, “will make it impossible for the public to know the leaders and owners of new state banks.” Thus, FAF argues that the proposed legislation reduces transparency of OFR and banks and would make public oversight of the banking industry more difficult. Finally, FAF states that the bill “provides no evidence of retribution” in order to support the bill’s statement of necessity and, therefore, the exemption regarding the identities of shareholders, officers, and directors is “unwarranted by the facts.”

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 655.057.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on February 16, 2020:

The committee substitute applies the public records exemption to the “personal identifying information” of a shareholder, subscriber, proposed officer, or proposed director of the proposed bank when marked by the applicant as confidential. The CS also defines “personal identifying information.” The original filed bill required the OFR to apply the exemption when revealing the names of proposed officers or directors would jeopardize that person’s employment or participation with another financial institution, and also prohibited the revelation of the identity of a minority shareholder or subscriber.

The CS removes the portion of the original bill prohibiting the revelation of information that would defame or cause unwarranted damage to the good name, or jeopardize the safety of, an individual. The CS requires that the applicant mark as confidential a business plan, or attached supporting documentation, in order for such information to be exempt from public records requirements. The CS also makes technical and public necessity statement revisions.

- B. **Amendments:**

None.