

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7007 PCB GOS 21-03 OGSR/Department of Agriculture and Consumer Services

**SPONSOR(S):** Government Operations Subcommittee, Chambliss

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 7036

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	17 Y, 0 N	Toliver	Smith
1) Regulatory Reform Subcommittee	16 Y, 0 N	Thompson	Anstead
2) State Affairs Committee	22 Y, 0 N	Toliver	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record 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.

The Department of Agriculture and Consumer Services (DACS) investigates and regulates several professions and organizations in the State of Florida, including the regulation of charitable organizations. DACS receives examination and investigation data from agencies in other states and federal agencies. Many charitable organizations operate both inside and outside of Florida making coordination with other state and federal agencies critical. The data from these partner agencies helps DACS carry out its mission to provide, among other duties, oversight of charitable organizations. In order to receive and share certain investigatory information, DACS must enter into agreements to maintain the confidentiality of the information.

In 2016, the Legislature created a public record exemption for criminal or civil intelligence or investigative information or any other information held by DACS as part of a joint or multi-agency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency when the information shared is confidential or exempt under the laws or regulations of that state or federal agency. The public records exemption does not apply to information held by DACS as part of an independent examination or investigation conducted by DACS.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2021, if this bill does not become law.

The bill does not appear to have a fiscal impact on 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 (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 then a public necessity statement and a two-thirds vote for passage are not required.

##### Department of Agriculture and Consumer Services (DACS)

The mission of DACS is to safeguard the public and support Florida's agricultural economy by:

- Ensuring the safety and wholesomeness of food and other consumer products through inspection and testing programs;
- Protecting consumers from unfair and deceptive business practices and providing consumer information;
- Assisting Florida's farmers and agricultural industries with the production and promotion of agricultural products; and
- Conserving and protecting the state's agricultural and natural resources by reducing wildfires, promoting environmentally safe agricultural practices, and managing public lands.<sup>5</sup>

DACS investigates and regulates several professions and organizations in the State of Florida, including regulation of charitable organizations. Charitable organizations that solicit contributions within the state are required to abide by certain requirements set forth in the Solicitation of Contributions Act (act).<sup>6</sup> DACS is authorized by the act to conduct investigations of those organizations and to bring a civil action against the organization if there is a violation of the act.<sup>7</sup> To assist in these investigations, DACS receives examination and investigation data from agencies in other states and federal agencies. Many charitable organizations operate both inside and outside of Florida making coordination with

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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, FLA. CONST.

<sup>5</sup> DACS, Statement of Agency Organization, available at

<https://www.fdacs.gov/content/download/34070/file/StatementofAgencyOrganizationandOperation.pdf> (last visited March 25, 2021).

<sup>6</sup> Section 496.401, F.S.

<sup>7</sup> Section 496.420(6), F.S.

other state and federal agencies critical. The data from these partner agencies helps DACS carry out its mission to provide, among other duties, oversight of these organizations.

DACS has memoranda of understanding with entities from other states and with federal agencies. Pursuant to these memoranda, DACS receives confidential examination and investigatory data. DACS has an agreement with the Federal Trade Commission (FTC), for instance. The FTC operates a Consumer Sentinel database, which operates as an investigative cyber tool and complaint database, that is protected from public disclosure and can only be provided to DACS if the department agrees not to disseminate the information.<sup>8</sup> This database is only available to law enforcement agencies and contains information on subjects related to:

- Identity theft;
- Do-Not-Call Registry violations;
- Computers, the internet, and online auctions;
- Telemarketing scams;
- Advance-fee loans and credit scams;
- Immigration services;
- Sweepstakes, lotteries, and prizes;
- Business opportunities and work-at-home schemes;
- Health and weight loss products; and
- Debt collection, credit reports, and financial matters.<sup>9</sup>

Similarly, the Internal Revenue Service (IRS) shares certain information, on a case-by-case basis, with DACS. The IRS has access to tax filing information that is valuable to DACS when investigating whether an organization - especially a charitable organization - is observing Florida's laws.

#### Public Record Exemption under Review

In 2016, the Legislature created a public records exemption for criminal or civil intelligence or investigative information or any other information held by DACS as part of a joint or multi-agency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency when the information that is shared is confidential or exempt<sup>10</sup> under the laws or regulations of that state or federal agency. DACS may obtain, use, and release the information in accordance with the conditions imposed by the joint or multi-agency agreement.

The public records exemption does not apply to information held by DACS as part of an independent examination or investigation conducted by DACS.

DACS may release the confidential and exempt information in the furtherance of its official duties and responsibilities, or to another governmental agency in the furtherance of its official duties and responsibilities.

The 2016 public necessity statement<sup>11</sup> for the exemption states the following:

Without the exemption, the department will be unable to obtain information that could assist it in pursuing violations of law under its jurisdiction. With this

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<sup>8</sup> FTC, Consumer Sentinel Network Confidentiality and Data Security Agreement, available at <https://register.consumersentinel.gov/Agency/ca.pdf> (last visited March 25, 2021).

<sup>9</sup> FTC, Consumer Sentinel Network, available at <https://www.ftc.gov/enforcement/consumer-sentinel-network> (last visited Feb. 19, 2021).

<sup>10</sup> There is a difference between records the Legislature designates 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. Sch. Bd. 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 683, 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 (Aug. 1, 1985).

<sup>11</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption "state with specificity the public necessity justifying the exemption."

exemption, the department should increase efficiency of investigations by saving time on developing investigative leads, witness data, and victim data. Furthermore, the exemption is necessary to enable the department to participate in joint or multiagency investigations and examinations. Without the exemption, the department would continue to be excluded from information due to the inability to maintain investigative confidentiality. Without the sharing and coordination of information, governmental agencies may be required to conduct duplicative independent investigations or examinations in order to meet their regulatory responsibilities. With this exemption, the department will strengthen relationships with other state and federal agencies, allowing them to become more efficient by sharing critical investigative data.<sup>12</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2021, unless saved from repeal by the Legislature.<sup>13</sup>

During the 2020 interim, subcommittee staff met with staff from DACS. DACS staff stated they had not had any issues interpreting or applying the exemption and that they were unaware of the existence of any litigation concerning the exemption. Further, DACS staff stated that they had not received any complaints concerning the exemption. DACS staff emphasized the importance of retaining the exemption as it provides the department with invaluable investigatory tools that aid in carrying out its duties, tools the department otherwise would be unable to access. As such, DACS staff recommended that the exemption be reenacted as is.

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemption for criminal or civil intelligence or investigative information or any other information held by DACS as part of a joint or multiagency examination or investigation with another state or federal regulatory, administrative, or criminal justice agency.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 570.077, F.S., relating to the confidentiality of intelligence or investigative information.

Section 2 provides an effective date of October 1, 2021.

## **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:

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<sup>12</sup> Chapter 2016-161, L.O.F.

<sup>13</sup> Section 624.4212(6), F.S.

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. This 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**

None.