

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 7015 PCB COM 21-02 Public Records

SPONSOR(S): Government Operations Subcommittee and Commerce Committee, Ingoglia and others

TIED BILLS: HB 7013 **IDEN./SIM. BILLS:** SB 1914, SB 7074

FINAL HOUSE FLOOR ACTION: 79 Y's 39 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 7015 passed the House on April 28, 2021, as SB 7074. HB 7013 passed the House on April 29, 2021, as SB 7072.

Section 230 of the Federal Communications Decency Act (Section 230) provides liability immunity for information service providers and social media platforms (platforms) that, in good faith, remove or restrict information deemed obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, even if such material is constitutionally protected, and from claims based on third-party content appearing on their platforms. While this immunity has fostered the growth of certain parts of the internet, recently, there have been criticisms of the broad federal immunity in Section 230 due to actions taken or not taken regarding the censorship of users by platforms. Government regulators have also recently investigated and initiated cases against certain platforms for antitrust activities.

HB 7013 (2021), to which HB 7015 is linked, requires a platform to meet certain requirements when restricting a user's speech and authorizes the Department of Legal Affairs (DLA) to bring an action against the platform under the Florida Deceptive and Unfair Trade Practices Act for failing to do so. The bill also allows DLA to determine if a platform likely committed an antitrust violation based on a case brought by a governmental entity and prohibits the platform from contracting for services with public entities if such a determination is made.

The bill provides public records exemptions for information received by DLA in an investigation into whether a platform has committed an antitrust violation based on a case brought by a governmental entity; or failed to meet certain requirements before restricting a user's speech.

All such information remains confidential and exempt until after the investigation's completion; but only the following information will remain confidential and exempt after the investigation's completion:

- All information to which another public records exemption applies;
- Personal identifying information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a business's data security; and
- Proprietary business information.

The bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and will be subject to repeal on October 2, 2026, unless saved from repeal by legislative reenactment.

The bill was approved by the Governor on May 24, 2021, ch. 2021-33, L.O.F., and becomes effective on the same date that SB 7072 (2021) takes effect on July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Public Records

Article I, section 24(a) of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. However, the Legislature may provide by general law for public records exemptions.¹ Such general law must state with specificity the public necessity justifying the exemption² and must be no broader than necessary to accomplish its purpose.³

Additionally, s. 119.07(1)(a), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt from disclosure. The Open Government Sunset Review Act⁴ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to:

- 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); or
- Protect trade or business secrets.⁵

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁶

Technology Transparency

Section 230 of the federal Communications Decency Act provides that internet platforms cannot be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the internet platform considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.⁷ The Act also provides internet platforms with immunity from claims based on third-party content appearing on their platforms.⁸

Recently, there have been criticisms of the broad federal immunity provisions granted to internet platforms under Section 230. While this immunity has fostered the free flow of ideas on the internet, critics have argued that the immunity provisions shield publishers from liability for harmful content or political censorship.⁹

Antitrust and Internet Platforms

¹ Art. I, s. 24(c), FLA. CONST.

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ Art. I, s. 24(c), FLA. CONST.

⁴ S. 119.15, F.S.

⁵ S. 119.15(6)(b), F.S.

⁶ S. 119.15(3), F.S.

⁷ 47 U.S.C. § 230(c).

⁸ *Id.*

⁹ Zoe Bedell and John Major, *What's Next for Section 230? A Roundup of Proposals*, Lawfare, (July 29, 2020) <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> (last visited April 9, 2021).

Critics have argued that internet platforms like Google, Apple, Facebook and Amazon built sprawling empires over commerce, communications and culture, and then abused their growing power. Recently, federal and state regulators have investigated and brought antitrust cases against such platforms.¹⁰ For example, the FTC and over 40 states, including Florida, have brought an action against Facebook for allegedly buying smaller rivals to maintain market dominance,¹¹ and DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.¹²

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹³ procurement of personal property and services. The Department of Management Services (DMS), statutorily designated as the central executive agency procurement authority, is responsible for overseeing agency implementation of the procurement process,¹⁴ creating uniform agency procurement rules,¹⁵ implementing the online procurement program,¹⁶ and establishing state term contracts.¹⁷

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:¹⁸

- Convicted Vendor List;
- Discriminatory Vendor List;
- Scrutinized Companies with Activities in Sudan List;
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List; or
- Scrutinized Companies that Boycott Israel List.

SB 7072 (2021)

SB 7072 (2021), to which SB 7074 is linked, requires a social media platform (platform) to meet certain requirements when restricting a user's speech and authorizes the Department of Legal Affairs (DLA) to bring an action against the platform under the Florida Deceptive and Unfair Trade Practices Act if it fails to do so.

SB 7072 (2021) also allows DLA to determine if a platform likely committed an antitrust violation based on a case brought by a governmental entity. The bill prohibits a platform from contracting for services with public entities if such a determination is made and the platform is consequently placed on the Antitrust Violator Vendor List.

Effect of the Bill

The bill provides public records exemptions for information received by DLA in an investigation into whether a platform has:

- Committed an antitrust violation based on a case brought by a governmental entity; or
- Failed to meet certain requirements before restricting a user's speech.

¹⁰ David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html> (last visited April 9, 2021).

¹¹ *Id.*; *Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020).

¹² McCabe, *supra* note 10; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

¹³ Section 287.012(1), F.S., defines the term "agency" as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

¹⁴ See ss. 287.032 and 287.042, F.S.

¹⁵ See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

¹⁶ See s. 287.057(22), F.S.

¹⁷ See ss. 287.042(2), 287.056, and 287.1345, F.S.

¹⁸ Ss. 287.133-135, F.S.

Specifically, the bill provides that, generally, all information received by DLA pursuant to such an investigation by DLA or a law enforcement agency is confidential and exempt,¹⁹ until such time as the investigation is completed or ceases to be active. However, during an active investigation, such information may be disclosed by DLA:

- In the performance of its official duties and responsibilities; or
- To another governmental entity in performance of its official duties and responsibilities.

Once an investigation is completed or ceases to be active, only the following information received by DLA in connection to such an investigation will remain confidential and exempt:

- All information to which another public records exemption applies;
- Personal identifying information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a business's data security; and
- Proprietary business information.

The term "proprietary business information" means information that:

- Is owned or controlled by the business;
- Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations;
- Has not been disclosed except as required by law or a private agreement providing that the information will not be released to the public;
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by DLA; and
- Includes trade secrets and competitive interests.

The bill provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution, and which provides that, if released, information received by DLA pursuant to an investigation by DLA or a law enforcement agency could:

- Frustrate or thwart the investigation and impair the ability of DLA to perform assigned functions;
- Undo a specific statutory exemption protecting the information;
- Be used for the purpose of identity theft;
- Result in the identification of cybersecurity system vulnerabilities; and
- Result in economic harm.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and are subject to repeal on October 2, 2026, unless saved from repeal by legislative reenactment.

The bill takes effect on the same date that SB 7072 (2021) takes effect on July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

¹⁹ 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 Rivera 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 to anyone other than the persons or entities specifically designated in statute. See Op. Att'y Gen. Fla. (1985).

2. Expenditures:

The bill may have a fiscal impact on agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record. The costs, however, could be absorbed by existing resources, as they are part of day-to-day agency responsibilities.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.