

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 Governmental Oversight and Accountability

BILL: SPB 7074

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: Public Records

DATE: April 5, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Ponder	McVaney		Pre-meeting

I. Summary:

SPB 7074, which is linked to the passage of SPB 7072 (2021), makes confidential and exempt from public copying and inspection requirements information collected for the Department of Legal Affairs (DLA) investigations into whether:

- A social media platform has committed an antitrust violation based on a case brought by a governmental entity; and
- A social media platform has failed to meet certain requirements before restricting speech by users.

Once an investigation is completed, only the following information received by DLA 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 bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill will become effective on the same date that SPB 7072 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.

II. Present Situation:

Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, section 24(a) of the Florida Constitution.¹ The general law must state with specificity the public necessity justifying the exemption² and must be no broader than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, 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. In addition, it may be no broader than 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; and
- 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 that appears on their platforms.⁸

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 Section 119.15, F.S.

⁵ Section 119.15(6)(b), F.S.

⁶ Section 119.15(3), F.S.

⁷ 47 U.S.C. § 230(c).

⁸ *Id.*

Recently, there have been criticisms of the broad federal immunity provisions granted to internet platforms. 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

A handful of digital or internet platforms - Google, Apple, Facebook, Amazon and Microsoft (collectively known as “GAFAM”¹⁰) - have built sprawling empires and obtained an unparalleled financial position in the marketplace,¹¹ and collectively maintain at least thirty-three percent market share in fifteen separate markets. Recently, federal and state regulators have been investigating and bringing antitrust actions against the GAFAM companies.¹² In February 2019, the Federal Trade Commission (FTC) created a task force dedicated to monitoring antitrust in technology markets.¹³ Additionally, the FTC and over 40 states, including Florida, sued Facebook alleging the company is illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct.¹⁴ Also, the Department of Justice and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.¹⁵

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹⁶ procurement of personal property and services. The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,¹⁷ creating uniform agency procurement rules,¹⁸ implementing the online procurement program,¹⁹ and establishing state term contracts.²⁰

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 Feb. 25, 2021).

¹⁰ This is phrasing economist Thomas Philippon uses. Thomas Philippon, *The Great Reversal* 159 (2019).

¹¹ See Pippa Stevens, *Here Are the 10 Companies with the Most Cash on Hand*, CNBC (Nov. 7, 2019), <https://www.cnbc.com/2019/11/07/microsoft-apple-and-alphabet-are-sitting-on-more-than-100-billion-in-cash.html> (last visited April 5, 2021).

¹² 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 Feb. 25, 2021).

¹³ *TC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, Fed. Trade Comm'n. (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

¹⁴ Federal Trade Commission, *FTC Sues Facebook for Illegal Monopolization*, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> (last visited April 5, 2021) (*Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020)).

¹⁵ McCabe, supra note 10; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

¹⁶ 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.

¹⁷ See ss. 287.032 and 287.042, F.S.

¹⁸ See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

¹⁹ See s. 287.057(22), F.S.

²⁰ See ss. 287.042(2), 287.056, and 287.1345, F.S.

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:²¹

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

SPB 7072 (2021)

SPB 7072 (2021), to which this bill is linked, allows DLA to determine if a social media platform has likely committed an antitrust violation based on a case brought by a governmental entity. If such a determination is made, the social media platform is prohibited from contracting for services with public entities and placed on the Antitrust Violator Vendor List.

SPB 7072 (2021) also requires social media platforms to meet certain requirements when they restrict speech by users. If a social media platform fails to meet such requirements, DLA may bring an action against the social media platform under the Florida Deceptive and Unfair Trade Practices Act.

III. Effect of Proposed Changes:

Section 1 and 2 create ss. 287.137(8) and 501.2041(10), F.S., to make all information received by DLA pursuant to an investigation by DLA or a law enforcement agency confidential and exempt from public copying and inspection requirements,²² until such time as the investigation is completed or ceases to be active.

The bill applies to records received by DLA pursuant to an investigation into:

- Whether a social media platform has committed an antitrust violation based on a case brought by a governmental entity; and
- Whether a social media platform has failed to meet certain requirements or improperly restricted speech by users.

During an active investigation, information made confidential and exempt may be disclosed by the DLA:

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

²¹ Sections 287.133-135, F.S.

²² 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 by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Op. Att’y Gen. Fla. (1985).

Once an investigation is completed or once an investigation ceases to be active, the following information received by DLA 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 that provides 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.

Section 3 provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution. The public necessity statement 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 vulnerabilities; and
- Result in economic harm.

This section provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill takes effect on the same date that SPB 7072 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates new public record exemptions. Thus, the bill requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new public record exemptions. Thus, the bill includes a public necessity statement.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates public record exemptions for sensitive investigative materials, which does not appear to be broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record may experience increased

workload and incur associated costs. These costs most likely will be absorbed within existing resources as part of the day-to-day responsibilities of agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 287.137 and 501.2041 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.