

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1461 Pub. Rec./Investigations by the Department of Legal Affairs

**SPONSOR(S):** Commerce Committee, McFarland

**TIED BILLS:** CS/CS/HB 1459 **IDEN./SIM. BILLS:** SB 1682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Commerce Committee	19 Y, 0 N, As CS	Wright	Hamon
2) State Affairs Committee	19 Y, 0 N	Skinner	Williamson
3) Judiciary Committee			

### SUMMARY ANALYSIS

CS/HB 1459 (2024), to which this bill is linked:

- Requires certain entities and persons that produce or offer AI content to the Florida public to:
  - Create certain safety and transparency standards; and
  - Make certain disclosures.
- Prohibits any entity or person from knowingly producing, generating, incorporating, or synthesizing child pornography through AI.

The Department of Legal Affairs (DLA), upon belief that any entity or person is in violation of the provisions of CS/HB 1459, may bring an action under the Florida Deceptive and Unfair Trade Practices Act.

This bill creates a public record exemption for all information held by DLA pursuant to a notification or an investigation of a violation. The bill provides that the confidential and exempt information may be released by DLA during an active investigation only in the furtherance of its official duties and responsibilities; for print, publication, or broadcast in certain instances; or to another governmental entity in the furtherance of the receiving entity's official duties and responsibilities.

Once an investigation is completed, the following information remains confidential and exempt:

- Information that is otherwise confidential or exempt;
- Personal identifying information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in data security; and
- Information that would disclose proprietary information.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature. It also includes a statement of public necessity as required by the Florida Constitution.

**Article I, s. 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 exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Public Records

The Florida Constitution sets forth the state's public policy regarding access to government records, guaranteeing every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may provide by general law an exemption<sup>2</sup> from public record requirements provided the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.<sup>3</sup>

Current law also addresses the public policy regarding access to government records by guaranteeing every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.<sup>4</sup> Furthermore, the Open Government Sunset Review (OGSR) Act<sup>5</sup> provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>6</sup> An identifiable public purpose is served if the exemption meets 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; or
- Protect trade or business secrets.<sup>7</sup>

Pursuant to the OGSR Act, a new public record exemption, or the substantial amendment of an existing public record exemption, is repealed on October 2nd of the fifth year following enactment, unless reviewed and saved from repeal through reenactment by the Legislature.<sup>8</sup>

##### Artificial Intelligence

The term "artificial intelligence" (AI) was coined at the Dartmouth Summer Research Project on Artificial Intelligence, a conference held in 1956. Since 2010, there has been a lot of advancement in AI research, which has been attributed to the "availability of large datasets (i.e., big data), improved [machine learning]<sup>9</sup> approaches and algorithms, and more powerful computers."<sup>10</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> A "public record exemption" means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the Florida Constitution. *See* s. 119.011(8), F.S.

<sup>3</sup> Art. I, s. 24(c), Fla. Const.

<sup>4</sup> *See* s. 119.01, F.S.

<sup>5</sup> S. 119.15, F.S.

<sup>6</sup> S. 119.15(6)(b), F.S.

<sup>7</sup> *Id.*

<sup>8</sup> S. 119.15(3), F.S.

<sup>9</sup> Machine learning (ML) examines how to build computer programs that improve their performance automatically for a task, through experience, without relying on explicit rules-based programming. Congressional Research Service, *Artificial Intelligence: Overview, Recent Advances, and Considerations for the 118th Congress*, available at <https://crsreports.congress.gov/product/pdf/R/R47644> (last visited Jan. 30, 2024).

<sup>10</sup> Congressional Research Service, *Artificial Intelligence: Overview, Recent Advances, and Considerations for the 118th Congress*, available at <https://crsreports.congress.gov/product/pdf/R/R47644> (last visited Jan. 30, 2024).

AI encompasses a large field of existing and emerging technologies, methodologies, and application areas. The Congressional Research Service has recently stated that AI is “generally thought of as computerized systems that work and react in ways commonly thought to require intelligence.”<sup>11</sup> The application of AI extends to areas such as “natural language processing, facial recognition, and robotics.”<sup>12</sup>

## Department of Legal Affairs

The Department of Legal Affairs (DLA) provides a wide variety of legal services, including defending the state in civil litigation cases; representing the people of Florida in criminal appeals in state and federal courts; protecting rights of children, consumers, and victims through its various protection programs; and investigating and litigating against businesses that seek to limit competition and defraud taxpayers.<sup>13</sup>

## CS/HB 1459 (2024)

### CS/HB 1459:

- Requires an entity or person who produces or offers for use or interaction AI content or technology for a commercial purpose, and makes such content or technology available to the Florida public, to create safety and transparency standards that:
  - Alert consumers that such content or technology is generated by AI.
  - Allow such content or technology to be recognizable as generated by AI to other AI.
- Requires an entity or a person to provide a clear and conspicuous notice on its Internet homepage or landing page if it provides an AI mechanism to communicate or interact with Florida consumers for a commercial purpose.
- Prohibits any entity or person from knowingly producing, generating, incorporating, or synthesizing child pornography through AI.
- Requires any state agency that uses AI to disclose if a person is interacting with AI when interacting with the agency and ensure that any confidential information accessible to an AI system remains confidential.

Any violation of the bill by a person or entity is an unfair and deceptive trade practice actionable under the Florida Deceptive and Unfair Trade Practices Act<sup>14</sup> solely by DLA. The bill does not establish a private cause of action.

The bill also creates an advisory council called the Government Technology Modernization Council to study and monitor the development and deployment of AI systems and provide reports on such systems to the Governor and the Legislature.

## **Effect of Proposed Changes**

The bill creates a public record exemption for all information held by DLA pursuant to a notification or an investigation of a violation by an entity or person of the requirements created by CS/HB 1459. Such

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> OPPAGA, Office of the Attorney General (Department of Legal Affairs), <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=1026> (last visited Jan. 30, 2024); *see also* ch. 16 and s. 20.11, F.S.

<sup>14</sup> Part II of Ch. 501, F.S. is known as the “Florida Deceptive and Unfair Trade Practices Act.” S. 501.201, F.S. The Florida Deceptive and Unfair Trade Practices Act is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce. S. 501.202, F.S.

information is made confidential and exempt<sup>15</sup> from public record requirements until the investigation is completed or is no longer active.<sup>16</sup>

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

- In the furtherance of its official duties and responsibilities.
- For print, publication, or broadcast if DLA determines that such release would assist in notifying the public or locating or identifying a person DLA believes to be a victim of an improper use or disposal of customer records, except that information which remains confidential and exempt after an investigation may not be released in this manner.
- To another governmental entity in the furtherance of the receiving entity's official duties and responsibilities.

Once an investigation is completed or ceases to be active, the following information held by DLA remains confidential and exempt:

- Information that is otherwise confidential or exempt.
- Personal identifying information.
- A computer forensic report.
- Information that would otherwise reveal weaknesses in an entity or person's data security.
- Information that would disclose an entity or person's proprietary information.<sup>17</sup>

The bill provides the constitutionally required public necessity statement,<sup>18</sup> which states that, if released, information held by DLA pursuant to a notification or an investigation of a violation by commercial entities of the requirements created by CS/HB 1459 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.
- Result in economic harm.

The bill provides that the public record exemption is subject to the OGSR Act and will repeal on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill will become effective on the same date that HB 1459 or similar legislation takes effect, if such legislation is adopted in the same legislative session, or an extension thereof, and becomes a law.

## B. SECTION DIRECTORY:

**Section 1:** Amends s. 501.174, F.S., as created by HB 1459 (2024), to create a public record exemption for investigations related to s. 501.174, F.S.

**Section 2:** Provides a public necessity statement as required by the Florida Constitution.

**Section 3:** Provides a contingent effective date.

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<sup>15</sup> There is a difference between records the Legislature designates *exempt* from public record requirements and those the Legislature designates *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); *State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018); *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. 04-09 (2004).

<sup>16</sup> The bill states that the public record exemption should be construed in conformity with s. 119.071(2)(c), F.S. Section 119.071(2)(c), F.S., creates an exemption for active criminal investigative and criminal intelligence information. Section 119.011(3), F.S., defines the terms "criminal intelligence information," "criminal investigative information," and "active."

<sup>17</sup> The bill defines the term "proprietary information" to mean information that is owned or controlled by the entity or person; is intended to be private and is treated by the entity or person as private because disclosure would harm the entity or person or its business operations; has not been disclosed except as required by law or through 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 an other source in the same configuration as received by DLA; and reveals competitive interests.

<sup>18</sup> Art. I s. 24(c), Fla. Const., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill may have a minimal fiscal impact on DLA because agency staff responsible for complying with public record requests may require training related to the creation of the public record exemption. DLA could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

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. The bill does not appear to affect county or municipal governments.

#### 2. Other:

##### Vote Requirement

Article I, s. 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 a public record exemption; thus, it requires a two-thirds vote for final passage.

##### Public Necessity Statement

Article I, s. 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 a public record exemption; thus, it includes a public necessity statement. The public necessity statement provides that, if released, information held by DLA pursuant to a notification or an investigation 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.

## Breadth of Exemption

Article I, s. 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 a public record exemption for sensitive investigative information and personal identifying information, which does not appear to be broader than necessary to accomplish its purpose.

### B. RULE-MAKING AUTHORITY:

The bill does not require rulemaking, nor does the bill confer or alter DLA's rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On January 23, 2024, the Commerce Committee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Clarifies that the public record exemption applies to information held by the Department of Legal Affairs to ensure records received or created by the department relating to its investigations of certain entities and persons is protected.
- Clarifies that information that is otherwise confidential or exempt remains protected at the conclusion of the investigation.
- Removes a duplicative public record exemption for trade secrets.
- Conforms the public necessity statement to the changes made to the public record exemption.
- Makes a technical change to conform the bill to changes made in the PCS for HB 1459, to which this bill is linked.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.