

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1491 Pub. Rec./Investigations by the Department of Legal Affairs  
**SPONSOR(S):** State Affairs Committee, Regulatory Reform & Economic Development Subcommittee, Tramont, Overdorf  
**TIED BILLS:** CS/CS/HB 3 **IDEN./SIM. BILLS:** SB 1794

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	13 Y, 0 N, As CS	Wright	Anstead
2) State Affairs Committee	18 Y, 0 N, As CS	Skinner	Williamson

### SUMMARY ANALYSIS

Internet usage and mobile technology have become mainstream, especially among teens and young adults, which has expanded the creation and dissemination of pornography. The majority of Americans, including minors, are exposed to pornography online regularly, and 56 percent of American high school students have viewed pornography in the last year.

Adolescents who view pornography tend to report feeling insecure about their ability to perform sexually or the way they look, display more aggression, and view women as sex objects.

HB 3 (2024), to which this bill is linked, requires a commercial entity that knowingly and intentionally publishes or distributes a substantial portion of material harmful to minors on a website or application to prohibit access to such material by any person younger than 18 years of age; and use reasonable age verification methods to verify that the age of a person attempting to access the material is 18 years of age or older. The Department of Legal Affairs (DLA), upon belief that any commercial entity is in violation of the provisions of HB 3, may bring an action under the Florida Deceptive and Unfair Trade Practices Act. A private cause of action is permitted in certain limited circumstances.

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 otherwise 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 that 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 the Legislature reenacts the exemption.<sup>8</sup>

##### Effects of Harmful Content on Children

Internet usage and mobile technology has become mainstream, especially among teens and young adults.<sup>9</sup> The majority of Americans come across pornography online and one-third will seek it out monthly.<sup>10</sup> Twenty-seven percent of young adults first view pornography before the onset of puberty,<sup>11</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> Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19(1-2) SEXUAL ADDICTION & COMPULSIVITY 99, 99-100 (2012); *see also* PEW RESEARCH CENTER, *Teens, Social Media & Technology Overview 2015*, <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> (last visited Jan. 12, 2024).

<sup>10</sup> Josh McDowell Ministry, *THE PORN PHENOMENON: THE IMPACT OF PORNOGRAPHY IN THE DIGITAL AGE* (2016), research summary available at <https://www.barna.com/research/porn-in-the-digital-age-new-research-reveals-10-trends/> (last visited Jan. 12, 2024).

<sup>11</sup> Josh McDowell Ministry, *KEY FINDINGS FOR THE PORN PHENOMENON UNVEILED* (2016), press release available at <https://www.josh.org/news-release/key-findings-for-the-porn-phenomenon-unveiled/> (last visited Jan. 13, 2024).

70 percent of teens accidentally stumble upon pornography online,<sup>12</sup> and teens may have experienced an increase in unwanted exposure to pornographic content online.<sup>13</sup> A sample of American high school students in 2021 found that 56 percent viewed pornography in the prior year.<sup>14</sup>

Research suggests that adolescents who view pornography tend to have more sexually permissive attitudes, have more sexual partners in their lifetime, and are more likely to engage in certain sexual acts.<sup>15</sup> Similarly, adolescents who viewed pornography tended to display more aggression, have more traditional gender role attitudes, and view women as sex objects.<sup>16</sup>

Adolescents who view pornography report feeling insecure about their ability to perform sexually or how they look, and tend to decrease their pornography use as their self-confidence increases or they develop positive relationships with friends and family.<sup>17</sup>

To attempt to reduce such effects on kids, Utah, Arkansas, Louisiana, and Ohio recently enacted laws to require commercial entities that have a substantial amount of material harmful to minors on their website to verify user age and prohibit access to minors under 18.<sup>18</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>19</sup>

### House Bill 3 (2024)

HB 3, to which this bill is linked, requires commercial entities that knowingly and intentionally publish or distribute a substantial portion of material harmful to minors on a website or application to:

- Prohibit access to such material by any person younger than 18 years of age; and
- Use reasonable age verification methods to verify that the age of a person attempting to access the material is 18 years of age or older.

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<sup>12</sup> KAISER FAMILY FOUNDATION, *Generation Rx.com: How Young People Use the Internet for Health Information*, December 2001, at 12, available at <https://www.kff.org/wp-content/uploads/2001/11/3202-genrx-report.pdf> (last visited Jan. 12, 2024).

<sup>13</sup> Kimberly J. Mitchell et al., *Trends in Youth Reports of Sexual Solicitations, Harassment and Unwanted Exposure to Pornography on the Internet*, 40 JOURNAL OF ADOLESCENT HEALTH 116, 124 (2007), available at: <http://unh.edu/ccrc/pdf/CV135.pdf> (last visited Jan. 12, 2024).

<sup>14</sup> Amanda Giordano, *What to Know About Adolescent Pornography Exposure*, Psychology Today, Feb. 27, 2022, <https://www.psychologytoday.com/us/blog/understanding-addiction/202202/what-know-about-adolescent-pornography-exposure> (last visited Jan. 12, 2024).

<sup>15</sup> Debra K. Braun-Courville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes and Behaviors*, 45(2) J ADOLESCENT HEALTH 153, 156-162 (2009). See also Jane D. Brown & Kelly L. L'Engle, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 COMM. RSCH. 129-151 (2009). Contra Marie-Therese Luder et al., *Associations between Online Pornography and Sexual Behavior among Adolescents: Myth or Reality?*, 40(5) ARCHIVES OF SEXUAL BEHAVIOR 1027-1035 (2011) (finding that pornography use had no association with early sexual imitation or risky sexual behaviors).

<sup>16</sup> Eileen M. Alexy et al., *Pornography as a Risk Marker for an Aggressive Pattern of Behavior among Sexually Reactive Children and Adolescents*, 14(6) J AM. PSYCHIATRIC NURSES ASS'N 442, 450 (2009). See also Elisabet Haggstrom-Nordin et al., *Experiences of and Attitudes towards Pornography among a Group of Swedish High School Students*, 14 EURO. J CONTRACEPTION AND REPRODUCTIVE HEALTHCARE 277, 277-284 (2009).

<sup>17</sup> Lotta Lofgren-Martenson & Sven-Axel Mansson, *Lust, Love, and Life: A Qualitative Study of Swedish Adolescents' Perceptions and Experiences with Pornography* 47 J SEX RSCH. 568, 575 (2010).

<sup>18</sup> Ch. 498, Laws of Utah 2023; Act No. 456, 2023 La. Acts; 2023 Ark. Acts 689; Ohio House Bill 33 - 135th General Assembly.

<sup>19</sup> OPPAGA, Office of the Attorney General (Department of Legal Affairs), <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=1026> (last visited Jan. 12, 2024); see also ch. 16 and s. 20.11, F.S.

DLA, upon belief that any commercial entity is in violation of the provisions of HB 3, may bring an action under the Florida Deceptive and Unfair Trade Practices Act. A private cause of action is permitted in certain limited circumstances.

## 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 commercial entities of the requirements created by HB 3. Such information is made confidential and exempt<sup>20</sup> from public record requirements until the investigation is completed or is no longer active.<sup>21</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 that 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; or
- 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 a commercial entity's data security; and
- Information that would otherwise disclose a commercial entity's proprietary information.<sup>22</sup>

The bill provides the constitutionally required public necessity statement, 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 HB 3 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.

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 reenacted by the Legislature.

The bill will become effective on the same date that HB 3 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law .

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<sup>20</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>21</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>22</sup> The bill defines the term "proprietary information" to mean information that is owned or controlled by the commercial entity; is intended to be private and is treated by the commercial entity as private because disclosure would harm the commercial entity 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.

**B. SECTION DIRECTORY:**

- Section 1:** Amends s. 501.1737, F.S., as created by HB 3 (2024), to create a public record exemption for investigations related to s. 501.1737, F.S.
- Section 2:** Provides a public necessity statement as required by the Florida Constitution.
- Section 3:** Provides a contingent effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:  
None.
2. Expenditures:  
See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:  
None.
2. Expenditures:  
None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

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.

**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 11, 2024, the Regulatory Reform & Economic Development Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute replaces "online platform" with "commercial entity" throughout the bill, to conform with the linked bill, HB 3.

On January 17, 2024, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment revised the bill to use common phrases and terms that exist in other public records statutes. The amendment also:

- Clarified that the public record exemption applies to information held by DLA to ensure records received or created by the department relating to its investigations of certain commercial entities is protected.
- Clarified that information that is otherwise confidential or exempt remains protected at the conclusion of the investigation.
- Removed a duplicative public record exemption for trade secrets.
- Conformed the public necessary statement to the changes made to the public record exemption.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.