

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 Governmental Oversight and Accountability Committee

BILL: SB 446

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: OGSR/Insurance Claim Data Exchange Information/Past Due Child Support

DATE: January 3, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Daniell | Farmer | CF | Favorable |
| 2. | Seay | Roberts | GO | Favorable |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

This bill is the result of the Children, Families, and Elder Affairs Committee’s Open Government Sunset Review of the public records exemption for personal information obtained during an insurance claim data exchange. The exemption will expire October 2, 2012, unless saved from repeal through reenactment by the Legislature.

Section 409.25659, F.S., currently requires the Department of Revenue (DOR) to develop and operate a data match system in which an insurer may voluntarily provide DOR with the name, address, and if known, date of birth, and Social Security Number or other taxpayer identification number for each noncustodial parent who has a claim with the insurer and who owes past-due child support. The exemption provides that specified information collected by DOR regarding a noncustodial parent who owes past-due child support is confidential and exempt from public records requirements. This bill reenacts this public records exemption.

This bill substantially section 409.25661 of the Florida Statutes.

II. Present Situation:

Public Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of

¹ Section 1390, 1391 F.S. (Rev. 1892).

access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

- (a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to mean:

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

² Article I, s. 24, Fla. Constitution.

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.¹⁵

The Act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, whose administration would be significantly impaired without the exemption;
- Protects information of a sensitive, personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is

⁸ Article I, s. 24(c), Fla. Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c), Fla. Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(5)(a), F.S.

used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁶

The Act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Insurance Claim Data Exchange

Section 409.25659, F.S., was established during the 2004 Regular Session to provide for the identification of claims¹⁷ on liability insurance which could potentially be applied to child support arrearages in Title IV-D cases.¹⁸

The department was directed by statute to develop and operate a data match system to identify noncustodial parents who owe past-due child support and who also have a claim with an insurer. This process allows insurers to voluntarily provide the Department of Revenue (DOR) with the name, address, and, if known, date of birth, and Social Security number or other taxpayer identification number for each noncustodial parent identified as having a claim.¹⁹ This data can only be used for purposes of child support enforcement.²⁰

Within the data match system, an insurer may provide DOR with the needed information in one of three ways:

- An insurer may provide the required data for each claim directly to DOR electronically so that the department can conduct a data match;
- An insurer may receive or access data from DOR and conduct a data match of all noncustodial parents who have a claim with the insurer and who owe past-due child support, and submit the match data regarding each noncustodial parent to DOR; or

¹⁶ Section 119.15(4)(b), F.S.

¹⁷ A “claim” is considered an open, unresolved bodily injury claim on liability coverage in excess of \$3,000 in an insurance contract payable to an individual, or to a third party for the benefit of the individual, who is a Florida resident or who had an accident or loss that occurred in Florida, or who has an outstanding child support obligation in Florida. Section 409.24659(1), F.S.

¹⁸ Chapter 2004-334, Laws of Fla. The term “Title IV-D” refers to state-run child support enforcement programs which are funded through grants provided for by the Social Security Act of 1975. Title IV of the Social Security Act covers grants to states for the purpose of providing aid and services to needy families with children and for child-welfare services. Part “D” of that law covers child support and the establishment of paternity.

¹⁹ Section 409.25659(2), F.S.

²⁰ Section 409.25659(5), F.S.

- An insurer may authorize an insurance claim data collection organization to complete one of the two options mentioned above.²¹

Due to the variety of data submission methods provided within the system, it would be possible for DOR to receive information on individuals having a claim with an insurer, who do not owe child support.²²

In 2004, DOR contacted most of the top 25 insurers in the state to begin implementation of the statute. However, during this time insurers were responding to claims resulting from damage caused by the 2004 hurricane season so DOR decided to postpone working on the insurance claim data exchange initiative.²³

In February 2006 Congress passed the Deficit Reduction Act of 2005 (the Act), which authorized the Federal Department of Health and Human Services (HHS) to compare information concerning individuals owing past-due child support with information maintained by insurers concerning insurance claims, settlements, awards, and payments. The Act further allows HHS to furnish information resulting from the data matches to state agencies responsible for child support enforcement.²⁴ A federal workgroup was established to implement this provision. The department monitored the activities of the federal workgroup charged with implementing the nationwide insurance data match program and began implementing the changes necessary to receive data from the federal program.²⁵

In November 2008, DOR began data matching activities with the federal program and began issuing income deduction notices on matches.²⁶ Between November 2008 and October 2009, the department received 2,996 data matches from the federal program.²⁷ Of those matches, 422 were previously made by the department through other means.²⁸ According to department representatives, approximately \$2 million has been collected since the department implemented the federal matching program.²⁹

During the 2009 Regular Session, there was discussion over whether the federal voluntary insurance data match program would replace the state's voluntary program. The department sent 84 letters to Florida-based insurance companies from November 2009 through February 2010

²¹ Section 409.25659(2)(a)-(c), F.S.

²² Conversation between representatives from the Fla. Dept. of Revenue and staff of the Senate Committee on Children, Families, and Elder Affairs (Jul. 12, 2011) [hereinafter Dept. of Revenue].

²³ Committee on Children, Families, and Elder Affairs, The Florida Senate, *Open Government Sunset Review Regarding Noncustodial Parents Owing Past-Due Child Support*, 4 (Interim Report 2009-202) (Sept. 2008), available at http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-202cf.pdf (last visited Jan. 3, 2012).

²⁴ *Id.*

²⁵ *Id.*

²⁶ E-mail from Debbie Thomas, Dep't of Revenue, to staff of the Senate Committee on Children, Families, and Elder Affairs (Jun. 14, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

²⁷ Governmental Affairs Policy Committee, The Florida House of Representatives, *House of Representatives Staff Analysis HB 7091* (Mar. 5, 2010), available at <http://archive.flsenate.gov/data/session/2010/House/bills/analysis/pdf/h7091.GAP.pdf> (last visited Jan. 3, 2012).

²⁸ *Id.*

²⁹ Dept. of Revenue, *supra* note 22.

inviting them to participate in the voluntary state program. The department received responses from two companies, both of which stated they do not handle personal liability insurance. In February 2011, DOR sent an additional 135 letters to Florida-based insurance companies and as of June 1, 2011, they had received only three responses, including one from Citizens Property Insurance Corporation (Citizens).³⁰ The department has been working with Citizens to design a data match system and by 2012, DOR should begin receiving data from Citizens.³¹ The department continues to encourage voluntary participation in the state insurance claim data match through annual contact letters to Florida-based insurers.³²

The department reports that as of May 2011, the number of noncustodial parents eligible to be matched using the insurance claim data exchange is 448,965.³³

Public Records Exemption for Insurance Claim Data Exchange

Section 409.25661, F.S., provides that information obtained by DOR during an insurance claim data exchange pursuant to s. 409.25659, F.S., is confidential and exempt from public disclosure until the department determines whether a match exists. If a match does exist, the matched data is no longer considered confidential and exempt and becomes available for public disclosure unless otherwise exempt. If a match does not exist, the information must be destroyed.

This public records exemption was first created by the Legislature in 2004. During the 2009 and 2010 Regular Sessions, the Legislature extended the repeal date of the exemption to provide DOR with ample time to determine the success of the provisions contained in the federal Deficit Reduction Act of 2005. This exemption stands repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

Committee on Children, Families, and Elder Affairs' Open Government Sunset Review

Based on an Open Government Sunset Review of this exemption, Senate professional staff of the Children, Families, and Elder Affairs Committee recommended that the Legislature retain the public records exemption established in s. 409.25661, F.S., which makes personal information obtained by DOR during an insurance claim data exchange pursuant to s. 409.25659, F.S., confidential and exempt from public disclosure until the department determines whether a match exists.³⁴

This recommendation was made in light of the information gathered for the Open Government Sunset Review, which indicated that a public necessity continues to exist in maintaining the confidential nature of personal information gathered by the department relating to persons having open liability claims with participating insurers. Additionally, the department reports that

³⁰ Dept. of Revenue, *CSE Insurance Data Match Public Records Exemption* (Jun. 14, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

³¹ Dept. of Revenue, *supra* note 22.

³² *Id.*

³³ E-mail from Debbie Thomas, Dept. of Revenue, to staff of the Senate Committee on Children, Families, and Elder Affairs (Jun. 24, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

³⁴ Senate Committee on Children, Families, and Elder Affairs, *Open Government Sunset Review of Section 409.25661, Relating to Insurance Claim Data Exchange Information* (Interim Report 2012-301) (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-301CF.pdf> (last visited Jan. 3, 2011).

insurance providers may be less likely to participate in the insurance claim data exchange program without the exemption, making the exemption vital to the effective administration of the program.

III. Effect of Proposed Changes:

Section 1 reenacts and saves from repeal the public records exemption allowing information obtained by the Department of Revenue (DOR) during an insurance claim data exchange to remain confidential and exempt from public disclosure until such time as the department determines whether a match exists.

Section 2 provides an effective date of October 1, 2012.

Other Potential Implications:

If the Legislature chooses not to retain the public records exemption for information obtained by DOR during an insurance claim data exchange, the exemption will expire on October 2, 2012. Without the exemption, the names, addresses, dates of birth, social security numbers, and claim numbers of noncustodial parents will become public.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains an already-existing public records exemption and thus is not subject to requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The bill complies with the requirement of Article I, section 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.