

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 Rules

BILL: CS/CS/SB 1278

INTRODUCER: Governmental Oversight and Accountability Committee; Banking and Insurance Committee and Senator Richter

SUBJECT: Public Records/Office of Financial Regulation

DATE: April 1, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>Johnson</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1278 creates a public records exemption for informal enforcement actions of the Office of Financial Regulation (OFR) and trade secrets held by the OFR in accordance with its statutory duties with respect to the Financial Institutions Codes. In addition, the bill defines:

- Examination report,
- Informal enforcement action,
- Working papers, and
- Personal financial information.

The OFR regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes (codes), chapters 655 to 667, Florida Statutes. The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness. Currently, s. 655.057, F.S., exempts certain records held by the OFR relating to the supervision and regulation of financial institutions chartered in Florida.

The bill provides for repeal of the exemption for informal enforcement actions and trade secrets on October 2, 2019, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act. Because this bill creates a new public records exemption, the bill provides a statement of public necessity as required by the State Constitution.

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records 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. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 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 the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹¹ OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹²

Regulation of State-Chartered Financial Institutions

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes (“codes”), chapters 655 to 667, F.S. The OFR ensures Florida-chartered financial institutions’ compliance with state and federal requirements for safety and soundness.

Current Public Records Exemptions under the Codes

Currently, s. 655.057, F.S., of the codes contains the following public records exemptions:

- All records and information relating to an “active” investigation or examination are confidential and exempt.
- After an investigation or examination is no longer active, information remains confidential and exempt to the extent that disclosure would:
 - Jeopardize the integrity of another active investigation;
 - Impair the safety and soundness of the financial institution;
 - Reveal personal financial information;
 - Reveal the identity of a confidential source;
 - Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or
 - Reveal investigative techniques or procedures.
- Reports of examination, operations, or condition, *including working papers*, or portions thereof, that are prepared by or for the use of the OFR or any state or federal agency responsible for the regulation or supervision of financial institutions.
 - Current law provides exceptions for persons to whom these reports and working papers may be released.
- Examination, operation, or condition reports of a failed financial institution, which shall be released within one year after the appointment of a liquidator, receiver, or conservator. However, any portion which discloses the identities of depositors, bondholders, members, borrowers, or stockholders (other than directors, officers, or controlling stockholders) remains confidential and exempt.
- Lists required to be maintained and submitted to the OFR by Florida-chartered credit unions and mutual associations of their members’ names and residences. These list of members are confidential and exempt.

¹⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

- Lists required to be maintained and submitted to the OFR by Florida-chartered banks, trust companies, and stock associations of their shareholders' names, addresses, and number of shares held by each shareholder. Any portion of these lists which reveal the shareholders' identities is confidential and exempt.

In addition, s. 655.059, F.S., provides that the books and records of a financial institution are "confidential" and are available to specified persons, including the OFR.¹³ However, this is not a public records exemption from s. 119.07(1), F.S., because private organizations (such as financial institutions) are generally not subject to the ch. 119, F.S., unless the private organization has been created by a public entity, has been delegated the authority to perform some governmental function, or plays an integral part in the decision-making process of a public entity.¹⁴ This statute merely prohibits financial institutions from disclosing its books and records to anyone other than the persons enumerated in s. 655.059(1)(a), F.S.

III. Effect of Proposed Changes:

Informal Enforcement Actions

The bill creates a limited public records exemption for "informal enforcement actions" by the OFR. An informal enforcement action is defined to mean "a board resolution, document of resolution, or an agreement in writing between the office and a financial institution" that the office imposes on an institution after considering the administrative enforcement guidelines in s. 655.031, F.S., and determining that a formal enforcement action is not an appropriate enforcement remedy. However, the bill limits the exemption by providing that after an investigation relating to an informal enforcement action is completed or ceases to be active, an informal enforcement action is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, only to the extent that disclosure would result in certain events (i.e., impair the safety and soundness of the financial institution; reveal investigative techniques or procedures, etc.).

The public necessity statement provides that public disclosure of informal enforcement actions could erode public confidence in financial institutions in this state and may lead to a reduced level of protection of the interests of the depositors and creditors of financial institutions. In addition, the public necessity statement provides that this exemption will, among other things, provide competitive equality to Florida-chartered institutions, because financial institutions that are federally chartered or chartered by other states are protected by those federal or state laws with regard to informal enforcement actions.

Trade Secrets

The bill creates a public records exemption for trade secrets, as defined in s. 688.002, F.S., that comply with s. 655.0591, F.S., and that are held by the OFR in accordance with its statutory duties with respect to the codes.

¹³ In addition, s. 655.012(1)(b), F.S., grants the OFR access to all books and records of all persons over whom the OFR exercises general supervision as is necessary for the performance of the duties and functions of the OFR, as prescribed by the codes.

¹⁴ Florida Attorney General Opinion 07-27.

The public necessity statement provides that disclosure of these trade secrets could result in a competitive disadvantage and economic loss to a financial institution.

Definitions

In addition to creating a definition of “informal enforcement action” for the new exemption, the bill defines the examination report, working papers, and personal financial information to clarify the existing exemptions in s. 655.057, F.S.

Statement of Public Necessity

Section 2 of the bill is the statement of public necessity supporting the new exemptions for informal enforcement actions and trade secrets. The bill provides legislative findings that informal enforcement actions and trade secrets must be kept confidential and exempt; and identified public purposes for exempting informal enforcement actions and trade secrets.

The bill will take effect on the same date that SB 1012 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:

None.

B. Public Records/Open Meetings Issues:

In order to pass a newly-created or expanded public records or public meetings exemption, Article I, s. 24 of the State Constitution requires a two-thirds vote of each house of the Legislature and a public necessity statement. The bill contains a public necessity statement for informal enforcement actions and trade secrets. This bill requires a two-thirds vote for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill’s protection of trade secrets and informal enforcement actions may benefit Florida-chartered financial institutions, since disclosure of such information could result in a competitive disadvantage in the marketplace and reputational risk.

C. **Government Sector Impact:**

The bill likely could create a minimal fiscal impact on the OFR, because OFR staff responsible for complying with public record requests could require training related to implementation of the public record exemption. In addition, the OFR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agency.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill amends section 655.057 of the Florida Statutes.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Governmental Oversight and Accountability on March 26, 2014:

The CS/CS amends the bill so that the public records exemptions currently in s. 655.057, F.S., were not made subject to a new Open Government Sunset Review (pursuant to s. 119.15, F.S.).¹⁵ Technical changes in s. 655.057, F.S., were also made.

The CS/CS makes the new exemptions for informal enforcement actions and trade secrets subject to the s. 119.15, F.S., the Open Government Sunset Review Act.

CS by Banking and Insurance on March 11, 2014:

The CS provides a reference to linked bill, SB 1012.

B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁵ Section 655.057, F.S. was subject to an Open Government Sunset Review pursuant to s. 119.14, F.S., however, s. 119.14, F.S. was repealed on October 1, 1995.