

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: SB 292

INTRODUCER: Senator Hays

SUBJECT: Public Records/Prepaid Wireless E911 Fee

DATE: March 4, 2014

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|-----------------|-----------|--------------------|
| 1. | <u>Caldwell</u> | <u>Caldwell</u> | <u>CU</u> | Favorable |
| 2. | <u>Kim</u> | <u>McVaney</u> | <u>GO</u> | Pre-meeting |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 292 expands existing public records exemptions for information contained in tax returns, reports, and other documents that retail sellers of wireless communications services and devices provide to the Department of Revenue when remitting prepaid wireless E911 fees collected from customers. The department may provide information relative to the E911 fee with the Department of Management Services for official use. Proprietary confidential business information to the E911 Board of Directors or to the Technology Program within the Department of Management Services or to the Department of Revenue as agent of the E911 Board is also confidential and exempt from public records.

The exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2019, unless reviewed and reenacted by the Legislature.

The bill contains a public necessity statement as required by the Florida Constitution.

Because this bill expands a public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

II. Present Situation:

Florida's Public Records Law

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

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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

The Open Government Sunset Review Act (the Act) 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 The Act 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

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).

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.

Taxpayer Records Provided to the Department of Revenue

Section 213.053(1), F. S., enumerates the statutory provisions to which confidentiality and information sharing provisions of the Department of Revenue apply. Section 213.053(2)(a), F.S., provides that “[a]ll information contained in returns, reports, accounts, or declarations received by the department, including investigative reports and information and including letters of technical advice, is confidential except for official purposes and is exempt from s. 119.07(1).” Section 213.053(8) authorizes the Department of Revenue to provide certain information to specific entities. The disclosure of information must be pursuant to a written agreement between the executive director and the agency and the agency is bound by the same requirements of confidentiality as the Department of Revenue.

The Department of Revenue is currently not authorized to share information with the E911 Board, nor is the Department of Revenue authorized to share information related to E911 revenue with the Department of Management Services.¹³

Proprietary Confidential Business Information submitted to the E911 Board or the Technology Program

Section 365.174, F.S. provides that the proprietary confidential business information submitted by a provider to the E911 Board or to the Technology Program within the Department of Management Services is confidential and exempt from public disclosure.¹⁴ This section also provides that propriety confidential business information includes information about customers, usage and capacity data, technological information and trade secrets.

III. Effect of Proposed Changes:

Pursuant to s. 365.172(8), F.S., communications service providers collect E911 fees from customers who remit monthly payments and, in turn, remit those fees to the E911 Board. Until July 1, 2013, E911 fees were not assessed on or collected if an end user’s service was a prepaid calling arrangement which included prepaid calling cards and prepaid wireless services sold by retailers.¹⁵ At issue was the complexity of collecting and remitting E911 fees by retailers who were not communications service providers. SB 294, the substantive bill related to this bill, creates a mechanism for collection of the E911 fees from retailers. This bill makes the information that is submitted to the Department of Revenue confidential and exempt from public record disclosure and allows the Department of Revenue, the E911 Board, and the Technology Program within the Department of Management Services to share those records.

Section 1 amends s. 213.053(1), F.S. to add the prepaid wireless E911 fee imposed under a new s. 365.172(9) in SB 294 to the confidentiality and information sharing provisions.¹⁶

¹³ Section 213.053(8)(q), F.S., provides that the Department of Revenue is limited to providing information related to ss 175.111 and 185.09, F.S. to the Department of Management Services.

¹⁴ Section 365.174(1) provides that statistical abstracts that do not contain information which identifies subscribers or revenue attributable to a provider can be released.

¹⁵ S. 365.172(8)(a)3.

¹⁶ This new subsection (9) provides for the process for remitting the E911 fee to and filing returns, reports, and other documents with the Department of Revenue. The subsection requires the seller to provide its name, federal identification number, taxpayer identification number issued by the department, its business location address and mailing address, and

The addition of s. 365.172, F.S., relating to the prepaid wireless E911 fee to s. 213.053(1), F.S., makes that section subject to s. 213.053(2), F.S., which provides that “[a]ll information contained in returns, reports, accounts, or declarations received by the department, including investigative reports and information and including letters of technical advice, is confidential except for official purposes and is exempt from s. 119.07(1)”, F.S.

This section provides that the exemption stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature through the Open Government Sunset Review Act.

This section amends s. 213.053(8), F.S., to authorize the Department of Revenue to provide information relative to the prepaid wireless E911 fee to the Secretary of Management Services, or his or her authorized agent, or to the E911 Board for use in the conduct of the Department of Management Services’ official business.

Section 2 provides that all proprietary confidential business information submitted by a provider to the E911 Board, to the Technology Program within the Department of Management Services, or to the Department of Revenue as an agent of the E911 Board is confidential and exempt from public disclosure. This section provides that the exemption stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature through the Open Government Sunset Review Act.

Section 3 provides the legislative finding of public necessity that the disclosure of any confidential proprietary business information contained in returns, reports, accounts, or declarations received by the Department of Revenue or submitted to the E911 Board, the Technology Program within the Department of Management Services, or the Department of Revenue as an agent of the Board would adversely affect the business interests of prepaid wireless service providers or sellers who provide the information by harming them in the market place and impair competition in the communications industry.¹⁷ The public necessity statement also provides that the disclosure of data that reveals the business interests of prepaid wireless service providers or sellers creates a competitive disadvantage and an unfair advantage for their competitors who can use the information to impair full and fair competition and impede competition in the wireless marketplace to the disadvantage of consumers of wireless service. Finally, the public necessity statement provides that the public and private harm resulting in the disclosure of the information significantly outweighs any public benefit derived from the disclosure and ability of the public to scrutinize or monitor agency action is not diminished by nondisclosure of the information.

county of the business location, The seller must also provide the reporting period, number of services sold during the reporting period, the amount of prepaid wireless E911 fees collected and the amount of any adjustment to the fees collected, the amount of any retailer collection allowance deducted from the amount of prepaid wireless E911 fees collected, and the amount to be remitted to the department. The paragraph also provides for consolidation of certain returns and when a return is not required. The department serves as an agent of the E911 Board for collection of the prepaid wireless E911 fee and the board retains authority to administer the fee.

¹⁷ Article I, Section 24(c) of the Florida Constitution requires that when a new public records exemption is enacted, a public necessity statement justifying the exemption must be included.

Section 4 provides that the bill is effective when similar legislation takes effect, however the number of the related bill is missing.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution provides that only the Legislature may create an exemption to the right of access to public records.¹⁸ Such an exemption must be created by general law, be passed by a two-thirds vote of each house of the Legislature, provide a statement of public necessity, and be as narrowly drafted as possible to accomplish the stated public necessity.¹⁹ However, because the constitutional provision took effect on July 1, 1993, any public records exemptions already in law on that date are grandfathered into the statutes.²⁰ Such an exemption becomes subject to constitutional requirements only if it is expanded in scope, thereby effectively creating a new exemption for an additional category of public records and requiring the exemption to meet all of the constitutional requirements of being narrowly tailored to meet the public necessity, including a statement of public necessity, and being repealed after five years unless reenacted.

Section 1 of this bill expands a public records exemption that was created before 1993²¹ and section 2 expands a public records exemption that was created after 1993.²² Because this bill expands public records exemptions, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Prepaid wireless providers and sellers may be more willing to provide proprietary confidential business information to the Department of Revenue, the E911 Board, and the

¹⁸ Art. I, s. 24(c) of the State Constitution.

¹⁹ *Id.*

²⁰ See Art. I, s. 24(d) of the State Constitution.

²¹ Section 213.053, F.S.

²² S. 365.174, F.S.

Technology Program within the Department of Management Services with the exemption in place.

C. **Government Sector Impact:**

The ability of the Department of Revenue, the E911 Board, or the Technology Program within the Department of Management Services to share confidential information may improve effectiveness and efficiency in the administration of the prepaid wireless E911 fees.

VI. Technical Deficiencies:

Section 4 of the bill does not specify the bill number of the underlying bill, which is SB 294.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 213.053 and 365.174.

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.