

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 7087 PCB CJS 14-05 Pub. Rec./Notices of Data Breach and Investigations/DLA

SPONSOR(S): Judiciary Committee; Government Operations Subcommittee; Civil Justice Subcommittee; and Metz

TIED BILLS: HB 7085 **IDEN./SIM. BILLS:** CS/SB 1526

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	11 Y, 0 N	Cary	Bond
1) Government Operations Subcommittee	11 Y, 0 N, As CS	Williamson	Williamson
2) Judiciary Committee	14 Y, 0 N, As CS	Cary	Havlicak

SUMMARY ANALYSIS

House Bill 7085 creates the Florida Information Protection Act of 2014 (Act). It requires commercial entities and certain government agencies to provide notice to the Department of Legal Affairs (DLA) in the event of a security breach.

The bill, which is linked to passage of House Bill 7085, creates a public record exemption relating to the Act. All information received by the DLA pursuant to a notice of a security breach, or received pursuant to an investigation by the DLA or another law enforcement agency, is confidential and exempt from public record requirements. The exemption applies until the investigation is completed or ceases to be active.

The bill authorizes the DLA to disclose the confidential and exempt information in certain instances.

Upon completion of an investigation or once an investigation ceases to be active, the following information remains confidential and exempt from public record requirements:

- All information to which another public record exemption applies;
- Personal information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a covered entity's data security; and
- Information that would disclose a covered entity's proprietary business information.

The bill defines "proprietary business information." It provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill does not appear to have a fiscal impact on state or local governments.

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 or expanded public record or public meeting exemption. The bill creates a public record exemption for certain information related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.¹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. An exemption may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.

Exempt versus Confidential and Exempt

There is a difference between records the Legislature has determined to be exempt and those which have been determined to be confidential and exempt.² If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.³ Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the statute.⁴ However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt.⁵

House Bill 7085 (2014), Florida Information Protection Act of 2014

House Bill 7085 creates the Florida Information Protection Act of 2014 (Act). It requires commercial entities and certain government agencies to provide notice to the Department of Legal Affairs (DLA) in the event of a security breach. A breach of security is an unauthorized access of data in electronic form containing personal information. Personal information includes either a user name or e-mail address, in combination with a password or security question and answer that would permit access to an online account, or an individual's first initial or name and last name in combination with any one or more of the following:

- Social security number;
- Driver license or identification card number, passport number, military identification number, or other similar number issued on a government document used to verify identity;

¹ Art I., s. 24(c), Fla.Const.

² *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004).

³ *Id.*

⁴ *Id.*

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

- Financial account number or credit or debit card number, in combination with any required security code, access, code, or password that is necessary to permit access to an individual's financial account;
- Any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional;
- An individual's health insurance policy number or subscriber identification number and any unique identifier used by a health insurer to identify the individual; and
- Any other information from or about an individual that could be used to personally identify that person.

The Act also requires the DLA to provide an annual report, by February 1, to the President of the Senate and the Speaker of the House of Representatives describing the nature of any reported breaches of security by governmental entities or third-party agents of governmental entities in the preceding year, along with recommendations for security improvements.

Effect of Proposed Changes

The bill, which is linked to passage of House Bill 7085, creates s. 501.171(11), F.S., to provide a public record exemption relating to the Act. All information received by the DLA pursuant to a notification of a security breach, or received pursuant to an investigation by the DLA or another law enforcement agency, is confidential and exempt from public record requirements until such time as the investigation is completed or ceases to be active.

During an active investigation, the DLA may disclose confidential and exempt information:

- In the furtherance of its official duties and responsibilities;
- For print, publication, or broadcast if the DLA determines that such release would assist in notifying the public or locating or identifying a person the DLA believes to have been a victim of the breach or improper disposal of customer records; or
- To another governmental agency in the furtherance of its official duties and responsibilities.

Upon conclusion of an investigation or once an investigation ceases to be active, the following information remains confidential and exempt from public record requirements:

- All information to which another public record exemption applies;
- Personal information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a covered entity's data security; and
- Information that would disclose a covered entity's proprietary business information.

Information that remains confidential and exempt from public record requirements after an investigation ceases to be active may not be released by the DLA during an investigation, even if the DLA determines that such release would assist in notifying the public or locating or identifying a person the DLA believes to have been a victim.

The bill defines "proprietary business information" to mean information that:

- Is owned or controlled by the covered entity.
- Is intended to be private and is treated by the covered entity as private because disclosure would harm the covered entity or its business operations.
- Has not been disclosed except as required by law or by 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 another source in the same configuration as received by the DLA.
- Includes:
 - Trade secrets as defined in the Uniform Trade Secrets Act.⁶

⁶ See s. 688.002(4), F.S.
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- Competitive interests, the disclosure of which would impair the competitive business of the covered entity who is the subject of the information.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides public necessity statement as required by the State Constitution.

B. SECTION DIRECTORY:

Section 1 amends s. 501.171, F.S., as created by House Bill 7085, to create a public record exemption.

Section 2 provides a public necessity statement.

Section 3 provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the Department of Legal Affairs (DLA). Staff responsible for complying with public record requests could require training related to the creation of the public record exemption, and the DLA may 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 DLA.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

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 or expanded public record or public meeting exemption. The bill creates a public record exemption related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State 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 related to the investigation of a violation of the Florida Information and Protection Act of 2014; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created 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 related to the investigation of a violation of the Florida Information and Protection Act of 2014.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for executive branch rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 19, 2014, the Civil Justice Subcommittee adopted one amendment to the PCB and reported the bill favorably. The amendment provides that information received by the DLA is confidential and exempt from a public record request during an active investigation and that certain sensitive personal and business information remains confidential and exempt after the investigation is complete.

On March 25, 2014, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Maintained the public record exemption for information provided to the DLA pursuant to a notice or investigation of a data breach.
- Restructured the exemption and made it clear the DLA is the custodian of the confidential and exempt information.
- Included a definition of proprietary business information.
- Provided for future repeal of the exemption pursuant to the Open Government Sunset Review Act.
- Modified the public necessity statement so that it conformed to the public record exemption.

On April 4, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides clarification that information that remains confidential and exempt from public record requirements after an investigation ceases to be active may not be released by the DLA during an investigation, even if the DLA determines that such release would assist in notifying the public or locating or identifying a person the DLA believes to have been a victim. This analysis is drafted to the committee substitute as passed by the Judiciary Committee.