

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 7010

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Payment Instrument Transaction Information/Office of Financial Regulation

DATE: January 29, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Billmeier</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	Favorable
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7010 is based on an Open Government Sunset Review (OGSR) of a public records exemption for certain information contained in the check cashing database maintained by the Office of Financial Regulation (OFR). Check cashers licensed by the OFR must enter certain information about transactions that exceed \$1,000 into a check cashing database.

The exemption upon which the OGSR is based makes confidential and exempt payment instrument transaction information held by the OFR which identifies a licensee, payor, payee, or conductor. The public necessity statement of the original exemption provides as justification for the exemption that disclosure of the information would reveal sensitive personal financial information including paycheck amounts, salaries, and business activities. Additionally, without the exemption, disclosure of the information could reveal business information that is traditionally private. The justification upon which the exemption is based remains valid. For this reason, the bill deletes the scheduled repeal of the exemption.

The bill requires a majority vote for passage. If the bill passes, the exemption would be permanent.

The bill takes effect October 1, 2018.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business

¹ FLA. CONST., art. I, s. 24(a).

of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The 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.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

- 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?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²²

The Office of Financial Regulation (OFR) Check Cashing Database

The Office of Financial Regulation (OFR) licenses and regulates check cashers pursuant to chapter 560, F.S. In 2013, the OFR was directed to issue a competitive solicitation for “a statewide, real time, online check cashing database to combat fraudulent check cash activity.”²³ The OFR launched the database on October 1, 2015.²⁴ Florida law imposes various requirements on check cashers. A licensee must maintain copies of each payment instrument cashed.²⁵ If the payment instrument exceeds \$1,000, the following additional information must be maintained:

- Customer files, as prescribed by rule, on all customers who cash corporate payment instruments that exceed \$1,000;
- Copies of personal identification with a photograph of each customer used as identification and presented by the customer;
- Thumbprints of each customer taken by the licensee when the payment instrument is presented for negotiation or payment.²⁶

The licensee must enter the following information into the check cashing database before cashing a payment instrument in excess of \$1,000:

- Transaction date;
- Payor name as displayed on the payment instrument;
- Payee name as displayed on the payment instrument;
- Conductor name, if different from the payee name;
- Amount of the payment instrument;
- Amount of currency provided;
- Type of payment instrument, which may include personal, payroll, government, corporate, third-party, or another type of instrument;
- Amount of the fee charged for cashing of the payment instrument;
- Branch or location where the payment instrument was accepted;
- The type of identification and identification number presented by the payee or conductor; and
- Payee’s workers’ compensation insurance policy number or exemption certificate number, if the payee is a business.²⁷

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- 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?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Section 560.310(4), F.S.; Chapter 2013-139, Laws of Florida.

²⁴ Office of Financial Regulation, *Florida Office of Financial Regulation Announces New Tool to Combat Financial Fraud* (Sept. 3, 2015), available at <https://www.flofr.com/PressReleaseDetail.aspx?id=4562> (last visited Jan. 24, 2018).

²⁵ Section 560.310(1), F.S.

²⁶ Section 560.310(2)(a)-(c), F.S.

²⁷ Section 560.310(2)(d), F.S.

The Legislature provided for the creation of the database as a tool to combat workers' compensation insurance premium fraud.²⁸ A common fraud scheme works as follows. A "facilitator" creates a shell company and purchases a minimal workers' compensation insurance policy²⁹ in the name of the shell company. The facilitator then allows an uninsured subcontractor to use the shell company name and workers' compensation insurance policy, for a fee, to obtain work from general contractors. After the subcontractor completes work, the general contractor pays the subcontractor wages with a company check made payable to the shell company. The facilitator cashes the check at a check cashing business, collects a fee for providing the insurance policy, and pays the subcontractor in cash. The subcontractor benefits because it has been able to operate using a minimal insurance policy and does not have to pay the full premium for workers' compensation coverage. The costs of these fraudulent schemes are absorbed by contractors and subcontractors who do not commit fraud.

The Department of Financial Services (DFS) uses the check cashing database and workers' compensation premium information held by the DFS to investigate insurance fraud. For example, the DFS could contrast information on the check cashing database showing a company cashed checks for \$50,000 with workers' compensation insurance filings that the company only reported \$10,000 in payroll. The DFS would investigate the company for compliance with workers' compensation laws and for insurance fraud. Additionally, the money service business could be alerted of the inconsistency, and refuse the check at the time it is presented.³⁰ Without the "real time" information obtained from the check cashing database, some fraud schemes might not be discovered until the OFR examines a licensee during its routine 5 year examination. The "shell" companies used to perpetrate the fraud scheme may only exist for a few months before the facilitator creates another company. Therefore, the ability of the OFR to access timely information is critical.

The DFS recently made an arrest in a workers' compensation fraud case. The DFS alleges that the defendant attempted to avoid payment workers' compensation insurance premium by underreporting the number of staff employed, the company's payroll, and the company's scope of work. In this case the defendant claimed that his company's annual payroll was \$273,786 and was quoted a workers' compensation insurance premium of \$25,311. DFS investigators determined the defendant cashed at least 620 checks worth nearly \$6.5 million at various check cashing businesses throughout Florida. If the defendant had accurately reported his payroll, his premium would have exceeded \$1 million.³¹

²⁸ Committee on Appropriations, The Florida Senate, *Bill Analysis and Fiscal Impact Statement of CS/SB 410*, April 25, 2013, at p. 1

²⁹ The facilitator typically obtains a policy covering a small number of workers in a low risk occupation so the premium paid to the insurer is minimal. Once the facilitator obtains a certificate of insurance, the facilitator can allow multiple contractors or subcontractors to use it and can charge a fee much less than the cost of workers' compensation coverage.

³⁰ Office of Financial Regulation, Department of Financial Services, *A Report by Money Service Business Facilitated-Workers' Compensation Fraud Work Group* at p. 11 (available at https://www.myfloridacfo.com/siteDocs/MoneyServiceBusiness/WC_MSBReport-Rec.pdf (last visited Jan. 24, 2018)).

³¹ Office of Financial Regulation, Department of Financial Services, *\$1 Million Workers' Comp Scam Leads to Arrest of Construction Company Owner*, (Nov. 3, 2017); available at <https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=4939> (last visited Jan. 24, 2018).

The DFS has investigated 86 cases involving “shell” companies and premium fraud since July 2016, and identified over \$196 million in transactions believed to be fraudulent. Twenty four people were arrested in various cases during fiscal year 2015-2016.³²

Confidential and Exempt Information from the Check Cashing Database

Section 560.312, F.S., provides that payment instrument transaction information held by the OFR pursuant to s. 560.310, F.S., which identifies a licensee, payor, payee, or conductor is confidential and exempt from disclosure. The Legislature made such information confidential and exempt because disclosure would “reveal sensitive personal financial information about payees and conductors” including “paycheck amounts, salaries, and business activities.”³³ The Legislature further found that public disclosure of licensees or payors would reveal business information that is traditionally private.³⁴ While information that identifies licensees, payors, payees, or conductors is confidential and exempt, other information is not.

Concerns Over Allowing Identifying Information to be Made Public

Staff with the OFR express concern that if identifying information were to be made public, persons or entities identified could be targets of crime. For example, the check cashing database contains information revealing the number of transactions over \$1,000 at a specific location on specific dates. If criminals were to access the database and learn that a certain location cashed a large number of checks on a certain day each month, that location or the persons conducting business at that location could face a higher risk of robbery.

In addition, the exemption applies to all persons who may use a check cashing business. For example, an individual without a bank account may choose to cash his or her paycheck at a check cashing business. The Legislature has specifically found that sensitive financial information such as paychecks and salary amounts is traditionally private.³⁵ If the exemption were to be repealed, many traditionally private transactions would be subject to public review.

Questions for the Legislature to Consider

Section 119.15, F.S., provides that an exemption shall be maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets 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 information of a sensitive personal nature concerning individuals, the release of which information would jeopardize the safety of such individuals. However, in exemptions

³² Department of Financial Services Memorandum from the Bureau Chief of Worker’s Compensation Fraud to the Director of the Investigative and Forensic Services Division dated October 13, 2017 (on file with the Committee on Governmental Oversight and Accountability and the Committee on Banking and Insurance).

³³ Chapter 2013-155, L.O.F.

³⁴ *Id.*

³⁵ *Id.*

under this subparagraph, only information that would identify the individuals may be exempted; 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 which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.³⁶

If the Legislature finds an identifiable public purpose, it must also find that the purpose is sufficiently compelling to override the strong public policy of open government and that the purpose cannot be accomplished without the exemption.

III. Effect of Proposed Changes:

This bill is based on an Open Government Sunset Review of a public records exemption for certain information contained in the check cashing database maintained by the Office of Financial Regulation. Check cashers licensed by the OFR must enter certain information about transactions that exceed \$1,000 into a check cashing database.

The exemption upon which the OGSR is based makes confidential and exempt payment instrument transaction information held by the OFR which identifies a licensee, payor, payee, or conductor. The public necessity statement of the original exemption provides as justification for the exemption that disclosure of the information would reveal sensitive personal financial information including paycheck amounts, salaries, and business activities. Additionally, without the exemption, disclosure of the information could reveal business information that is traditionally private. The justification upon which the exemption is based remains valid. For this reason, the bill deletes the scheduled repeal of the exemption.

The bill requires a majority vote for passage. If the bill passes, the exemption would be permanent.

The bill takes effect October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

The bill continues a current exemption but does not expand the scope of an existing exemption. Therefore, a simple majority vote of the members present and voting in each house of the Legislature is required for passage.

³⁶ Section 119.15(6)(b), F.S.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Maintaining the exemption will allow the private sector to continue to maintain the confidentiality of financial information, such as the identity of persons who cash checks in amounts of \$1,000 or greater, which has historically been confidential.

Preserving the ability of the OFR to timely investigate and prosecute fraud will maintain a more level playing field for legitimate contractors.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 560.312 of the Florida Statutes.

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.