

<b>Tab 1</b>	<b>SPB 7072 by GO; Social Media Platforms</b>					
828884	A	S	FAV	GO, Rodrigues	Delete L.388 - 392:	04/06 05:29 PM
<b>Tab 2</b>	<b>SPB 7074 by GO; Public Records/Social Media Platform Activities</b>					
<b>Tab 3</b>	<b>SB 418 by Burgess; (Similar to CS/CS/H 00327) Public Records/Persons Seeking Shelter</b>					
217140	D	S	RCS	GO, Burgess	Delete everything after	04/06 05:32 PM
<b>Tab 4</b>	<b>SB 1456 by Rodrigues; (Identical to CS/H 00311) Public Records/Examination and Assessment Instruments</b>					
<b>Tab 5</b>	<b>SB 1824 by Powell; (Similar to H 01153) Public Records/Division of Emergency Management or a Local Emergency Management Agency</b>					
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**The Florida Senate**  
**COMMITTEE MEETING EXPANDED AGENDA**

**GOVERNMENTAL OVERSIGHT AND ACCOUNTABILITY**

**Senator Rodrigues, Chair**  
**Senator Gruters, Vice Chair**

**MEETING DATE:** Tuesday, April 6, 2021

**TIME:** 4:00—6:00 p.m.

**PLACE:** *Mallory Horne Committee Room, 37 Senate Building*

**MEMBERS:** Senator Rodrigues, Chair; Senator Gruters, Vice Chair; Senators Mayfield, Stargel, Stewart, and Torres

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
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PUBLIC TESTIMONY WILL BE RECEIVED FROM ROOM A2 AT THE DONALD L. TUCKER CIVIC CENTER, 505 W PENSACOLA STREET, TALLAHASSEE, FL 32301

Consideration of proposed bill:

1	<b>SPB 7072</b>	Social Media Platforms; Prohibiting a social media platform from knowingly deplatforming a candidate; providing requirements for public contracts and economic incentives related to entities that have been convicted or held civilly liable for antitrust violations; providing that social media platforms that fail to comply with specified requirements and prohibitions commit an unfair or deceptive act or practice; authorizing the Department of Legal Affairs to investigate suspected violations under the Deceptive and Unfair Trade Practices Act and bring specified actions for such violations, etc.	Submitted and Reported Favorably as Committee Bill Yeas 3 Nays 2
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Consideration of proposed bill:

2	<b>SPB 7074</b>	Public Records/Social Media Platform Activities; Providing a public records exemption for information received by the Attorney General pursuant to an investigation by the Attorney General or a law enforcement agency into certain social media platform activities; providing a public records exemption for information received by the Department of Legal Affairs pursuant to an investigation by the department or a law enforcement agency into violations by certain social media platforms; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.	Submitted and Reported Favorably as Committee Bill Yeas 4 Nays 1
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**COMMITTEE MEETING EXPANDED AGENDA**

Governmental Oversight and Accountability  
Tuesday, April 6, 2021, 4:00—6:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	<b>SB 418</b> Burgess (Similar CS/CS/H 327)	Public Records/Persons Seeking Shelter; Creating an exemption from public records requirements for the name, address, and telephone number of a person which are held by an agency providing shelter or assistance to such person during an emergency; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.  MS 02/16/2021 Favorable GO 04/06/2021 Fav/CS RC	Fav/CS Yeas 5 Nays 0
4	<b>SB 1456</b> Rodrigues (Identical CS/H 311)	Public Records/Examination and Assessment Instruments; Expanding an exemption from public records requirements for examination and assessment instruments used for statewide standardized assessments and student progression to include those instruments used for statewide kindergarten screening, youth enrolled in Department of Juvenile Justice programs, limited English proficient students, civic literacy assessments, measuring minority and underrepresented student achievement, and certification of educators and those administered by a Florida College System institution, a state university, or the Department of Education; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.  ED 03/30/2021 Favorable GO 04/06/2021 Favorable RC	Favorable Yeas 5 Nays 0
5	<b>SB 1824</b> Powell (Similar H 1153)	Public Records/Division of Emergency Management or a Local Emergency Management Agency; Expanding an exemption from public records requirements for information furnished by a person or business to the Division of Emergency Management or a local emergency management agency to receive assistance with emergency planning to include emergency response assessment reports, evaluation tools, or after-action reports prepared by the division or a local emergency management agency; providing for future legislative review and repeal of the exemption; providing a statement of public necessity, etc.  MS 03/30/2021 Favorable GO 04/06/2021 Fav/CS RC	Fav/CS Yeas 5 Nays 0

Other Related Meeting Documents

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SPB 7072

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Social Media Platforms

DATE: April 7, 2021

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Ponder	McVane		<b>GO Submitted as Comm. Bill/Fav</b>

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**I. Summary:**

SPB 7072 establishes a violation for social media deplatforming of a political candidate and requires a social media platform to meet certain requirements when they restrict speech by users.

The bill prohibits social media platforms from deplatforming candidates for political office and allows the Florida Elections Commission to fine a social media platform \$100,000 per day for deplatforming statewide candidates and \$10,000 per day for deplatforming all other candidates, in addition to the remedies provided in ch. 106, F.S., relating to campaign financing.

Additionally, if a social media platform knowingly provides free advertisements for a candidate, such advertisement is deemed an in-kind contribution, and the candidate must be notified.

The bill establishes restrictions for contracting with public entities for certain social media platforms who have violated antitrust laws and who have been placed on the Antitrust Violator Vendor List. The Department of Management Services is required to maintain the Antitrust Violator Vendor List (list) of the names and addresses of the people or affiliates who have been disqualified from the public contracting and purchasing process. The bill outlines the process for placing such person or affiliates on the list, and the process for a person or affiliates to appeal the decision to place such person or affiliate on the list. The bill provides for exceptions from the applicability of the antitrust violator provisions.

The bill requires a social media platform to:

- Publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban;
- Apply censorship, deplatforming, and shadow banning standards in a consistent manner among users on the platform;
- Inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days;

- Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts, and provide that information upon request;
- Categorize algorithms used for post-prioritization and shadow banning and allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content (the opt-out opportunity must be reoffered annually);
- Provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning; and
- Allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after being deplatformed.

The bill establishes that a social media platform that fails to comply with these requirements may be found in violation of the Florida Deceptive and Unfair Trade Practices Act by the Department of Legal Affairs (DLA). Additionally, a user may bring a private cause of action against a social media platform for failing to apply consistently certain standards and for censoring or deplatforming without proper notice.

The DMS and DLA may experience increased workloads and associated costs in carrying out the duties and responsibilities placed on the agencies in this bill.

The bill expressly provides that if any provision of the act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

The bill takes effect July 1, 2021.

## **II. Present Situation:**

### **Candidates for Office and In-Kind Contributions**

#### ***Violations of Florida Election Law***

The Division of Elections (division) is created within the Florida Department of State.<sup>1</sup> The division must ensure compliance with election laws, provides statewide coordination of election administration, and promotes public participation in the electoral process.

The Florida Elections Commission (Elections Commission) is created within the Department of Legal Affairs (DLA) of the Office of Attorney General. The Elections Commission is composed of nine members appointed by the Governor.<sup>2</sup> For purposes of the Elections Commission jurisdiction, a "violation" means the willful performance of a prohibited act or the willful failure to perform a required act.<sup>3</sup> Willfulness is a determination of fact; however, at the request of the

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<sup>1</sup> Section 20.10(2)(a), F.S.

<sup>2</sup> Section 106.24(1)(b), F.S.

<sup>3</sup> Section 106.25(3), F.S.

respondent at any time after probable cause is found, willfulness may be considered and determined in an informal hearing before the Elections Commission.<sup>4</sup>

The Elections Commission determines probable cause based on the investigator's report, the recommendation of counsel for the Elections Commission, the complaint, and staff recommendations, as well as any written statements submitted by the respondent and any oral statements made at the hearing.<sup>5</sup> If probable cause has been found by the Elections Commission, a respondent may agree to a consent order, elect to have a formal administrative hearing conducted by an administrative law judge in the Division of Administrative Hearings, or elect to have a formal or informal hearing conducted before the Elections Commission.<sup>6</sup>

In order to carry out its responsibilities, the Elections Commission may subpoena any person in the state, doing business in the state, or who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof, and require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state.<sup>7</sup>

Civil penalties are generally limited to not more than \$1,000 per count or violation.<sup>8</sup> Other penalties include permanent or temporary injunctions, and restraining orders.<sup>9</sup> Any civil penalty or fine assessed is deposited into the General Revenue Fund.<sup>10</sup>

Actions for violation of ch. 104 and 106, F.S., (the elections code and campaign financing, respectively) must be commenced before 2 years have elapsed from the date of the violation.<sup>11</sup>

### ***In-kind Contributions to Candidates***

Section 106.011(3)(e), F.S., defines the term "candidate" to mean a person to whom any of the following applies:

- A person who seeks to qualify for nomination or election by means of the petitioning process;
- A person who seeks to qualify for election as a write-in candidate;
- A person who receives contributions or makes expenditures, or consents for any other person to receive contributions or make expenditures, with a view to bring about his or her nomination or election to, or retention in, public office;
- A person who appoints a treasurer and designates a primary depository; or
- A person who files qualification papers and subscribes to a candidate's oath as required by law.

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<sup>4</sup> *Id.* This section further provides that the Elections Commission may not by rule determine what constitutes willfulness or further define the term "willful" for purposes of election law.

<sup>5</sup> Section 106.25(2), F.S.

<sup>6</sup> Section 106.25(5), F.S.

<sup>7</sup> Section 106.26(1), F.S.

<sup>8</sup> Section 106.265, F.S.

<sup>9</sup> Section 106.27, F.S.

<sup>10</sup> Section 106.265(4), (5), F.S.

<sup>11</sup> Section 106.28, F.S.

Generally, a “political committee” means a combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of \$500 during a single calendar year:

- Accepts contributions for the purpose of making contributions to any candidate, political committee, affiliated party committee, or political party;
- Accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;
- Makes expenditures that expressly advocate the election or defeat of a candidate or the passage or defeat of an issue; or
- Makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, affiliated party committee, or political party.

Candidates and political committees must report all contributions, loans, expenditures, distributions, and transfers, regardless of the amount.<sup>12</sup> They must report the full name and address of each person making the contribution or receiving the expenditure and, for contributions over \$100, the occupation.<sup>13</sup>

An in-kind contribution<sup>14</sup> is anything of value except money made for the purpose of influencing the results of an election.<sup>15</sup> The valuation of an in-kind contribution is fair market value, and in-kind contributions are subject to the same contribution limitations as money.<sup>16</sup>

## Freedom of Speech and Internet Platforms

### Section 230

The federal Communications Decency Act (CDA) was passed in 1996 “to protect children from sexually explicit Internet content.”<sup>17</sup> 47 U.S. Code § 230 (Section 230) was added as an amendment to the CDA to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.<sup>18</sup>

Congress stated in Section 230 that “[i]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>19</sup>

<sup>12</sup> Sections 106.011(5) and 106.07(1), F.S.

<sup>13</sup> Section 106.07(4)(a), F.S.

<sup>14</sup> Examples of in-kind contributions include food provided for a fundraiser free of charge, donated tickets to an event, and certain kinds of free advertisement. DE 04-06 Fla. Op. Dept. of State, Div. of Elections (2004). <https://opinions.dos.state.fl.us/searchable/pdf/2004/de0406.pdf>.

<sup>15</sup> Florida Department of State, Division of Elections, *Campaign Finance*, <https://dos.myflorida.com/elections/candidates-committees/campaign-finance/> (last visited April 2, 2021)

<sup>16</sup> Sections 106.011(5) and 106.055, F.S.

<sup>17</sup> *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (citing *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon))).

<sup>18</sup> *Force*, 934 F.3d at 63 (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))).

<sup>19</sup> 47 U.S.C. § 230(b)(1)–(2).

Specifically, Section 230 states that no provider or user of an interactive computer service may be held liable on account of:<sup>20</sup>

- Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
- Any action taken to enable or make available to information content providers or others the technical means to restrict access to material from any person or entity that is responsible for the creation or development of information provided through any interactive computer service.

Section 230 “assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions,<sup>21</sup> both of which “appl[ied] traditional defamation law to internet providers.”<sup>22</sup> The first decision held that an interactive computer service provider could not be liable for a third party’s defamatory statement ... but the second imposed liability where a service provider filtered content in an effort to block obscene material.”<sup>23</sup> To provide clarity, Section 230 provides that “[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>24</sup> In light of Congress’s objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.<sup>25</sup>

Section 230 specifically addresses how the federal law affects other laws. Section 230 prohibits all inconsistent causes of action and prohibits liability imposed under any State or local law.<sup>26</sup> Section 230 does not affect federal criminal law, intellectual property law, the Electronic Communications Privacy Act of 1986, or sex trafficking law.

Recently, there have been criticisms of the broad immunity provisions or liability shields which force individuals unhappy with third-party content to sue the user who posted it. While this immunity has fostered the free flow of ideas on the Internet, critics have argued that Section 230 shields publishers from liability for allowing harmful content.<sup>27</sup> Congressional and executive proposals to limit immunity for claims relating to platforms purposefully hosting content from those engaging in child exploitation, terrorism, and cyber-stalking have been introduced.<sup>28</sup> Bills have been filed that would require internet platforms to have clear content moderation policies,

<sup>20</sup> 47 U.S.C. § 230(c).

<sup>21</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>22</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>23</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173 (citing 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox))).

<sup>24</sup> 47 U.S.C. § 230(c)(1).

<sup>25</sup> *Force*, 934 F.3d at 63 (quoting *LeadClick*, 838 F.3d at 173).

<sup>26</sup> 47 U.S.C. § 230(e).

<sup>27</sup> Zoe Bedell and John Major, *What’s Next for Section 230? A Roundup of Proposals* Lawfare, (July 29, 2020) <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> (last visited Feb. 25, 2021).

<sup>28</sup> *Id.*; United States Department of Justice, Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996, <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> (last visited Feb. 25, 2021); EARN IT Act of 2020, S.3398, 116th Cong. (2020).



submit detailed transparency reports, and remove immunity for platforms that engage in certain behavioral advertising practices.<sup>29</sup> Proposals have also been offered to limit the liability shield for internet providers who restrict speech based on political viewpoints.<sup>30</sup>

### *Internet and Social Media Platforms*

There are many ways in which individuals access computer systems and interact with systems and other individuals on the Internet. Examples include:

- Social media sites, which are websites and applications which allow users to communicate informally with others, find people, and share similar interests;<sup>31</sup>
- Internet platforms, which are servers used by an Internet provider to support Internet access by their customers;<sup>32</sup>
- Internet search engines, which are computer software used to search data (such as text or a database) for specified information;<sup>33</sup> and
- Access software providers, which are providers of software (including client or server software) or enabling tools for content processing.<sup>34</sup>

Such platforms earn revenue through various modes and models. Examples include:

- Data monetization.<sup>35</sup> This uses data that is gathered and stored on the millions of users that spend time on free content sites, including specific user location, browsing habits, buying behavior, and unique interests. This data can be used to help e-commerce companies tailor their marketing campaigns to a specific set of online consumers. Platforms that use this model are typically free for users to use.<sup>36</sup>
- Subscription or membership fees. This model requires users pay for a particular or unlimited use of the platform infrastructure.<sup>37</sup>
- Transaction fees. This model allows platforms to benefit from every transaction that is enabled between two or more actors. An example is AirBnB, where users transacting on the site are charged a fee.<sup>38</sup>

<sup>29</sup> Bedell, *supra* note 27; PACT Act, S.4066, 116th Cong. (2020); BAD ADS Act, S.4337, 116th Cong. (2020).

<sup>30</sup> Bedell, *supra* note 27; Limiting Section 230 Immunity to Good Samaritans Act, S.3983, 116th Cong. (2020)

<sup>31</sup> DelValle Institute Learning Center, *Social Media Platforms*, <https://delvalle.bphc.org/mod/wiki/view.php?pageid=65> (last visited Feb. 24, 2021).

<sup>32</sup> IGI Global, *Internet Platform*, <https://www.igi-global.com/dictionary/internet-platform/15441> (last visited Feb. 24, 2021).

<sup>33</sup> Merriam Webster, *Search Engine*, <https://www.merriam-webster.com/dictionary/search%20engine> (last visited Feb. 24, 2021).

<sup>34</sup> 47 U.S.C. § 230(f)(4) (defining “access software provider to mean a provider of software (including client or server software), or enabling tools that do any one or more of the following: (i) filter, screen, allow, or disallow content; (ii) pick, choose, analyze, or digest content; or (iii) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content).

<sup>35</sup> The Alexander von Humboldt Institute for Internet and Society, *How do digital platforms make their money?*, July 29, 2019, <https://www.hiig.de/en/how-do-digital-platforms-make-their-money/> (last visited Feb. 27, 2021).

<sup>36</sup> Investopedia, *How Do Internet Companies Profit with Free Services?*, <https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp#:~:text=Profit%20Through%20Advertising,content%20is%20through%20advertising%20revenue.&text=Each%20of%20these%20users%20represents,and%20services%20via%20the%20Internet>. (last visited Feb. 27, 2021).

<sup>37</sup> HIIG, *supra* note 35.

<sup>38</sup> *Id.*

### *The Florida Deceptive and Unfair Trade Practices Act*

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) exists “to protect the consuming public and legitimate business enterprises from those who engage in (1) unfair methods of competition; or (2) unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”<sup>39</sup> The FDUTPA is modeled after the federal statute that authorizes the Federal Trade Commission.<sup>40</sup>

Florida has determined that the following acts or practices are unfair or deceptive:

- Imposing unconscionable prices for the rental or lease of any dwelling unit or self-storage facility during a period of declared state of emergency;<sup>41</sup>
- Failing to abide by storage requirements for personal information and notice requirements for data breaches of such information;<sup>42</sup> and
- Failing to abide by requirements for weight-loss programs.<sup>43</sup>

The state attorney or the Department of Legal Affairs (DLA) may bring FDUTPA actions when it is in the public interest on behalf of consumers or governmental entities.<sup>44</sup> The Office of the State Attorney (SAO) may enforce FDUTPA violations occurring in its jurisdiction. DLA has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.<sup>45</sup> Consumers may also file suit through private actions.<sup>46</sup>

DLA and the SAO have powers to investigate FDUTPA claims, which include:<sup>47</sup>

- Administering oaths and affirmations;
- Subpoenaing witnesses or matter; and
- Collecting evidence.

DLA and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;

<sup>39</sup> Section 501.202(2), F.S.

<sup>40</sup> 15 U.S.C. § 45.; See D. Matthew Allen, et. al., *The Federal Character of Florida’s Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083 (Summer 2011).

<sup>41</sup> Section 501.160, F.S.

<sup>42</sup> Section 501.171, F.S.

<sup>43</sup> Section 501.0579, F.S.

<sup>44</sup> Section 501.207(1)(c) and (2), F.S.; see s. 501.203(2), F.S. (defining “enforcing authority” and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office’s jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period.); see also David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida), available at [http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division\\*](http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division*) (last visited on Feb, 21, 2021).

<sup>45</sup> Section 501.203(2), F.S.

<sup>46</sup> Section 501.211, F.S.

<sup>47</sup> Section 501.206(1), F.S.

- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.<sup>48</sup>

### ***Freedom of Speech***

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> “[T]he First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well.”<sup>50</sup> “[O]nline speech is equally protected under the First Amendment as there is ‘no basis for qualifying the level of First Amendment scrutiny that should be applied’ to online speech.”<sup>51</sup>

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.<sup>52</sup> The government bears the burden of demonstrating the constitutionality of any such content-based regulation.<sup>53</sup>

The United States Supreme Court has recognized that First Amendment protection extends to corporations.<sup>54</sup> “This protection has been extended by explicit holdings to the context of political speech.”<sup>55</sup> Under these precedents, it is well settled that political speech does not lose First Amendment protection “simply because its source is a corporation.”<sup>56</sup> Generally, the government may not require a corporation to host another’s speech absent a showing of a compelling state interest.<sup>57</sup>

### ***Supremacy Clause***

It is a basic tenet of “Our Federalism”<sup>58</sup> that where federal and state law conflict, state law must yield.<sup>59</sup> This principle is captured in Article VI of the Constitution, known as the Supremacy

<sup>48</sup> Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. S. 501.2105, F.S.

<sup>49</sup> See *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).

<sup>50</sup> *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).

<sup>51</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

<sup>52</sup> *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665–66 (2004).

<sup>53</sup> *Id.* at 660.

<sup>54</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 342 (2010).

<sup>55</sup> *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 428–429 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936)).

<sup>56</sup> *Id.* (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. at 784 (1978); see *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” (quoting *Bellotti*, 435 U.S., at 783))).

<sup>57</sup> *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980); *First National Bank of Boston v. Bellotti*, 438 U.S. (1978); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

<sup>58</sup> See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

<sup>59</sup> *Denson v. United States*, 574 F.3d 1318, 1345 (11th Cir. 2009).

Clause, which reads: “This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the ... Laws of any State to the Contrary notwithstanding.”<sup>60</sup> The United States Supreme Court has explained that the Supremacy Clause was designed to ensure that states do not “retard, impede, burden, or in any manner control” the execution of federal law.<sup>61</sup> The framers of the Constitution rejected a proposal to allow a federal veto of state laws “in favor of allowing state laws to take effect, subject to a later challenge under the Supremacy Clause.”<sup>62</sup> Outside the strictures of the Supremacy Clause, the States retain broad autonomy in structuring their governments and pursuing legislative objectives.”<sup>63</sup>

## **Antitrust Laws, and State Contracts and Incentives**

### ***Antitrust Law***

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers.

Antitrust law exists to protect competition, but not necessarily individual competitors, in economic markets, based on the idea that an unregulated market will lead to the creation of coercive monopolies.<sup>64</sup> Federal antitrust law includes the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. These laws are enforced in federal district court<sup>65</sup> by the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), state Attorneys General, and private plaintiffs. Antitrust case law is well-developed, and it is often difficult to distinguish aggressive, pro-competitive conduct—which is legal—from predatory, anti-competitive conduct.<sup>66</sup>

The Sherman Antitrust Act<sup>67</sup> prohibits any attempt to restrain trade or form a monopoly. A monopoly has two elements: (1) monopoly power and (2) willful acquisition or maintenance of that power, as opposed to power naturally resulting from a superior product, acumen, or historic accident. Stated differently, a plaintiff must prove the defendant acquired the monopoly power in a “predatory” manner. Penalties for violating the Sherman Act include up to ten years’

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<sup>60</sup> U.S. Const. art. VI, cl 2.

<sup>61</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, (1819); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, (1824) (Marshall, C.J.) (“[A]cts of the State Legislatures ... [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress ... is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it.”).

<sup>62</sup> *Shelby County v. Holder*, 133 S. Ct. 529, 543 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> John J. Miles, Antitrust Primer, 20140513 AHILA Seminar Papers 1 (2014) (stating the purpose of antitrust law is to “protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.”).

<sup>65</sup> Steven Fox, Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes, The Florida Bar, Business Litigation in Florida (2017) (federal district courts have exclusive jurisdiction over federal antitrust actions).

<sup>66</sup> Animesh Ballabh, Antitrust Law: An Overview, 88 J. Pat. & Trademark Off. Soc'y 877 (2006); John J. Miles, Antitrust Primer, 20140513 AHILA Seminar Papers 1 (2014).

<sup>67</sup> 15 U.S.C. §§. 1 et seq.

imprisonment and a fine up to \$100 million for a corporation or \$1 million for any other person.<sup>68</sup>

The Clayton Act<sup>69</sup> prohibits specific business actions, including sales, or setting a price, discount or rebate on condition that the buyer not deal with competitors of the seller where the effect may be to substantially lessen competition in interstate commerce.<sup>70</sup> Those types of practices have been held to violate s. 1 of the Sherman Act.<sup>71</sup> The Clayton Act also prohibits prospective corporate mergers and other asset acquisitions whose effects may substantially lessen competition.<sup>72</sup> To determine whether a merger violates the Clayton Act, a court must decide whether the merger is likely to create an appreciable danger of anticompetitive effects. The plaintiff must establish a prima facie case that a transaction is anticompetitive, such as by showing that an acquisition will significantly increase market concentration and lessen competition.<sup>73</sup> The burden then shifts to the defendant to rebut the prima facie case, such as by introducing evidence casting doubt on the plaintiff's prediction of anticompetitive effects.<sup>74</sup> If the defendant rebuts the prima facie case, the plaintiff has the final burden to demonstrate an antitrust violation.<sup>75</sup> If the plaintiff prevails, the customary remedy is for the court to order divestiture and unwind the merger.<sup>76</sup>

In enacting the Florida Antitrust Act of 1980,<sup>77</sup> the Legislature expressly stated its “intent ... that, in construing this chapter, due consideration and great weight given to the interpretations of the federal courts relating to comparable federal antitrust statutes.”<sup>78</sup> The standing requirements for a private cause of action under the Florida Antitrust Act parallel the standing requirements of Section 4 of the Clayton Act.<sup>79</sup> Implemented by the Office of the Attorney General (OAG), the Florida Antitrust Act essentially mirrors the federal Sherman Act, and prohibits:<sup>80</sup>

- Every contract, combination, or conspiracy in restraint of trade or commerce;<sup>81</sup> and
- Monopolization or attempted monopolization of any part of trade or commerce.<sup>82</sup>

A Florida antitrust law violation is punishable by up to three years' imprisonment and fines up to \$1 million for a corporation and \$100,000 for any other person.<sup>83</sup> There is also a private right of action for any person injured by certain antitrust violations.<sup>84</sup>

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<sup>68</sup> 15 U.S.C. §1.

<sup>69</sup> 15 U.S.C. § 18.

<sup>70</sup> 15 U.S.C. § 14.

<sup>71</sup> See, e.g., *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30, 47, 51 (D.D.C. 2000), *aff'd, in part, rev'd in part, remanded in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>72</sup> 15 U.S.C. § 18.

<sup>73</sup> *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence is first step in analysis); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).

<sup>74</sup> *Id.*

<sup>75</sup> *Chicago Bridge & Iron*, 534 F.3d at 423.

<sup>76</sup> *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 792 (9th Cir. 2015).

<sup>77</sup> Sections 542.15 – 542.36, F.S.

<sup>78</sup> Section 542.32, F.S.

<sup>79</sup> *Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 102 (Fla. 1st DCA 1996).

<sup>80</sup> Section 542.16, F.S.

<sup>81</sup> Section 542.18, F.S.

<sup>82</sup> Section 542.19, F.S.

<sup>83</sup> Section 542.21, F.S.

<sup>84</sup> Sections 542.21 and 542.22, F.S.

### ***Antitrust Actions Against Internet Platforms***

Critics have argued for years that internet platforms like Google, Apple, Facebook and Amazon improperly built empires over commerce, communications and culture, and then abused their power. Recently, federal and state regulators investigated and brought antitrust cases against these platforms.<sup>85</sup> For example, the FTC and over 40 states, including Florida, have brought an action against Facebook for allegedly buying smaller rivals to maintain market dominance.<sup>86</sup> Also, DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.<sup>87</sup>

### ***Procurement of Commodities and Services***

Chapter 287, F.S., regulates state agency<sup>88</sup> procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods that include:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.<sup>89</sup>

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.<sup>90</sup> However, specified contractual services and commodities are not subject to competitive solicitation requirements.<sup>91</sup>

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,<sup>92</sup> creating uniform agency procurement rules,<sup>93</sup>

<sup>85</sup> David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html> (last visited Feb. 25, 2021).

<sup>86</sup> *Id.*; *Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020).

<sup>87</sup> McCabe, *supra* note 59; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

<sup>88</sup> Section 287.012(1), F.S., defines the term "agency" as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

<sup>89</sup> See Sections 287.012(6) and 287.057(1), F.S.

<sup>90</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two threshold amount (\$35,000) contained in s. 287.017, F.S., to be competitively procured.

<sup>91</sup> See Sections 287.057(3)(e), F.S.

<sup>92</sup> See Sections 287.032 and 287.042, F.S.

<sup>93</sup> See Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

implementing the online procurement program,<sup>94</sup> and establishing state term contracts.<sup>95</sup> The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:<sup>96</sup>

- Convicted Vendor List;
- Discriminatory Vendor List;
- Scrutinized Companies with Activities in Sudan List;
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List; and
- Scrutinized Companies that Boycott Israel List.

### ***Economic Incentives***

The Department of Economic Opportunity (DEO) advances Florida's economy by championing the state's economic development vision and by administering state and federal programs and initiatives to help visitors, citizens, businesses, and communities.<sup>97</sup> Enterprise Florida, Inc. (EFI) is a nonprofit corporation established by the Legislature to serve as the state's main economic development organization.<sup>98</sup> EFI is required to enter into a performance-based contract with DEO.<sup>99</sup>

EFI works with businesses and economic development partners to determine whether projects are eligible for state economic development incentives. A project must be vetted by EFI and EFI must determine that incentives are necessary to secure a deal in order for an incentive package to be developed and sent to DEO for further review. Once the incentive package is finalized, DEO and other appropriate state bodies issue formal approvals.

Florida has a number of incentive programs intended to promote economic development in the state. These programs come in a variety of forms including tax refunds, tax credits, tax exemptions, and cash grants under chapter 288, Florida Statutes. Businesses interested in expanding or relocating in Florida learn about the state's economic incentive programs through several channels, including EFI, state and local economic development organizations, and private site selection consultants. Businesses can apply for more than one incentive to support their expansion or relocation projects.<sup>100</sup>

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<sup>94</sup> See Section 287.057(23), F.S.

<sup>95</sup> See Sections 287.042(2), 287.056, and 287.1345, F.S.

<sup>96</sup> Sections 287.133-135, F.S.

<sup>97</sup> Section 20.60(4)(b)(f), F.S.; Florida Department of Economic Opportunity, About Us, <https://floridajobs.org/about-us> (last visited Feb. 22, 2021).

<sup>98</sup> Section 288.901, F.S. Chapter 92-277, Laws of Fla., created EFI, while ch. 96-320, Laws of Fla, established EFI as a public-private partnership.

<sup>99</sup> Section 20.60(1), F.S., requires DEO to "establish annual performance standards for Enterprise Florida, Inc., CareerSource Florida, Inc., the Florida Tourism Industry Marketing Corporation, and Space Florida and report annually on how these performance measures are being met."

<sup>100</sup> OPPAGA, Report No. 16-09, p. 50-51.

Once a company begins the application process, EFI notifies the division so that it may begin the formal due diligence process to determine the business's statutory eligibility and financial standing. When due diligence and the application are complete, EFI determines what incentives and associated amounts may be available to the applicant and makes an approval or disapproval recommendation to DEO's executive director. If the business is approved, DEO will develop a contract or agreement with the applicant that specifies the total incentive amount, performance conditions that must be met to receive payment, payment schedule, and sanctions for failure to meet performance conditions.<sup>101</sup>

### III. Effect of Proposed Changes:

The bill provides the following definitions:

- “Affiliate” means
  - A predecessor or successor of a person convicted of or held civilly liable for an antitrust violation; or
  - An entity under the control of any natural person who is active in the management of the entity and who has been convicted of or held civilly liable for an antitrust violation. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The term also includes a person who knowingly enters into a joint venture with a person who has violated an antitrust law during the preceding 36 months.
- “Algorithm” means a mathematical set of rules that specify how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material
- “Antitrust violation” means any state or federal antitrust law as determined in a civil or criminal proceeding brought by the Attorney General, a state attorney, a similar body or agency of another state, the Federal Trade Commission, or the United States Department of Justice.
- “Candidate” has the same meaning as in s. 106.011(3)(e), F.S. (a person who files qualification papers and subscribes to a candidate's oath as required by law).
- “Censor” includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. This term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.
- “Convicted or being held civilly liable” or “convicted or held civilly liable” means a criminal finding of guilt or conviction, with or without an adjudication of guilt, being held civilly liable, or having a judgment levied for an antitrust violation, in any federal or state trial court of record relating to charges brought by indictment, information, or complaint on or after July 1, 2021, as a result of a jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere or other order finding liability.
- “Deplatform” has the same meaning as in the new provision of the bill addressing censorship, s. 501.2041, F.S. That is, the action or practice by a social media platform to

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<sup>101</sup> *Id.*



permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 60 days.

- “Economic incentives” means state grants, cash grants, tax exemptions, tax refunds, tax credits, state funds, and other state incentives under chapter 288 or administered by Enterprise Florida, Inc.
- “Journalistic enterprise” means an entity that:
  - Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
  - Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
  - Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
  - Operates under a broadcast license issued by the Federal Communications Commission.
- “Person” means a natural person or an entity organized under the laws of any state or of the United States *who operates as a social media platform*, with the legal power to enter into a binding contract and which bids or applies to bid on contracts let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.
- “Post-prioritization” means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, feed, view, or search results. The term does not include post-prioritization of content and material based on payments by a third party, including other users, to the social media platform.
- “Public entity” means the state and any of its departments or agencies.
- “Shadow ban” means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform that are not readily apparent to a user.
- “Social media platform” means any technology platform or access software provider that does business in the state and provides or enables computer access by multiple users in a public digital forum for the primary purpose of connecting with other users and creating and sharing user generated content over the Internet. The internet platform or social media site may be a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity, that does business in this state and that satisfies at least one of the following thresholds:
  - Has annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
  - Has at least 100 million monthly individual platform participants globally.

**Section 1** creates s. 106.072, F.S., to provide requirements for candidates and social media platforms related social media deplatforming of political candidates. This section provides that a social media platform may not knowingly deplatform a candidate. Upon a finding of a violation of this section by the Elections Commission, in addition to the remedies provided in ss. 106.265

and 106.27, F.S., the social media platform may be fined \$100,000 per day for deplatforming a statewide candidate, and \$10,000 per day for deplatforming all other candidates.

This section provides that if a social media platform knowingly provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' poses, content, material, and comments are not considered free advertising.

This section provides that this provision may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

**Section 2** creates 287.137, F.S., to establish restrictions for contracting with public entities for certain social media platforms who have violated antitrust laws. This section provides that a person or affiliate who has been placed on the antitrust violator vendor list following a conviction or being held civilly liable for an antitrust violation may not:

- Submit a bid, proposal, or reply for any new contract to provide any goods or services to a public entity;
- Submit a bid, proposal, or reply for a new contract with a public entity for the construction or repair of a public building or public work;
- Submit a bid, proposal, or reply on new leases of real property to a public entity;
- Be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a new contract with a public entity; or
- Transact new business with a public entity.

This section prohibits a public entity from accepting a bid, proposal, or reply from, awarding a new contract to, or transacting new business with any person or affiliate on the list unless that person or affiliate has been removed from the list. This prohibition does not apply to contracts that were awarded or business transactions that began before a person or an affiliate was placed on the list or before July 1, 2021.

This section provides that beginning July 1, 2021, all invitations to bid, requests for proposals, and invitations to negotiate, as those terms are defined in s. 287.012, F.S., and any contract document described in s. 287.058, F.S., must contain a statement informing persons of the public contracting and purchasing disqualifications imposed upon being placed on the antitrust vendor list.

The department must maintain an antitrust violator vendor list of the names and addresses of the people or affiliates who have been disqualified from the public contracting and purchasing process. DMS must publish the initial antitrust violator vendor list on January 1, 2022, and must update and electronically publish the list quarterly thereafter. A person or an affiliate disqualified from the public contracting and purchasing process is disqualified as of the date the final order is entered.

This section requires DMS to investigate, upon receiving reasonable information from any source, that a person was convicted or held civilly liable for antitrust violations, and determine whether good cause exists to place that person or an affiliate of that person on the list. If good cause exists, DMS must notify the person or affiliate in writing of its intent to place the name of

that person or affiliate on the list, and of the person's or affiliate's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person or affiliate does not request a hearing, DMS must enter a final order placing the name of the person or affiliate on the list. A person or affiliate may not be placed on the list without receiving an individual notice of intent from DMS.

This section allows a person or affiliate to dispute placement on the list. Within 21 days after receipt of the notice of intent, the person or affiliate may file a petition for a formal hearing under the Administrative Procedures Act (ss. 120.569 and 120.57(1), F.S.) to determine whether it is in the public interest for the person or affiliate to be placed on the list. A person or affiliate is prohibited from filing a petition for an informal hearing under s. 120.57(2), F.S.

This section specifies that the procedures of the Administrative Procedures Act apply to any formal hearing, except, within 30 days after the formal hearing or receipt of the hearing transcript, whichever is later, the administrative law judge (ALJ) must enter a final order that consist of findings of fact, conclusions of law, interpretation of agency rules, and any other information required by law or rule to be contained in the final order. The final order must direct the DMSA to place or not place the person or affiliate on the antitrust violator vendor list. The final order of the administrative law judge is final agency action for purposes of s. 120.68, F.S.

This section provides that any person or affiliate who has been notified by the DMS of its intent to place his or her name on the antitrust violator vendor list may offer evidence on any relevant issue. An affidavit alone does not constitute competent substantial evidence that the person has not been convicted or is not an affiliate of a person convicted or held civilly liable.

This section provides that, in a formal hearing, DMS must prove that it is in the public interest for the person or affiliate to be placed on the list. Proof that a person was convicted or was held civilly liable for antitrust violations, or that an entity is an affiliate of such a person constitutes a prima facie case that it is in the public interest for the person or affiliate to be put on the list. Status as an affiliate must be proven by clear and convincing evidence. If the ALJ determines that the person was not convicted or that the person was not civilly liable or is not an affiliate of such person, that person or affiliate may not be placed on the antitrust violator list.

This section provides that in determining whether it is in the public interest to place a person or affiliate on the list, the bill indicates that the ALJ must consider the following factors:

- Whether the person or affiliate committed an antitrust violation.
- The nature and details of the antitrust violation.
- The degree of culpability of the person or affiliate proposed to be placed on the antitrust violator vendor list.
- Reinstatement or clemency in any jurisdiction in relation to the antitrust violation at issue in the proceeding.
- The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom the DMS has given notice to be put on the list, the person or affiliate may prove by a

preponderance of the evidence that it would not be in the public interest to put him or her on the antitrust violator vendor list, based upon evidence addressing the factors listed above.

This section permits the Attorney general to temporarily place any person charged or accused of any state or federal antitrust law in a civil or criminal proceeding brought by the Attorney General, a state attorney, the Federal Trade Commission, or the United States Department of Justice on or after July 1, 2021, on the list. The Attorney General may make a finding of probable cause that a person has likely violated the underlying antitrust laws, and temporarily place such person on the antitrust violator vendor list until such proceeding has concluded. Affiliates may not be placed on the list under this temporary procedure.

If probable cause exists, the Attorney General must notify the person in writing of its intent to temporarily place the name of that person on the antitrust violator vendor list, and of the person's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person does not request a hearing, the Attorney General must enter a final order temporarily placing the name of the person on the antitrust violator vendor list. A person may not be placed on the antitrust violator vendor list without receiving an individual notice of intent from the Attorney General.

Within 21 days after receipt of the notice of intent, the person may file a petition for a formal hearing under the Administrative Procedures Act to determine whether it is in the public interest for the person to be temporarily placed on the antitrust violator vendor list. A person may not file a petition for informal hearing.

In determining whether it is in the public interest to temporarily place a person on the antitrust violator vendor, the ALJ must consider the following factors:

- The likelihood the person committed the antitrust violation.
- The nature and details of the antitrust violation.
- The degree of culpability of the person proposed to be placed on the list.
- The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

This section specifies that the temporary removal procedure does not apply to affiliates.

Section 2 also allows a person or affiliate to petition for removal from the antitrust violator vendor list no sooner than 6 months after the date a final order is entered. If the petition is based upon a reversal of the conviction or liability on appellate review or pardon, then they may petition at any time. The petition must be filed with the DMS. A person or affiliate may be removed from the list subject to such terms and conditions as prescribed by the ALJ upon a determination that removal is in the public interest. In determining whether removal would be in the public interest, the ALJ must consider any relevant factors.

This section provides that upon proof that a person was found not guilty or not civilly liable, the antitrust violation case was dismissed, the court entered a finding in the person's favor, the person's conviction or determination of liability has been reversed on appeal, or that the person has been pardoned, the ALJ must determine that removal of the person or an affiliate from the list is in the public interest.

If the petition for removal is denied, the person or affiliate may not petition for another hearing on removal for a period of nine months after the date of denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. The DMS may petition for removal before the expiration of such period if it determines that removal would be in the public interest.

This section provides that the conviction of a person or a person held civilly liable for an antitrust violation, or placement on the antitrust violator vendor list, does not affect any rights or obligations under any contract, franchise, or other binding agreement that predates such conviction or placement on the antitrust violator vendor list.

This section provides that a person who has been placed on the antitrust violator vendor list is not a qualified applicant for economic incentives under chapter 288, and such entity shall not be qualified to receive such economic incentives.

This section specifies that the provision regarding the antitrust violator vendor list does not apply to any activities regulated by the Public Service Commission or to the purchase of goods or services made by any public entity from the Department of Corrections, from the nonprofit corporation organized under chapter 946, or from any qualified nonprofit agency for the blind or any qualified nonprofit agency for other severely handicapped persons under ss. 413.032-413.037. 337, F.S.

The bill expressly provides that the antitrust violator vendor list may only be enforced to the extent not inconsistent with federal law and notwithstanding any other provision of state law.

**Section 3** creates s. 501.2041, F.S., to establish unlawful acts and practices by social media platforms. This section requires a social media platform to:

- Publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban;
- Apply censorship, deplatforming, and shadow banning standards in a consistent manner among users on the platform;
- Inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days;
- Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts, and provide that information upon request;
- Categorize algorithms used for post-prioritization and shadow banning and allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content (the opt-out opportunity must be reoffered annually);
- Provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning; and
- Allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after being deplatformed.

This section prohibits a social media platform from censoring a user's content or material or deplatforming a user from the social media platform in a way that would otherwise violate

FDUTPA, or without notifying the user who posted or attempted to post the content or material. The notification must:

- Be in writing;
- Be delivered via electronic mail or direct electronic notification to the user within 30 days of the censoring action;
- Include a thorough rationale explaining the reason that the social media platform censored the user; and
- Include a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable.

This section also prohibits a social media platform from:

- Applying or using post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate for office in Florida, beginning from the date of qualification and ending on the date of the election or the date such candidate for office ceases to be a candidate before the date of election. Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation. Social media platforms must provide users with a method to identify themselves as qualified candidates, and may confirm such qualification by reviewing the website of the Division of Elections of the Department of State.
- Taking any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation.

This section provides that a social media platform is not required to notify a user of a censoring action if the censored content or material is obscene (as defined in s. 847.001, F.S.), which means content or material that:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

If a social media platform fails to comply with any of the foregoing requirements, the bill provides that the social media platform commits an unfair or deceptive trade act or practice. If the DLA, by its own inquiry or as a result of a complaint, suspects that a violation is imminent, occurring, or has occurred, DLA may investigate the suspected violation in accordance with FDUTPA. In an investigation by DLA into alleged violations of this section, DLA's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation.

A user may bring a private cause of action against a social media platform for failing to:

- Notify such user of an act of censoring or deplatforming, or
- Apply censorship, deplatforming, and shadow banning standards in a consistent manner.

The court may award the following damages to the user:

- Up to \$100,000 in statutory damages per proven claim;
- Actual damages;
- If aggravating factors are present, punitive damages;
- Other forms of equitable relief; and
- If the user was deplatformed, costs and reasonable attorney fees.

Each failure to comply with each of the individual requirements in the bill are treated as a separate violation, act, or practice by the social media platform.

The bill provides that its provisions may only be enforced to the extent they are not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

**Section 4** amends s. 501.212, F.S., to update a cross reference.

**Section 5** expressly provides that if any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity must not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

**Section 6** provides the bill take effect July 1, 2021.

#### **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:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

## E. Other Constitutional Issues:

### *Jurisdiction*

For a court to exercise jurisdiction over a respondent, it must have subject matter jurisdiction and personal jurisdiction. State courts have general jurisdiction, and therefore a claim made under a state statute meets the subject matter jurisdiction requirement.<sup>102</sup>

The Florida Supreme Court set forth the two-prong test for personal jurisdiction: first, the complaint must allege sufficient jurisdictional facts to come within Florida's long-arm statute<sup>103</sup> (s. 48.193, F.S.); and second, the nonresident defendant must have minimum contacts with Florida to satisfy federal due process requirements.<sup>104</sup> The constitutional "minimum contacts" prong "is controlled by United States Supreme Court precedent interpreting the Due Process Clause and imposes a more restrictive requirement" than the long-arm statute.<sup>105</sup> Both prongs must be satisfied in order to exercise personal jurisdiction over a non-resident defendant.<sup>106</sup>

The long arm statute confers jurisdiction over parties who are "[o]perating, conducting, engaging in, or carrying on a business or business venture in [Florida] or having an office or agency in [Florida]."<sup>107</sup> "In order to establish that a defendant is 'carrying on business' for the purposes of [Florida's] long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit."<sup>108</sup> Courts consider the following factors in analyzing whether a non-resident defendant is engaged in "a general course of business activity": (1) "the presence and operation of an office in Florida"; (2) "the possession and maintenance of a license to do business in Florida"; (3) "the number of Florida clients served"; and (4) "the percentage of overall revenue gleaned from Florida clients."<sup>109</sup>

Whether a nonresident defendant has those requisite minimum contacts to satisfy constitutional due process requirements is a fact specific inquiry.<sup>110</sup> "Factors that go into determining whether sufficient minimum contacts exist include the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections."<sup>111</sup> A nonresident's occasional physical presence in Florida to attend trade shows, or "to make a one-off corporate

<sup>102</sup> *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

<sup>103</sup> A long-arm statute is a statutory device by which a state obtains jurisdiction over certain causes of action involving parties or events (or both) outside that state. It is called a long-arm statute because it allows a state court to reach parties located outside the state and even possibly for events which occurred outside the state. In essence, it allows the state to reach its "long arm" outside the state.

<sup>104</sup> *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989).

<sup>105</sup> *Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000).

<sup>106</sup> *Rollet v. de Bizemont*, 159 So. 3d 351, 356 (Fla. 3d DCA 2015).

<sup>107</sup> Section 48.193(1)(a)(1), F.S.

<sup>108</sup> *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1167 (11th Cir. 2005).

<sup>109</sup> *Id.*

<sup>110</sup> See *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989) (relying on *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985), for the proposition that whether the minimum-contacts requirement has been satisfied depends upon the facts of each case).

<sup>111</sup> *Labry v. Whitney Nat'l Bank*, 8 So.3d 1239, 1241 (Fla. 1st DCA 2009).



solicitation” of a company whose office is in Florida is insufficient to comport with the constitutional due process requirements.<sup>112</sup> Minimum contacts may be satisfied, however, when a non-resident defendant enters into a contract with a Florida party for substantial services performed in Florida and agrees to make payment in Florida.<sup>113</sup>

Whether a Florida court would have personal jurisdiction over a nonresident internet or social media platform defendant involves a fact specific inquiry to be decided by a court on a case-by-case basis.

### ***Freedom of Speech***

First Amendment protection extends to corporations.<sup>114</sup> Corporations and other associations, like individuals contribute to the “discussion, debate, and the dissemination of information and ideas” that the First Amendment seeks to foster.<sup>115</sup> Because some provisions of the bill seek to restrict certain speech made by internet and social media platforms, the First Amendment protections afforded to corporate speech may be implicated.

Also, corporations have a right to unrestricted independent expenditures for political communications and elections as a form of corporate speech.<sup>116</sup> Some of the provisions of the bill may implicate First Amendment protections related to political corporate speech.

A state may “enforce reasonable time, place and manner regulations” in public spaces “as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>117</sup> However, a law may be invalid if it is overbroad, in the sense that it prohibits a substantial amount of protected speech in relation to the law’s “legitimate sweep.”<sup>118</sup> Because some provisions of the bill speak to solely to political speech, these provisions may be read as an unconstitutional content-based restriction.

### ***Supremacy Clause***

As discussed above, the Supremacy Clause was designed to ensure that states do not “retard, impede, burden, or in any manner control” the execution of federal law.<sup>119</sup>

<sup>112</sup> See *Piazenko v. Pier Marine Interiors GMBH*, 2020 WL 6751314 (Fla. 3d DCA Nov. 18, 2020); see also *Price v. Point Marine, Inc.*, 610 So. 2d 1339, 1342 (Fla. 1st DCA 1992) (affirming dismissal for lack of jurisdiction over non-resident defendant where, “absent a continued and sustained effort to procure business, or actual procurement of business, these activities are insufficient to constitute substantial activities within the state of Florida”).

<sup>113</sup> *Smith Architectural Grp., Inc. v. Dehaan*, 867 So. 2d 434, 436 (Fla. 4th DCA 2004).

<sup>114</sup> *Citizens United*, 558 U.S. at 342.

<sup>115</sup> *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986), quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>116</sup> *Id.* at 340.

<sup>117</sup> *United States v. Grace*, 461 U.S. 171, 177 (1983) (citation omitted); see, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

<sup>118</sup> See *U.S. v. Stevens*, 559 U.S. 460 (2010).

<sup>119</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, (1819); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, (1824) (Marshall, C.J.) (“[A]cts of the State Legislatures ... [that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress ... is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it.”).

The bill may implicate the Supremacy Clause by attempting to regulate in an area that may be preempted by federal law.<sup>120</sup>

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

A person or affiliate may experience an indeterminate fiscal impact if such party is disqualified from state term contract eligibility upon removal from the vendor list as specified within the bill.

**C. Government Sector Impact:**

The Department of Management Services may experience increased workload and associated costs in carrying out the provisions relating to the removal of vendors from state procurements of the bill.

The Department of Legal Affairs may experience increased workload and associated costs in carrying out its new duties and responsibilities under the bill.

**VI. Technical Deficiencies:**

Lines 71 to 76 provide:

A social media platform may not *knowingly* deplatform a candidate. Upon a finding of a *violation* of this section by the Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform ... (emphasis added).

Section 106.25(3), F.S., provides that:

For the purposes of commission jurisdiction, a *violation* shall mean the *willful performance* of an act prohibited by this chapter or chapter 104 or the willful failure to perform an act required by this chapter or chapter 104. The commission may not by rule determine what constitutes willfulness or further define the term “willful” for purposes of this chapter or chapter 104. *Willfulness* is a determination of fact; however, at the request of the respondent at any time after probable cause is found, willfulness may be considered and determined in an informal hearing before the commission.

The bill creates a violation that is based on acting “knowingly” while the same chapter defines a violation to be a “willful act.” The term “willful” is generally taken to cover not only knowing violations of a standard, but reckless ones as well.<sup>121</sup> The use of the term “knowingly” suggests

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<sup>120</sup> 47 U.S.C. § 203(e).

<sup>121</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

that a defendant acts with actual knowledge or awareness that the act he or she performs is unlawful. The Legislature may want to consider an amendment to align these provisions to the same standard.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 501.212 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 106.072, 287.137, and 501.2041.

**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.

**FOR CONSIDERATION By** the Committee on Governmental Oversight and Accountability

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1 A bill to be entitled  
2 An act relating to social media platforms; creating s.  
3 106.072, F.S.; defining terms; prohibiting a social  
4 media platform from knowingly deplatforming a  
5 candidate; providing fines for violations; authorizing  
6 social media platforms to provide free advertising for  
7 candidates under specified conditions; providing  
8 enforcement authority consistent with federal and  
9 state law; creating s. 287.137, F.S.; defining terms;  
10 providing requirements for public contracts and  
11 economic incentives related to entities that have been  
12 convicted or held civilly liable for antitrust  
13 violations; prohibiting a public entity from entering  
14 into any type of contract with a person or an  
15 affiliate on the antitrust violator vendor list;  
16 providing applicability; requiring certain contract  
17 documents to contain a specified statement; requiring  
18 the Department of Management Services to maintain a  
19 list of people or affiliates disqualified from the  
20 public contracting and purchasing process; specifying  
21 requirements for publishing such list; providing  
22 procedures for placing a person or an affiliate on the  
23 list; providing procedural and legal rights for a  
24 person or affiliate to challenge placement on the  
25 list; providing a procedure for temporarily placing a  
26 person on an antitrust violator vendor list; providing  
27 procedural and legal rights for a person to challenge  
28 temporary placement on the list; specifying conditions  
29 for removing certain entities and affiliates from the

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30 list; authorizing a person, under specified  
31 conditions, to retain rights or obligations under  
32 existing contracts or binding agreements; prohibiting  
33 a person who has been placed on the antitrust violator  
34 vendor list from receiving certain economic  
35 incentives; providing exceptions; providing  
36 enforcement authority consistent with federal and  
37 state law; creating s. 501.2041, F.S.; defining terms;  
38 providing that social media platforms that fail to  
39 comply with specified requirements and prohibitions  
40 commit an unfair or deceptive act or practice;  
41 requiring a notification given by a social media  
42 platform for censoring content or deplatforming a user  
43 to contain certain information; providing an exception  
44 to the notification requirements; authorizing the  
45 Department of Legal Affairs to investigate suspected  
46 violations under the Deceptive and Unfair Trade  
47 Practices Act and bring specified actions for such  
48 violations; specifying circumstances under which a  
49 private cause of action may be brought; specifying how  
50 damages are to be calculated; providing construction  
51 for violations of certain provisions of this act;  
52 granting the department specified subpoena powers;  
53 providing enforcement authority consistent with  
54 federal and state law; amending s. 501.212, F.S.;  
55 conforming a provision to changes made by the act;  
56 providing for severability; providing an effective  
57 date.  
58

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Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 106.072, Florida Statutes, is created to read:

106.072 Social media deplatforming of political candidates.—

(1) As used in this section, the term:

(a) "Candidate" has the same meaning as in s.

106.011(3)(e).

(b) "Deplatform" has the same meaning as in s. 501.2041.

(c) "Social media platform" has the same meaning as in s. 501.2041.

(2) A social media platform may not knowingly deplatform a candidate. Upon a finding of a violation of this section by the Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform may be fined \$100,000 per day for statewide candidates and \$10,000 per day for other candidates.

(3) A social media platform that knowingly provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' posts, content, material, and comments are not considered free advertising.

(4) This section may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

Section 2. Section 287.137, Florida Statutes, is created to read:

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287.137 Antitrust violations; denial or revocation of the right to transact business with public entities; denial of economic benefits.—

(1) As used in this section, the term:

(a) "Affiliate" means:

1. A predecessor or successor of a person convicted of or held civilly liable for an antitrust violation; or

2. An entity under the control of any natural person who is active in the management of the entity and who has been convicted of or held civilly liable for an antitrust violation. The term includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The ownership by one person of shares constituting a controlling interest in another person, or a pooling of equipment or income among persons when not for fair market value under an arm's length agreement, is a prima facie case that one person controls another person. The term also includes a person who knowingly enters into a joint venture with a person who has violated an antitrust law during the preceding 36 months.

(b) "Antitrust violation" means any state or federal antitrust law as determined in a civil or criminal proceeding brought by the Attorney General, a state attorney, a similar body or agency of another state, the Federal Trade Commission, or the United States Department of Justice.

(c) "Antitrust violator vendor list" means the list required to be kept by the department pursuant to paragraph (3)(b).

(d) "Conviction or being held civilly liable" or "convicted

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117 or held civilly liable” means a criminal finding of guilt or  
 118 conviction, with or without an adjudication of guilt, being held  
 119 civilly liable, or having a judgment levied for an antitrust  
 120 violation in any federal or state trial court of record relating  
 121 to charges brought by indictment, information, or complaint on  
 122 or after July 1, 2021, as a result of a jury verdict, nonjury  
 123 trial, or entry of a plea of guilty or nolo contendere or other  
 124 order finding of liability.

125 (e) “Economic incentives” means state grants, cash grants,  
 126 tax exemptions, tax refunds, tax credits, state funds, and other  
 127 state incentives under chapter 288 or administered by Enterprise  
 128 Florida, Inc.

129 (f) “Person” means a natural person or an entity organized  
 130 under the laws of any state or of the United States which  
 131 operates as a social media platform, as defined in s. 501.2041,  
 132 with the legal power to enter into a binding contract and which  
 133 bids or applies to bid on contracts let by a public entity, or  
 134 which otherwise transacts or applies to transact business with a  
 135 public entity. The term includes those officers, directors,  
 136 executives, partners, shareholders, employees, members, and  
 137 agents who are active in the management of an entity.

138 (g) “Public entity” means the state and any of its  
 139 departments or agencies.

140 (2) (a) A person or an affiliate who has been placed on the  
 141 antitrust violator vendor list following a conviction or being  
 142 held civilly liable for an antitrust violation may not submit a  
 143 bid, proposal, or reply for any new contract to provide any  
 144 goods or services to a public entity; may not submit a bid,  
 145 proposal, or reply for a new contract with a public entity for

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146 the construction or repair of a public building or public work;  
 147 may not submit a bid, proposal, or reply on new leases of real  
 148 property to a public entity; may not be awarded or perform work  
 149 as a contractor, supplier, subcontractor, or consultant under a  
 150 new contract with a public entity; and may not transact new  
 151 business with a public entity.

152 (b) A public entity may not accept a bid, proposal, or  
 153 reply from, award a new contract to, or transact new business  
 154 with any person or affiliate on the antitrust violator vendor  
 155 list unless that person or affiliate has been removed from the  
 156 list pursuant to paragraph (3) (e).

157 (c) This subsection does not apply to contracts that were  
 158 awarded or business transactions that began before a person or  
 159 an affiliate was placed on the antitrust violator vendor list or  
 160 before July 1, 2021.

161 (3) (a) Beginning July 1, 2021, all invitations to bid,  
 162 requests for proposals, and invitations to negotiate, as those  
 163 terms are defined in s. 287.012, and any contract document  
 164 described in s. 287.058 must contain a statement informing  
 165 persons of the provisions of paragraph (2) (a).

166 (b) The department shall maintain an antitrust violator  
 167 vendor list of the names and addresses of the people or  
 168 affiliates who have been disqualified from the public  
 169 contracting and purchasing process under this section. The  
 170 department shall electronically publish the initial antitrust  
 171 violator vendor list on January 1, 2022, and shall update and  
 172 electronically publish the list quarterly thereafter.  
 173 Notwithstanding this paragraph, a person or an affiliate  
 174 disqualified from the public contracting and purchasing process

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175 pursuant to this section is disqualified as of the date the  
 176 final order is entered.

177 (c)1. Upon receiving reasonable information from any source  
 178 that a person was convicted or held civilly liable, the  
 179 department shall investigate the information and determine  
 180 whether good cause exists to place that person or an affiliate  
 181 of that person on the antitrust violator vendor list. If good  
 182 cause exists, the department shall notify the person or  
 183 affiliate in writing of its intent to place the name of that  
 184 person or affiliate on the antitrust violator vendor list and of  
 185 the person's or affiliate's right to a hearing, the procedure  
 186 that must be followed, and the applicable time requirements. If  
 187 the person or affiliate does not request a hearing, the  
 188 department shall enter a final order placing the name of the  
 189 person or affiliate on the antitrust violator vendor list. A  
 190 person or an affiliate may not be placed on the antitrust  
 191 violator vendor list without receiving an individual notice of  
 192 intent from the department.

193 2. Within 21 days after receipt of the notice of intent,  
 194 the person or affiliate may file a petition for a formal hearing  
 195 under ss. 120.569 and 120.57(1) to determine whether it is in  
 196 the public interest for the person or affiliate to be placed on  
 197 the antitrust violator vendor list. A person or an affiliate may  
 198 not file a petition for an informal hearing under s. 120.57(2).  
 199 The procedures of chapter 120 shall apply to any formal hearing  
 200 under this paragraph except, within 30 days after the formal  
 201 hearing or receipt of the hearing transcript, whichever is  
 202 later, the administrative law judge shall enter a final order  
 203 that shall consist of findings of fact, conclusions of law,

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204 interpretation of agency rules, and any other information  
 205 required by law or rule to be contained in the final order. The  
 206 final order shall direct the department to place or not place  
 207 the person or affiliate on the antitrust violator vendor list.  
 208 The final order of the administrative law judge is final agency  
 209 action for purposes of s. 120.68.

210 3. In determining whether it is in the public interest to  
 211 place a person or an affiliate on the antitrust violator vendor  
 212 list under this paragraph, the administrative law judge shall  
 213 consider the following factors:

214 a. Whether the person or affiliate committed an antitrust  
 215 violation.

216 b. The nature and details of the antitrust violation.

217 c. The degree of culpability of the person or affiliate  
 218 proposed to be placed on the antitrust violator vendor list.

219 d. Reinstatement or clemency in any jurisdiction in  
 220 relation to the antitrust violation at issue in the proceeding.

221 e. The needs of public entities for additional competition  
 222 in the procurement of goods and services in their respective  
 223 markets.

224 4. In any proceeding under this paragraph, the department  
 225 must prove that it is in the public interest for the person or  
 226 affiliate to whom it has given notice under this paragraph to be  
 227 placed on the antitrust violator vendor list. Proof that a  
 228 person was convicted or was held civilly liable or that an  
 229 entity is an affiliate of such person constitutes a prima facie  
 230 case that it is in the public interest for the person or  
 231 affiliate to whom the department has given notice to be put on  
 232 the antitrust violator vendor list. Status as an affiliate must

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be proven by clear and convincing evidence. If the administrative law judge determines that the person was not convicted or that the person was not civilly liable or is not an affiliate of such person, that person or affiliate may not be placed on the antitrust violator vendor list.

5. Any person or affiliate who has been notified by the department of its intent to place his or her name on the antitrust violator vendor list may offer evidence on any relevant issue. An affidavit alone does not constitute competent substantial evidence that the person has not been convicted or is not an affiliate of a person convicted or held civilly liable. Upon establishment of a prima facie case that it is in the public interest for the person or affiliate to whom the department has given notice to be put on the antitrust violator vendor list, the person or affiliate may prove by a preponderance of the evidence that it would not be in the public interest to put him or her on the antitrust violator vendor list, based upon evidence addressing the factors in subparagraph 3.

(d)1. If a person has been charged or accused of any state or federal antitrust law in a civil or criminal proceeding brought by the Attorney General, a state attorney, the Federal Trade Commission, or the United States Department of Justice on or after July 1, 2021, the Attorney General may, by a finding of probable cause that a person has likely violated the underlying antitrust laws, temporarily place such person on the antitrust violator vendor list until such proceeding has concluded.

2. If probable cause exists, the Attorney General shall notify the person in writing of its intent to temporarily place

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the name of that person on the antitrust violator vendor list, and of the person's right to a hearing, the procedure that must be followed, and the applicable time requirements. If the person does not request a hearing, the Attorney General shall enter a final order temporarily placing the name of the person on the antitrust violator vendor list. A person may not be placed on the antitrust violator vendor list without receiving an individual notice of intent from the Attorney General.

3. Within 21 days after receipt of the notice of intent, the person may file a petition for a formal hearing pursuant to ss. 120.569 and 120.57(1) to determine whether it is in the public interest for the person to be temporarily placed on the antitrust violator vendor list. A person may not file a petition for an informal hearing under s. 120.57(2). The procedures of chapter 120 shall apply to any formal hearing under this paragraph.

4. In determining whether it is in the public interest to place a person on the antitrust violator vendor list under this paragraph, the administrative law judge shall consider the following factors:

a. The likelihood the person committed the antitrust violation.

b. The nature and details of the antitrust violation.

c. The degree of culpability of the person proposed to be placed on the antitrust violator vendor list.

d. The needs of public entities for additional competition in the procurement of goods and services in their respective markets.

5. This paragraph does not apply to affiliates.



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291 (e)1. A person or an affiliate may be removed from the  
 292 antitrust violator vendor list subject to such terms and  
 293 conditions as may be prescribed by the administrative law judge  
 294 upon a determination that removal is in the public interest. In  
 295 determining whether removal would be in the public interest, the  
 296 administrative law judge must consider any relevant factors,  
 297 including, but not limited to, the factors identified in  
 298 subparagraph (c)3. Upon proof that a person was found not guilty  
 299 or not civilly liable, the antitrust violation case was  
 300 dismissed, the court entered a finding in the person's favor,  
 301 the person's conviction or determination of liability has been  
 302 reversed on appeal, or the person has been pardoned, the  
 303 administrative law judge shall determine that removal of the  
 304 person or an affiliate of that person from the antitrust  
 305 violator vendor list is in the public interest. A person or an  
 306 affiliate on the antitrust violator vendor list may petition for  
 307 removal from the list no sooner than 6 months after the date a  
 308 final order is entered pursuant to this section but may petition  
 309 for removal at any time if the petition is based upon a reversal  
 310 of the conviction or liability on appellate review or pardon.  
 311 The petition must be filed with the department, and the  
 312 proceeding must be conducted pursuant to the procedures and  
 313 requirements of this subsection.

314 2. If the petition for removal is denied, the person or  
 315 affiliate may not petition for another hearing on removal for a  
 316 period of 9 months after the date of denial unless the petition  
 317 is based upon a reversal of the conviction on appellate review  
 318 or a pardon. The department may petition for removal before the  
 319 expiration of such period if, in its discretion, it determines

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320 that removal would be in the public interest.

321 (4) The conviction of a person or a person held civilly  
 322 liable for an antitrust violation, or placement on the antitrust  
 323 violator vendor list, does not affect any rights or obligations  
 324 under any contract, franchise, or other binding agreement that  
 325 predates such conviction or placement on the antitrust violator  
 326 vendor list.

327 (5) A person who has been placed on the antitrust violator  
 328 vendor list is not a qualified applicant for economic incentives  
 329 under chapter 288, and such entity shall not be qualified to  
 330 receive such economic incentives.

331 (6) This section does not apply to any activities regulated  
 332 by the Public Service Commission or to the purchase of goods or  
 333 services made by any public entity from the Department of  
 334 Corrections, from the nonprofit corporation organized under  
 335 chapter 946, or from any qualified nonprofit agency for the  
 336 blind or any qualified nonprofit agency for other severely  
 337 handicapped persons under ss. 413.032-413.037.

338 (7) This section may only be enforced to the extent not  
 339 inconsistent with federal law and notwithstanding any other  
 340 provision of state law.

341 Section 3. Section 501.2041, Florida Statutes, is created  
 342 to read:

343 501.2041 Unlawful acts and practices by social media  
 344 platforms.-

345 (1) As used in this section, the term:

346 (a) "Algorithm" means a mathematical set of rules that  
 347 specifies how a group of data behaves and that will assist in  
 348 ranking search results and maintaining order or that is used in

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349 sorting or ranking content or material based on relevancy or  
 350 other factors instead of using published time or chronological  
 351 order of such content or material.

352 (b) "Censor" includes any action taken by a social media  
 353 platform to delete, regulate, restrict, edit, alter, inhibit the  
 354 publication or republication of, suspend a right to post,  
 355 remove, or post an addendum to any content or material posted by  
 356 a user. The term also includes actions to inhibit the ability of  
 357 a user to be viewable by or to interact with another user of the  
 358 social media platform.

359 (c) "Deplatform" means the action or practice by a social  
 360 media platform to permanently delete or ban a user or to  
 361 temporarily delete or ban a user from the social media platform  
 362 for more than 60 days.

363 (d) "Journalistic enterprise" means an entity that:

364 1. Publishes in excess of 100,000 words available online  
 365 with at least 50,000 paid subscribers or 100,000 monthly active  
 366 users;

367 2. Publishes 100 hours of audio or video available online  
 368 with at least 100 million viewers annually;

369 3. Operates a cable channel that provides more than 40  
 370 hours of content per week to more than 100,000 cable television  
 371 subscribers; or

372 4. Operates under a broadcast license issued by the Federal  
 373 Communications Commission.

374 (e) "Post-prioritization" means action by a social media  
 375 platform to place, feature, or prioritize certain content or  
 376 material ahead of, below, or in a more or less prominent  
 377 position than others in a newsfeed, a feed, a view, or in search

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378 results. The term does not include post-prioritization of  
 379 content and material based on payments by a third party,  
 380 including other users, to the social media platform.

381 (f) "Shadow ban" means action by a social media platform,  
 382 through any means, whether the action is determined by a natural  
 383 person or an algorithm, to limit or eliminate the exposure of a  
 384 user or content or material posted by a user to other users of  
 385 the social media platform. This term includes acts of shadow  
 386 banning by a social media platform which are not readily  
 387 apparent to a user.

388 (g) "Social media platform" means any information service,  
 389 system, Internet search engine, or access software provider that  
 390 does business in this state and provides or enables computer  
 391 access by multiple users to a computer server, including an  
 392 Internet platform or a social media site. The Internet platform  
 393 or social media site may be a sole proprietorship, partnership,  
 394 limited liability company, corporation, association, or other  
 395 legal entity that does business in this state and that satisfies  
 396 at least one of the following thresholds:

397 1. Has annual gross revenues in excess of \$100 million, as  
 398 adjusted in January of each odd-numbered year to reflect any  
 399 increase in the Consumer Price Index.

400 2. Has at least 100 million monthly individual platform  
 401 participants globally.

402 (h) "User" means a person who resides or is domiciled in  
 403 this state and who has an account on a social media platform,  
 404 regardless of whether the person posts or has posted content or  
 405 material to the social media platform.

406 (2) A social media platform that fails to comply with any

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of the provisions of this subsection commits an unfair or deceptive act or practice as specified in s. 501.204.

(a) A social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban.

(b) A social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform.

(c) A social media platform must inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days.

(d) A social media platform may not censor a user's content or material or deplatform a user from the social media platform:

1. Without notifying the user who posted or attempted to post the content or material; or

2. In a way that violates this part.

(e) A social media platform must:

1. Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts.

2. Provide, upon request, a user with the number of other individual platform participants who were provided or shown content or posts.

(f) A social media platform must:

1. Categorize algorithms used for post-prioritization and shadow banning.

2. Allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or

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chronological posts and content.

(g) A social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity in subparagraph (f)2.

(h) A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e), beginning from the date of qualification and ending on the date of the election or the date such candidate for office ceases to be a candidate before the date of election. Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation of this paragraph. Social media platforms must provide users with a method to identify themselves as qualified candidates and may confirm such qualification by reviewing the website of the Division of Elections of the Department of State.

(i) A social media platform must allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after being deplatformed.

(j) A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation of this paragraph.

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465 (3) For purposes of subparagraph (2)(d)1., a notification  
 466 must:  
 467 (a) Be in writing.  
 468 (b) Be delivered via electronic mail or direct electronic  
 469 notification to the user within 30 days after the censoring  
 470 action.  
 471 (c) Include a thorough rationale explaining the reason that  
 472 the social media platform censored the user.  
 473 (d) Include a precise and thorough explanation of how the  
 474 social media platform became aware of the censored content or  
 475 material, including a thorough explanation of the algorithms  
 476 used, if any, to identify or flag the user's content or material  
 477 as objectionable.  
 478 (4) Notwithstanding any other provisions of this section, a  
 479 social media platform is not required to notify a user if the  
 480 censored content or material is obscene as defined in s.  
 481 847.001.  
 482 (5) If the department, by its own inquiry or as a result of  
 483 a complaint, suspects that a violation of this section is  
 484 imminent, occurring, or has occurred, the department may  
 485 investigate the suspected violation in accordance with this  
 486 part. Based on its investigation, the department may bring a  
 487 civil or administrative action under this part.  
 488 (6) A user may only bring a private cause of action for  
 489 violations of paragraph (2)(b) or subparagraph (2)(d)1. In a  
 490 private cause of action brought under paragraph (2)(b) or  
 491 subparagraph (2)(d)1., the court may award the following damages  
 492 to the user:  
 493 (a) Up to \$100,000 in statutory damages per proven claim.

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494 (b) Actual damages.  
 495 (c) If aggravating factors are present, punitive damages.  
 496 (d) Other forms of equitable relief.  
 497 (e) If the user was deplatformed in violation of paragraph  
 498 (2)(b), costs and reasonable attorney fees.  
 499 (7) For purposes of bringing an action under subsection (2)  
 500 or subsection (6), each failure to comply with the individual  
 501 provisions of subsection (2) shall be treated as a separate  
 502 violation, act, or practice.  
 503 (8) In an investigation by the department into alleged  
 504 violations of this section, the department's investigative  
 505 powers include, but are not limited to, the ability to subpoena  
 506 any algorithm used by a social media platform related to any  
 507 alleged violation.  
 508 (9) This section may only be enforced to the extent not  
 509 inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and  
 510 notwithstanding any other provision of state law.  
 511 Section 4. Subsection (2) of section 501.212, Florida  
 512 Statutes, is amended to read:  
 513 501.212 Application.—This part does not apply to:  
 514 (2) Except as provided in s. 501.2041, a publisher,  
 515 broadcaster, printer, or other person engaged in the  
 516 dissemination of information or the reproduction of printed or  
 517 pictorial matter, insofar as the information or matter has been  
 518 disseminated or reproduced on behalf of others without actual  
 519 knowledge that it violated this part.  
 520 Section 5. If any provision of this act or the application  
 521 thereof to any person or circumstance is held invalid, the  
 522 invalidity shall not affect other provisions or applications of

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523 the act which can be given effect without the invalid provision  
524 or application, and to this end the provisions of this act are  
525 declared severable.

526 Section 6. This act shall take effect July 1, 2021.

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/6/21

Meeting Date

SPB 7072

Bill Number (if applicable)

Topic Social Media

Amendment Barcode (if applicable)

Name CARL SZABO

Job Title Vice President

Address 1401 K St NW Suite 502

Phone 202-420-7485

Street

Washington

DC

State

20005

Zip

Email CSZABO@NetChoice.org

Speaking: ☐ For ☒ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against  
(The Chair will read this information into the record.)

Representing NetChoice

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

**This form is part of the public record for this meeting.**

S-001 (10/14/14)

**YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM**

**THE FLORIDA SENATE**

**APPEARANCE RECORD**

April 6, 2021

*Meeting Date*

7072

*Bill Number (if applicable)*

Topic Social Media Platforms

*Amendment Barcode (if applicable)*

Name James Hines

Job Title \_\_\_\_\_

Address 660 North Capitol St. , NW Suite 200

Phone 512.673.2089

*Street*

Washington D.C.

20001

Email hines@internetassociation.org

*City*

*State*

*Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☒ Against  
(The Chair will read this information into the record.)

Representing Internet Association

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM

THE FLORIDA SENATE

APPEARANCE RECORD

4/6/2021

Meeting Date

7072

Bill Number (if applicable)

Topic Social Media Platforms

Amendment Barcode (if applicable)

Name Cynthia Henderson

Job Title

Address 108 E Jefferson Street Suite A

Phone 8505590855

Street

Tallahassee

FL

32301

Email cyhenderson@me.com

City

State

Zip

Speaking:



For



Against



Information

*Questions*  
*otherwise stated*

Waive Speaking:



In Support



Against

(The Chair will read this information into the record.)

Representing Kingston Public Affairs LLC

Appearing at request of Chair:



Yes



No

Lobbyist registered with Legislature:



Yes



No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)





828884

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
04/06/2021	.	
	.	
	.	
	.	

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The Committee on Governmental Oversight and Accountability  
(Rodrigues) recommended the following:

**Senate Amendment**

Delete lines 388 - 392  
and insert:

(g) "Social media platform" means any technology platform  
or access software provider that does business in the state and  
provides or enables computer access by multiple users in a  
public digital forum for the primary purpose of connecting with  
other users and creating and sharing user generated content over  
the Internet. The Internet platform

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SPB 7074

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Public Records/Social Media Platform Activities

DATE: April 6, 2021

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Ponder	McVaney		<b>GO Submitted as Comm. Bill/Fav</b>

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**I. Summary:**

SPB 7074, which is linked to the passage of SPB 7072 (2021), makes confidential and exempt from public copying and inspection requirements information collected for the Department of Legal Affairs (DLA) investigations into whether:

- A social media platform has committed an antitrust violation based on a case brought by a governmental entity; and
- A social media platform has failed to meet certain requirements before restricting speech by users.

Once an investigation is completed, only the following information received by DLA will remain confidential and exempt:

- All information to which another public records exemption applies;
- Personal identifying information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a business's data security; and
- Proprietary business information.

The bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill will become effective on the same date that SPB 7072 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

Article I, section 24(c) of the Florida 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 public record exemptions; thus, it requires a two-thirds vote for final passage.

## II. Present Situation:

### Public Records

Article I, section 24(a) of the Florida 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, section 24(a) of the Florida Constitution.<sup>1</sup> The general law must state with specificity the public necessity justifying the exemption<sup>2</sup> and must be no broader than necessary to accomplish its purpose.<sup>3</sup>

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect 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; and
- Protect trade or business secrets.<sup>5</sup>

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup>

### Technology Transparency

Section 230 of the federal Communications Decency Act provides that internet platforms cannot be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the internet platform considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>7</sup> The Act also provides internet platforms with immunity from claims based on third-party content that appears on their platforms.<sup>8</sup>

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<sup>1</sup> Art. I, s. 24(c), FLA. CONST.

<sup>2</sup> This portion of a public record exemption is commonly referred to as a "public necessity statement."

<sup>3</sup> Art. I, s. 24(c), FLA. CONST.

<sup>4</sup> Section 119.15, F.S.

<sup>5</sup> Section 119.15(6)(b), F.S.

<sup>6</sup> Section 119.15(3), F.S.

<sup>7</sup> 47 U.S.C. § 230(c).

<sup>8</sup> *Id.*

Recently, there have been criticisms of the broad federal immunity provisions granted to internet platforms. While this immunity has fostered the free flow of ideas on the internet, critics have argued that the immunity provisions shield publishers from liability for harmful content or political censorship.<sup>9</sup>

### **Antitrust and Internet Platforms**

A handful of digital or internet platforms - Google, Apple, Facebook, Amazon and Microsoft (collectively known as “GAFAM”<sup>10</sup>) - have built sprawling empires and obtained an unparalleled financial position in the marketplace,<sup>11</sup> and collectively maintain at least thirty-three percent market share in fifteen separate markets. Recently, federal and state regulators have been investigating and bringing antitrust actions against the GAFAM companies.<sup>12</sup> In February 2019, the Federal Trade Commission (FTC) created a task force dedicated to monitoring antitrust in technology markets.<sup>13</sup> Additionally, the FTC and over 40 states, including Florida, sued Facebook alleging the company is illegally maintaining its personal social networking monopoly through a years-long course of anticompetitive conduct.<sup>14</sup> Also, the Department of Justice and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.<sup>15</sup>

### **Procurement of Commodities and Services**

Chapter 287, F.S., regulates state agency<sup>16</sup> procurement of personal property and services. The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,<sup>17</sup> creating uniform agency procurement rules,<sup>18</sup> implementing the online procurement program,<sup>19</sup> and establishing state term contracts.<sup>20</sup>

<sup>9</sup> Zoe Bedell and John Major, *What's Next for Section 230? A Roundup of Proposals*, Lawfare, (July 29, 2020) <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals> (last visited Feb. 25, 2021).

<sup>10</sup> This is phrasing economist Thomas Philippon uses. Thomas Philippon, *The Great Reversal* 159 (2019).

<sup>11</sup> See Pippa Stevens, *Here Are the 10 Companies with the Most Cash on Hand*, CNBC (Nov. 7, 2019), <https://www.cnbc.com/2019/11/07/microsoft-apple-and-alphabet-are-sitting-on-more-than-100-billion-in-cash.html> (last visited April 5, 2021).

<sup>12</sup> David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html> (last visited Feb. 25, 2021).

<sup>13</sup> *TC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, Fed. Trade Comm'n. (Feb. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

<sup>14</sup> Federal Trade Commission, *FTC Sues Facebook for Illegal Monopolization*, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> (last visited April 5, 2021) (*Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590 (D.C. Cir. 2020)).

<sup>15</sup> McCabe, *supra* note 10; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).

<sup>16</sup> Section 287.012(1), F.S., defines the term “agency” as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

<sup>17</sup> See ss. 287.032 and 287.042, F.S.

<sup>18</sup> See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

<sup>19</sup> See s. 287.057(22), F.S.

<sup>20</sup> See ss. 287.042(2), 287.056, and 287.1345, F.S.

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:<sup>21</sup>

- Convicted Vendor List;
- Discriminatory Vendor List;
- Scrutinized Companies with Activities in Sudan List;
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List; and
- Scrutinized Companies that Boycott Israel List.

### **SPB 7072 (2021)**

SPB 7072 (2021), to which this bill is linked, allows DLA to determine if a social media platform has likely committed an antitrust violation based on a case brought by a governmental entity. If such a determination is made, the social media platform is prohibited from contracting for services with public entities and placed on the Antitrust Violator Vendor List.

SPB 7072 (2021) also requires social media platforms to meet certain requirements when they restrict speech by users. If a social media platform fails to meet such requirements, DLA may bring an action against the social media platform under the Florida Deceptive and Unfair Trade Practices Act.

### **III. Effect of Proposed Changes:**

**Section 1 and 2** create ss. 287.137(8) and 501.2041(10), F.S., to make all information received by DLA pursuant to an investigation by DLA or a law enforcement agency confidential and exempt from public copying and inspection requirements,<sup>22</sup> until such time as the investigation is completed or ceases to be active.

The bill applies to records received by DLA pursuant to an investigation into:

- Whether a social media platform has committed an antitrust violation based on a case brought by a governmental entity; and
- Whether a social media platform has failed to meet certain requirements or improperly restricted speech by users.

During an active investigation, information made confidential and exempt may be disclosed by the DLA:

- In the performance of its official duties and responsibilities; or
- To another governmental entity in performance of its official duties and responsibilities.

---

<sup>21</sup> Sections 287.133-135, F.S.

<sup>22</sup> There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 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 statute. See Op. Att’y Gen. Fla. (1985).

Once an investigation is completed or once an investigation ceases to be active, the following information received by DLA will remain confidential and exempt:

- All information to which another public records exemption applies;
- Personal identifying information;
- A computer forensic report;
- Information that would otherwise reveal weaknesses in a business's data security; and
- Proprietary business information.

The term "proprietary business information" means information that:

- Is owned or controlled by the business;
- Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations;
- Has not been disclosed except as required by law or 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 DLA; and
- Includes trade secrets and competitive interests.

**Section 3** provides a public necessity statement as required by article I, section 24(c) of the Florida Constitution. The public necessity statement provides that, if released, information received by DLA pursuant to an investigation by DLA or a law enforcement agency could:

- Frustrate or thwart the investigation and impair the ability of DLA to perform assigned functions;
- Undo a specific statutory exemption protecting the information;
- Be used for the purpose of identity theft;
- Result in the identification of vulnerabilities; and
- Result in economic harm.

This section provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill takes effect on the same date that SPB 7072 (2021) 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:**

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:*****Vote Requirement***

Article I, section 24(c) of the Florida 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 new public record exemptions. Thus, the bill requires a two-thirds vote for final passage.

***Public Necessity Statement***

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new public record exemptions. Thus, the bill includes a public necessity statement.

***Breadth of Exemption***

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates public record exemptions for sensitive investigative materials, which does not appear to be broader than necessary to accomplish its purpose.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Agencies responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record may experience increased

workload and incur associated costs. These costs most likely will be absorbed within existing resources as part of the day-to-day responsibilities of agencies.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 287.137 and 501.2041 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.



**FOR CONSIDERATION By** the Committee on Governmental Oversight and Accountability

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A bill to be entitled

An act relating to public records; amending s. 287.137, F.S.; providing a public records exemption for information received by the Attorney General pursuant to an investigation by the Attorney General or a law enforcement agency into certain social media platform activities; authorizing release of confidential and exempt information in certain instances; requiring certain information to remain confidential and exempt after an investigation is completed or ceases to be active; defining the term "proprietary business information"; providing for future legislative review and repeal of the exemption; amending s. 501.2041, F.S.; providing a public records exemption for information received by the Department of Legal Affairs pursuant to an investigation by the department or a law enforcement agency into violations by certain social media platforms; authorizing release of confidential and exempt information in certain instances; requiring certain information to remain confidential and exempt after an investigation is completed or ceases to be active; defining the term "proprietary business information"; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing a contingent effective date.

Be It Enacted by the Legislature of the State of Florida:

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**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

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Section 1. Subsection (8) is added to section 287.137, Florida Statutes, as created by SB 7072, 2021 Regular Session, to read:

287.137 Antitrust violations; denial or revocation of the right to transact business with public entities; denial of economic benefits.—

(8) (a) All information received by the Attorney General under paragraph (3) (d) pursuant to an investigation by the Attorney General or a law enforcement agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2) (c).

(b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the Attorney General:

1. In the performance of his or her official duties and responsibilities; or

2. To another governmental entity in performance of its official duties and responsibilities.

(c) Once an investigation is completed or ceases to be active, the following information received by the Attorney General shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. All information to which another public records exemption applies.

2. Personal identifying information.

3. A computer forensic report.

4. Information that would otherwise reveal weaknesses in a

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business' data security.

5. Proprietary business information.

(d) For purposes of this subsection, the term "proprietary business information" means information that:

1. Is owned or controlled by the business;

2. Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations;

3. Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public;

4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the Attorney General; and

5. Includes:

a. Trade secrets as defined in s. 688.002.

b. Competitive interests, the disclosure of which would impair the competitive advantage of the business that is the subject of the information.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Subsection (10) is added to section 501.2041, Florida Statutes, as created by SB 7072, 2021 Regular Session, to read:

501.2041 Unlawful acts and practices by social media platforms.-

(10) (a) All information received by the department pursuant

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to an investigation by the department or a law enforcement agency of a violation of this section is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2)(c).

(b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the department:

1. In the performance of its official duties and responsibilities; or

2. To another governmental entity in performance of its official duties and responsibilities.

(c) Once an investigation is completed or ceases to be active, the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

1. All information to which another public records exemption applies.

2. Personal identifying information.

3. A computer forensic report.

4. Information that would otherwise reveal weaknesses in a business' data security.

5. Proprietary business information.

(d) For purposes of this subsection, the term "proprietary business information" means information that:

1. Is owned or controlled by the business;

2. Is intended to be private and is treated by the business as private because disclosure would harm the business or its

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business operations;

3. Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public;

4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department; and

5. Includes:

a. Trade secrets as defined in s. 688.002.

b. Competitive interests, the disclosure of which would impair the competitive advantage of the business that is the subject of the information.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 3. The Legislature finds that it is a public necessity that all information received by the Attorney General and the Department of Legal Affairs pursuant to an investigation by the Attorney General, the Department of Legal Affairs, or a law enforcement agency under ss. 287.137 and 501.2041, Florida Statutes, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution for the following reasons:

(1) A notification of a violation of s. 501.172, Florida Statutes, or antitrust laws may result in an investigation of such violations. The premature release of such investigatory information could frustrate or thwart the investigation and impair the ability of the Attorney General and the Department of

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Legal Affairs to effectively and efficiently administer ss. 287.137 and 501.2041, Florida Statutes. In addition, release of such information before completion of an active investigation could jeopardize the ongoing investigation.

(2) To continue to protect from public disclosure all information to which another public record exemption applies once an investigation is completed or ceases to be active. Release of such information by the Department of Legal Affairs and the Attorney General would undo the specific statutory exemption protecting that information.

(3) An investigation of social media platform activities is likely to result in the gathering of personal identifying information that could be used for the purpose of identity theft. For this reason, personal identifying information should remain confidential and exempt once an investigation is completed or ceases to be active.

(4) Information received by the Attorney General and the Department of Legal Affairs may contain proprietary business information, including trade secrets. Through such information, including trade secrets, a business derives independent, economic value, actual or potential, from the information being generally unknown to, and not readily ascertainable by, other persons who might obtain economic value from its disclosure or use. Allowing public access to proprietary business information, including trade secrets, through a public records request could destroy the value of the proprietary business information and cause a financial loss to the business submitting the information. Release of such information could give business competitors an unfair advantage and weaken the position of the

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entity supplying the proprietary business information in the  
marketplace.

(5) Information received by the Attorney General and the  
Department of Legal Affairs may contain a computer forensic  
report or information that could reveal weaknesses in a  
business' data security. The release of this information could  
result in the identification of vulnerabilities in the business'  
cybersecurity system and be used to harm the business and the  
business' clients. For this reason, a computer forensic report  
and information that could reveal weaknesses in a business' data  
security should remain confidential and exempt once an  
investigation is completed or ceases to be active.

(6) The Legislature finds that the harm that may result  
from the release of information received by the Attorney General  
and the Department of Legal Affairs pursuant to an investigation  
by the Attorney General, the Department of Legal Affairs, or a  
law enforcement agency under ss. 287.137 and 501.2041, Florida  
Statutes, could impair the effective and efficient  
administration of these investigations and thus, outweighs the  
public benefit that may be derived from the disclosure of the  
information.

Section 4. This act shall take effect July 1, 2021, if SB  
7072 or similar legislation takes effect, if such legislation is  
adopted in the same legislative session or an extension thereof  
and becomes a law.

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 418

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Burgess

SUBJECT: Public Records/Persons Seeking Shelter

DATE: April 6, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Caldwell	MS	<b>Favorable</b>
2.	Candelaria	McVane	GO	<b>Fav/CS</b>
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 418 exempts from public inspection and copying requirements the address and telephone number of a person which are held by an agency providing public emergency shelter to the person during a storm or catastrophic event.

The bill provides that the exemption created under the bill is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2026, unless reviewed and saved from repeal by the Legislature.

The bill provides a statement of public necessity as required by the State Constitution, providing that the exemption is necessary to limit the amount of privacy a person must forfeit by choosing to enter a shelter, and to protect a person from those who might seek to exploit their vulnerability following a catastrophic event.

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

The bill is not expected to impact state or local government revenues and expenditures. See Section V. Fiscal Impact Statement.

The bill takes effect upon becoming a law.

## II. Present Situation:

### Access to Public Records - Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> The right to inspect or copy applies to the official business 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.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S. 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.”

<sup>6</sup> 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.”

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

custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>18</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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.<sup>26</sup>

## Public Shelters

The Division of Emergency Management (DEM) is established in the Executive Office of the Governor to serve as the state's emergency management agency.<sup>27</sup> The State Emergency Management Act<sup>28</sup> directs the DEM to oversee and manage emergency preparedness, response, recovery, and mitigation programs in Florida.

The DEM currently manages a program for surveying existing public and private buildings, with the owner's written agreement, to identify which facilities are appropriately designed and located

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<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</sup> 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?
- 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?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 14.2016, F.S.

<sup>28</sup> Section 252.31, F.S., through s. 252.60, F.S., are known as the State Emergency Management Act. Section 252.31, F.S.



to serve as shelters in the event of an emergency.<sup>29</sup> Public facilities, including schools, post-secondary education facilities, and other facilities owned or leased by the state or local governments, but excluding hospitals or nursing homes, suitable for use as public hurricane evacuation shelters must be made available at the request of the local emergency management agencies.<sup>30</sup>

The DEM is required to prepare a state comprehensive emergency management plan (CEMP) that must be integrated into, and coordinated with, the emergency management plans of the Federal Government.<sup>31</sup> The CEMP<sup>32</sup> must include a shelter component, the Statewide Emergency Shelter Plan (plan),<sup>33</sup> with specific planning provisions and the CEMP must promote shelter activity coordination between the public, private, and nonprofit sectors.<sup>34</sup> The plan must include the following:

- Contain strategies to ensure the availability of adequate shelter space in each region of the state;
- Establish strategies for refuge-of-last-resort programs;
- Provide strategies to assist local emergency management efforts to ensure that adequate staffing plans exist for all shelters, including medical and security personnel;
- Provide for a post-disaster communications system for public shelters;
- Establish model shelter guidelines for operations, registration, inventory, power generation capability, information management, and staffing; and
- Set forth policy guidance for sheltering people with special needs.<sup>35</sup>

The plan must be prepared and submitted to the Governor and Cabinet each even-numbered year.<sup>36</sup> The plan, among other requirements, must identify the location and square footage of existing shelters as well as shelters needed in the next five years.<sup>37</sup> The plan must also identify the types of public facilities that should be constructed to comply with emergency shelter criteria and must recommend an appropriate and available source of funding for the additional cost of constructing emergency shelters within these public facilities.<sup>38</sup>

Public shelters are not required to gather personal information on shelter residents, however, nothing in law prevents the collection of this information. Shelters that collect personal information on their residents may do so to have an accurate accounting of all persons staying within or to locate family members for the purpose of family reunification. While no public

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<sup>29</sup> Section 252.385(2)(a), F.S.

<sup>30</sup> Section 252.385(4)(a), F.S.

<sup>31</sup> Section 252.35(2)(a), F.S.; *see also* s. 1013.372, F.S.

<sup>32</sup> FLA. ADMIN. CODE R. 27P-2.002, incorporates the CEMP by reference; *See* Comprehensive Emergency Management Plan, Division of Emergency Management, available at <https://www.floridadisaster.org/globalassets/importedpdfs/2014-state-cemp-basic-plan.pdf> (last visited January 27, 2021).

<sup>33</sup> 2018 Statewide Emergency Shelter Plan, DIVISION OF EMERGENCY MANAGEMENT, available at <https://www.floridadisaster.org/globalassets/dem/response/sesp/2018/2018-sesp-entire-document.pdf> (last visited January 27, 2021).

<sup>34</sup> Section 252.35(2)(a)2., F.S.

<sup>35</sup> *Id.*

<sup>36</sup> Section 1013.372(2), F.S.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

record exemption for this information exists, the plan states that shelter staff members should “abide by principles of confidentiality.”<sup>39</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 252.385, F.S., to exempt<sup>40</sup> from public inspection and copying requirements the address and telephone number of a person which are held by an agency, as defined in s. 119.011, F.S., providing public emergency shelter to person during a storm or catastrophic event.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

**Section 2** provides a public necessity statement as required by the Florida Constitution. The statement asserts that:

Shelters are made available to the public to provide a safe place of accommodation before, during, and immediately following an emergency. During an emergency, the people affected are in a vulnerable state, as they have voluntarily displaced themselves from their residences and possessions to seek refuge. The information submitted to an agency by such a person seeking shelter could be used by persons seeking to take advantage of their vulnerability during or following the emergency. In addition, people seeking shelter for their safety and the safety of their families should not be forced to forfeit their privacy for the sake of such safety.

**Section 3** provides that the bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

Not applicable. 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.

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<sup>39</sup> *Supra*, note 33 at Appendix F, pg. F-2.

<sup>40</sup> There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 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 statute. *See WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); *Op. Att’y Gen. Fla. 85-692* (1985).

**B. Public Records/Open Meetings Issues:*****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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new exemption for the address and telephone number of a person which are held by an agency providing public emergency shelter to the person during a storm or catastrophic event. Thus, the bill requires a two-thirds vote to be enacted.

***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect the address and telephone number of a person using a public shelter provided by an agency during a storm or catastrophic event. This bill exempts only the address and telephone number of a person using a public shelter provided by an agency during a storm or catastrophic event from the public records requirements. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

An agency may incur a minimal fiscal impact associated with training staff responsible for complying with public records requests related to the creation of the public records exemptions. Costs associated with redacting the exempt information prior to releasing a record may be incurred. The costs, however, would be absorbed within existing resources, as they are part of day-to-day responsibilities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 252.385, 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 by Governmental Oversight and Accountability on April 6, 2021:**

The CS removes the “name” of a person seeking shelter from the public records exemption and revises the public necessity statement to align it with the exempted information. The CS establishes that the exempted information is for a person provided public emergency shelter during a storm or catastrophic event. The CS removes all references to the term “assistance” throughout the bill.

**B. Amendments:**

None.

By Senator Burgess

20-00685-21

2021418\_\_

A bill to be entitled

An act relating to public records; amending s. 252.385, F.S.; creating an exemption from public records requirements for the name, address, and telephone number of a person which are held by an agency providing shelter or assistance to such person during an emergency; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (5) is added to section 252.385, Florida Statutes, to read:

252.385 Public shelter space; public records exemption.—

(5) The name, address, and telephone number of a person which are held by an agency, as defined in s. 119.011, providing shelter or assistance to such person during an emergency are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the name, address, and telephone number of a person which are held by an agency providing shelter or assistance to such person during an emergency be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of

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the State Constitution. Shelters are made available to the public to provide a safe place of accommodation before, during, and immediately following an emergency. During an emergency, the people affected are in a vulnerable state, as they have voluntarily displaced themselves from their residences and possessions to seek refuge. The information submitted to an agency by such a person seeking shelter or assistance could be used by persons seeking to take advantage of their vulnerability during or following the emergency. In addition, people seeking shelter or assistance for their safety and the safety of their families should not be forced to forfeit their privacy for the sake of such safety. Therefore, the Legislature finds that it is a public necessity to protect such information from public disclosure.

Section 3. This act shall take effect upon becoming a law.

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**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/6/21  
Meeting Date

SB418  
Bill Number (if applicable)

Topic Public Records/Persons Seeking Shelter

Amendment Barcode (if applicable)

Name Tonnette Graham

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against  
(The Chair will read this information into the record.)

Representing FL Association of Counties

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

**This form is part of the public record for this meeting.**

S-001 (10/14/14)

YOU MUST PRINT AND DELIVER THIS FORM TO THE ASSIGNED TESTIMONY ROOM

**THE FLORIDA SENATE**

**APPEARANCE RECORD**

April 6, 2021

*Meeting Date*

418

*Bill Number (if applicable)*

Topic Public Records/Persons Seeking Shelter

*Amendment Barcode (if applicable)*

Name Lisa Hurley

Job Title \_\_\_\_\_

Address 311 E. Park Ave.

Phone 850.224.5081

*Street*

Tallahassee

Florida

32301

Email lhurley@smithbryanandmyers.com

*City*

*State*

*Zip*

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against  
(The Chair will read this information into the record.)

Representing Collier County

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)



217140

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/06/2021	.	
	.	
	.	
	.	

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The Committee on Governmental Oversight and Accountability  
(Burgess) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause  
and insert:

Section 1. Subsection (5) is added to section 252.385,  
Florida Statutes, to read:

252.385 Public shelter space; public records exemption.—

(5) The address and telephone number of a person provided  
public emergency shelter during a storm or catastrophic event  
and held by the agency, as defined in s. 119.011, that provided





217140

the emergency shelter is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that the address and telephone number of a person who was provided public emergency shelter during a storm or other catastrophic event be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Emergency shelters are made available to the public to provide a safe place of accommodation before, during, and immediately following storms or other catastrophic events. During these emergency events, those affected are in a vulnerable state, as they have voluntarily displaced themselves from their residences and possessions to seek refuge. The information submitted to an agency by such a person seeking emergency shelter during a storm or other catastrophic event could be used by persons seeking to take advantage of their vulnerability during or following the emergency. In addition, those seeking emergency shelter for their safety and the safety of their families should not be forced to forfeit their privacy for the sake of such safety. Therefore, the Legislature finds that the need to protect the address and telephone number of individuals seeking emergency shelter is sufficiently compelling to override this state's public policy of open government and that the protection of such information cannot be accomplished without this exemption.

Section 3. This act shall take effect upon becoming a law.



217140

===== T I T L E   A M E N D M E N T =====

And the title is amended as follows:

Delete everything before the enacting clause  
and insert:

A bill to be entitled  
An act relating to public records; amending s.  
252.385, F.S.; creating an exemption from public  
records requirements for the address and telephone  
number of persons provided public emergency shelter  
and held by the agency that provided the emergency  
shelter; providing for future legislative review and  
repeal of the exemption; providing a statement of  
public necessity; providing an effective date.

**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 1456

INTRODUCER: Senator Rodrigues

SUBJECT: Public Records/Examination and Assessment Instruments

DATE: April 5, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brick	Bouck	ED	<b>Favorable</b>
2.	Candelaria	McVaney	GO	<b>Favorable</b>
3.			RC	

---

## **I. Summary:**

SB 1456 makes confidential and exempt from public inspection and copying requirements records related to certain examinations and assessments, including developmental materials and workpapers that are prepared, prescribed, or administered by Florida College System institutions, state universities, or the Department of Education. The bill grants authority to the State Board of Education and the Board of Governors of the State University System to make rules and regulations, respectively, governing the appropriate management of the protected materials.

The bill provides that the public records exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

This bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect on July 1, 2021.

## **II. Present Situation:**

### **Access to Public Records - Generally**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> The right to inspect or copy applies to the official business 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.<sup>2</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> *Id.*

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, section 11.0431, Florida Statutes (F.S.), provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S. 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.”

<sup>6</sup> 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.”

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

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> Art. I, s. 24(c), Fla. Const.

<sup>11</sup> *Id.* See, e.g., *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or

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(Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>18</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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.<sup>26</sup>

### **Exempt Educational Assessment Instruments**

Education records, as defined in the Family Educational Rights and Privacy Act (FERPA),<sup>27</sup> are confidential and exempt from the requirement to provide public access to public records.<sup>28</sup> Also specifically confidential and exempt are examination and assessment instruments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered pursuant to s. 1008.22, F.S., which relates to the student assessment program for public schools, and 1008.25, F.S., which relates to public school student progression, student support, and reporting requirements. Assessments and examinations covered by this exemption include the statewide, standardized comprehensive assessments, end-of-course assessments, and the Florida Alternate Assessment.<sup>29</sup> The State Board of Education (SBE) is responsible for adopting rules governing access, maintenance, and destruction of the instruments and related materials.<sup>30</sup>

The SBE is also responsible for adopting rules governing access, maintenance, and the destruction of examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered pursuant to educator certification requirements. The teacher certification assessments and examinations are also confidential and exempt from public records disclosure requirements.<sup>31</sup>

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</sup> 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?
- 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?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> FERPA applies to records created for an educational purpose and maintained by an educational agency. 20 U.S.C. s. 1232g.

<sup>28</sup> Section 1002.221(1), F.S.

<sup>29</sup> Sections 1008.22, 1008.23 and 1008.25, F.S.

<sup>30</sup> Section 1008.23, F.S.

<sup>31</sup> Sections 1008.23 and 1012.56, F.S.

### Other Required Assessments

In addition to the assessments required by ss. 1008.22 and 1008.25, F.S., the law requires:

- A statewide kindergarten screening assessment.<sup>32</sup>
- An assessment to measure learning gains of those students in a Department of Juvenile Justice education program.<sup>33</sup>
- An assessment for the identification of limited English proficient students.<sup>34</sup>
- A civic literacy assessment to be administered by Florida College System institutions and state universities to all incoming students.<sup>35</sup>
- The Preliminary SAT/National Merit Scholar Qualifying Test (PSAT/NMSQT) and the PreACT assessments administered under the Florida Partnership for Minority and Underrepresented Student Achievement.<sup>36</sup>

### III. Effect of Proposed Changes:

The bill expands the scope of the existing public records exemption that covers examination and assessment instruments relating to statewide, standardized assessments and student progression. The bill makes confidential and exempt from public access:

- The statewide kindergarten screening assessment.
- The assessment of learning gains for students in a Department of Juvenile Justice education program.
- Assessments for the identification of limited English proficient students.
- The civic literacy assessment administered by Florida College System (FCS) institutions and state universities.
- Teacher certification assessments.
- The Preliminary SAT/National Merit Scholar Qualifying Test and the PreACT assessments administered under the Florida Partnership for Minority and Underrepresented Student Achievement.

The bill creates a new public records exemption that covers all examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered by an FCS institution, a state university, or the Florida Department of Education. The bill provides that the FCS, Board of Governors of the State University System, and the State Board of Education are responsible for implementing rules or regulations governing access, maintenance, and destruction of the assessments and related records.

The bill provides a statement of public necessity as required by the Florida Constitution. The bill makes legislative findings that the exemptions are necessary in order to:

- Maintain the security of proprietary information included in assessment instruments.
- Prevent cheating, plagiarism, and academic dishonesty in education.

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<sup>32</sup> Section 1002.69, F.S.

<sup>33</sup> Section 1003.52, F.S.

<sup>34</sup> Section 1003.56, F.S.

<sup>35</sup> Section 1007.25, F.S.

<sup>36</sup> Section 1007.35(5), F.S.

- Ensure the validity of the results derived from the administration of examinations and assessments.
- Maintain the state's ability to objectively assess educational progress and performance
- Protect a student's privacy and his or her ability to protect his or her personal information and educational records.

The bill provides that the public records exemptions are subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

The bill takes effect July 1, 2021.

#### **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:**

###### ***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 bill creating or expanding an exemption to the public records requirements. This bill creates a new exemption for records relating to certain examinations and assessments, thus, the bill requires a two-thirds vote to be enacted.

###### ***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

###### ***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to:

- Maintain the security of proprietary information included in assessment instruments.
- Prevent cheating, plagiarism, and academic dishonesty in education.
- Ensure the validity of the results derived from the administration of examinations and assessments.
- Maintain the state's ability to objectively assess educational progress and performance.



- Protect a student's privacy and his or her ability to protect his or her personal information and educational records.

This bill exempts from public inspection and copying requirements only examinations and assessments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered by a Florida College System institution, a state university, or the Florida Department of Education. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The test security requirements in the bill for postsecondary and K-12 assessments may have a positive fiscal impact associated with preventing the compromise of test items, which requires a redevelopment of test items. Additionally, it will likely strengthen the Department of Education's ability to collect damages from entities charged and convicted of such violations and theft.<sup>37</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>37</sup> Florida Department of Education, *2021 Agency Legislative Bill Analysis of SB 1456* (Jan. 22, 2021), at 3.

**VIII. Statutes Affected:**

This bill substantially amends section 1008.23 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.

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

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By Senator Rodrigues

27-01058B-21

20211456\_\_

A bill to be entitled

An act relating to public records; amending s. 1008.23, F.S.; expanding an exemption from public records requirements for examination and assessment instruments used for statewide standardized assessments and student progression to include those instruments used for statewide kindergarten screening, youth enrolled in Department of Juvenile Justice programs, limited English proficient students, civic literacy assessments, measuring minority and underrepresented student achievement, and certification of educators and those administered by a Florida College System institution, a state university, or the Department of Education; providing that provisions governing access, maintenance, and destruction of certain instruments and related materials shall be prescribed by rules of the State Board of Education and regulations of the Board of Governors, respectively; providing for future legislative review and repeal of the exemption; providing legislative findings; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1008.23, Florida Statutes, is amended to read:

1008.23 Confidentiality of assessment instruments.—

(1) All examination and assessment instruments, including

Page 1 of 4

**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

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20211456\_\_

developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered pursuant to ss. 1002.69, 1003.52, 1003.56, 1007.25, 1007.35, 1008.22, and 1008.25, and 1012.56 shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution ~~the provisions of s. 119.07(1) and from s. 1001.52.~~ Provisions governing access, maintenance, and destruction of such instruments and related materials shall be prescribed by rules of the State Board of Education.

(2)(a) All examination and assessment instruments, including developmental materials and workpapers directly related thereto, which are prepared, prescribed, or administered by a Florida College System institution, a state university, or the Department of Education shall be confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) Provisions governing access, maintenance, and destruction of the instruments and related materials identified under paragraph (a) shall be prescribed by rules of the State Board of Education and regulations of the Board of Governors, respectively.

(3) This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. (1) The Legislature finds that it is a public necessity to exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution examination and assessment instruments used for statewide kindergarten

Page 2 of 4

**CODING:** Words ~~stricken~~ are deletions; words underlined are additions.

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59 screening, youth enrolled in Department of Juvenile Justice  
60 programs, limited English proficient students, civic literacy  
61 assessments, measuring minority and underrepresented student  
62 achievement, and certification of educators and those  
63 administered by a Florida College System institution, a state  
64 university, or the Department of Education.

65 (2) The state has historically protected education records  
66 from public disclosure. Section 1002.221, Florida Statutes,  
67 makes K-12 education records generally confidential, while s.  
68 1008.23, Florida Statutes, as it is currently written, already  
69 makes examination and assessment instruments relating to  
70 statewide, standardized assessments and student progression  
71 confidential.

72 (3) Assessment instruments contain proprietary information  
73 that must be protected to maintain the security of such  
74 information. In addition, examination and assessment instruments  
75 must be protected to prevent cheating, plagiarism, and academic  
76 dishonesty in education and to ensure the validity of the  
77 results derived from the administration of examinations and  
78 assessments.

79 (4) The state's ability to objectively assess educational  
80 progress and performance is impaired if examination and  
81 assessment instruments can be publicly disseminated before or  
82 after being administered. Public dissemination of already-  
83 administered examination and assessment instruments may also  
84 invade a student's privacy and harm his or her ability to  
85 protect his or her personal information and educational records.

86 (5) Based on the foregoing, the Legislature finds that the  
87 harm that may result from the release of such examination and

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88 assessment instruments outweighs any public benefit that may be  
89 derived from the disclosure of the information.

90 Section 3. This act shall take effect July 1, 2021.

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/6/2021

*Meeting Date*

SB 1456

*Bill Number (if applicable)*

Topic Governmental Oversight- SB 1456

*Amendment Barcode (if applicable)*

Name Jessica Fowler

Job Title Deputy Director of Legislative Affairs

Address 325 W. Gaines St. Suite 1520

Phone 850-245-5037

*Street*

Tallahassee

FL

32399-0400

*City*

*State*

*Zip*

Email jessica.fowler@fldoe.org

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against  
(The Chair will read this information into the record.)

Representing Florida Department of Education

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

*While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.*

***This form is part of the public record for this meeting.***

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/6/21

Meeting Date

1456

Bill Number (if applicable)

Topic SB 1456 - Assessment Confidentiality

Amendment Barcode (if applicable)

Name Kristin Whitaker

Job Title Assistant Vice Chancellor

Address 325 W. Gaines St.

Phone 850-566-5217

Street

Tallahassee, FL

City

State

Zip

Email KWhitaker242@gmail.com

Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☒ In Support ☐ Against  
(The Chair will read this information into the record.)

Representing Board of Governors

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 1824

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Powell

SUBJECT: Public Records/Division of Emergency Management or a Local Emergency Management Agency

DATE: April 6, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Caldwell</u>	<u>MS</u>	<u>Favorable</u>
2.	<u>Candelaria</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>                    </u>	<u>                    </u>	<u>RC</u>	<u>                    </u>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1824 expands the current public records exemption relating to any information furnished by a person or business to the Division of Emergency Management or a local emergency management agency for the purpose of receiving assistance with emergency planning to exempt from public inspection and copying requirements the following information held by the Division of Emergency Management or a local emergency management agency:

- Emergency response assessment reports prepared by the division or a local emergency management agency;
- Evaluation tools prepared by the division or a local emergency management agency; and
- After-action reports prepared by the division or a local emergency management agency.

The bill provides a public necessity statement as required by the Florida Constitution. According to this statement, the exemption is necessary to protect sensitive information regarding the state's vulnerabilities in responding to emergencies. The public necessity statement also asserts that the exemption is needed to allow agencies to make candid written assessments of their responses to emergencies without making a public record of the assessments, which could be misunderstood or misinterpreted by the public.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill is not expected to impact state and local government revenues and expenditures.

The bill takes effect July 1, 2021.

## **II. Present Situation:**

### **Access to Public Records - Generally**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> The right to inspect or copy applies to the official business 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.<sup>2</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>7</sup>

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020)

<sup>4</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4<sup>th</sup> DCA 2018).

<sup>5</sup> Section 119.01(1), F.S. 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.”

<sup>6</sup> 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.”

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



The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person's right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>10</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is "exempt" or "confidential and exempt." Custodians of records designated as "exempt" are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>14</sup> Custodians of records designated as "confidential and exempt" may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>16</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> 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.<sup>19</sup>

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<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>12</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>13</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>14</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>18</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

<sup>19</sup> Section 119.15(3), F.S.

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.<sup>20</sup> 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 subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>21</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>22</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

The Act also requires specified questions to be considered during the review process.<sup>24</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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.<sup>26</sup>

### **Information Furnished to the Division of Emergency Management**

Information furnished by a person or a business to the Division of Emergency Management for the purpose of being provided assistance with emergency planning is exempt from disclosure under this state's public records laws.<sup>27</sup>

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<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

<sup>23</sup> Section 119.15(6)(b)3., F.S.

<sup>24</sup> 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?
- 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?

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 252.905, F.S.

### III. Effect of Proposed Changes:

The bill expands the current public records exemption relating to any information furnished by a person or business to the Division of Emergency Management or a local emergency management agency for the purpose of receiving assistance with emergency planning to exempt from public inspection and copying requirements the following information held by the Division of Emergency Management or a local emergency management agency:

- Emergency response assessment reports prepared by the division or a local emergency management agency;
- Evaluation tools prepared by the division or a local emergency management agency; and
- After-action reports prepared by the division or a local emergency management agency.

The bill defines the following terms. The term “Emergency response assessment report” is defined to mean:

A report containing analysis and evaluation of collected data and information pertinent to the response actions taken by first responders and disaster response stakeholders before, during, or after a disaster or an emergency. For the purposes of this definition, response actions include, but are not limited to, saving lives or relieving suffering, protecting the health and safety of the public, preventing the escalation of an incident, mitigating further damage, maintaining or restoring critical functions, safeguarding the environment, and restoring normal services.

The term “Evaluation tool” is defined to mean:

An instrument or technique used to measure and evaluate the quality or efficacy of disaster response actions or interventions.

The term “after-action report” is defined to mean:

A report containing observations of a disaster, an incident, an emergency, or an exercise and recommendations identifying specific corrective actions for post-event improvements.

The bill provides that the exemptions are subject to the Open Government Sunset Review Act and will repeal October 2, 2026, unless the Legislature reviews and reenacts the exemptions by that date.

The bill’s public necessity statement reads as follows:

The Legislature finds it is a public necessity that emergency response assessment reports, evaluation tools, and after-action reports relied upon by emergency management agencies to evaluate the effectiveness of a response and used to improve that response be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. Such assessments, tools, and reports cover a cross-section of agencies and entities and may include protected information, such as threat, vulnerability, and capability assessment information.

This protected information must be exempt from public records requirements not only because of its sensitive nature, but to assure participating agencies that their candid assessments of response techniques or procedures will not be misunderstood or misinterpreted, but instead be the basis for meaningful evaluation and improvement of existing response systems. This need outweighs the value of publicly disclosing these emergency response assessment reports, evaluations tools, and after-action reports.

The bill takes effect July 1, 2021.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the State Constitution.

##### **B. Public Records/Open Meetings Issues:**

###### ***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 bill creating or expanding an exemption to the public records requirements. This bill enacts a new public records exemption. Thus, the bill requires a two-thirds vote to be enacted.

###### ***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

###### ***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect after-action reports, emergency response assessment reports, and evaluation tools from public disclosure. The bill exempts these records in part because they include information that could be exploited and because agencies may be hesitant to include candid assessments of what went wrong in responding to an emergency in the records if the agencies know that the assessments are going to be subjected to public scrutiny. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

##### **C. Trust Funds Restrictions:**

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The division or a local emergency management agency may incur a minimal fiscal impact associated with training staff responsible for complying with public records requests related to the creation of the public records exemptions. Costs associated with redacting the exempt information prior to releasing a record may be incurred. The costs, however, would be absorbed by existing resources, as they are part of day-to-day responsibilities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 252.905 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 by Governmental Oversight and Accountability on April 6, 2021:**

The CS removes the exemption for all data and records contained in an emergency management electronic collaboration system. The CS removes the definition of the term “emergency management electronic collaboration system.”

B. Amendments:

None.

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

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By Senator Powell

30-01626-21

20211824\_\_

1 A bill to be entitled  
 2 An act relating to public records; amending s.  
 3 252.905, F.S.; defining terms; expanding an exemption  
 4 from public records requirements for information  
 5 furnished by a person or business to the Division of  
 6 Emergency Management or a local emergency management  
 7 agency to receive assistance with emergency planning  
 8 to include emergency response assessment reports,  
 9 evaluation tools, or after-action reports prepared by  
 10 the division or a local emergency management agency;  
 11 providing for future legislative review and repeal of  
 12 the exemption; providing a statement of public  
 13 necessity; providing an effective date.  
 14  
 15 Be It Enacted by the Legislature of the State of Florida:  
 16  
 17 Section 1. Section 252.905, Florida Statutes, is amended to  
 18 read:  
 19 252.905 Emergency planning information; public records  
 20 exemption.—  
 21 (1) As used in this section, the term:  
 22 (a) "After-action report" means a report containing  
 23 observations of a disaster, an incident, an emergency, or an  
 24 exercise and recommendations identifying specific corrective  
 25 actions for post-event improvements.  
 26 (b) "Emergency management electronic collaboration system"  
 27 means a web-based collaborative application designed to support  
 28 a shared relational database used by the division or a local  
 29 emergency management agency to store and update transactional

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

30-01626-21

20211824\_\_

30 data related to an emergency or a disaster which is input and  
 31 used by multiple responders.  
 32 (c) "Emergency response assessment report" means a report  
 33 containing analysis and evaluation of collected data and  
 34 information pertinent to the response actions taken by first  
 35 responders and disaster response stakeholders before, during, or  
 36 after a disaster or an emergency as those terms are defined in  
 37 s. 252.34. Such response actions include, but are not limited  
 38 to, saving lives or relieving suffering, protecting the health  
 39 and safety of the public, preventing the escalation of an  
 40 incident, mitigating further damage, maintaining or restoring  
 41 critical functions, safeguarding the environment, and restoring  
 42 normal services.  
 43 (d) "Evaluation tools" means instruments or techniques used  
 44 to measure and evaluate the quality or efficacy of disaster  
 45 response actions or interventions.  
 46 (2) The following ~~Any~~ information held by the division or a  
 47 local emergency management agency, including all data and  
 48 records contained in an emergency management electronic  
 49 collaboration system, ~~furnished by a person or a business to the~~  
 50 ~~division for the purpose of being provided assistance with~~  
 51 ~~emergency planning~~ is exempt from s. 119.07(1) and s. 24(a),  
 52 Art. I of the State Constitution;  
 53 (a) Any information furnished by a person or a business to  
 54 the division or a local emergency management agency for the  
 55 purpose of receiving assistance with emergency planning.  
 56 (b) Emergency response assessment reports, evaluation  
 57 tools, or after-action reports prepared by the division or a  
 58 local emergency management agency.

Page 2 of 3

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

30-01626-21

20211824\_\_

59       (3) This section is subject to the Open Government Sunset  
60 Review Act in accordance with s. 119.15 and shall stand repealed  
61 on October 2, 2026, unless reviewed and saved from repeal  
62 through reenactment by the Legislature. This exemption applies  
63 to information held by the division before, on, or after the  
64 effective date of this exemption.

65       Section 2. The Legislature finds it is a public necessity  
66 that emergency response assessment reports, evaluation tools,  
67 and after-action reports relied upon by emergency management  
68 agencies to evaluate the effectiveness of a response and used to  
69 improve that response be made exempt from s. 119.07(1), Florida  
70 Statutes, and s. 24(a), Article I of the State Constitution.  
71 Such assessments, tools, and reports cover a cross-section of  
72 agencies and entities and may include protected information,  
73 such as threat, vulnerability, and capability assessment  
74 information. This protected information must be exempt from  
75 public records requirements not only because of its sensitive  
76 nature, but to assure participating agencies that their candid  
77 assessments of response techniques or procedures will not be  
78 misunderstood or misinterpreted, but instead be the basis for  
79 meaningful evaluation and improvement of existing response  
80 systems. This need outweighs the value of publicly disclosing  
81 these emergency response assessment reports, evaluations tools,  
82 and after-action reports.

83       Section 3. This act shall take effect July 1, 2021.





755356

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/06/2021	.	
	.	
	.	
	.	

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The Committee on Governmental Oversight and Accountability  
(Powell) recommended the following:

**Senate Amendment**

Delete lines 26 - 49  
and insert:

(b) "Emergency response assessment report" means a report  
containing analysis and evaluation of collected data and  
information pertinent to the response actions taken by first  
responders and disaster response stakeholders before, during, or  
after a disaster or an emergency as those terms are defined in  
s. 252.34. Such response actions include, but are not limited



755356

11 to, saving lives or relieving suffering, protecting the health  
12 and safety of the public, preventing the escalation of an  
13 incident, mitigating further damage, maintaining or restoring  
14 critical functions, safeguarding the environment, and restoring  
15 normal services.

16 (c) "Evaluation tools" means instruments or techniques used  
17 to measure and evaluate the quality or efficacy of disaster  
18 response actions or interventions.

19 (2) The following ~~Any~~ information held by the division or a  
20 local emergency management agency ~~furnished by a person or a~~  
21 ~~business to the~~



## THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

### COMMITTEES:

Appropriations, *Chair*  
Banking and Insurance  
Governmental Oversight and Accountability  
Rules

### JOINT COMMITTEE:

Joint Legislative Budget Commission,  
*Alternating Chair*

### SENATOR KELLI STARGEL

22nd District

April 6, 2021

The Honorable Ray Rodrigues, Chair  
Committee on Governmental Oversight and Accountability  
305 Senate Building  
404 South Monroe Street  
Tallahassee, FL 32399

Dear Chair Rodrigues:

Please excuse my absence from today's Governmental Oversight and Accountability Committee.

Sincerely,

A handwritten signature in dark ink that reads "Kelli Stargel". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Kelli Stargel  
State Senator, District 22

Cc: Joe McVaney/Staff Director  
Tamra Redig/AA

#### REPLY TO:

- ☐ 2033 East Edgewood Drive, Suite 1, Lakeland, Florida 33803 (863) 668-3028
- ☐ 420 Senate Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5022

Senate's Website: [www.flsenate.gov](http://www.flsenate.gov)

**WILTON SIMPSON**  
President of the Senate

**AARON BEAN**  
President Pro Tempore

# CourtSmart Tag Report

**Room:** SB 37  
**Caption:** Governmental Oversight and Accountability Committee

**Case No.:**

**Type:**  
**Judge:**

**Started:** 4/6/2021 4:01:07 PM

**Ends:** 4/6/2021 4:44:49 PM **Length:** 00:43:43

4:01:14 PM Meeting called to order by Chair Rodrigues  
4:01:21 PM Roll call by Committee Administrative Assistant (CAA)  
4:01:25 PM Comments from chair  
4:02:28 PM Tab 3 - SB 418 by Senator Burgess - Public Records/Persons Seeking Shelter  
4:02:39 PM Delete-all amendment 217140 by Senator Burgess  
4:02:54 PM Senator Burgess explains the delete-all amendment  
4:03:27 PM No questions  
4:03:33 PM No appearance cards  
4:03:50 PM No debate  
4:03:57 PM Amendment is adopted  
4:04:02 PM Back on the bill as amended  
4:04:10 PM No questions  
4:04:20 PM Tonnelle Graham, Florida Association of Counties, waives in support of the bill  
4:04:28 PM Lisa Hurley waives in support of the bill  
4:04:41 PM No debate  
4:04:47 PM Senator Burgess waives close on bill  
4:04:51 PM CS/SB 418 is reported favorably  
4:05:12 PM Gavel turned over to Vice Chair Gruters  
4:05:21 PM Tab 4 - SB 1456 by Sen Rodrigues - Public Records/Examination and Assessment Instruments  
4:05:43 PM Senator Rodrigues explains the bill  
4:07:23 PM Sen Torres in questions  
4:07:43 PM Senator responds to questions  
4:08:03 PM No appearance forms  
4:08:10 PM No debate  
4:08:13 PM Senator Rodrigues waives close on bill  
4:08:17 PM SB 1456 is reported favorably  
4:08:29 PM Gavel turned back over to Chair Rodrigues  
4:08:35 PM Tab 5 - SB 1824 by Sen Powell - Public Records/Division of Emergency Management or a Local  
Emergency Management Agency  
4:08:49 PM Senator Powell explains bill  
4:09:27 PM No questions  
4:09:31 PM No appearance forms  
4:09:44 PM Amendment 755356 by Senator Powell  
4:09:51 PM Senator Powell explains amendment  
4:10:38 PM No questions  
4:10:40 PM No appearance cards  
4:10:47 PM No debate  
4:10:51 PM Sponsor waives close on amendment  
4:10:56 PM Amendment is adopted  
4:11:03 PM Back on the bill as amended  
4:11:10 PM No appearance forms  
4:11:15 PM No debate  
4:11:18 PM Senator Powell waives close on bill  
4:11:22 PM CS/SB 1824 is reported favorably  
4:11:46 PM Gavel turned over to Vice Chair Gruters  
4:11:55 PM Tab 1 - SPB 7072 by Governmental Oversight and Accountability Committee - Social Media Platforms  
4:12:09 PM Senator Rodrigues explains bill  
4:14:36 PM Senator Stewart in questions  
4:15:09 PM Senator Rodrigues responds to questions  
4:16:07 PM Back and forth in questions  
4:24:19 PM Senator Torres in questions  
4:24:29 PM Senator Rodrigues continues to respond to questions

4:24:54 PM Senator Torres in questions  
4:25:05 PM Response by Senator Rodrigues  
4:25:11 PM Back and forth in questions  
4:29:40 PM Amendment 828884 by Senator Rodrigues  
4:29:50 PM Senator Rodrigues explains amendment  
4:30:21 PM No questions  
4:30:24 PM No appearance forms  
4:30:31 PM No debate  
4:30:34 PM Senator Rodrigues wavies close on amendment  
4:30:46 PM Amendment is adopted  
4:30:50 PM Back on the bill as amended  
4:30:59 PM Speaker Carl Szabo, NetChoice, opposed to Proposed Bill  
4:37:10 PM Speaker Cynthia Henderson, Kingston Public Affairs LLC, in support of Proposed Bill  
4:38:41 PM James Hines, Internet Association, waives in opposition to Proposed Bill  
4:39:04 PM Senator Torres in debate  
4:39:47 PM Senator Stewart in debate  
4:40:57 PM Senator Rodrigues moves that SPB 7072 as amended be submitted as a Committee Bill  
4:41:17 PM SPB 7072 is reported favorably as a Committee Bill  
4:41:29 PM Tab 2 -SPB 7074 by Governmental Oversight and Accountability Committee - Public Records/Social  
Media Platform Activities  
4:41:57 PM Senator Rodrigues explains bill  
4:42:41 PM Senator Torres in questions  
4:43:40 PM Senator Rodrigues responds to questions  
4:43:47 PM No appearance forms  
4:43:52 PM No debate  
4:43:56 PM Senator Rodrigues moves that SPB 7074 be submitted as a Committee Bill  
4:44:12 PM SPB 7074 is reported favorably  
4:44:21 PM Gavel turned back over to Senator Rodrigues  
4:44:32 PM Senator Torres moves to adjourn  
4:44:39 PM Meeting is adjourned