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HOUSE OF REPRESENTATIVES
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS

BILL #: HB 1805 (PCB IN 01-02)
RELATING TO: Public Records
SPONSOR(S): Committee on Insurance and Representative Waters & others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) INSURANCE YEAS 14 NAYS 0
- (2) STATE ADMINISTRATION YEAS 5 NAYS 0
- (3) COUNCIL FOR COMPETITIVE COMMERCE
- (4)
- (5)

I. SUMMARY:

Under article I, s. 24 of Florida's Constitution, "[e]very person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf" The Legislature may exempt certain records and meetings, but the exemption must include a specific statement of public necessity and not be broader than necessary to accomplish its stated purpose.

The Fifteenth Statewide Grand Jury, in a September 2000 report on insurance fraud, found that crash reports filed with law enforcement agencies are used to solicit crash victims, often in violation of the prohibition of crash report use for commercial solicitation purposes.

This bill requires the Department of Highway Safety and Motor Vehicles (DHSMV) and law enforcement agencies and to hold personally identifying information confidential and exempt from disclosure under Florida's public records laws for sixty days. The bill also requires personally identifying information to be redacted in certain circumstances. Third-degree felony penalties are provided for the unauthorized release of personally-identifying information and the use of a falsified credentials to obtain or attempt to obtain personally-identifying information. The bill takes effect upon becoming a law.

This bill has an indeterminate fiscal impact.

Strike-all amendment by the Committee on State Administration:

There is a strike-all amendment by the Committee on State Administration traveling with the bill. This amendment creates a public records exemption for personally identifying information and any insurance policy number contained in a motor vehicle crash report held by the Department of Highway Safety and Motor Vehicles and law enforcement agencies (the bill as filed creates a public records exemption for personally identifying information and insurance information). Both the amendment and the bill provide for expiration of the exemption after 60 days. Both the bill and the amendment provide for exceptions to the exemption. Both the bill and the amendment make it a third degree felony if such information is knowingly disclosed or knowingly obtained under false pretenses. The amendment restructures and edits the public necessity statement.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|------------------------------|---------|--------|---------|
| 1. <u>Less Government</u> | Yes [] | No [] | N/A [x] |
| 2. <u>Lower Taxes</u> | Yes [] | No [] | N/A [x] |
| 3. <u>Individual Freedom</u> | Yes [] | No [x] | N/A [] |

This bill affects the public's ability to obtain motor vehicle accident reports. Currently the public's access to motor vehicle accident reports is not restricted.

- | | | | |
|-----------------------------------|---------|--------|---------|
| 4. <u>Personal Responsibility</u> | Yes [] | No [] | N/A [x] |
| 5. <u>Family Empowerment</u> | Yes [] | No [] | N/A [x] |

B. PRESENT SITUATION:

Florida Public Records

Constitutional provisions

Article I, s. 24, Florida Constitution, expresses Florida's public policy regarding access to government records:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Statutory exemptions

The Legislature may by general law exempt certain records and meetings from the requirements of article I, s. 24. The general law must include a specific statement of the public necessity justifying the exemption, and the exemption must not be broader than necessary to accomplish the stated purpose of the law.

In the Open Government Sunset Review Act of 1995, the Legislature included an express statement of intent that exemptions to the public records and public meetings laws be created or maintained only if the exempted record or meeting is of a sensitive, personal nature concerning individuals; the exemption is necessary for the effective and efficient administration of a governmental program; or the exemption affects confidential information concerning an entity.

"Exempt" public records vs. "confidential and exempt" public records

There is a legal difference between public records that are "exempt" and public records that are

also “confidential.” An “exempt” document is one that does not have to be released to the public pursuant to a public records request. However, an agency may use exempt documents and exempt information in reports released to the public, reports to the governor’s office, and in internal memoranda. The appropriate test for whether an agency should release exempt information is whether or not there is a “strong public policy or need” for the information and whether the “disclosure is consistent with the intent of the statute.”¹

“Confidential and exempt” status places a greater level of responsibility on the agency not to release the document or the information contained in the document. Thus, agencies could not use the documents or the information internally or in reports for general circulation. “Confidential and exempt” documents and information may only be released subject to express exceptions listed in the exemption statute.

Example:

Consider the difference between “exempt” information and “confidential and exempt” information as applied to a statute dealing with automotive tag registrations. If tag information were exempt from the public records law, then the tag agency would not have to release tag numbers or registrant names when requested. The tag agency would still have the discretion to release numbers and names if a strong public policy goal were met and the disclosure was consistent with the purpose and reason behind keeping the information out of general circulation. A “strong public policy” might be giving law enforcement officers access to tag numbers for identifying stopped vehicles. A statute that declares automotive tag registration information “confidential and exempt” means that the tag agency could not share tag information with anyone, even law enforcement, unless an express exception was given in the statute. Thus, for law enforcement officers to have access to tag numbers and registrant names, the statute would have to explicitly provide that “tag information may be released to state, county, and municipal law enforcement officers.”

Redactions

A “redaction” is the “careful editing of a document, especially to remove confidential references or offensive material.”² There are several instances in Florida law where agencies are authorized to release redacted reports: protective investigation reports done by the Department of Children and Families,³ closed-door hospital board meeting transcripts where confidential strategic plan information is discussed,⁴ confidential medical and mental history in pre-sentence defendant investigation reports viewed by victims of felony crimes,⁵ and minutes of closed door meetings of the Florida Joint Underwriters Association and the Residential Property and Casualty Joint Underwriting Association regarding open claim and underwriting files.⁶

¹ Attorney General’s Opinion, 90-50, June 28, 1990.

² Black’s Law Dictionary, 7th Edition (1999)

³ Section 119.07(7)(c), F.S.

⁴ Section 395.3035(4)(b), F.S.

⁵ Section 960.001(1)(g)(2), F.S.

⁶ Sections 627.311(3)(l)(1)(i), F.S., and 627.351(6)(n)(1)(i), F.S.

Motor Vehicle Crash Reports

Section 316.066, F.S., requires law enforcement officers to file written reports of motor vehicle crashes. Pursuant to s. 119.105, F.S., police reports are public record. The use of crash reports made by law enforcement officers for commercial solicitation purposes is prohibited under s. 119.105, F.S, and s. 316.066(3)(c), F.S.

Grand Jury Report on Insurance Fraud

In its report on insurance fraud,⁷ the Grand Jury found that individuals called “runners” would pick up copies of crash reports filed with law enforcement agencies. The reports would then be used to solicit people involved in motor vehicle accidents.

The Grand Jury found a strong correlation between illegal solicitations and the commission of a variety of frauds, including insurance fraud. “[T]he wholesale availability of these reports is a major contributing factor to this illegal activity and likely the single biggest factor contributing to the high level of illegal solicitation.”⁸ The Grand Jury also found access to crash reports provides the ability to contact large numbers of potential clients in violation of Florida’s prohibition of crash report use for commercial solicitation purposes. According to the Grand Jury, “virtually anyone involved in a car accident in the state is fair game to the intrusive and harassing tactics of solicitors. Such conduct can be emotionally, physically, and ultimately, financially destructive.”

State Legislation and First Amendment Concerns

Recently, two sections of Florida law dealing with police public records have been challenged under the first amendment to the U.S. Constitution as unconstitutionally restricting protected commercial speech. In 1996, the U.S. District Court for the Southern District of Florida permanently enjoined the State of Florida from enforcing section 316.650(11), F.S. (prohibiting the commercial use of identifying information on a uniform traffic ticket), because the state could not prove that the total ban on information usage directly advanced a substantial state interest.⁹ In 1998, a challenge was brought to section 119.105, F.S. (prohibiting the commercial use of victim information obtained from police reports).¹⁰ The state was preliminarily enjoined from enforcing the law during trial. The case settled before final adjudication.

Restrictions by other states on access to police public records have been challenged in the courts as well. Most recently, Kentucky’s limitation on access to police accident reports and California’s limitation on access to arrest records have been challenged facially under the first amendment. While the Sixth and Ninth U.S. Circuit Courts of Appeals, responsible for Kentucky and California respectively, ruled each state’s statutes unconstitutional for restricting protected commercial speech, the U.S. Supreme Court reversed and remanded the decisions of the Courts of Appeals saying that a facial invalidation was improper since the statutes dealt with access to government

⁷ Second Interim Report of the Fifteenth Statewide Grand Jury, No. 95,746 (Fla. 2000).

⁸ Id.

⁹ Babkes v. Satz, 944 F.Supp 909 (S.D. Fla. 1996).

¹⁰ Pellegrino v. Satz, No. 98-7365-Civ. (S.D. Fla. 1998).

records and not the restriction of speech. Both cases are currently pending in U.S. District Courts and have not been finally adjudicated.

(Please see section V-A below, "Comments: Constitutional Issues" below for more in depth discussion on constitutional issues.)

C. EFFECT OF PROPOSED CHANGES:

Personally-identifying information, defined as "information that reveals the identity of persons involved in [a motor vehicle] crash, including name, home or business telephone number, address, insurance policy information, driver's license number, and vehicle license number," would be declared confidential and exempt from disclosure under Florida's public records laws and could not be released by any agency or possessor except to authorized parties for 60 days. In addition, persons would be prohibited from accessing confidential personally-identifying information by using false credentials.

Motor vehicle crash report requests

While personally-identifying information would be confidential and exempt, motor vehicle crash reports would not. Thus, motor vehicle crash reports could still be released under a public records request. Agencies would be directed to redact, remove, or black line all personally-identifying information for 60 days after report filing.

Access to personally-identifying information

Only persons involved in a crash; their attorneys, insurers, insurance agents, or insurer's contracted claims information providers; authorized news organizations; law enforcement agencies; regulatory agencies; and prosecuting authorities would be permitted to view or receive un-redacted copies of the motor vehicle crash report during the first 60 days after a crash. Authorized news organizations would be newspapers, and television and radio stations that are in the business of distributing daily or weekly news articles or stories to the general public. These include normal newspapers, free newspapers, news magazines and local and national television and radio stations. Trade magazines or professional magazines, "given away primarily to distribute advertising" and periodicals or products whose "primary purpose" is to "publish personally-identifying information" could not receive access to personally-identifying information in crash reports for 60 days, but could obtain reports with personally-identifying information removed without having to wait 60 days.

Criminalization of disclosing personally-identifying information

A duty of confidentiality would be imposed upon all authorized recipients of personally-identifying information (crash attorneys, insurers, insurance agents, and insurers' contracted claims information providers; news organizations; law enforcement agencies; regulatory agencies; and prosecuting authorities) for the first 60 days after a crash. Whoever knowingly disclosed personally-identifying information to a party not authorized to receive that information would be guilty of a third degree felony, punishable by up to five years in prison and up to a \$5,000 fine.

Criminalization of using falsified credentials to obtain personally-identifying information

Individuals who knowingly use falsified credentials to obtain or attempt to obtain personally-identifying information would be guilty of a third degree felony punishable by up to five years in prison and up to a \$5,000 fine.

D. SECTION-BY-SECTION ANALYSIS:

See "Effects of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

Though redaction may require an indeterminate expenditure of funds by state and local governments, the bill is expected to decrease demand for accident reports. The decrease in demand for crash reports should reduce photocopying and other associated costs and offset any increased costs associated with redaction requirements. Thus, though indeterminate, a positive fiscal impact is anticipated.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Though redaction may require an indeterminate expenditure of funds by local governments, the bill is expected to decrease demand for accident reports. The decrease in demand for crash reports should reduce photocopying and other associated costs and offset any increased costs associated with redaction requirements. Thus, though indeterminate, a positive fiscal impact is anticipated.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce county or municipal revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the amount of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Kentucky's limitations on access to police accident reports came in the wake of a surge of advertising by attorneys and chiropractors directed to recent motor vehicle accident victims. In response, Kentucky prohibited access to motor vehicle accident reports except for parties, parents of minor parties, insurers of parties, attorneys of parties, news-gathering organizations, and courts of law with properly executed subpoenas. News-gathering organizations were not permitted to use the information for a commercial purpose other than publishing or broadcasting the news.

California's limitation on access to state arrest records limited records requests to only journalistic, political, or governmental purposes, or investigative purposes by a licensed private investigator. Address information from arrest records could not be used directly or indirectly to sell a product or service and requesters were required to sign an affidavit that they would not use the information for commercial purposes.

Both laws were challenged under the first amendment (as applied to the states through the fourteenth amendment) to the U.S. Constitution. The Ninth U.S Circuit Court of Appeals declared the California law unconstitutional as a restriction on protected commercial speech.¹¹ The Ninth Circuit said that California's regulations did not directly advance California's asserted government interest. The Sixth U.S. Circuit Court of Appeals declared the Kentucky law unconstitutional on the same grounds.¹² Both decisions were appealed to the U.S. Supreme Court.

The U.S. Supreme Court, in reviewing the California statute, declared that a facial first amendment attack, or an attempt to overturn the statute without actually applying it to someone or an entity, is not valid.¹³ Rather, to declare a government records statute unconstitutional under the first amendment, there must be speech involved and not just a restriction on who can receive information.¹⁴ Thus, the California case was remanded back to the Ninth Circuit. The Kentucky case was also remanded back to the Sixth Circuit for reconsideration in light of the California decision.¹⁵ Since the U.S. Supreme Court only ruled on facial challenges under the first amendment, both the Sixth and Ninth Circuits remanded their cases back to U.S. District Courts for fact-finding on "as applied" challenges.¹⁶ As such, though facially a statute that restricts commercial entities access to public records survives, the question of whether or not such a law "as applied" violates the entities' commercial speech rights has not been answered.

B. RULE-MAKING AUTHORITY:

None.

¹¹ United Reporting Publ'g Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998).

¹² Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1998).

¹³ See Los Angeles Police Dept. v. United Reporting Publ'g. Corp., 528 U.S. 32 (1999)

¹⁴ Id.

¹⁵ Amelkin v. McClure, 528 U.S. 1059 (1999)

¹⁶ Amelkin v. McClure, 205 F.3d 293 (6th Cir. 2000); United Reporting Publ'g. Corp. v. California Hwy Patrol, 231 F.3d 483 (9th Cir. 2000).

C. OTHER COMMENTS:

Committee on State Administration

This bill contains several technical problems. The bill defines "personally identifying information" to include "insurance policy information," yet the bill creates an exemption for both personally identifying information and "insurance information." Also, the public necessity statement addresses "personally identifying information," but does not provide a necessity statement for "insurance information." Finally, the exemption and the public necessity statement contain certain unclear language.

The sponsors have filed a strike-all amendment that remediates these concerns.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 12, 2001, the Committee on State Administration adopted a strike-everything amendment to HB 1805. This amendment creates a public records exemption for personally identifying information and any insurance policy number contained in a motor vehicle crash report held by the Department of Highway Safety and Motor Vehicles and law enforcement agencies (the bill as filed creates a public records exemption for personally identifying information and insurance information). Both the amendment and the bill provide for expiration of the exemption after 60 days. Both the bill and the amendment provide for exceptions to the exemption. Both the bill and the amendment make it a third degree felony if such information is knowingly disclosed or knowingly obtained under false pretenses. The amendment restructures and edits the public necessity statement.

VII. SIGNATURES:

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