

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 892

SPONSOR: Governmental Oversight & Productivity Committee and Senators Garcia and Constantine

SUBJECT: Public Records Exemption/Deferred Presentment Providers

DATE: April 17, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.	_____	_____	AGG	_____
3.	_____	_____	AP	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates an exemption for information contained in the database for deferred presentment providers which would be created by the Committee Substitute for Committee Substitute for Senate Bills 1526 and 314 by the Finance and Taxation Committee, the Commerce and Economic Opportunities Committee, Banking and Insurance Committee, and Senators Constantine and Campbell.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.¹ Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.²

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption:

1. Must state with specificity the public necessity justifying the exemption;
2. Must be no broader than necessary to accomplish the stated purpose of the law;
3. Must relate to one subject;
4. Must contain only exemptions to public records or meetings requirements; and
5. May contain provisions governing enforcement.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."³ The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.⁴

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁵ If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁶

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

¹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

² *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

³ *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

⁴ *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987).

⁵ Attorney General Opinion 85-62.

⁶ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.⁷ For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.⁸ The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.⁹

The Open Government Sunset Review Act of 1995 - Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?

⁷ *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

⁸ *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).

⁹ *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

CS for CS for SBs 1526 and 314 – The Money Transmitters' Code¹⁰ provides for licensure and regulation of certain check cashing operations by the Department of Banking and Finance (DBF).¹¹ No person may engage in the business of cashing payment instruments or the exchange of foreign currency without first registering under the provisions of this part, which:

- provides for registration, regulation, reports, and examinations for persons cashing checks or exchanging foreign currency;
- provides an exemption from registration for persons engaged in cashing payment instruments or exchanging foreign currency for compensation if such activity for each location does not exceed 5 percent of the total gross income from the retail sale of goods or services during its most recently completed fiscal year;
- requires an investigation fee of up to \$250, provides for a renewal fee of up to \$500 every two years, and provides for a \$50 registration fee for each location or, at the option of the registrant, a total two-year fee of \$5,000 for all locations operating in the state; and
- provides limitations on all persons in the business of cashing payment instruments or exchanging foreign currency, including prohibiting check cashers from:

¹⁰ Chapter 560, F.S.

¹¹ Part III, ch. 560, F.S., the Check Cashing and Foreign Currency Act.

- charging fees, except as otherwise provided by this part, in excess of 5 percent of the face amount of a payment instrument, or 6 percent without the provision of identification, or \$5, whichever is greater;
- charging fees in excess of 3 percent of the face amount of a payment instrument, or 4 percent without provision of identification, or \$5, whichever is greater, if such check is the payment of state public assistance or federal social security benefit payable to the bearer; and
- charging fees for personal checks or money orders in excess of 10 percent of the face amount of the payment instruments, or \$5, whichever is greater.

Section 560.204, F.S., provides for the registration of persons engaged in the selling or issuing of payment instruments or in activity of a funds transmitter.

Section 560.307, F.S., provides that an application for registration under the *Check Cashing and Foreign Currency Exchange Act* shall be filed together with a nonrefundable investigation fee, not to exceed \$250.

Deferred Presentments and Loans - A deferred presentment is characterized by a registrant who accepts a post-dated check from a person or agrees to wait a certain number of days before cashing the check. If a licensed check casher holds the check for a period of time, the transaction could be interpreted as having some characteristics of a loan. It is the DBF's position that, although this type of transaction is not expressly prohibited by statute, it is probable that the drafters of the statute did not contemplate this practice.

Furthermore, it is the DBF's position that licensed check cashers are not permitted to execute "rollovers" of deferred presentment transactions because a "rollover" would clearly convert the transaction into a loan of a type not authorized by any Florida statute. It is the DBF's position that a rollover would be both a regulatory violation, which could result in civil penalties, and a criminal violation of ch. 687, F.S., relating to interest, usury, and lending practices, should the interest rate exceed 18 percent per annum.¹²

Section 516.02, F.S., states that a person must not engage in the business of making consumer finance loans unless authorized to do so under ch. 516, F.S., or some other statute. A consumer finance loan means a loan in an amount of \$25,000 or less with an annual interest greater than 18 percent per annum.¹³ Specific statutes authorizing consumer finance loans in excess of 18 percent are found in ch. 516, F.S.,¹⁴ ch. 520, F.S.,¹⁵ ch. 537, F.S.,¹⁶ ch. 539, F.S.,¹⁷ and

¹² The department also administers the Money Laundering Program to deter money laundering through financial institutions operating in Florida. The more recent focus of money laundering activities has been on money transmitters (check cashers, foreign currency exchangers, money order issuers, and wire transmitters) which have been increasingly identified as vehicles for money laundering.

¹³ Section 516.012, F.S.

¹⁴ Consumer Finance.

¹⁵ Retail Installment Sales.

¹⁶ Title Loans.

¹⁷ Pawnbroking.

ch. 655, F.S.¹⁸ Consequently, deferred deposit loans, or any variation thereof, which do not strictly comport with the requirements of ch. 560, F.S., may be contrary to the law if the amount of the loan is \$25,000 or less and the interest rate exceeds 18 percent per annum. A violation of ch. 687, F.S., which addresses usurious contracts, may result in a second-degree misdemeanor conviction if the interest rate exceeds 25 percent but does not exceed 45 percent. If a usurious lender charges a per annum interest rate in excess of 45 percent the offense may be punished as a third-degree felony.¹⁹

The Committee Substitute for Committee Substitute for Senate Bills 1526 and 314 creates the “Deferred Presentment Act” as part IV of ch. 560, F.S. It provides authorization for and regulation of “deferred presentment transactions” in which a person provides cash or currency in exchange for another person’s check and agrees to hold that person’s check for a period of time prior to depositing or redeeming the check. This committee substitute provides for regulation of this industry by the DBF.

Provisions in this committee substitute include:

- registration requirements for deferred presentment providers;
- a \$500 limit on the face amount of a check taken for deferred presentment, exclusive of allowable fees;
- a maximum fee of 10 percent of the amount paid to the consumer (“drawer”), although an additional \$5 verification may be charged;
- a prohibition against a deferred presentment agreement being for a term in excess of 31 days or less than seven days;
- a prohibition against “rollovers” which extend a deferred presentment agreement;
- a prohibition against a deferred presentment provider (provider) entering into an agreement if an individual has an outstanding agreement with any provider or a previous transaction has been closed for less than 24 hours (to verify this information, the provider must access a centralized database that will be implemented by the department; until such time as this database is implemented, the provider must obtain a signed statement from the individual that he or she does not have an outstanding agreement and has not terminated an agreement within the past 24 hours);
- a requirement for a 60-day grace period extension, without any additional charge, if an individual is unable to pay the amount due at the end of the deferment period, which may be conditioned on requiring the individual to attend a consumer credit counseling service and comply with a payment plan approved by the service;
- required provisions for deferred presentment agreements, including disclosures that must be made to the consumer;
- a one-check limitation which any one consumer may have outstanding to one provider at any one time;
- the ability of the consumer to redeem his or her check prior to the presentation date; and

¹⁸ Financial Institutions.

¹⁹ Sections 687.071(2) and (3), F.S.

- the ability of the provider to seek collection of a returned check pursuant to s. 68.065, F.S., (but without the provision for treble damages).

This committee substitute also amends ch. 560, F.S., the Money Transmitters' Code, which provides for the regulation of the money transmitter industry by the Department of Banking and Finance. This industry includes wire transmitters, check cashers, and foreign money exchangers. This committee substitute will provide the following changes to ch. 560, F.S.:

- deletes examination fees and uses registration fees to fund the regulatory program;
- adds an initial \$50 application fee for each vendor or branch of a part II (payment instruments and funds transmission) or part III (check cashing and foreign currency) registrant;
- authorizes the department to assess a registrant a \$500 late filing fee if the renewal application is submitted within 60 days after the expiration of the license;
- increases the cap on renewal fees for registrants with multiple locations from \$5,000 to \$20,000; and
- requires registrants to notify the department of any newly established locations within 60 days.

The CS for CS for SBs 1526 and 314 has an effective date of October 1, 2001.

III. Effect of Proposed Changes:

The committee substitute creates an exemption to public records requirements for identifying information contained in the database for deferred presentment providers which is authorized under the newly-create section 560.404, F.S. The committee substitute permits access to the database by deferred presentment providers to verify whether any deferred presentment transactions are outstanding for a particular person and by the Department of Banking and Finance for the purpose of maintaining the database.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Under Art. I, s. 24(a) of the State Constitution, an exemption is required to be narrowly tailored to the public necessity that is the reason for the exemption. The committee substitute provides a limited exemption for "identifying information contained in the database for deferred presentment providers" which is related to the stated public necessity for the exemption, which is to "prevent identity theft and related crimes and to prevent borrowers who may already be in financial difficulty from being put at further risk from the threat of fraud."

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The committee substitute has an effective date of July 1, 2001, while the bill on which it is dependent, the CS for CS for SBs 1526 and 314, is not effective until October 1, 2001. The committee substitute should be made effective only upon passage of the CS for CS for SBs 1526 and 314.

VII. Related Issues:

None.

VIII. Amendments:

None.