

# 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 378

SPONSOR: Comprehensive Planning, Local & Military Affairs and Senator Wise

SUBJECT: Public Records Exemption; Personal Identifying Information Held by Public Utilities

DATE: January 31, 2002      REVISED: 02/05/02 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cooper</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/1 amendment</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill exempts from public records requirements personal identifying information held by a public water, wastewater, natural gas, electric, cable television, or telecommunications utilities, which would identify a utility customer. The exemption is retroactive in effect.

This bill amends s. 119.07 of the Florida Statutes.

## II. Present Situation:

### **Constitutional Access to Public Records and Meetings**

Florida has a long history of providing public access to the meetings and records of governmental and other public entities. The Florida Legislature enacted the first law affording access to public records in 1909. The Public Records Law, ch. 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies.

In November 1992, the public affirmed its approval of Florida’s tradition of “government in the sunshine” by enacting a constitutional amendment to guarantee the practice. 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 special districts, as well as constitutional officers, boards, and commissioners 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 the 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 that are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits 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 provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

#### **The Open Government Sunset Review Act of 1995**

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would 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. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The act also 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.

### **Public Utility Customer Records**

Current law does not provide a public records exemption for a customer's personal identifying information held by a water, wastewater, natural gas, electric, cable television, or telecommunications utility owned by a public entity.

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

The bill creates an exemption from public records requirements for personal identifying information held by a public water, wastewater, natural gas, electric, cable television, or telecommunications utility which would identify a customer. The bill specifies that "personal identifying information" includes a customer's name, social security number, taxpayer identification number, address, telephone number, bank account number, debit, charge, or credit card numbers, or driver identification number.

The exemption applies retroactively.

The exemption is subject to the Open Government Sunset Review Act of 1995, in accordance with s. 119.15, F.S., and is repealed on October 2, 2007, unless reviewed and reenacted by the Legislature.

**Section 2** contains a statement of public necessity, as required by s. 24, Art. I of the State Constitution. The statement bases the exemption on the need to prevent identity theft and fraud, and to ease the competitive disadvantage that release of identifying information causes for public utilities.

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

## **IV. Constitutional Issues:**

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

None.

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

This bill creates a single exemption from public records requirements of s. 24(a), Art. I of the State Constitution. The bill contains a statement of public necessity.

Article I, s. 24 of the State Constitution requires that the Legislature state the public necessity for an exemption and requires that an exemption be no broader than necessary to effectuate the underlying basis for that exemption.

The statement provides three bases for the exemption: (1) the need to prevent identity theft; (2) the need to prevent fraud; and (3) the need to ease the competitive disadvantage that release of identifying information causes for public utilities.

**Identity Theft and Fraud** - The exemption includes in “personal identifying information”

. . . a customer’s name; social security number; taxpayer identification number; address; telephone number; bank account number; debit, charge, and credit card numbers; and drive identification number.

The bill exempts a customer’s name, but does not include a customer’s name in the statement of public necessity. Further, under the circumstances presented, it is arguable whether exempting a customer’s name is necessary to prevent identity theft when all other information about the customer (social security number; taxpayer identification number; address; telephone number; bank account, debit, charge, and credit card numbers, and drive ID number) is exempt. In other words, including the names of customers in the exemption could be challenged for overbreadth because, standing alone, access to customers’ names provide no more opportunity for identity theft or fraud than names listed in a phone book.

**Competitive Disadvantage** - The bill also exempts personal identifying information from public records requirements because

“. . . release of such identifying information creates a competitive disadvantage for an agency owned or operated facility. A private utility is not required by law to disclose any of its customer records to the public.”

This provision does not state *how* a private utility is subject to a competitive disadvantage by making personal identifying information regarding its customers exempt from public access, but merely notes that private utilities are not required to disclose who their customers are. Access to customer lists in a truly competitive environment could place public utilities at a competitive disadvantage; the statement, however, does not elucidate this issue generally, or specifically in relation to utilities in Florida. In any case, assuming that public utilities would be subject to a competitive disadvantage, the primary information that would permit a competitor to raid customers would be names, addresses and telephone numbers.

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:

Agencies will incur costs associated with keeping the records or information exempt.

**VI. Technical Deficiencies:**

Given the issues reviewed under IV., B. Constitutional Issues, supra, it would be appropriate to conform the public record exemption and the statement of public necessity.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Governmental Oversight & Productivity:

Revises statement of public necessity to include in the statement the records that are made exempt and clarifies the bases for the exemption.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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