

# 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: SB 24-E

SPONSOR: Senator Brown-Waite

SUBJECT: Public Records Exemption; Military Separation Forms

DATE: April 30, 2002

REVISED: 05/01/02

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Fav/1 amendment
2.				
3.				
4.				
5.				
6.				

## I. Summary:

This bill creates a public records exemption for personal identifying information contained in military separation forms that are held by the clerk of the court. "Personal identifying information" is defined to include the name, social security number, date of birth, home of record, and next of kin.

The bill is made subject to the Open Government Sunset Review Act and will be repealed October 2, 2006, unless reviewed and reenacted by the Legislature prior to that date.

This bill creates an undesignated section of the Florida Statutes.

## II. Present Situation:

**Access to Public Records** - Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.<sup>1</sup> Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.<sup>2</sup> The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

<sup>1</sup> Section 1, ch. 5942, 1909; RGS 424; CGL 490.

<sup>2</sup> Chapter 67-125 (1967 L.O.F.).

Every person has 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, 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.<sup>3</sup>

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level, making it a substantive right,<sup>4</sup> and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment “grandfathered” exemptions that were in effect on July 1, 1993, until they are repealed.<sup>5</sup> Rules of court that limit access to records, and that were in effect on November 3, 1992, remain in effect until repealed.<sup>6</sup>

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

**Exemptions to Access to Public Records** - Article I, s. 24 (c) of the State Constitution authorizes only the Legislature to create exemptions from the public access provisions of the law and constitution. Exemptions must be enacted by *general* law. Any law that creates an exemption must:

- < State with specificity the public necessity that justifies the exemption;
- < Be no broader than necessary to comport with the stated public necessity; and
- < Relate only to exemptions and their enforcement.<sup>7</sup>

Exemptions to open government requirements are strictly construed and are interpreted narrowly so that they are limited to their stated purpose.<sup>8</sup>

**Sunset and Review of Exemptions** - The Open Government Sunset Review Act of 1995<sup>9</sup> provides for the systematic repeal of exemptions to the Public Records Law and Public Meetings Law five years after the creation of, or substantial modification to, an exemption. The repeal cycle began in 2001. The 1995 act also specifies the conditions under which a public records or public meetings exemption may be created.

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001).

<sup>5</sup> Article I, s. 24(d) of the State Constitution.

<sup>6</sup> *See*, Rule 2.051, Public Access to Judicial Records, Fla. R. Jud. Admin.

<sup>7</sup> Article I, s. 24(c) of the State Constitution includes within “enforcement” maintenance, control, destruction, disposal, and disposition of records.

<sup>8</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla 4<sup>th</sup> DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5<sup>th</sup> 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).

<sup>9</sup> Sections 119.15 and 286.0111, F.S.

By law, an exemption may be created or expanded only if the exemption:

- 1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>10</sup>

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

**Military Discharge Papers** – The United States Armed Forces issue discharge papers to members of the Armed Forces that are being released from active military duty. According to information posted on the Internet by the United States Department of Veterans’ Affairs,

A DD-214 is issued to military members upon separation from active service. DD-214s were issued to separated servicemembers beginning in the 1950’s. The term “DD-214” is often used generically to mean “separation papers” or “discharge papers,” no matter what form number was used to document active duty military service. . . .

In the past, discharged military personnel were advised to file military separation forms with the clerk of the court to ensure that there is an easily retrievable document recording their service in the United States Armed Forces. Filing could help to avoid problems that might arise from the loss of documentation of service. For example, a fire in 1973 destroyed a number of military service records. While some Army and Air Force records were salvaged and others reconstructed, some veterans who did not have copies of their records had to find other means to prove their military service. According to a representative of the department, this recommendation is not made officially any more because of computerized recordkeeping. Nevertheless, there is a long-established practice of filing military-separation papers and the practice still continues.

The Department of Veterans’ Affairs may or may not have a copy of an individual’s military separation papers. According to the department’s Internet website,

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<sup>10</sup> Section 119.15(4)(b), F.S.

If VA has a copy of a DD-214, it is usually because the veteran attached a copy (or sometimes, the original) to his or her application for disability or education benefits. If you've lost your original DD-214 or a copy and you are receiving (or applied for in the past) disability or education benefits from VA, we may have a copy (or the original, if you gave it to us) on file. At the very least, if you are currently receiving benefits (or did in the past), we should be able to provide a Statement of Service, which can be used instead of a "DD-214."

While the department may or may not have a copy of military separation papers, the National Personnel Records Center (Assistant Director for Military Records) maintains the records of individual military service performed by veterans of the Air Force, Army, Navy, Marine Corps, and Coast Guard. A registry number has been assigned to each of about 35 million of the more than 52 million records folders on file. A computer query under either the name or service number of the veteran will identify the registry number assigned to the veteran's record folder. This registry number indicates both that the Center has received the folder, and the folder's approximate location within the Center's large and numerous file areas. The 35 million computer-indexed files include complete records from all of the service departments; partial Army and Air Force records salvaged from a fire in 1973; and partial reconstructions of records lost in that fire. Records folders that have been indexed begin with those pertaining to persons discharged or retired during the first decade of the 20th century; and include records of persons whose service ended at least three months prior to the current date.

There is no public access to the Registry File Index, which is only used by Center staff and a limited number of off-site Federal Government facilities as a searching tool. This is a system of records under the Privacy Act (5 USC 552a). Reference requests into the actual military service records are restricted to individual veterans (or their next of kin if deceased); others acting in an official capacity on a veteran's behalf; government agencies designated for routine uses of the records; and others to the extent that information is releasable under the provisions of the Freedom of Information Act.

The Freedom of Information Act (FOIA) allows the public to gain access to its government's information. A FOIA request is a written request for records held or believed to be held by a government agency. Under the act, any person may request information contained in federal records. On the other hand, the Privacy Act of 1974 protects records that relate to an individual that are indexed or located by social security number, service number, or other means of personal identifying information. Thus, according to staff of the Government Information Locator Service, public information that is contained in a DD-214, such as the years a person served, their rank, where they entered into active duty and where they were discharged, could be provided to any one requesting the information. On the other hand, private information, such as the type of discharge, the date of birth, last known address, social security number, medical records, and other descriptive information would not be released.<sup>11</sup>

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<sup>11</sup> Conversation with Charles Pellegrini, Government Information Locator Service, Government Printing Office, April 30, 2002.

### III. Effect of Proposed Changes:

**Exemption Created by the Bill** – The bill makes confidential and exempt from public records requirements personal identifying information that is contained in military-discharge papers held by the clerk. Specifically, personal identifying information in the following forms is made confidential and exempt:

- < DD-214;
- < DD-215;
- < WD AGO 53;
- < WD AGO 55;
- < WD AGO 53-55;
- < NAVMC 78-PD; and
- < NAVPERS 553.

The bill defines “personal identifying information” to include the name, social security number, date of birth, home of record, and next of kin.

The bill authorizes the clerk of the court to release a complete copy of any of the forms to the person named in the form as having served in the United States Armed Forces, or his or her personal representative, executor, or court-appointed guardian.

**Statement of Public Necessity** – There are two primary purposes stated for the exemption. The first is to minimize the potential for identity theft. Military discharge papers contain a great deal of information about an individual, including name, social security number, date of birth, home of record, tours of duty, and next of kin. The bill states that the presence of all this information in a single document that is available to the public greatly facilitates the commission of identity theft.

The second stated purpose for the exemption is related to threat of terrorism. The bill states that information contained in military discharge papers, especially in a state with a large population of former military personnel, could be used to identify persons with military training or combat experience. This information could be used to identify and target these individuals or to avoid areas with a large concentration of former military personnel in staging terrorist acts.

**Open Government Sunset Review Act** – The bill makes the exemption subject to the requirements of s. 119.15, F.S., the Open Government Sunset Review Act of 1995. As a result, the exemption will be subject to review during the 2005 legislative interim and will be repealed October 2, 2006, unless reenacted by the Legislature during the 2006 legislative session.

### IV. Constitutional Issues:

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

None.

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

Some of the information contained in military discharge papers, such as identity of the veteran, the years of service, that person's highest rank, where and when they entered service and were discharged, may be obtained by anyone who makes a request under the Federal Freedom of Information Act. Under the Privacy Act of 1974, however, other information in discharge papers cannot be released, except to the person named in the discharge papers or his or her next of kin or legal representative. For example, date of birth, medical records, last known address, social security number and the type of discharge, would not be released.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

Persons who have been discharged from the military may receive some added financial protection if the bill inhibits identity theft.

**C. Government Sector Impact:**

Since military discharge papers are filed with the clerks of the court, the impact of the bill will be upon these clerks. It is unknown how many military discharge papers already have been filed with the clerks. There will be costs associated with locating these records, as well as for redacting the information that is made confidential and exempt by the bill. The costs associated with this are unknown to staff.

It is unknown how many discharge papers are filed with the clerks of the court per year. The clerks will have to review and revise their procedures in order to protect the information in these forms that are made confidential and exempt by the bill. The costs associated with this are unknown to staff.

**VI. Technical Deficiencies:**

The bill refers to personal identifying information contained in forms “. . . held by the clerk . . .” This provision would be clearer if the phrase “of the court” were added.

The bill defines “personal identifying information” to include the name, social security number, date of birth, home of record, and next of kin. This phrase would be clearer if it were modified to refer to the person who was being discharged from the military.

**VII. Related Issues:**

The Committee Substitute for House Bill 1679 (Senate Bill 668), which passed during the 2002 legislative session, amends s. 28.2221, F.S., to prohibit a county recorder or clerk of the court from placing an image or copy of a military discharge form on the internet. Military discharge papers that already are on the Internet would have to be removed under the bill if an affected party identifies the record by page number and requests that it be removed. This bill has not yet been signed into law by the Governor nor become law without his signature. If the bill does become law, it would alleviate much of the potential that discharge papers have for use in the commission of identity theft and in the planning of terrorist activities because the Internet facilitates the use of these documents. If individuals had to perform searches for these papers at the courthouse, it would be more difficult. Nevertheless, unlike the current bill, the CS/HB 1679 would not make all personal identifying information contained in hard copies filed with the clerks confidential and exempt. As a result, the bill under consideration provides more protection for the information contained in these forms.

The Committee Substitute for House Bill 1673 (Senate Bill 1588), which passed during the 2002 legislative session, makes confidential and exempt social security numbers held by an agency before, on, or after the date the bill becomes law. The bill explicitly authorizes the release of this information to another governmental entity or its agents if required for the entity to perform its duties and responsibilities. The bill also authorizes release of social security numbers to commercial interests under specified conditions. Any final judgment, court order, or docket sheet filed after the effective date of the bill must contain a separate attachment for social security numbers. Except for final judgments, court orders, or docket sheets, if a social security number is or has been otherwise included in a court file before, on, or after October 1, 2002, the social security number may be included as part of a court record available to the public for inspection and copying unless redaction is requested by the holder of the social security number, or his or her attorney or legal guardian, in a written request. The bill has not yet been signed by the Governor nor become law without his signature. If the CS/HB 1673 becomes law, the exemption for social security numbers in military discharge papers will be redundant.

Senate Bill 980, which was identical to this bill but had no House companion, passed the Senate 33-2 in the 2002 legislative session, but died in messages.

**VIII. Amendments:**

#1 by Governmental Oversight & Productivity:

Strike-everything amendment that eliminates the public records exemption. The amendment provides that a veteran or certain other authorized persons may request that a military-separation form filed with the county recorder be removed. The requestor must provide the page number of the record where the document is recorded. Proof of identification of the requestor is required. No fee is authorized. (WITH TITLE AMENDMENT)