

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 Criminal Justice Committee

BILL: SB 1328

INTRODUCER: Senator Hays

SUBJECT: Public Records/Office of Financial Regulation

DATE: March 30, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Arzillo</u>	<u>Burgess</u>	<u>BI</u>	Favorable
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Pre-Meeting
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Office of Financial Regulation (Office) is the regulatory body in charge of oversight of state financial institutions. The Office charters and routinely examines financial institutions in order to ensure they are complying with regulatory requirements. Many financial institutions federally chartered or chartered in other states operate within Florida or in multiple states, making interstate cooperation essential for performing the Office's duties. At times, however, the acquisition of information from federal or out-of-state regulatory agencies is impractical because the information is not exempt from the public records requirements. Therefore, this bill institutes certain exemptions from public records requirements including information developed by out-of-state or federal regulatory agencies and information made available to the Office on a restricted basis or in connection with a multiagency investigation.

This bill substantially amends the following section of the Florida Statutes: 119.0712.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.¹ Article I, s. 24(a), of the Florida Constitution, provides that:

¹ FLA CONST. Art. I, Section 24.

Every person² 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.

The Public Records Act³ specifies conditions under which access must be provided to agency⁴ records. Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge.⁶ Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.⁷ Exemptions can only be created by the Legislature,⁸ and must be created in general law, state the public necessity justifying it, and may not be broader than necessary to meet that public necessity.⁹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁰ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act

The Open Government Sunset Review Act¹² sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an

² Section 1.01(3) F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

³ Chapter 119, F.S.

⁴ The word “agency” is defined in s. 119.011(2), to mean “...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.”

⁵ Section 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567, 568-69 (Fla. 1999).

¹⁰ Attorney General Opinion 85-62.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).

¹² Section 119.15, F.S.

automatic repeal of the exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act 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 is necessary to meet one of the following purposes:

- 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 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.
- Protects trade or business secrets.¹³

Office of Financial Regulation Public Records Exemptions

Florida law exempts certain information obtained or created by the Office when it is involved in the charter, examination, or investigation of financial institutions.¹⁴ However, the exemptions vary among the Office's regulatory programs. Nevertheless, there are three areas where confidentiality and exemptions are currently disallowed, but would assist the Office in performing its investigatory and examination duties more diligently and efficiently.

The first instance in which the Office is impeded from gathering information is when a federal or out-of-state regulatory agency maintains confidentiality requirements of certain information obtained through investigations or examinations. In this instance, the Office is required to keep the information confidential, but cannot do so because there is no confidentiality provision for the information under current Florida law. Therefore, valuable information that could be obtained from other agencies is not accessible by the Office.

Furthermore, the Office is limited in its capacity to become involved in out-of-state or federal investigations due to limited confidentiality and exemptions. Currently, if the Office is involved in a multi-agency examination or investigation, the Office cannot accept information from other agencies if the information is confidential under the federal or out-of-state laws. The Office is also inadvertently limited in the supply of information in multi-jurisdictional investigations. Several of the Office's exemptions are only effective for the time of the investigation or examination. Specifically, information used in multi-jurisdictional investigations or examinations may become public record under current Florida law after the examination or investigation is complete. If the federal or out-of-state laws provide for a continuing confidentiality, then the Office is limited in its ability to provide information in these instances.

Additionally, the Office is limited in the gathering of information from out-of-state and federal agencies that treat certain information as confidential. In these cases, the Office is required to

¹³ Section 119.15(6)(b), F.S.

¹⁴ See s. 560.129, F.S. (Money Services Businesses exemptions), s. 494.00125, F.S. (mortgage brokering and lending), s. 517.2015, F.S. (securities), s. 520.9965, F.S. (retail installment sales), s. 655.057, F.S. (financial institutions).

sign confidentiality agreements with the appropriate regulatory agency. However, the Office cannot sign these agreements if Florida law does not exempt the information from public records requirements. Therefore, the Office is inhibited in its investigative capacity to gather information from other regulatory agencies.

III. Effect of Proposed Changes:

Section 1 creates public records exemptions for certain documents and information held by the Office. Therefore all records obtained by the office from a state or federal agency through an agreement of confidentiality or restricted basis is subject to the public records exemption. Additionally, the bill exempts information that is developed as part of a joint investigation or examination from public records requirements. Information held by the office on or after the effective date of the bill is subject to this exemption. The bill provides for an automatic repeal, in accordance with s. 119.15, F.S., on October 2, 2016, unless reenacted by the Legislature prior to that date.

Section 2 states the public necessity of the bill. The bill explains that the exemption is necessary to facilitate the Office's access to information that could assist in pursuing violations of the laws and regulations under the Office's jurisdiction. The exemption is also necessary to allow for the participation by the Office in joint or multiagency investigations and examinations because this would assist the Office in more efficiently using its resources by sharing information and coordinating examinations and investigations with other governmental agencies. Therefore, the public records exemption provided for in this bill is necessary to ensure the effective and efficient administration of the regulatory programs administered by the Office.

Section 3 provides that the bill take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, this bill requires a two-thirds vote for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate. The bill could create a fiscal impact on the Office because its staff would have to be trained with regard to the categories of information made confidential and exempt from public disclosure versus records that are available for public inspection and copying. The Office could also incur costs associated with redacting confidential and exempt information prior to releasing a record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has expressed concerns that the exemption created by the bill is broader than necessary to meet public necessity. Specifically, the First Amendment Foundation (FAF) is concerned with out-of-state regulators possibly transferring information to Florida in order to keep information confidential. FAF staff indicated to Senate professional staff that the FAF's position regarding the bill would be "neutral" if the bill's language conformed to the language in CS/HB 677.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.