

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 675 Pub. Rec./Office of Financial Regulation

**SPONSOR(S):** Regulatory Affairs Committee; Government Operations Subcommittee; Insurance & Banking Subcommittee; Broxson

**TIED BILLS:** CS/CS/HB 673 **IDEN./SIM. BILLS:** CS/CS/SB 1278

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	9 Y, 0 N, As CS	Bauer	Cooper
2) Government Operations Subcommittee	11 Y, 0 N, As CS	Williamson	Williamson
3) Regulatory Affairs Committee	15 Y, 0 N, As CS	Bauer	Hamon

### SUMMARY ANALYSIS

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes ("Codes"), chapters 655 to 667, Florida Statutes. The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness. Currently, s. 655.057, F.S., exempts certain records held by the OFR relating to the supervision and regulation of financial institutions chartered in Florida.

The bill creates a limited public records exemption for informal enforcement actions as well as an exemption for trade secrets that are held by the OFR in accordance with its statutory duties with respect to the Codes. In addition, the bill defines:

- Examination report,
- Informal enforcement action,
- Working papers, and
- Personal financial information.

The bill provides that the newly created exemptions are subject to the Open Government Sunset Review Act and will stand repeal on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill provides that the act shall take effect on the same date that HB 673 or similar legislation is adopted in the same legislative session or an extension thereof and becomes a law.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it appears to require a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Public Records Laws**

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24, of the State Constitution, provides that:

(a) 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Fla. Const. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word "agency" is defined in s. 119.011(2), F.S., 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>5</sup> Section 119.011(12), F.S.

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

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

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.<sup>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>15</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An exemption meets the three statutory criteria if it:

- 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 under this provision.
- 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>16</sup>

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

### **Supervision of State-Chartered Financial Institutions**

The Office of Financial Regulation (OFR) regulates and charters banks, trust companies, credit unions, and other financial institutions pursuant to the Financial Institutions Codes ("Codes"), chapters 655 to 667, Florida Statutes. The OFR ensures Florida-chartered financial institutions' compliance with state and federal requirements for safety and soundness.

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<sup>8</sup> Florida Attorney General Opinion 85-62.

<sup>9</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So.2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So.2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So.2d 567, 569 (Fla. 1999).

<sup>12</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

CS/CS/HB 673 (2014), which is linked to this bill, amends a number of provisions throughout the Codes.

### **Current Public Records Exemptions Under the Codes**

Currently, s. 655.057, F.S., contains the following public records exemptions:

- All records and information relating to an “active” investigation or examination are confidential and exempt.
- After an investigation or examination is no longer active, the following information remains confidential and exempt to the extent that disclosure would:
  - Jeopardize the integrity of another active investigation;
  - Impair the safety and soundness of the financial institution;
  - Reveal personal financial information;
  - Reveal the identity of a confidential source;
  - Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or
  - Reveal investigative techniques or procedures.
- Reports of examination, operations, or condition, *including working papers* or portions thereof, that are prepared by or for the use of the OFR or any state or federal agency responsible for the regulation or supervision of financial institutions.
  - Current law provides exceptions for persons to whom these reports and working papers may be released.
- Examination, operation, or condition reports of a failed financial institution, which shall be released within 1 year after the appointment of a liquidator, receiver, or conservator. However, any portion which discloses the identities of depositors, bondholders, members, borrowers, or stockholders (other than directors, officers, or controlling stockholders) remains confidential and exempt.
- Florida-chartered credit unions and mutual associations are required to maintain and submit to the OFR a list of their members’ names and residences. This list of members is confidential and exempt.
- Florida-chartered banks, trust companies, and stock associations are required to maintain and produce to the OFR lists of their shareholders’ names, addresses, and number of shares held by each shareholder. Any portion of this list which reveals the shareholders’ identities is confidential and exempt.

In addition, s. 655.059, F.S., provides that the books and records of a financial institution are “confidential” and may only be made available to specified persons, including the OFR.<sup>18</sup> However, this is not a public records exemption from s. 119.07(1), F.S., because private organizations (such as financial institutions) are generally not subject to the Sunshine Law, unless the private organization has been created by a public entity, has been delegated the authority to perform some governmental function, or plays an integral part in the decision-making process of a public entity.<sup>19</sup> This statute merely prohibits financial institutions from disclosing its books and records to anyone other than the persons enumerated in s. 655.059(1)(a), F.S.

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<sup>18</sup> In addition, s. 655.012(1)(b), F.S., grants the OFR access to all books and records of all persons over whom the OFR exercises general supervision as is necessary for the performance of the duties and functions of the OFR, as prescribed by the Codes.

<sup>19</sup> Florida Attorney General Opinion 07-27.

## **Effect of the Bill**

### *Informal Enforcement Actions*

The bill creates a limited exemption for “informal enforcement actions” by the OFR, which the bill defines as “a board resolution, document of resolution, or an agreement in writing between the office and a financial institution” that the office imposes on an institution after considering the administrative enforcement guidelines in s. 655.031, F.S., and determining that a formal enforcement action<sup>20</sup> is not an appropriate enforcement remedy. However, the bill limits the exemption by providing that after an investigation relating to an informal enforcement action is completed or ceases to be active, an informal enforcement action is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, only to the extent that disclosure would result in certain events (i.e., impair the safety and soundness of the financial institution, reveal investigative techniques or procedures, etc.).

The public necessity statement provides that public disclosure of informal enforcement actions could erode public confidence in financial institutions in this state and may lead to a reduced level of protection of the interests of the depositors and creditors of financial institution. In addition, the public necessity statement provides that this exemption will, among other things, provide competitive equality to Florida-chartered institutions, because financial institutions that are federally chartered or chartered by other states are protected by those federal or state laws with regard to informal enforcement actions.<sup>21</sup>

### *Trade Secrets*

The bill creates a public records exemption for trade secrets, as defined in s. 688.002, F.S., that comply with s. 655.0591, F.S.,<sup>22</sup> and that are held by the OFR in accordance with its statutory duties with respect to the Codes. The public necessity statement provides that disclosure of these trade secrets could result in a competitive disadvantage and economic loss to a financial institution.

### *Definitions*

In addition to creating a definition of “informal enforcement action” for the new exemption, the following terms are defined in the bill to clarify existing exemptions in s. 655.057, F.S.:

- Examination report,
- Working papers,<sup>23</sup> and
- Personal financial information.

### *Statement of Public Necessity*

Section 2 of the bill is the statement of public necessity as required by the State Constitution. It contains:

- Legislative findings that informal enforcement actions and trade secrets must be kept confidential and exempt; and
- Identified public purposes for exempting informal enforcement actions and trade secrets.

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<sup>20</sup> Generally, the OFR initiates a formal enforcement action with a cease and desist order issued under s. 655.033, F.S., or a suspension or removal order under s. 655.037, F.S. Pursuant to s. 655.0321, F.S., the OFR is required to consider the public purposes stated in s. 119.14(4)(b), F.S., in determining whether the hearings, proceedings, and documents relating to these formal enforcement actions shall be closed/confidential and exempt from s. 286.011 and s. 119.071(1), F.S., respectively.

<sup>21</sup> According to the OFR, federal courts have broadly construed 5 U.S.C. §552(b)(8) of the federal Freedom of Information Act, which exempts matters contained in or related to examination, operating, or condition reports prepared by federal financial supervisory and regulatory agencies. E-mail from the OFR (received October 18, 2014), on file with the Insurance & Banking Subcommittee.

<sup>22</sup> CS/CS/HB 673 creates s. 655.0591, F.S., to provide a statutory procedure when a person required to submit documents to the OFR pursuant to the Codes claims that such documents contain a trade secret.

<sup>23</sup> The bill’s definition of “working papers” is substantially similar to the definition of “work papers” in s. 624.319(3)(b)1., F.S., of the Insurance Code.

*Open Government Sunset Review Act*

The bill provides that the newly created public record exemptions are subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

B. SECTION DIRECTORY:

**Section 1** amends s. 655.057, F.S., relating to records; limited restrictions upon public access.

**Section 2** provides a statement of public necessity as required by the State Constitution.

**Section 3** provides a contingent effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's protection of trade secrets and informal enforcement actions may benefit Florida-chartered financial institutions, since disclosure of such information could result in a competitive disadvantage in the marketplace and reputational risk.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on the OFR, because OFR staff responsible for complying with public record requests could require training related to expansion of the public record exemption. In addition, the OFR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agency.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

*Vote Requirement and Public Necessity Statement for Public Records Bills*

In order to pass a newly-created or expanded public records or public meetings exemption, Article I, s. 24 of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

*Subject Requirement*

Section 24(c), art. I of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes.

*Public Necessity Statement*

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly-created public-records or public-meetings exemption.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 19, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Removed the original bill's exemption for working papers, since the Codes already exempt working papers,
- Removed the exemption for examination reports and working papers for subsidiaries, affiliates, and service corporations,
- Created a trade secrets exemption,
- Created a limited exemption for informal enforcement actions,
- Made references to s. 24(a), Art. I of the State Constitution instead of only s. 119.07(1), F.S., for all current and new exemptions in s. 655.057, F.S.,
- Subjected the entire section to Open Government Sunset Review,
- Retained the bill's definitions of examination report, informal enforcement action, and personal financial information, and
- Provided a more specific definition of "working papers."

On March 25, 2014, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with a committee substitute. The amendment:

- Removed the newly added references to Art. I, s. 24(a) of the State Constitution from the public record exemptions found in current law.
- Revised the Open Government Sunset Review Act provision to provide that only the newly created public record exemptions were subject to the October 2, 2019, repeal date.
- Corrected a drafting error in the public necessity statement.

On April 10, 2014, the Regulatory Affairs Committee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment provided technical drafting changes to make the bill identical to its Senate companion, CS/CS/SB 1278.

This analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.