

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 Committee on Governmental Oversight and Accountability

BILL: SB 7012
INTRODUCER: Banking and Insurance Committee
SUBJECT: OGSR/Credit History Information and Credit Scores/Office of Financial Regulation
DATE: March 10, 2015 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	_____	BI Submitted as Committee Bill
2.	<u>Kim</u>	<u>McVaney</u>	_____	Favorable
3.	_____	_____	_____	_____

I. Summary:

SB 7012 is the result of an Open Government Sunset Review (OGSR) by the Banking and Insurance Committee professional staff of a public records exemption that makes credit history information and credit scores held by the Office of Financial Regulation (OFR) confidential and exempt from public-records requirements.¹ The OFR licenses and regulates loan originators (non-depository mortgage brokers and mortgage lenders).² Applicants for initial licensure or renewal of a license must meet minimum requirements in order to demonstrate character, financial responsibility, and general fitness, as required by the federal SAFE Mortgage Licensure Act of 2008.³ As part of this licensure process, an applicant must authorize the release of an independent credit report and credit score to the OFR.⁴

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2015, unless reenacted by the Legislature. This bill continues the exemption and does not expand the scope of the public records exemption. The reenactment of the exemption would continue to protect sensitive personal financial information of applicants from being disclosed. The release of such sensitive personal information would be defamatory and make those persons vulnerable to identity theft and other crimes.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any public record made or received in connection with

¹ Section 494.00125, F.S.

² Chapter 494, F.S.

³ Parts II and III of chapter 494, F.S.

⁴ Sections 494.00312, 494.00313, 494.00611, and 494.00612, F.S.

the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.⁵ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.⁶ The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.⁷

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁸ guarantees every person's right to inspect and copy any state or local government public record.⁹ The Sunshine Law¹⁰ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.¹¹

The Legislature may create an exemption to public records or open meetings requirements.¹² An exemption must specifically state the public necessity justifying the exemption¹³ and must be tailored to accomplish the stated purpose of the law.¹⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open

⁵ FLA. CONST., art. I, s. 24(a).

⁶ FLA. CONST., art. I, s. 24(b).

⁷ FLA. CONST., art. I, s. 24(b).

⁸ Chapter 119, F.S.

⁹ Section 119.011(12), F.S., defines "public record" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

¹⁰ Section 286.011, F.S.

¹¹ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

¹² FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released, to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹³ FLA. CONST., art. I, s. 24(c).

¹⁴ FLA. CONST., art. I, s. 24(c).

meetings exemptions.¹⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁷ An exemption serves an identifiable purpose if it meets one of the following criteria: It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁸ Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁹ or it protects trade or business secrets.²⁰ In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.²¹

The OGSR also requires specific questions to be considered during the review process.²² In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²³ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁴

¹⁵ Section 119.15, F.S. Section 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ Section 119.15(6)(b), F.S.

²² Section 119.15(6)(a), F.S. The questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²³ FLA. CONST., art. I, s. 24(c).

²⁴ Section 119.15(7), F.S.

Regulation of Loan Originators

Federal SAFE Mortgage Licensing Act

The federal Housing and Economic Recovery Act was enacted on July 30, 2008,²⁵ Title V of this Act is titled “The Secure and Fair Enforcement for Mortgage Licensing Act of 2008” (SAFE Act or SAFE). The intent of SAFE is to provide greater accountability and regulation of individual loan originators (mortgage brokers and mortgage lenders) and enhance consumer protections by establishing minimum licensure and registration requirements for loan originators.²⁶ Loan originators must undergo state licensure and annual renewal, provide fingerprints to the regulator for submission to any state or registry authorized to conduct a criminal background check, and allow the regulator to access a credit report through the registry.

The Act directs the establishment of a nationwide mortgage licensing system and registry (NMLS or registry). The SAFE Act requires states to comply with these minimum standards²⁷ and participate in the registry to facilitate states' compliance with the requirements of SAFE.²⁸ The registry collects and maintains specified information on loan originators. The purpose of the registry is to create a common database on loan originators among federal and state regulators, provide information to the public about the employment history of loan originators, and maintain a history of disciplinary and enforcement actions against loan originators.

The SAFE Act creates confidentiality standards for the federal and state regulators who participate in the registry, which collects a common pool of information from each participant. For example, only state regulators have access to review credit information, including credit scores, on licensees and must comply with certain terms and conditions.²⁹ For example, only authorized recipients may have access to or view the services and consumer report information. Authorized recipients may not disseminate or provide third party access to the services or consumer report information.³⁰

Except as otherwise provided, SAFE applies federal or state privacy or confidentiality laws, and any privilege arising under federal or state law, after information has been disclosed to the NMLS. Such information may be shared with all state and federal regulatory officials with mortgage regulatory authority without loss of privilege or loss of confidentiality protections provided by such laws.³¹ Any state law in conflict with this standard is superseded to the extent it provides less confidentiality or privilege.³² These requirements do not apply to information that

²⁵ Public Law 110-289.

²⁶ H.R. 3221, Public Law 110-289, Title V, s. 1502.

²⁷ The SAFE Act provides that, if a state does not enact minimum regulatory standards that comply with the SAFE after the enactment, the U.S. Department of Housing and Urban Development (HUD) will enforce the minimum standards for loan originators operating in Florida as state-licensed loan originators.

²⁸ NMLS Resource Center, available at <http://mortgage.nationwidelicencingsystem.org/safe/Pages/default.aspx> 9last visited January 30, 2015).

²⁹ Frequently Asked Questions, NMLS, available at <http://mortgage.nationwidelicencingsystem.org/profreq/Pages/FAQ.aspx#credit> (last visited January 30, 2015).

³⁰ Correspondence from the Office of Financial Regulation (January 27, 2015) (on file with Senate Banking and Insurance Committee).

³¹ H.R. 3221, Public Law 110-289, Title V, s. 1512.

³² Title V, sec. 1512(a)-(c).

is in the registry regarding a loan originator's employment history, or publicly adjudicated disciplinary and enforcement history.³³

Florida Regulation of Loan Originators

In Florida, the Office of Financial Regulation (OFR) regulates non-depository loan originators and other specified financial entities.³⁴ In 2009, the Legislature enacted and the Governor approved legislation³⁵ bringing the state into compliance with the SAFE Mortgage Licensing Act of 2008. Effective October 1, 2010, the OFR began accepting and processing applications for loan originator licenses.

The licensure and renewal process includes a review of the applicant's credit report and credit information by the state regulator, which OFR accesses through the registry. Every individual applying for state licensure as a mortgage loan originator is required to complete the credit authorization process through the NMLS.³⁶ The credit report obtained through NMLS is a TransUnion Credit Report with a Vantage Score. The OFR is required to comply with terms and conditions relating to the confidentiality of this information.

Once the OFR accesses a credit report, the OFR evaluates any adverse information contained in an applicant's credit report in the context of the "totality of the circumstances."³⁷ For example, an adverse item may result from inaccuracies in the credit report or factors that do not necessarily reflect negatively upon the applicant's character, general fitness, or financial responsibility.³⁸ The OFR must notify applicants of specific items of concern and provide the applicant with an opportunity to explain the circumstances surrounding the specific items and provide additional relevant information or documentation relating to the OFR's determination. During this process, the OFR must consider the following information for determining whether a person has demonstrated that he or she possesses the character, general fitness, and financial responsibility to warrant the OFR's determination that the person will operate honestly, fairly, and efficiently:

1. The relevant person's entire credit history as reflected in the credit report.
2. The information provided by the relevant person.
3. The responses contained in the license application.
4. The previous licensing history with the OFR including whether the relevant person was named in any regulatory action by the OFR.
5. Other information that reflects upon an applicant's character, general fitness, or financial responsibility.

³³ Title V, sec. 1512(d).

³⁴ The OFR is organized under the Financial Services Commission. The commission is composed of the Governor and Cabinet. Section 20.121(3), F.S.

³⁵ Chapter 2009-241, Laws of Florida.

³⁶ See Frequently Asked Questions at <http://mortgage.nationwidelicencingsystem.org/profreq/Pages/FAQ.aspx#credit> (last visited January 29, 2015).

³⁷ Rule 69V-40.0113, F.A.C.

³⁸ A 2013 Federal Trade Commission report found that one in five consumers had an error on at least one of their three credit reports. The report can be viewed at <http://www.ftc.gov/news-events/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports> (last visited January 29, 2015).

6. The time and context of the information available and any pattern of behavior the information may demonstrate.³⁹

In considering the totality of circumstances, the fact that an applicant has been a debtor in a bankruptcy or has been the control person of a bankrupt company cannot be the sole basis of the OFR’s determination to deny the issuance of a license.⁴⁰ The OFR may not use a credit score or the absence or insufficiency of credit history information to determine charter, general fitness, or financial responsibility. If the OFR uses information contained in a credit report as the basis for denying a license, the OFR is required to provide particularity for the grounds or basis for denial.⁴¹

The OFR⁴² provided the following data⁴³ concerning denials and withdrawals in recent years:

Loan Originator Application Denials & Withdrawals			
	FY 2011-12	FY 2012-13	FY 2013-14
Denials	1958	134	165
Withdrawals	340	93	97
Total	2298	227	262
Loan Originator Renewal Denials & Withdrawals			
	FY 2011-12	FY 2012-13	FY 2013-14
Denials	76	31	58
Withdrawals	28	18	16
Total	104	49	74

Public Records Under Review

Section 494.00125(3), F.S., provides that credit history information and credit scores held by the OFR related to the licensure under ch. 494, F.S., are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. However, this public records exemption does not apply to information that is otherwise publicly available. The OFR is authorized to provide such credit history information and credit scores to other governmental entities having regulatory or law enforcement authority.

Credit reports can include credit history information regarding credit card usage and limits, loans, outstanding tax liens, uncollectible debt, bankruptcies, and foreclosures. Chapter 494, F.S., defines the term, “credit report,” to mean any written, oral, or other information obtained from a consumer-reporting agency as described in the federal Fair Credit Reporting Act, which bears on

³⁹ Rule 69V-40.0113, F.A.C.

⁴⁰ Sections 494.00611, 494.00321, and 494.067, F.S.

⁴¹ *Id.*

⁴² Correspondence from the Office of Financial Regulation (January 26, 2015) (on file with the Senate Committee on Banking and Insurance).

⁴³ If an applicant has been denied licensure in any state, the applicant must disclose this reportable event in future application submission in any state. Because of this requirement, many applicants will withdraw their application rather than having a record of a licensure denial that would be available on the registry. The OFR does not track on their internal licensing system the reasons for denials.

an individual's credit worthiness, credit standing, or credit capacity. A credit score alone, as calculated by the reporting agency, is not considered a credit report.⁴⁴ The term, "credit score," is defined in s. 494.001(8), F.S.

III. Effect of Proposed Changes:

The bill repeals the expiration date, thereby continuing the public records exemption for credit history information and credit scores held by the Office of Financial Regulation pursuant to s. 494.00125, F.S. The effective date of the bill is October 1, 2015.

The continuation of this exemption will protect sensitive personal financial information of applicants from being subject to disclosure. The release of such information could make those persons vulnerable to identity theft and other crimes and could adversely affect the name or reputation of an applicant.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill continues a current exemption but does not expand the scope of an existing public records exemption; therefore, a simple majority vote of the members present and voting in each house of the Legislature is required for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The continuation of this exemption protects an applicant's sensitive, personal financial information held by the OFR. The disclosure of such information could make those persons vulnerable to identity theft and other crimes. In addition, the release of such exempted information contained in a credit report or a credit score could adversely affect the name or reputation of an applicant.

⁴⁴ Section 494.001(7), F.S.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 494.00321, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.