

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: CS/SB 202

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Brandes

SUBJECT: Court Records

DATE: February 21, 2017 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Peacock</u>	<u>Ferrin</u>	<u>GO</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 202 provides immunity from liability to the clerk of court for releasing confidential information from a court record which the filer failed to disclose to the clerk. The liability protections apply to the release of any information made confidential by court rules. This information includes, among other things, records of dependency matters, a victim's address in a domestic violence action, juvenile delinquency records, medical records, adoption records and estate inventories.

Under current law, clerks are immune from liability for the inadvertent release of a few items of confidential information. Specifically, a clerk is not liable for inadvertently releasing social security, bank account, charge, debit, and credit card numbers found in official records or court records filed before January 1, 2012.

The bill provides an effective date of July 1, 2017.

II. Present Situation:

Public Records Law

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ This right to access public records includes records made or received by legislative, executive, and judicial branches of government.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption from the requirement that a public record be accessible to the public.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

Exemption from Public Records Law for Certain Sensitive Information

Social security numbers held by an agency are confidential and exempt from the public access requirements of the public records law.¹⁰ As justification for the exemption, the Legislature recognized that:

the social security number can be used as a tool to perpetuate fraud against an individual and to acquire sensitive personal, financial, medical, and familial

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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 "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 (*see Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ 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 (*see WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption.

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.071(5)(a)5., F.S.

information, the release of which could cause great financial or personal harm to an individual.¹¹

Similarly, bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from disclosure requirements under the public records law.¹²

The requirements to maintain and disclose records under the Public Records Act apply to an “agency,”¹³ which includes executive branch agencies and local governments.¹⁴ However, the exemptions for social security numbers¹⁵ and bank, debit, charge, and credit card account numbers¹⁶ also apply to official records and court records kept by the clerk of court.

Official Records

The clerk of the court maintains official records and court records. An official record is recorded by the clerk as part of a general series called “Official Records” and includes such documents as bills of sale, mortgages, deeds, notices of levy, tax warrants, and liens.¹⁷

A person who prepares or files an official record is generally not supposed to include social security, bank account, debit, charge, and credit card numbers in the document.¹⁸ However, if a person’s social security number or financial account number is included in an official record, the person or his or her attorney or legal guardian may request that the information be redacted. If the clerk does not receive a redaction request, the sensitive information may be included in the records available to the public.¹⁹

If the record containing a social security number or financial account number is in an electronic format, the clerk as county recorder²⁰ must use his or her best efforts to keep the information confidential and exempt without a request for redaction.²¹ However, the clerk is immune from liability for an inadvertent release of this sensitive information.²²

¹¹ Section 119.071(5)(a)1.b., F.S.

¹² Section 119.071(5)(b), F.S.

¹³ Section 119.011(2), F.S., defines the term “agency” 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.

¹⁴ See, i.e., *Locke v. Hawkes*, 595 So. 2d 32, 37 (1992), in which the Florida Supreme Court held that the definition of an agency in chapter 119, F.S., was intended to apply solely to executive branch agencies and officers and to local governmental entities and their officers.

¹⁵ Section 119.0714(1)(i), F.S.

¹⁶ Section 119.0714(1)(j), F.S.

¹⁷ Section 28.222(2) and (3), F.S.

¹⁸ Section 119.0714(3), F.S.

¹⁹ Section 119.0714(3)(a), F.S.

²⁰ Section 28.22(1), F.S., provides that the clerk is the county recorder. “The clerk of the circuit court shall be the recorder of all instruments that he or she may be required or authorized by law to record in the county where he or she is clerk.”

²¹ Section 119.0714(3)(a)1., F.S.

²² Section 119.0714(3)(e), F.S.

Court Records

For court records filed with the clerk of court on and after January 1, 2012, the clerk must maintain any social security numbers and financial account numbers in those records as confidential and exempt from disclosure under public records law.²³ Clerks are not liable for inadvertently releasing social security, bank account, charge, debit, and credit card numbers found in court records that were filed before January 1, 2012.²⁴ However, a person whose social security number or financial account number is contained in an older record, or his or her attorney or legal guardian, may request that the clerk redact the numbers from the record.²⁵

Rules of Court

Rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration requires the clerk of the court to designate and maintain the confidentiality of the following records or information, which are exempt from disclosure under existing law and the Florida Rules of Criminal Procedure:

- Chapter 39, F.S., records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment (Sections 39.0132(3) and (4)(a), F.S).
- Adoption records (Section 63.162, F.S).
- Social Security, bank account, charge, debit, and credit card numbers (Section 119.0714(1)(i)-(j) and (2)(a)-(e), F.S.).²⁶
- HIV test results and the identity of any person upon whom an HIV test has been performed (Section 381.004(2)(e), F.S.).
- Records, including test results, held by the Department of Health or its authorized representatives relating to sexually transmissible diseases (Section 384.29, F.S.).
- Birth records and portions of death and fetal death records (Sections 382.008(6) and 382.025(1), F.S.).
- Information that can be used to identify a minor petitioning for a waiver of parental notice when seeking to terminate pregnancy (Section 390.01116, F.S.).
- Clinical records under the Baker Act (Section 394.4615(7), F.S.).
- Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals (Section 397.501(8), F.S.).
- Clinical records of criminal defendants found incompetent to proceed or acquitted by reason of insanity (Section 916.107(8), F.S.).
- Estate inventories and accountings (Section 733.604(1), F.S.).

²³ Section 119.0714(2)(d) and (2)(e)1., F.S. The Legislature made the public records exemption for social security numbers, bank account, debit, credit and charge card numbers in court records permanent in 2007 (ch. 2007-251, L.O.F.) At that time, the Legislature extended the period of time in which the holder would need to make a redaction request for the number to be removed from the records, from January 1, 2008 to January 1, 2011. In 2010, the Legislature extended the January 1, 2011 date by a year, to give the clerks until January 1, 2012 to have a process in place for redacting the numbers on its own, without the prompting of the holder of the number (Conference Committee Amendment for CS/HB 5401, *Summary of Conference Committee Action* (April 30, 2010)). Chapter 2010-162, L.O.F.

²⁴ Section 119.0714(2)(d), F.S.

²⁵ Section 119.0714(2)(a), F.S.

²⁶ Fla. R. Jud. Admin. 2.420(d)(1)(B)(iii) mirrors the distinction between pre-and-post January 1, 2012, records for purposes of confidentiality of social security number, bank account, charge, debit, and credit card numbers.

- The victim's address in a domestic violence action on petitioner's request (Section 741.30(3)(b), F.S.).
- Protected information regarding victims of child abuse or sexual offenses (Sections 119.071(2)(h) and 119.0714(1)(h), F.S.).
- Gestational surrogacy records (Section 742.16(9), F.S.).
- Guardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases (Sections 744.1076 and 744.3701, F.S.).
- Grand jury records (Sections 905.17 and 905.28(1), F.S.).
- Records acquired by courts and law enforcement regarding family services for children (Section 984.06(3)-(4), F.S.).
- Juvenile delinquency records (Sections 985.04(1) and 985.045(2), F.S.).
- Records disclosing the identity of persons subject to tuberculosis proceedings and records held by the Department of Health or its authorized representatives relating to known or suspected cases of tuberculosis or exposure to tuberculosis (Sections 392.545 and 392.65, F.S.).
- Complete presentence investigation reports (Fla. R. Crim. P. 3.712).
- Forensic behavioral health evaluations under ch. 916, F.S. (Section 916.1065, F.S.).
- Eligibility screening, substance abuse screening, behavioral health evaluations, and treatment status reports for defendants referred to or considered for referral to a drug court program (Section 397.334(10)(a), F.S.).

Additionally, a person who files a record containing any of the confidential information above must alert the clerk to the existence of the information using a form Notice of Confidential Information within Court Filing.²⁷ Once the form notice is filed, the clerk court must review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality.²⁸

Rule 2.515 of the Florida Rules of Judicial Administration requires that every document of a party represented by an attorney must be signed by at least one attorney of record. The attorney's signature constitutes a certificate by the attorney that, among other things, the document contains no confidential or sensitive information or that any such information has been protected by identifying the confidential or sensitive information in accordance with the requirements of rules 2.420 and 2.425 of the Florida Rules of Judicial Administration.

Florida Rules of Judicial Administration Committee Meeting

At a meeting of the Florida Rules of Judicial Administration Committee, dated May 29, 2015, clerks raised a concern over the issue of attorneys filing documents with the clerk without disclosing the confidential nature of the documents. Specifically, the clerks were concerned that they would be liable for the inadvertent disclosure of confidential information, and they sought indemnification from liability through court rule. Committee members instructed the clerks that

²⁷ Fla. R. Jud. Admin. 2.420(2)(A).

²⁸ Fla. R. Jud. Admin. 2.420 (d)(2)(B).

this matter is appropriately within the province of the Legislature, not the court. As such, the committee advised the clerks to seek statutory immunity.²⁹

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 119.0714(2)(e)1., F.S., and deletes the introductory phrase “[o]n January 1, 2012, and thereafter” in this section. This language is no longer necessary as the clerks were given time to implement a process for ensuring social security numbers, and bank account, debit, charge, and credit card numbers were confidential and exempt.

This section creates s. 119.0714(2)(g), F.S., and provides that the clerk of court is not liable for the release of information that is required by the Florida Rules of Judicial Administration to be identified by the filer as confidential if the filer fails to make the required identification of the confidential information to the clerk of court.

Section 2 of the bill provides an effective date of July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties or municipalities to spend funds, reduce the counties’ or municipalities’ ability to raise revenue or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill precludes an individual who is harmed by the release of his or her social security number, financial account number, or other confidential information from seeking damages from a clerk of court. However, the bill does not preclude the person from seeking damages from the person who filed the confidential information without properly disclosing its existence to the clerk.

²⁹ The Florida Bar Rules of Judicial Administration Committee, *Subcommittee Action Report*, pg. 1, 9-10 (May 29, 2015) (Copy on file with the Governmental Oversight and Accountability Committee).

C. Government Sector Impact:

This bill may reduce risk exposure of the clerk of court, by providing immunity from liability for an inadvertent release of any information classified as confidential by the court. According to the clerks:

Clerks receive literally millions of pages of documents filed each year and in spite of the Rules of Judicial Administration, many of those pages contain confidential or sensitive information that has not been identified as required.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.0714, Florida Statutes.

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

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

CS by Governmental Oversight and Accountability on February 21, 2017:

CS/SB 202 differs from SB 202 in the following ways:

- Deletes the term “inadvertent” in regards to release of information made confidential by the Florida Rules of Judicial Administration if the filer failed to disclose the existence of confidential information to the clerk of the court.
- The clerk of the court is not liable for releasing information required by the Florida Rules of Judicial Administration to be identified by the filer as confidential if the filer fails to make the required identification of confidential information to the clerk of the court.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

³⁰ Clerks of the Court, *Clerks Liability for Redaction Errors* (Copy on file with the Senate Committee on Judiciary).