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Committee on Banking and Insurance

Senator Rudy Garcia, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 560.4041, F.S., DEFERRED PRESENTMENT PROVIDERS

SUMMARY

In 2001, legislation was enacted regulating “deferred presentment providers” which are businesses that charge a fee for cashing a customer’s check and agreeing to hold that check for a certain number of days prior to depositing or redeeming the check, often referred to as a “pay day loan.” The law prohibits a deferred presentment provider from entering into a deferred presentment transaction with a person who has an outstanding transaction with any other provider, or who had a previous transaction with any provider that was terminated for less than 24 hours. In order to verify such information the provider must access a database established by the Office of Financial Regulation (OFR) and all providers must enter detailed information into the database about each transaction. A public records exemption is provided by s. 560.4041, F.S., for “identifying information” contained in the database. This exemption is scheduled for repeal on October 2, 2006, subject to legislative review pursuant to the Open Government Sunset Review Act.

Committee staff recommends that the public records exemption for identifying information submitted by deferred presentment providers to the OFR database be reenacted and amended. Rather than exempting “identifying information” in the database, the law should more specifically exempt information that identifies either the person who writes the check (“drawer”) or the deferred presentment provider. This is consistent with how the exemption has been interpreted and applied by OFR.

Exempting from public disclosure information identifying an individual person is justified due to the sensitive, personal nature of the information, which would be an unwarranted invasion of privacy if disclosed. The exemption is further justified by the need to prevent identity theft against the individual and related fraud crimes. Exempting information identifying a business engaged in deferred presentment

transactions is justified because the information in the database for each transaction is proprietary business information, the disclosure of which could harm the provider’s business and could result in a competitive disadvantage if used by another provider or other money transmitter.

The law should also be amended to more clearly specify the information from the database that may be provided to deferred presentment providers, consistent with OFR’s current rules, to allow providers to access information that it has entered into the database and to obtain an eligibility determination for a particular person based on information in the database.

An alternative recommendation is to enact a single new exemption to replace the two exemptions currently provided for the quarterly reports submitted by money transmitters [s. 560.129(3), F.S.] and the identifying information submitted by deferred presentment providers to the OFR database [s. 560.4041, F.S.]. A single exemption should exempt information on financial transactions entered into by a money transmitter that is specific to, or identifies, a particular money transmitter or individual.

BACKGROUND

Public Records Law

The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a) of the State Constitution provides that:

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.

The Public Records Law¹ also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term “public records” to include:

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.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”² Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.³

Under Article I, s. 24 (c) of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is

repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”⁴

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”⁵

¹ Ch. 119, F.S.

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

³ See *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

⁴ Section 119.15(3)(b), F.S.

⁵ Section 119.15(4)(b), F.S.

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

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

The Deferred Presentment Act (Regulation of “Pay-Day Loans”)

“Deferred presentment providers,” more commonly known as “pay-day lenders,” are businesses that charge a fee for cashing a customer’s check and agreeing to hold that check for a certain number of days prior to depositing or redeeming the check. This transaction is similar to a loan. For example, a business may advance \$100 in exchange for a \$115 post-dated check, which the business will not cash or deposit for 30 days.

The Deferred Presentment Act was enacted in Florida in 2001, codified as part IV of chapter 560, F.S.⁶ This act supplemented requirements that applied to check cashing operations, generally. The law requires any person engaged in a deferred presentment transaction (a “deferred presentment provider”) to be registered with the Office of Financial Regulation and be subject to its regulation.

Every deferred presentment transaction agreement must be written and signed by both parties and executed on the same day that the currency is provided. The written agreement must contain certain information, including the date, amount of the check, length of the deferral period, date the deferred presentment transaction is due, (etc.).⁷ The law establishes \$500, plus allowable fees, as the maximum face amount of a check that may be taken for deferred presentment. The maximum fee is 10 percent of the face amount, plus a maximum \$5.00

verification fee.⁸ Upon receipt of the borrower’s (“drawer’s”) check, the deferred presentment provider must immediately provide the drawer with the amount of the check, minus the allowable fees. The provider may not actually collect the fee before the drawer’s check is presented or redeemed.

The deferred presentment agreement may not be for a term in excess of 31 days or less than 7 days. The provider is prohibited from renewing or extending any transaction (“rollover”) or from holding more than one outstanding check for any one drawer at any one time. Further, and most relevant to this open government sunset review, a provider may not enter into a deferred presentment transaction with a person who has an outstanding transaction with any *other* provider, or with a person whose previous transaction with any provider has been terminated for less than 24 hours.⁹

To verify such information, the provider must maintain its own database and access a database established by OFR. The OFR is required to establish this database of all deferred presentment transactions in the state and give providers real-time access to the database through an Internet connection. Providers must submit data on each transaction as required by OFR, including the following information:

- drawer’s name, address, and drivers’ license number;
- drawer’s social security or employment authorization alien registration number;
- drawer’s date of birth;
- amount and date of the transaction;
- date the transaction is closed; and
- check number.¹⁰

All of the information listed above is required by statute, except the drawer’s date of birth and check number.

Public Records Exemption for Database of Deferred Presentment Transactions

A separate act in 2001 created a public records exemption for “identifying information” contained in the database established by OFR for deferred present providers, as follows:

⁸ Section 560.404(5) and (6), F.S. The maximum \$5.00 verification fee is established by Rule 69V-560.801, Fla. Admin. Code, as authorized by s. 560.309(4), F.S.

⁹ Section 560.404(8), (18), and (19), F.S.

¹⁰ Section 560.404(23), F.S.

⁶ Ch. 2001-119, Laws of Fla., which created ss. 560.404-560.408, F.S., designated as Part IV of ch. 560, F.S.

⁷ Section 560.404(3), F.S.

The identifying information contained in the database for deferred presentment providers, which is authorized under s. 560.404, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that the identifying information in the database may be accessed by deferred presentment providers to verify whether any deferred presentment transactions are outstanding for a particular person and by the office for the purpose of maintaining the database.¹¹

The act further provided that the statutory exemption shall stand repealed on October 2, 2006, unless reviewed and reenacted by the Legislature, pursuant to the Open Government Sunset Review Act of 1995, in accordance with s. 119.05, F.S.

METHODOLOGY

Staff reviewed the law and committee files for the legislation that initially regulated deferred presentment transactions and that created the public records exemption under review, and other public records exemptions for reports of deferred presentment providers. Related rules were also reviewed. A questionnaire prepared jointly with the House Governmental Operations Committee was sent to OFR, whose responses provided additional information and recommendations. Staff conducted follow-up interviews with OFR representatives and other interested parties.

FINDINGS

The Office of Financial Regulation has established the database of all deferred presentment transactions in the state, as required by s. 560.4041, F.S., which is maintained by Veritec Solutions, a privately-owned contract vendor. The database provides the mechanism by which OFR and deferred presentment providers can verify whether any deferred presentment transactions are outstanding for a particular person so that the following policies, as set forth by the Legislature, may be enforced: 1) prevent the practice of “rollover” transactions,” 2) prevent simultaneous deferred presentment transactions with multiple providers by an individual drawer, and 3) prevent a new deferred presentment transaction by a drawer within 24 hours of the termination of a prior transaction.

The Open Government Sunset Review Act prescribes certain questions that must be considered by the Legislature in determining whether to reenact a public records exemption.

What specific records are affected by the exemption?

The statute specifies that “identifying information” contained in the database is confidential and exempt from public disclosure. For each transaction, deferred presentment providers must enter into the database the drawer’s name, social security or employment authorization alien registration number, address, driver’s license number, date of birth, amount of the transaction, date of transaction, date that the transaction is closed, and check number.

OFR considers all of this information “identifying information” that is exempt from public disclosure. As interpreted and applied by OFR, the exemption is not limited to information that specifically identifies an individual drawer, such as his name, address, and social security number, but also prohibits disclosure of the number and amount of transactions for a particular provider. All of the information is considered to be “identifying information” regarding a particular transaction, even if does not identify the individual drawer. However, the 2001 act creating this public records exemption contained a public necessity statement (quoted on page 5) that refers only to protecting the identity of the individual, not the business. The broader interpretation by OFR is influenced by other, related statutory public records exemptions. Another statute provides that all quarterly reports required to be submitted by deferred presentment providers and other registered money transmitters to OFR are confidential and exempt from the Public Records Law.¹² These quarterly reports contain such information as required by rule, which includes monthly totals of: 1) the number of deferred presentment transactions; 2) the face amount of all deferred presentment transactions (excluding fees); 3) fees received from all transactions; and 4) verification fees received for all transactions.¹³ The 2000 act that created this public records exemption made legislative findings that quarterly reports contain detailed business

¹² Section 560.129(3), F.S., exempts from public disclosure all quarterly reports submitted by money transmitters under s. 560.118(2)(b), F.S.

¹³ Rule 69V-560.602, Fla. Admin. Code; Form OFR-MT-1-01.

¹¹ Ch. 2001-268, Laws of Fla.; s. 560.4041, F.S.

information, proprietary matters, and market share data which, if disclosed to a third party, could harm the money transmitter and result in a competitive disadvantage if used by another money transmitter.¹⁴

Another statutory provision exempts from public disclosure trade secret information and personal financial information obtained by OFR through an examination or investigation of a deferred presentment provider or other money transmitter, which exemption continues after the investigation or examination ceases to be active.¹⁵

Since the quarterly reports containing the monthly totals of each deferred presentment provider's transactions are confidential and exempt pursuant to law, OFR believes it would be inconsistent and improper to reveal such information from the database, supporting a broad interpretation of the exemption for "identifying information" contained in the database. OFR reports that there have not been any problems protecting the disclosure of this information and that it is not readily obtainable for any other source. Although OFR has not been a party to any litigation regarding the release of information from the database, it is aware of private litigation between deferred presentment providers in 2004, in which one of the parties issued a subpoena to OFR's contract vendor, Veritec Solutions, in an attempt to require Veritec to produce information from the database. According to OFR, Veritec filed a motion to quash the subpoena based on the confidentiality of the information and other reasons. The court granted Veritec's motion to quash the subpoena.¹⁶

Whom does the exemption uniquely affect?

The exemption affects consumers who engage in deferred presentment transactions, registered deferred presentment providers, and the vendor that maintains the database (Veritec Solutions). Deferred presentment providers must register with OFR, which then notifies the vendor. The provider must then register with the vendor in order to access the database. The vendor provides a user-ID and password to the provider who may access the database by using the following website: www.fladpp.com. The provider may also

access the database by calling a toll-free number provided by the vendor.¹⁷

The statute provides that "the database may be accessed by deferred presentment providers to verify whether any deferred presentment transactions are outstanding for a particular person." As implemented by OFR and specified by rule, a deferred presentment provider has access to all information that it enters into the database, but has limited access to information submitted by other providers.¹⁸ A provider can only obtain an eligibility determination for a particular person, based on the identifying information provided by that provider. The inquiry states only that a person is eligible or ineligible for a new transaction and a general description of the reason why a person is ineligible. The person (borrower) seeking the transaction may make a direct inquiry to the vendor to request a more detailed explanation of a particular transaction that was the basis for an ineligibility determination.

What is the exemption's public purpose or goal?

The 2001 act creating this exemption contained the following statement of public necessity:

The Legislature finds that the exemption from public-records requirements which is provided in this act is a public necessity due to the need to prevent identity theft and related crimes and to prevent borrowers who may already be in financial difficulty from being put at further risk from the threat of fraud. The Legislature further finds that to make such identifying information available would be an unwarranted invasion of the privacy of the person who furnishes to a deferred presentment provider the information that the provider submits to the Department of Banking and Finance [currently, OFR] for incorporation into the database.¹⁹

The OFR recommends reenacting the exemption. The agency's primary concern with releasing information from the database is that borrowers using deferred presentment providers could be subject to identity theft and related crimes and that the legislative findings in 2001, quoted above, continue to apply. The OFR notes that the consumers who engage in these transactions are particularly vulnerable because of their financial situation.

¹⁴ Ch. 2000-293, Laws of Fla.

¹⁵ Section 560.129(1)(b), F.S.

¹⁶ *Florida Auto Loans, Inc., v. U.S.A. Cash Today*, Fifth Judicial Circuit (Marion Co., FL), Circuit Court Case No. 03-2028-CA-K.

¹⁷ See, Rule 69V-560.907, Fla. Admin. Code

¹⁸ Rule 69V-560.912, Fla. Admin. Code.

¹⁹ Sec. 2, ch. 2001-268, Laws of Fla.

In addition, OFR states that the release of information from the database would reveal trade secret information of businesses engaged in deferred presentment transactions. However, the public necessity statement from the 2001 act creating this exemption did not refer to protecting the identity of businesses. But, as noted, the 2000 act that created a public records exemption for quarterly reports submitted by all money transmitters (which includes deferred presentment providers) made legislative findings that such reports contain detailed business information, proprietary matters, and market share data which, if disclosed to a third party, could harm the money transmitter and result in a competitive disadvantage if used by another money transmitter.

Is the information otherwise readily obtainable?

No. The information on each deferred presentment transaction, made confidential and exempt pursuant to s. 560.4041, F.S., is not readily obtainable from any other source.

Is the record or meeting protected by another exemption?

Social security numbers held by state agencies are generally exempt from public disclosure pursuant to s. 119.0721, F.S. Otherwise, the information reported to the OFR database on each deferred presentment transaction is not protected by another exemption.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Quarterly reports required to be submitted by registered money transmitters (which includes deferred presentment providers) are exempt from public disclosure pursuant to s. 560.129(3), F.S. A “money transmitter” is any person located in or doing business in Florida who acts as a payment instrument seller, foreign currency exchanger, check casher, funds transmitter, or deferred presentment provider.²⁰ These quarterly reports include monthly totals of the number and face amount of all transactions and the fees received. This exemption could be merged with the exemption provided by s. 560.4041, F.S., for the identifying information submitted by deferred presentment providers on each transaction to the database. For example, a single exemption could be enacted for information on financial transactions

submitted to OFR by a money transmitter that identifies a particular money transmitter or individual.

RECOMMENDATIONS

Committee staff recommends that the public records exemption provided in s. 560.4041, F.S., for identifying information submitted by deferred presentment providers to the OFR database be reenacted and amended. Rather than exempting “identifying information” in the database, the law should more specifically exempt information that identifies either the person who writes the check (“drawer”) or the deferred presentment provider. This is consistent with how the exemption has been interpreted and applied by OFR.

Exempting from public disclosure information identifying an individual person is justified due to the sensitive, personal nature of the information, which would be an unwarranted invasion of privacy if disclosed. The exemption is further justified by the need to prevent identity theft against the individual and related fraud crimes. Exempting information identifying a business engaged in deferred presentment transactions is justified because the information in the database for each transaction is proprietary business information, the disclosure of which could harm the provider’s business and could result in a competitive disadvantage if used by another provider or other money transmitter.

The law should also be amended to more clearly specify the information from the database that may be provided to deferred presentment providers, consistent with OFR’s current rules, to allow providers to access information that it has entered into the database and to obtain an eligibility determination for a particular person based on information in the database.

An alternative recommendation is to create a single new exemption to replace the two exemptions currently provided for the quarterly reports submitted by money transmitters [s. 560.129(3), F.S.] and the identifying information submitted by deferred presentment providers to the OFR database [s. 560.4041, F.S.]. A single exemption should exempt information on financial transactions entered into by a money transmitter that is specific to or identifies a particular money transmitter or individual.

²⁰ Section 560.103(11), F.S.