

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/ SB 668

SPONSOR: Committee on Judiciary and Senator Burt

SUBJECT: Study Commission on Public Records

DATE: February 12, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	AED	_____
5.	_____	_____	AP	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates a 21-member Study Commission on Public Records. Members are to be appointed by the Governor, the Speaker of the House of Representatives, the President of the Senate, the Chief Justice of the Supreme Court, and the Florida Association of Court Clerks and Comptrollers. The Commission must address particular issues regarding official records, privacy, and public access, and must submit a report by January 1, 2003. Members are to be reimbursed for per diem and travel expenses.

The bill also revises existing law governing Internet publication of specified public records by the clerks of the court. It further imposes a moratorium on the placement of specified court records and official records on the publicly available Internet except for an index of documents. The bill provides that title insurance companies with specified arrangements with the clerks of the court are not subject to the moratorium by virtue of any existing arrangement with the clerks of the court to access such information over the Internet. The bill requires the Clerks of the Court to remove any posted records as statutorily protected under the moratorium from any publicly available Internet website upon the request of an affected person. A person may petition the circuit court for an order directing the clerks of the court compliance with this provision.

This bill creates an undesignated section of chapter law and substantially amends section 28.2221 of the Florida Statutes.

II. Present Situation:

Public Records Accessibility and Confidentiality¹

In recent years, legislative, executive and judicial branch initiatives have actively sought to maximize the benefits of advanced technologies by encouraging and promoting electronic access, electronic filing and other electronic activities as cost-savings means. In many instances, these advanced technologies have streamlined and improved governmental operations. They have also facilitated the sharing, exchange, storage, retrieval and accessibility of information and records. With the rapidly increasing ease of public accessibility to such information and records, however, there is rising concern regarding access and dissemination of such, particularly as pertains to information not otherwise confidential or publicly exempt such as personal, sensitive or other identifying information.

The advent of the Internet and other advanced information management technologies are quickly removing the traditional logistical, physical and geographical impediments to accessing information via physical, visual or audio form. The evolving technology has lifted the “veil of practical obscurity” that traditionally acted to restrain the widespread access and dissemination of information in public records. That is, until recently few persons or entities other than attorneys, researchers, media, or other commercial users had the sophistication, patience, or financial means to find or extract specific or bulk information (intrinsically valuable in its raw state or in a reformulated or aggregated form) from government records.

The pervasive and invasive power of such technology to access and disseminate information is best exemplified by the recent enactment of ch. 2000-164, L.O.F.; s. 28.2221, F.S. Within this legislative enactment dedicated to the promotion of electronic commerce, electronic filing, and electronic signatures, the Legislature required the county recorder to post an index of recorded documents in the official records on the Internet by January 1, 2002, and to provide electronic retrieval of the images of such documents by January 1, 2006. In anticipation of compliance by the statutory deadline, some clerks of the court (the public records custodian for court records) have already begun to scan and place records on the Internet resulting in a significant amount of published information, some of which is personal, sensitive or extraneous. To date, approximately 19 of the 69 county recorders (67 of these recorders are Clerks of Court, and the remaining two are responsible for recording documents) have made images of official records available on their official websites, and confidential or exempt information is not being redacted from these images.² Additionally, confidential or exempt information is not being redacted in copies of official records that are provided over the counter.

The posting on the Internet and ease of access to the public records underscored the huge repository of information that is collected and available in governmental records, particularly in judicial records and most particularly in family, dependency, delinquency and probate case files. An average user of the Internet can potentially find in those records personal and sensitive information, including but not limited to, social security numbers, addresses of minor children,

¹ Extracted from *Review of Family Courts Division and Model Family Court: Court Services and System*, Senate Interim Project Report, 2002-141, January 2002.

² Chart provided by staff of the Office of the Orange County Comptroller on January 17, 2002, by electronic transmission. Due to the large volume of official records received by the Clerks' offices, and the diversity of their content, additional time and staff would be needed to fully redact all confidential or exempt information from such records.

dates of birth, psychological evaluations, credit card numbers, financial account numbers, medical reports, academic records, and child custody and visitation schedules. The information available can also include facts or allegations embarrassing or damaging to one's personal or professional reputation or family or could reveal information threatening the personal safety of parties, relatives or witnesses. Although historically always available, never has this information been so readily and easily accessible on such a scale to the general public. The Internet and other advanced technologies such as compression technologies that allow for data mining, bulk data transfers, and compilation of data on space-saver and cheaper mediums such as CD roms have brought to light the particular vulnerability of such information to be used and manipulated in various and unexpected ways beyond the legitimate or original purposes intended or envisioned.³ The Clerks of Court's effort to comply with the statutory mandate to post images of the documents in official records has also revealed the shortcomings in the current mechanisms for maintaining information that is currently confidential and publicly exempt under the existing laws and rules, particularly that information contained in court records. The volume and the variety of ways in which information is collected or submitted to the clerks of court present logistical challenges due to limited resources and personnel. There are already over 600 statutorily created categories of publicly exempt or confidential information. This situation has raised questions of whether the current process or practices realistically allow clerks of the court to identify, flag and redact every instance of publicly exempt or confidential information, and whom should be responsible for asserting the right of publicly exempt and confidential information.

Constitutional Rights of Access to Public Records and Privacy

Despite the concern and general acknowledgment that Florida's existing policies, practices and laws governing public records and information may not be adequately protecting the rights, privileges and safety of its citizens, the underlying dilemma is that Florida has a very open public records law which affords citizens of Florida considerably more access and knowledge about governmental operations than that afforded in any other state. Section 24 of Article I of the *Florida Constitution* provides that "every person has the right to inspect or copy any public record" By the same token, Article I, section 23, of the *Florida Constitution*, provides that every natural person "has the right to be let alone and free from governmental intrusion" The provision also states that the right to privacy must not limit the public's right of access to public records and meetings as provided for in Article I, Section 24 of the Florida Constitution, "except as otherwise provided" through exemptions." In other words, the right to privacy yields to the right of access to public records. *See Board of County Commissioners of Palm Beach County v. D.B.* 784 So. 2d 585, 591 (Fla. 4th DCA 2001)⁴ Therefore, unless the Legislature

³ One of the primary areas of concerns relating to this disclosure of personal information is the crime of identity theft. Pursuant to recommendations by a Governor's Task Force on Privacy and Technology, legislation was recently enacted to provide enhanced penalties for the fraudulent use or possession of personal identification information. *See* ch. 2001-233, L.O.F.; s. 817.568, F.S. A recent statewide grand jury also recommended a controversial suggestion to exempt from disclosure all personal identifying information of citizens, including social security numbers, birth dates, driver license numbers, phone numbers, mother's maiden name, bank account numbers, and credit card numbers, unless the citizen consents to its release, a court order requires it, or a "compelling need" can be shown for its disclosure. *See* Statewide Grand Jury Report, Identity Theft in Florida, First Interim Report of the Sixteenth Statewide Grand Jury, Case No: SC 01-1095, January 10, 2002.

⁴ *See also Wallace v. Guzman*, 687 So. 2d 1351, 1354 (Fla. 3d DCA 1997)(right of privacy shall not be construed to limit public right of access to public records); *Dean Forsberg & Walter Freeman v. The Housing Authority of the City of Miami*

specifically exempts information from public disclosure in the Florida Statutes, the constitutional right to access public records supersedes the constitutional right to privacy.

Public Records

Public records include official records. Section 28.001, F.S., defines “official records” to mean “each instrument that the clerk of the circuit court is required or authorized to record in one general series called ‘Official Records’ as provided for in s. 28.222.” The purpose for recording a document is to put the public on notice about a particular matter. For example, a deed regarding real property must be recorded with the Clerk’s office for proof and authentication of the transfer of the property. Any claims of lien against a property must also be recorded. Other examples of documents that must be recorded with the Clerk’s office are: mortgages, notices of levy, tax executions, powers of attorney, judgments, military discharges, copies of bankruptcy petitions, marriage licenses, death certificates, and wills.⁵

However, public records include more than just official records. It includes all executive, legislative, and judicial branch records transmitted, created, or received pursuant to law or ordinance in the court of official government business. Chapter 119, F.S., governs agency⁶ records. Section 119.011(1), F.S., defines public records as “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.” Florida’s public records law requires that all state, county, and municipal records must be open for personal inspection and copying by any person. In order to protect, for example, certain personal information, the Florida statutes contain numerous public records

Beach & Murray Gilman, 455 So. 2d 373, 374 (Fla. 1984) (no public exemption existed for house authority records and constitutional right of privacy provides no relief because it does not apply to public records).

⁵ See also section 28.222(3), F.S., provides that documents to be recorded include instruments such as: deeds; leases; bills of sale; agreements; mortgages; notices or claims of lien; notices of levy; tax warrants; tax executions; and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments; notices of lis pendens; judgments, including certified copies of judgments, entered by any court of this state or by a United States court having jurisdiction in this state and assignments, releases, and satisfactions of the judgments; that portion of a certificate of discharge, separation, or service which indicates the character of discharge, separation, or service of any citizen of this state with respect to the military, air, or naval forces of the United States; notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens, in accordance with the laws of the United States; certified copies of petitions, with schedules omitted, commencing proceedings under the Bankruptcy Act of the United States, decrees of adjudication in the proceedings, and orders approving the bonds of trustees appointed in the proceedings; certified copies of death certificates authorized for issuance by the Department of Health which exclude the information that is confidential under s. 382.008, and certified copies of death certificates issued by another state whether or not they exclude the information described as confidential in s. 382.008.

⁶ “Agency” is defined 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.” Section 119.011(2), F.S.

exemptions that prohibit or restrict the disclosure of certain information that appears in public records.

Public records also include court records. Over a year ago, the Florida Supreme Court spearheaded a study to examine public records and privacy within the context of advanced technology and accessibility as pertains to court records. Extensive work by an ad hoc workgroup of the Judicial Management Council culminated with a report to recommend the creation of a committee to study further the issue and develop policies for achieving the benefits of electronic access but cognizant of the public's right of privacy and the need to protect the integrity and fairness of the judicial process.⁷ The final report also contained a recommendation to impose a temporary moratorium on the placement of images of trial court records on websites and unrestricted access through other electronic means.

Additionally, the Florida Association of Clerks and Comptroller also formed a Privacy and Confidentiality Task Force to examine the issues as raised by the clerks' role as custodians of official records and in the implementation of ch. 2000-164, L.O.F. The goals of the task force are to establish standards and guidelines for providing Internet access to official records and court records. The Task Force recommended placing the burden of maintaining confidentiality of specified personal information on the person or entity who submits documentation as official records or courts records.⁸ To date, the Task Force has recommended use of a universal, confidential information form to be used in the request for redaction of confidential or publicly exempt information.⁹ A number of Clerks' offices have begun to use the form formally.

The workgroup participating in the 2001 legislative interim project entitled Review of the Family Courts Division and Model Family Court also recommended further deliberative study on the public records and privacy issue. The workgroup suggested the creation of a legislatively-created

⁷ See *Privacy and Electronic Access to Court Records, Report and Recommendations*, Judicial Management Council, Florida Supreme Court, December 2001. It was also noted that the Florida Supreme Court has a broad responsibility under the Florida Constitution for the administrative supervision of all courts, including setting policies regarding court records and that the JMC should be directed to oversee development of statewide policy regarding electronic access to court records. It was also recommended that the JMC create a committee for the purpose of addressing this issue; and that the amended definitions for the terms "records of the judicial branch," "court records," and "administrative records," recommended by the Supreme Court Workgroup on Public Records to the Florida Supreme Court be adopted. See also Report of the Supreme Court Workgroup on Public Records, April 30, 2001; In re Report of the Supreme Court Workgroup on Public Records, SC01-897 (pending decision on oral argument in November, 2001, relating to proposed rules arising from workgroup recommendations). The workgroup was established to review and provide recommendations on the records issue in the judicial branch, including the definitions for court records, access, exemptions, retention, fees and copyrights as relates to those records and also within the context of public records requests. One of its recommendations included requiring public requests to be made in writing and are all under consideration by the court.

⁸ Privacy Issues White Paper, Florida Association of Court Clerks Privacy Task Force, October 2001.

⁹ The Office of the Orange County Comptroller is using a universal form resulting from a settled lawsuit against the Clerk for disclosing exempt information on the Internet. (Orange County Case No. CI 97-858). The form requires the filer to swear or affirm under oath that he or she is providing truthful information and that information requested to be redacted does indeed fall under a public records exemption provided for in statute. The filer must know the book and page number of all the recorded documents that contain the exempt information. This requires the requestor to keep coming back and making requests for redaction as he or she becomes aware of new documents recorded that contain confidential or exempt information. The Clerk's office does not independently verify whether the person is or whether the records requested to be redacted actually is exempt from disclosure by law.

commission that could develop the expertise and formulate specific recommendations as to policies, procedures and laws governing public records. Cognizant of the constitutional rights of access and privacy, and the fair administration of justice, the commission would address basic questions of why, what, how, when, and to whom information is or should be collected, stored, accessed, retrieved and disseminated. The workgroup also recommended that a moratorium be placed on the Internet publication of official and court records to afford the opportunity for the development of appropriate legislative policies.

Clerks of the Courts

Clerks of the circuit courts are constitutionally elected officers. *See* s. 16, Art. V and s. 1, Art. VIII, *Fla. Const.* They serve 4 year terms. The constitution provides for clerks of county courts if authorized by general or special law. The duties and responsibilities of the clerk of court are set forth in general law, i.e., chapter 28, F.S., as follows:

- Serves as the “recorder of all instruments that he or she is required or authorized by law to record in the county where he or she is the clerk.
- Records all instruments in one general series called “official records.”
- Keeps a register which includes the filing number of each instrument, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument and such register of official records must be made available at each office where official records are filed.
- Maintains a general alphabetical index, direct and inverse, of all instruments filed for record,
- Maintains a progress docket in which he or she must note the filing of each pleading, motion, or other paper and any step taken by him or her in connection with each action, appeal, or other proceeding before the circuit court,
- May keep a separate progress dockets for civil and criminal matters, and,
- Keeps an alphabetical index, direct and inverse, for the docket.

Nothing in the Public Records Law or the statutes governing the duties of the Clerk authorizes the Clerk to alter or destroy Official Records. However, the statute does impose a duty on the Clerk to prevent the release of confidential material that may be contained in the Official Records. This would also be applicable when the Clerk is releasing copies of the Official Records by any means, such as via the Internet. Moreover, there is nothing that precludes the Clerk from altering reproductions of the Official Records to protect confidential information.¹⁰

III. Effect of Proposed Changes:

Section 1 creates a 21-member Study Commission (the Commission) on Public Records, of whom 8 serve in an advisory non-voting capacity. The Commission is comprised of:

¹⁰ *See* AGO 97-67 (1997). In response to a question regarding the clerk’s duty to remove from official records the address of a law enforcement officer pursuant to s. 199.07(3)(i), F.S., the Attorney General opined that the Clerk must redact any confidential or exempt information from records released by the Clerk, including records released over the Internet.

- Six persons appointed by the Governor, the first three of whom are voting members--a public citizen, an attorney with expertise in public records and privacy law, and a representative from the First Amendment Foundation, a representative from the Department of Children and Family Services, a representative from the Department of Juvenile Justice, a representative from the Department of Education.
- Five persons appointed by the President of the Senate, the first three of whom are voting members --a member of the Senate interested and knowledgeable in public records, judicial records, real property, and probate issues; one attorney with expertise in family law and a representative of the real property title industry, a domestic violence advocate and a child and family advocate;
- Five persons appointed by the Speaker of the House, the first three of whom are voting members --a member of the House interested and knowledgeable in public records, judicial records, and family law issues; one attorney with expertise in real property and probate law, a representative from a financial institution or the credit industry, two representatives from local or community service providers sector;
- Four persons appointed by the Chief Justice of the Supreme Court, the first two of whom are voting members: two judges or justices interested and knowledgeable about the public records law and familiar with judicial records, and a representative from the judicial branch; and
- One person appointed by the Florida Association of Court Clerks and Comptrollers;

The Governor shall designate an attorney to serve as chair of the Commission. Commission members serve without compensation, but are entitled to reimbursement for per diem and travel expenses. The bill further designates that the Speaker of the House of Representatives and the President of the Senate must designate staff from within the Legislature to assist the Commission. The Commission must be appointed within 30 days after the effective date of the Act. A majority of the members constitute a quorum. A quorum is necessary for the purpose of voting on any action or recommendation. The first meeting must be held within 40 to 60 days after the effective date of the act. The commission must meet at least once every two months. All meetings must be held in Tallahassee except that two meeting may be held elsewhere if decided by the Commission.

The Commission has a two-fold goal, to address issues of privacy and public access as they relate to court records, and to address issues of privacy and public access as they relate to official records. The Commission is to consider a number of subissues as they address these two issues including, but not limited to, the effect of technological advances on the collection and dissemination of sensitive personal information and the expectation of privacy, the appropriate balance of the negative and positive effects of electronic access and privacy, what information is required or extraneous, what information should be made available or exempted, who should be able to access information, the appropriate balance of protecting interests of participants in the judicial process and the fairness of the judicial process, and what impediments exist to maintaining the confidential and publicly exempt status of existing and future records.

The Commission is to make recommendations concerning needed changes to current laws, procedures, and policies. The Commission must submit a final report to the Governor, the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, and the President of the Senate by January 1, 2003. The Commission is terminated on June 30, 2003.

Section 2 amends s. 28.2221, F.S., regarding electronic access to official records. Currently, this section of law states that the Legislature finds that a proper and legitimate state purpose is served in providing electronic access to official records. This section adds that a proper and legitimate state purpose is also served by preventing disclosure of records and information publicly exempt under law.

This section is also amended to limit the information contained in the index to the grantor and grantee names, party names, date, book and page number, and type of record.

This section places a moratorium on the placement of specified official records on a publicly available Internet website. The following official records may not be placed or made available via the Internet website for general public access:

- Military discharges,
- Death certificates, and
- Any court files, records and papers relating to matters or cases governed by the Florida Rules of Family Law, the Florida Rules of Juvenile procedure, and the Florida Probate Rules.

It is further clarified through an express exemption that title insurance companies or their designees who have arrangements with the clerks of the court to access the statutorily protected information over the Internet are not subject to this moratorium. The section, as amended, does not affect the existing provision imposing a January 1, 2006 deadline by which each county recorder is required to provide for electronic retrieval of images of all documents referenced in the index that are not subject to the new moratorium. In addition, the Clerks of the Court are required to remove any posted records as statutorily protected under the moratorium from any publicly available Internet website upon the request of an affected person. The bill allows any affected person to petition for a writ of mandamus in the circuit court to enforce compliance with this provision.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may protect the rights, privileges, and safety of individuals whose records are currently or would otherwise have been posted on a publicly available Internet website maintained by the clerks of the court. Personal, sensitive and other identifying information as arises within specified records will not be made publicly accessible over the publicly available Internet website which should reduce the dissemination of such information until the Legislature has time to examine the issue.

Title insurance companies, at a minimum by virtue of the express provision in the bill, and other aggregate users of court file or official records information such as Lexis-Nexus may still access such information through electronic means and secure Internet website arrangements.

It is indeterminate how many persons may avail themselves of the right to request redaction or removal of posted records from the Internet and how many persons may seek writ of mandamus to enforce compliance with the moratorium under s. 28.2221.

Removing specified official records may have some negative ramifications for those private businesses that have been accessing information contained therein through the Internet. However, the bill does not preclude paper access directly by appearing in the clerks' office or access via other electronic means for bulk downloading or data dumping as may be provided through CD Roms, dial-up subscriptions or secure Internet websites.

C. Government Sector Impact:

This proposed committee bill creates a new commission whose members receive reimbursement for per diem and travel expenses. It is estimated that the cost of this commission will not exceed \$25,000.

It is indetermine how the Clerks' Offices may be affected by the provisions of the bill. For those counties that have already posted a substantial portion of the specified records on the publicly available Internet website, the clerks of the court may result in additional workload arising from persons who request removal of specified records as statutorily protected by the moratorium. Additionally, public (i.e., noncommercial entity) inquiries that have been diverted to the Internet and requests for removal from the Internet already posted records may result in additional workload and need for additional staff in the Clerks' offices.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The express exclusion of title insurance companies from the moratorium may create an ambiguity to the application of the provision to other bulk data aggregators such that the clerks of the court may now construe the provision to prevent these other bulk data aggregators from accessing information through electronic means other than the publicly available Internet website available and accessible by the general public.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
