

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 Governmental Oversight and Accountability Committee

BILL: SB 2652

INTRODUCER: Senator Fasano

SUBJECT: Public Records

DATE: April 19, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Woodham	Burgess	BI	Favorable
2.	Naf	Wilson	GO	Pre-meeting
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 2652 makes changes to the confidentiality provisions of Part I, ch. 494, F.S., which regulates mortgage brokerage and mortgage lending. This bill creates two new exemptions from public-records law. The first exemption is for information collected by the Office of Financial Regulation (OFR) pursuant to the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) in order to ensure that the OFR treats the information in accord with the confidentiality provisions of the federal act. The second exemption is for credit reports obtained by the OFR for licensure purposes under ch. 494, F.S. The bill deletes s. 494.0021, F.S. which contains a public records exemption for “audited financial statements.” A provision for that exemption is now created within s. 494.00125, F.S.

This bill creates new public-records exemptions and therefore requires a two-thirds vote of each house of the Legislature for enactment.

This bill substantially amends the following sections of the Florida Statutes: s. 494.00125, F.S.

This bill repeals the following sections of the Florida Statutes: s. 494.0021, F.S.

II. Present Situation:

The S.A.F.E. Act

On July 30, 2008 the United States Congress passed the Federal Housing and Economic Recovery Act¹ in order to respond to the crisis in the housing market. Title V of this act is known

¹ H.R. 3221, Public Law 110-289.

as “The Secure and Fair Enforcement for Mortgage Licensing Act of 2008,” or S.A.F.E. Act. The purpose of this act is to provide greater accountability and regulation of mortgage brokers and lenders (loan originators in the act). The act creates national minimum standards for the licensure and regulation of loan originators and requires states to bring their policies and procedures into compliance. States are allowed under the S.A.F.E. Act to implement stricter regulations than are required under the act.

The S.A.F.E. Act imposes the following requirements, among others, for licensure of loan originators:

- Loan originators must undergo state licensure and annual renewal;
- They must provide fingerprints to the regulator for submission to any state or national entity authorized to conduct a criminal background check;
- Allow the regulator to obtain a credit report; and
- Requires that loan originators have never had their license revoked, nor been convicted of a felony in the seven years previous.

The National Mortgage Licensing System and Registry (“registry”)²

The registry is a national registration system created under the S.A.F.E. Act containing information on loan originators. The purpose of the registry is to:

- Create a common information pool on loan originators among federal and state regulators;
- Make public the employment history of loan originators; and
- Make public the history of disciplinary and enforcement actions against loan originators.

Confidentiality Requirements under the S.A.F.E. Act

Given the registry creates a common pool of information the federal act creates common confidentiality standards for the federal and state regulators who participate in the registry.

- Except as otherwise provided, any requirement under Federal or State Law bestowing privacy or confidentiality on any information or material provided to the registry still applies once that information or material is placed in the registry.
- This information and material may be shared with all state and federal and regulatory officials with mortgage industry oversight authority without the loss of privilege or the original confidentiality protection under federal or state law that conferred it.
- Any state law in conflict with this standard is superseded to the extent it provides less confidentiality or privilege.³

These requirements do not apply to whatever material or information is in the registry regarding a loan originator’s employment history, or the loan originator’s publicly adjudicated disciplinary and enforcement history.⁴

Public Records; Exemptions

Section 24(a), Art. I of the State Constitution states:

² H.R. 3221, Public Law 110-289, see Title V

³ H.R. 3221, Public Law 110-289, see Title V, sec. 1512(a)-(c)

⁴ H.R. 3221, Public Law 110-289, see Title V, sec. 1512(d)

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.

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions from the public records law. Any exemption must be no broader than necessary to accomplish its purpose, and any bill creating an exemption must contain a statement of public necessity justifying the exemption. A bill creating an exemption may contain multiple exemptions. However, it may not contain other substantive provisions.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides for the legislative review and repeal of any public records exemptions or any public meetings exemptions created or substantially amended in 1996 and subsequently. The law states that an exemption may be created or expanded only if 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;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or;
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.

Section 119.15(3), F.S., requires that in the 5th year after enactment of a new exemption or substantial amendment of an existing exemption, that exemption is repealed on October 2 of the 5th year, unless the Legislature renews the exemption.

III. Effect of Proposed Changes:

Section 1

Technical changes

The bill makes technical and clarifying changes to subsection (1) of s. 494.00125, F.S., which contains the public records exemption for information relative to an investigation or examination by the OFR pursuant to ch. 494, F.S. (Mortgage Brokerage and Mortgage Lending).

Subsection (1) is further amended to delete a reference to consumer complaints held by the Department of Financial Services, and instead references consumer complaints held by the Financial Services Commission (See Technical Deficiencies Section of this analysis).

The section removes the existing language in s. 494.0021, F.S., which creates a public records exemption for “all audited financial statements,” and places that language in the newly created s. 494.00125(2), F.S.

New Public Records Exemptions

This section creates the following new public records exemption related to information collected under the S.A.F.E. Act:

- Information and material placed in the registry pursuant to the requirements of other state or federal law, and not under the requirements of chapter 494, F.S., is privileged or confidential under other state or federal law, and was obtained by the Office of Financial Regulation.
- This exemption does not prevent the OFR from sharing the information and materials with those federal entities or entities of other states that possess relevant oversight, regulatory, or law enforcement authority.
- Likewise, this exemption does not extend to information or material relating to the employment history of loan originators in the registry, or publicly adjudicated disciplinary and enforcement actions against them.

This section creates the following new public records exemption:

- Credit reports obtained by the OFR for licensing purposes pursuant to ch. 494, F.S.

These exemptions are automatically repealed on October 2, 2014 in accordance with s. 119.15, F.S., unless the Legislature renews them by that time.

Section 2

Section 494.0021, F.S., is repealed. However, the substance of this provision is retained in statute under s. 494.00125(2), F.S., which this bill creates in Section 1.

Section 3

The Legislature finds it is a public necessity that information contained in the registry submitted under other state or federal law be made confidential and exempt from public-records requirements. This action “is necessary to ensure compliance with the confidentiality requirements of the S.A.F.E.. Mortgage Licensing Act of 2008 and to ensure that other state or federal laws governing confidentiality are not compromised.”

Likewise, the Legislature finds it a public necessity to make credit reports collected under the licensing provisions of chapter 494, F.S., confidential and exempt from public-records requirements. The reason given is that credit reports contain sensitive financial information, and thus their disclosure would make those persons whose information the reports contain vulnerable to identity theft and other crimes.

Section 4

This bill would become law on the same date that SB 2226 or similar legislation takes effect, provided such legislation “is enacted in the same legislative session, or an extension thereof, and becomes law.”

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

This bill creates two new public-records exemptions. This bill complies with the requirements of s. 24, Art. I of the State Constitution that laws creating new public-records exemption state with specificity the public necessity justifying the exemption, be no broader than necessary to accomplish the stated purpose of the exemption, relate to only one subject, and contain only exemptions or provisions governing enforcement.

Because this bill creates new public-records exemptions, it requires a two-thirds vote from each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

B. Private Sector Impact:**C. Government Sector Impact:**

This bill creates two new public-records exemptions. The first is an exemption for to certain information collected on loan originators under the federal S.A.F.E. Act. This exemption brings the OFR into compliance with the confidentiality standards in s. 1512, of the S.A.F.E. Act and helps shield the agency and the state from being made party to legal actions in other states or at the federal level. Fiscal outlay to ensure compliance is indeterminate.

The second new exemption covers credit reports collected by the OFR pursuant to ch. 494, F.S. The intent in creating this exemption is to prevent identity theft and similar abuses. This exemption also simplifies the OFR's processing of public records requests regarding credit reports received from loan originators applying for licensure, since the OFR will simply not release the record.

VI. Technical Deficiencies:

Lines 27-29, deleting the reference to the Department of Financial Services and replacing it with a reference to the Financial Services Commission. The portion of the statute amended in lines

27-29, already references the OFR, which is itself part of the Financial Services Commission. This change creates redundancy in the statute.

The term in line 96 of the bill, “audited financial statements” is considered out of date by the accounting profession. The preferred term is “financial audit statements.”

VII. Related Issues:

The language in lines 109-111 of the bill concerns the public-records exemption the bill creates for information entered in the S.A.F.E. registry from a federal source or another state. The language in question qualifies the particular information held exempt as that which is “privileged or confidential under other state or federal law.” This may require the OFR to determine if particular parts of the information in fact are privileged or confidential under federal or state law. If such a procedure is found required, the costs of administering this program could increase significantly.

Another issue concerns the legislative finding in the bill that exempting credit reports from public-records requirements is a public necessity. Public-records exemptions are construed narrowly under Florida law, and generally exemptions are created for information, as opposed to physical or electronic records. The language generally used in creating an exemption does so for “personal, identifying or financial” information or other language to the same effect. This bill exempts credit reports in entirety, but does not explain whether or how all the information contained in credit reports constitute “personal, financial, or identifying” information. However, it should be noted there are exceptions to the general practice of exempting information as opposed to records that exist in statute.⁵ Furthermore, there are at least two places in the Insurance Code where credit reports are specifically made exempt from disclosure.⁶ In further evaluating this exemption, the following additional factors may be noted:

- Operating within the S.A.F.E. registry, Florida will have access to credit reports collected by the federal government and by other state governments, who will both have access to credit reports that the OFR collects.
- Federal state agencies may have stronger confidentiality requirements for credit reports than Florida would typically require.
- Adoption of Senate Bill 2226, a measure before the Banking and Insurance Committee to implement the S.A.F.E. Act in Florida, would require the OFR to collect credit reports.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

⁵ Section 626.511(3), F.S.

⁶ Sections 626.521(5), F.S. and 626.842(3), F.S.

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