

**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.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: SB 1576

INTRODUCER: Senator Fasano

SUBJECT: Public Records/Credit History and Scores

DATE: March 30, 2010 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Snider	Burgess	BI	<b>Favorable</b>
2.	Naf	Wilson	GO	<b>Favorable</b>
3.			RC	
4.				
5.				
6.				

**I. Summary:**

This bill makes credit history information and credit scores held by the Office of Financial Regulation (OFR) for licensure purposes under ch. 494, F.S. pursuant to the Federal Secure and Fair Enforcement for Mortgage Licensing (S.A.F.E.) Act of 2008 confidential and exempt from public-records requirements. The bill provides for review and repeal of the newly-created public-records exemption under the Open Government Sunset Review Act. The bill provides a public necessity statement as required by the State Constitution. Because this bill creates a new public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.

The bill co-locates the public-records exemptions of Part I, ch. 494, F.S. in the same section of law by moving the existing public-records exemption for all audited financial statements submitted to the OFR pursuant to parts I-III, ch. 494, F.S. from its current location in s. 494.0021, F.S. to s. 494.00125, F.S.

The bill makes clarifying technical and organizational changes to the existing public-records exemption for information relating to an investigation or examination by the OFR pursuant to ch. 494, F.S.

This bill substantially amends the following sections of the Florida Statutes: 494.00125 and 494.0021.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.<sup>1</sup> In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24(a), of the Florida 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.

In addition to the State Constitution, the Public Records Act<sup>3</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection.<sup>4</sup> The term “public record” is broadly defined 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.<sup>5</sup>

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<sup>1</sup> Sections 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> FLA CONST. Art. I, Section 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word “agency” is defined in s. 119.011(2), F.S., 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.”

<sup>5</sup> Section 119.011(12), F.S.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>7</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>8</sup> A bill enacting an exemption<sup>9</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>10</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>11</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>12</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>13</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.<sup>14</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?

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<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>7</sup> FLA CONST. Art. I, Section 24(c).

<sup>8</sup> *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567, 569-570 (Fla. 1999).

<sup>9</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>10</sup> FLA CONST. Art. I, Section 24(c).

<sup>11</sup> Attorney General Opinion 85-62.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).

<sup>13</sup> Section 119.15, F.S.

<sup>14</sup> Section 119.15(6)(b), F.S.

- 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?<sup>15</sup>

### **Current Public-Records Exemptions for Part I, ch. 494, F.S.**

Current law makes information relative to an investigation or examination by the OFR pursuant to ch. 494 confidential and exempt from public-records requirements until the investigation or examination is completed or ceases to be active.<sup>16</sup> Except as necessary for the OFR to enforce the provisions of ch. 494, such information remains confidential and exempt after the investigation or examination is completed or ceases to be active if disclosure would:

- Jeopardize the integrity of another active investigation or examination;
- Reveal the name, address, telephone number, social security number, or any other identifying number or information of any complainant, customer, or account holder;
- Disclose the identity of a confidential source;
- Disclose investigative techniques or procedures; or
- Reveal a trade secret as defined in s. 688.002.<sup>17</sup>

The OFR may release such confidential and exempt information to any law enforcement or administrative agency, but such agencies must maintain the confidentiality of the information.<sup>18</sup>

Current law also provides that all audited financial statements submitted pursuant to Parts I-III, ch. 494, F.S. are confidential and exempt from public-records requirements.<sup>19</sup> OFR employees may access and use such information in the prosecution of violations of Parts I-III, ch. 494, F.S.<sup>20</sup>

### **Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“S.A.F.E”)**

The Housing and Economic Recovery Act of 2008<sup>21</sup> was enacted on July 30, 2008. Title V of this act is titled the “Secure and Fair Enforcement for Mortgage Licensing Act of 2008” or “S.A.F.E. Mortgage Licensing Act of 2008” (S.A.F.E.). The intent of S.A.F.E. is to provide greater accountability and regulation of loan originators (defined to include mortgage brokers and lenders) and to enhance consumer protections by:

<sup>15</sup> Section 119.15(6)(a), F.S.

<sup>16</sup> Section 494.00125(1)(a), F.S.

<sup>17</sup> Section 494.00125(1)(b), F.S.

<sup>18</sup> Section 494.00125(1)(d), F.S.

<sup>19</sup> Section 494.0021, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> Pub. L. 110-289, 122 Stat. 2654 (2008).

- Providing uniform license applications and reporting requirements for state-licensed loan originators;
- Providing increased accountability and tracking of loan originators;
- Enhancing consumer protections and supporting anti-fraud measures;
- Establishing a means by which residential mortgage loan originators would, to the greatest extent possible, be required to act in the best interests of the consumer;
- Facilitating responsible behavior in the subprime mortgage marketplace and provides comprehensive training and examination requirements related to subprime mortgage lending; and
- Facilitating the collection and disbursement of consumer complaints on behalf of state and federal mortgage regulators.<sup>22</sup>

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

The National Mortgage Licensing System and Registry (registry) is a national registration system created under the S.A.F.E. Act that maintains information on loan originators.<sup>23</sup> 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.

The act creates common confidentiality standards for the federal and state regulators who participate in the registry, which collects a common pool of information from each participant. 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 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.<sup>24</sup> These requirements do not apply to whatever material or

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<sup>22</sup> Title V, sec. 1502.

<sup>23</sup> *Id.*

<sup>24</sup> Title V, sec. 1512(a)-(c).

information is in the registry regarding a loan originator's employment history, or the loan originator's publicly adjudicated disciplinary and enforcement history.<sup>25</sup>

### **Florida's Compliance with S.A.F.E.**

In 2009, the Legislature enacted and the Governor approved legislation<sup>26</sup> bringing the state into compliance with the S.A.F.E. Mortgage Licensing Act of 2008. Commencing October 1, 2010, the OFR will begin accepting and processing loan originator license applications. This process includes a review of the applicant's credit report and credit information which may be contained within the registry. If the OFR notes specific items of concern, the applicant is notified in writing and is provided an opportunity to explain the circumstances surrounding the item, as well as to provide any information that the applicant believes is relevant.

### **III. Effect of Proposed Changes:**

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

It relocates existing language in s. 494.0021, F.S., which provides a public-records exemption for all audited financial statements, to the newly-created s. 494.00125(2), F.S.

The bill creates a new public-records exemption for credit history information and credit scores held by the OFR for licensing purposes pursuant to ch. 494, F.S. This would include, but not be limited to:

- Credit history information in credit reports.
- Credit scores.
- Correspondence seeking, providing, or clarifying credit history information.
- Records regarding credit history information.
- Information placed in the registry pursuant to the requirements of other state or federal law, and not under the requirements of ch. 494, F.S., that is privileged or confidential under other state or federal law.

The bill provides for compliance with the confidentiality requirements of the S.A.F.E. Mortgage Licensing Act of 2008 by ensuring that other state or federal laws governing confidentiality are not compromised. In addition, it provides for maintaining the confidentiality of a Florida applicant's information provided to or placed in the registry.

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.

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<sup>25</sup> Title V, sec. 1512(d).

<sup>26</sup> Chapter 2009-241, Laws of Florida.

The bill provides for future review and repeal of the public-records exemption for credit history information and credit scores pursuant to the Open Government Sunset Review Act. The exemptions automatically repeals on October 2, 2015, in accordance with s. 119.15, F.S., unless renewed by the Legislature.

The bill provides a statement of public necessity. It states that credit history information and credit scores held by the OFR and related to the licensing provisions of ch. 494, F.S. must be made confidential and exempt from public-records requirements because disclosure of that sensitive financial information could cause reputational harm to or risk identity theft of those individuals whose information was disclosed.

The bill specifies an effective date of July 1, 2010.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

###### **Vote Requirement**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for passage of a newly-created public-records or public-meetings exemption. This bill creates a new public-records exemption; thus, this bill requires a two-thirds vote for passage.

###### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly-created public-records or public-meetings exemption. This bill creates a new public-records exemption; thus, it includes a public necessity statement.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

Indeterminate. The bill could create a fiscal impact on the OFR because OFR staff would have to be trained with regard to the categories of information made confidential and exempt from public disclosure versus records that are available for public inspection and copying. The OFR could also incur costs associated with redacting confidential and exempt information prior to releasing a record.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**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.