

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB IBFA 09-03 Pub. Rec./Office of Financial Regulation [CPSC]
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee
TIED BILLS: PCB IBFA 09-01 IDEN./SIM. BILLS: SB 2652

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Orig. Comm.: Insurance, Business & Financial Affairs Policy Committee | 17 Y, 2 N | Barnum | Cooper. Rows 2-6 are numbered 1) through 5) with empty cells.

SUMMARY ANALYSIS

PCB IBFA 09-03 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:

- 1. Information collected by the Office of Financial Regulation pursuant to the federal S.A.F.E Act in order to ensure that OFR treats the information in accord with the confidentiality provisions of the federal act.
2. Credit reports obtained by 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.

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. Thus, this bill requires a two-thirds vote for passage.

The bill takes effect on the same date as PCB IBFA 09-01 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background on Florida's Public Records Laws**

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> More comprehensive legislation was adopted in 1967 with the enactment of ch. 119, F.S.

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution provides that:

Every person<sup>3</sup> 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...

The Public Records Act<sup>4</sup> specifies conditions under which access must be provided to agency<sup>5</sup> records. Unless specifically exempted, all agency records are available for public inspection. 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>6</sup>

---

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

<sup>2</sup> Article I, s. 24 of the State Constitution.

<sup>3</sup> Section 1.01(3) F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> The word "agency" is defined in s. 119.011(2), 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>6</sup> Section 119.011(12), F.S.

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge.<sup>7</sup> Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.<sup>8</sup>

Only the Legislature is authorized to create exemptions.<sup>9</sup> An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.<sup>10</sup>

The Open Government Sunset Review Act<sup>11</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of exemptions. By June 1, the Division of Statutory Revision of the Office of Legislative Services must certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Under the Public Records Act, an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are:

1. 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;
2. If 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
3. If 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 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.<sup>12</sup>

### **Current Situation:**

The Housing and Economic Recovery Act of 2008<sup>13</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 enhance consumer protections by:

- Providing uniform license applications and reporting requirements for State-licensed loan originators.
- Providing a comprehensive licensing and supervisory database.
- Aggregating and improving the flow of information to and between regulators.
- Providing increased accountability and tracking of loan originators.
- Streamlining the licensing process and reduces the regulatory burden.
- Enhancing consumer protections and supporting anti-fraud measures.

---

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

<sup>10</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

<sup>11</sup> Section 119.15, F.S.

<sup>12</sup> Section 119.15(6)(b), F.S.

<sup>13</sup> H.R. 3221, Public Law 110-289

- Providing consumers with easily accessible information, offered at no charge, regarding the employment history of, and publicly adjudicated disciplinary and enforcement actions against, loan originators.
- 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 market place and provides comprehensive training and examination requirements related to subprime mortgage lending.
- Facilitating the collection and disbursement of consumer complaints on behalf of State and Federal mortgage regulators.<sup>14</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. 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.
  - 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.
- 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.AF.E Act containing information on loan originators.<sup>15</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.

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 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>16</sup> 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.<sup>17</sup>

#### **Effect of Bill:**

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.

It moves 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.

The bill creates new public records exemptions related to information collected under the SAFE Act:

<sup>14</sup> H.R. 3221, Public Law 110-289, Title V, sec. 1502

<sup>15</sup> Id.

<sup>16</sup> H.R. 3221, Public Law 110-289, Title V, sec. 1512(a)-(c)

<sup>17</sup> H.R. 3221, Public Law 110-289, Title V, sec. 1512(d)

- 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.

It also creates the following new public records exemption:

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

The bill provides for future review and repeal of the exemptions on October 2, 2014, pursuant to the Open Government Sunset Review Act of 1995. 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.

The bill provides a statement of public necessity. It provides that 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 being 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.

#### B. SECTION DIRECTORY:

- Section 1. Amends s. 494.00125, F.S., by clarifying confidential and exempt provisions.
- Section 2. Repeals s. 494.0021, F.S.
- Section 3. Provides a statement of public necessity.
- Section 4. Provides for an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

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

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

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. Thus, this bill requires a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

At the March 27, 2009 meeting of the Insurance, Business and Financial Affairs Policy Committee four technical amendments were proposed and adopted.