

March 1, 2021



House Commerce Committee
303 House Office Building
402 S. Monroe Street
Tallahassee, FL 32399-1300

Open Government Bills before the House Commerce Committee

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I write to express the First Amendment Foundation's concerns with COM1 and COM2, which will be heard before the House Commerce Committee on Tuesday, March 2.

As noted in the staff analysis for COM1, the bill implicates First Amendment protections for businesses. By requiring social media companies to carry users' posts, even if such posts violate a company's speech policies, companies must alter the content of their speech and carry messages with which they disagree, thus violating companies' speech right. Compelling speech violates the Free Speech clause of the First Amendment, just as prohibiting free speech is a violation.

In addition, the bill prohibits social media companies from taking any action to censor a journalistic enterprise based on the content of a publication or broadcast, yet narrowly defines a journalistic enterprise as an entity that publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users. Accordingly, social media companies could censor news websites covering small municipalities, but would be forced (compelled) to carry content of larger news entities.

Finally, the measure may be preempted by federal law pursuant to the Supremacy Clause of the U.S. Constitution. Section 230 of the Communications Decency Act permits interactive service providers, including social media platforms, to filter, restrict, and remove content without liability if done in good faith and in accordance with their Terms of Service. However, COM1 imposes additional requirements on social media companies when filtering, restricting, or removing content. Because Congress has spoken on the issue and requires only good faith, the proposed requirements are likely to be preempted by Section 230. Moreover, the increased mandates on social media companies would impede the congressional objective to limit regulation of the internet.

Regulating corporations only in Florida, when those corporations are not regulated in other states and abroad, is unlikely to bring lucrative business into Florida. For these reasons, FAF opposes COM1.

While the Foundation does not oppose COM2, FAF objects to making investigation records confidential. Notably, the active criminal intelligence information and active criminal investigative information exemption only exempts such information; it does not make the information confidential. Fla. Stat. § 119.071(2)(c). Making a record "confidential and exempt" has a completely different consequence than making a record merely "exempt." Because the information is only exempt, the statute does not prohibit the release of such information, but rather gives discretion to the record custodian to act in the best interest of the public. As courts have noted, there "are many situations in which investigators have reasons for displaying information which they have the option not to display." *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991). However, COM2 makes investigative information received the Attorney General confidential, contrary to Fla. Stat. § 119.071(2)(c).

Once an investigation under this proposed legislation is complete, investigative information remains confidential and exempt if the information is exempt by another public records exemption. Accordingly, information that is only exempt by another statute could become "confidential and exempt" by this bill, further shielding public information from the public. Confidentiality eliminates the discretion of the records custodian to release such information. While this public records exemption bill is related to the Technology Transparency proposal, this measure reduces transparency of technology companies and investigations into such companies by making the records confidential and prohibiting the release of investigative records related to antitrust violations. FAF opposes making investigative information confidential.

If you have any questions, please do not hesitate to contact us.

With best regards,

FIRST AMENDMENT FOUNDATION



Pamela C. Marsh
President

cc: The Honorable Chris Sprowls, Speaker, Florida House
Jim Baltzelle, Associated Press, Chair, First Amendment Foundation
Samuel Morley, General Counsel, Florida Press Association
Lisa Nellesen Savage, Chair, Florida Society of News Editors