

April 5, 2021



Senate Governmental Oversight and Accountability Committee  
330 Knott Building  
404 S. Monroe Street  
Tallahassee, FL 32399-1100

Open Government Bills before the Senate Governmental Oversight  
and Accountability Committee

I write to express the First Amendment Foundation's concerns with Senate Bills 7072 and 7074.

SB 7072 threatens First Amendment protections for businesses in Florida. By prohibiting social media companies from temporarily or permanently banning a candidate (even when a candidate violates the social media company's policies) and restricting censorship of other users, SB 7072 will require companies to carry messages with which they disagree, thus violating companies' speech right. Based on the protections afforded by the First Amendment, the government cannot force websites to display speech they do not want to display, just as the government cannot mandate websites remove speech they do not want to take down. While it is clear the First Amendment instructs that governments shall make no law prohibiting protected speech, it is equally clear that governments may not compel speech. Further, the First Amendment applies to governments. It does **not** apply to corporations. Passing legislation that dictates how corporations may conduct their own businesses in Florida is unlikely to attract corporations to Florida.

If SB 7072 becomes law, social media companies will not be able to filter speech (even inciteful speech or hate speech) on their sites, which was one of the purposes of the federal law. Section 230 imposes liability only on the speaker, not the platform of the speech. SB 7072 undermines the purpose of Section 230 by imposing liability on social media companies and giving the speaker immunity for speech that violates a social media company's policies or terms of service.

Moreover, the restrictions on censoring candidates and other users will likely 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*. The law was intended to allow internet services providers to decide what type of content they wanted to host. However, SB 7072 imposes additional requirements on social media sites when filtering, restricting, or removing content in good faith and prohibits sites from restricting content of candidates or journalistic enterprises. Because Congress has spoken on the issue, the proposed requirements of SB

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7072 will likely be preempted by Section 230 and therefore deemed void. Expensive, unsuccessful federal litigation is the foreseeable result.

With regard to SB 7074, FAF objects to making investigative 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 under Florida Statute 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, SB 7074 makes investigative information received the Attorney General or Department of Legal Affairs confidential, contrary to Florida Statute, § 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 information from the public. Language is significant. Confidentiality eliminates the discretion of the records custodian to release such information. 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 violations of antitrust law and the Deceptive and Unfair Trade Practice Act. 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 Wilton Simpson, President, Florida Senate  
Jim Baltzelle, Associated Press, Chair, First Amendment Foundation  
Samuel Morley, General Counsel, Florida Press Association  
Lisa Nellesen Savage, Chair, Florida Society of News Editors