



# First Amendment FOUNDATION

Protecting Your Right to Know Since 1985

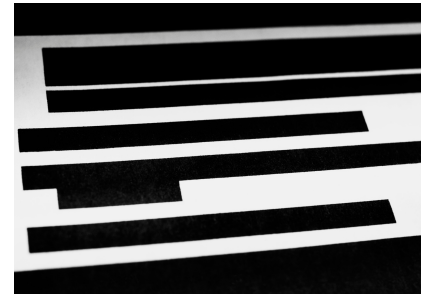
## RIGHT TO KNOW AT RISK

This week, the legislature approved **four** new exemptions and reinstated **three** exemptions due to expire under the Open Government Sunset Review Act.

This is up from just **eight** exemptions approved by the legislature during the 2020 session. As mentioned in our last weekly report, bills are flying through committees and both chambers in a year with limited public participation. The diminution of the public's right to know is especially troubling as we still grapple with the COVID-19 pandemic.

Rather than addressing ways to make information on new cases and vaccines more accessible or how government entities can comply with the Sunshine Law during pandemics or emergencies, the legislature is focused on restricting the public's right of access to government information and meetings. New exemptions would preclude oversight of the Public Service Commission and private entities regulated by state agencies.

There is one positive note this week. The House will vote on **Senate Bill 400**, Ray Rodrigues (R-Fort Myers), which prohibits an agency from filing a declaratory



### ALSO IN THIS EDITION

- Education Records
- Court Records
- Public Notice
- Social Media
- Home Address Exemptions
- Agency Records
- Trade Secrets & Proprietary Business Information
- Law Enforcement & Agency Investigative Information

action against the requestor to determine whether the record is confidential or exempt. This legislation will ensure that public records are available to every person, not just requestors with the time and resources to defend a public records lawsuit. The Senate approved **SB 400** last week. If approved by the House next week, the bill will go to the Governor to be signed into law.

## Education Records

**Senate Bill 220**, Jeff Brandes (R-St. Petersburg), was approved by the Senate Rules committee 7 to 5, along party lines. The bill exempts the names of applicants for president of a state university or college and closes meetings that would identify candidates. The names become public when the final group of applicants is considered or 21 days before a meeting to interview candidates. The bill sponsor asserted at this week's Rules hearing that the hiring process is already hidden and releasing the name 21 days before a final interview will make the search more open. But the public will not know all of the applicants – the public will only know the candidates handpicked by headhunting firms. Further, there is nothing to prevent board of trustees from releasing just one name – this practice has been seen across the country at schools conducting closed searches.

Supporters assert that privacy will incentivize more qualified applicants to apply. As FAF has noted, this point is irrelevant. Candidates do not submit an application for the job; serious contenders have provided their names and resumes to search firms for consideration. Moreover, research comparing closed and open searches indicates that there is no discernable difference between the quality of candidates selected in closed and open searches. Rather, closed searches are more likely to result in insider candidates (who would not fear retaliation) and candidates from the business sector.

**Senate Bill 1456**, Ray Rodrigues (R-Fort Myers), expands the exemption for examination and assessment instruments for tests given to assess kindergarten readiness and certify educators, in addition to other tests. The bill also creates a new exemption for examinations administered by a Florida College System or State University or the Florida Department of Education. SB 1456 was substituted for the House version, **House Bill 311**, David Silvers (D-West Palm Beach). The Senate and House both unanimously voted in favor of HB 311.

## Court Records

**Senate Bill 468**, Randolph Bracy (D-Orlando), permits courts to expunge misdemeanor convictions for possessing 20 grams or less of cannabis under certain circumstances. A person may only receive one expunction under the bill. **Senate Bill 470** makes confidential and exempts records expunged under this statute. The Senate approved both bills. Senators Jim Boyd (R-Bradenton) and George Gainer (R-Panama City) were the only no votes on the expunction bill, SB 468.

**House Bill 1229**, Jenna Persons-Mulicka (R-Fort Myers), which would be known as "Serena's Law," requires a county recorder or clerk of court to make known on a publicly available website the identity of an adult against whom an injunction for protection against domestic violence, sexual violence, or stalking is entered and the fact that a protective injunction has been entered against a respondent or defendant. The House unanimously approved the bill.

## Public Notice

**Senate Bill 402**, Ray Rodrigues (R-Fort Myers), amends the requirements for publication of legal notices in newspapers and allows internet publication of notices. The Senate Appropriations committee adopted an amendment to address the types of newspapers and websites eligible to publish notices. More specifically, newspapers must be sold or available to the public at no less than 10 publicly accessible outlets and must hold a periodicals permit from the postal service. The amendment prevents county commissions, city councils, and school boards from placing notices in infrequently read publications or in papers in different parts of the state.

## Social Media

**Senate Bill 7072**, Governmental Oversight and Accountability, regulates social media companies and authorizes the Department of Legal Affairs and Attorney General to investigate suspected violations of social media companies.



The "Technology Transparency" bill prohibits social media companies from "deplatforming" a candidate, even if the candidate violates a website's policies. Deplatforming is defined as permanently deleting or banning a user for more than 60 days. SB 7072 prevents social media companies from taking any action to censor, deplatform, or shadow ban a "journalistic enterprise," including an entity with at least 50,000 paid subscribers or 100,000 monthly active users or that operates a cable channel that provides 40 hours of content per week. Accordingly, a website would be forced to carry a larger media outlet's content, despite violating a website's terms, but could take down a smaller outlet carrying the same message. The bill is likely to be preempted by Section 230 of the Federal Communications Decency Act, which allows interactive service providers to filter and remove content in good faith. Moreover, this bill violates social media companies' First Amendment rights by forcing them to carry messages with which they disagree. The Senate Appropriations committee approved the bill 10 to 9, mostly along party lines. The Senate heard the bill on second reading and could vote on the bill next week. The House companion, **House Bill 7013**, was temporarily postponed on second reading on Tuesday.

**Senate Bill 7074**, Governmental Oversight and Accountability committee, makes confidential and exempts information received by the Attorney General, Department of Legal Affairs, and law enforcement agencies pursuant to investigations into unlawful

practices of social media companies. SB 7074 makes information both confidential and exempt, not merely exempt. Accordingly, agencies are prohibited from releasing the information. Confidentiality is counter to Florida Statute, § 119.071(2)(c), the exemption for criminal investigative information, making information merely exempt. SB 7074 was approved by the Senate Appropriations committee 11 to 9, mostly along party lines. The Senate heard the bill on second reading and could vote on SB 7074 next week. The House companion, **House Bill 7015**, was temporarily postponed on second reading on Tuesday.

## Home Address Exemptions

**Senate Bill 1488**, Kelli Stargel (R-Lakeland) exempts the home addresses and personal information of current members of the Senate and House of Representatives, and the name and places of employment of legislators' spouses and children. It has been amended and no longer exempts the information of Cabinet officers. The exemption makes it impossible for the public to know whether lawmakers live in the district they are elected to represent or whether conflicts of interests exist between officials and their spouses and adult children. The bill passed 15-2, with Senators Jeff Brandes (R-St. Petersburg) and Bobby Powell (D-West Palm Beach) voting no.

## Agency Records

**Senate Bill 1326**, Gayle Harrell (R-Stuart), exempts drivers' secure login held by the Department of Highway Safety and Motor Vehicles for using digital driver's license and identification cards, known as Florida Smart ID, and geolocation data held by DHSMV. The Senate Appropriations committee unanimously voted in favor of the bill. The House unanimously approved, **House Bill 1315**, Chip LaMarca (R-Lighthouse Point), the House companion. The Senate substituted SB 326 for the House version and unanimously approved HB 1315.

**Senate Bill 654**, Jennifer Bradley (R-Orange Park), creates an exemption for Department of Military Affairs information that is stored or transmitted on a Department of Defense Network or communications device or pertains to the Department of Defense. SB 654 was unanimously approved by the Senate Appropriations committee. The committee adopted

an amendment to exempt information held by the Department, rather than information received or maintained by the Department. On Thursday, the Senate temporarily postponed SB 654. The House State Affairs committee unanimously voted in favor of a similar amendment to House Bill 1069, Bobby Payne (R-Palatka). The House is set to vote on HB 1069 Friday.

**Senate Bill 844**, Ed Hooper (R-Palm Harbor), in part provides that clerks of court may enter access agreements to permit certain individuals to access otherwise exempt property records to conduct a title search. Hopper explained this bill is meant to cure

obstacles created by a 2019 law expanding the definition of home address. (FAF noted the problems this law would cause when introduced in 2019). SB 844 does not fully address the problem created by the overbroad definition of home address but gives certain professionals access to otherwise exempt information -- while other professionals, journalists, and the public cannot access the information. SB 844 was unanimously approved by the Senate Rules committee. The House unanimously passed the companion, **House Bill 781**, Will Robinson (R-Bradenton). The Senate substituted SB 844 for HB 781 and unanimously approved the House bill, which next goes to the governor for approval.

**Senate Bill 1704**, Doug Broxson (R-Pensacola), was unanimously approved by the Senate Rules committee. The bill exempts certain records held by a supervisor of elections that, if disclosed, would facilitate unauthorized access to data or unauthorized modification, disclosure, or destruction of information related to security of election technologies. The House unanimously passed **House Bill 1639**, Michael Grant (R-Port Charlotte). The Senate version was substituted for HB 1639; the Senate unanimously voted in favor of the bill.

The Senate Rules committee unanimously approved **Senate Bill 418**, Danny Burgess (R-Zephyrhills), which exempts the addresses and phone number of individuals seeking shelter or assistance from an agency during an emergency. SB 418 was read a second time by the Senate and substituted for **House Bill 327**, which is identical. The Senate approved **House Bill 327**, Bob Rommel (R-Naples), with Sen. Lori Berman (D-Boynton Beach) voting no.

**Senate Bill 7004**, Senate Transportation committee, exempts financial information of private entity applicants to the State Infrastructure Bank (SIB). The exemption is based on the unsupported speculation that private entities may be unwilling to apply to the SIB if information is public. However, Department of Transportation records show no applicants applied in the year following the introduction of the exemption, and there was no difference in the number of applicants in the three years before and after the exemption was enacted. The records make clear that private entities may be unwilling to apply to the SIB, but applicants' failure to apply is not due to a fear their information will become public. The exemption does not meet the constitutional justification of necessity. The bill was substituted by the House version, **HB 7037**, and approved with Senators Berman and Burgess voting no.

**Senate Bill 7050**, Senate Community Affairs, saves from repeal the exemption for unsolicited proposals received by a public entity. The Senate voted in favor of SB 7050 with Senator Berman voting no.

**House Bill 1395**, Tracie Davis (D-Jacksonville), exempts the name of certain lottery prize winners for 90 days. At the end of the 90 days, the name of winners becomes public. By releasing the name after 90 days, winners can take necessary safety precautions before



public disclosure and the public can access the names of winners and detect any suspicious patterns of lottery winnings. The House voted in favor of HB 1395, with Rep. Anthony Sabatini (R-Clermont) voting no.

**House Bill 379**, Mike Giallombardo (R-Cape Coral), exempts certain identifying information held by an economic development agency administering state or federally funded small business loan program. An agency can release the information in an aggregated and anonymized format. This exemption would preclude oversight of public loan programs. The Senate voted on the House version and adopted an amendment to align the House version with **Senate Bill 968**, George Gainer (R-Panama City). As amended, only the tax returns, credit history, credit reports, and credit scores would be exempt. Identifying information of loan recipients would be available, which is an improvement and allows public scrutiny of loan programs. The Senate voted in favor of the bill with Senator Berman voting no. Because the bill was amended, it now goes back to the House.

**Senate Bill 7078** was temporarily postponed on second reading on Thursday. **Senate Bill 7076** creates the Gaming Control Commission to regulate and investigate gaming. Senate Bill 7078 provides that exempt and confidential information received by the Commission maintains its status as exempt or confidential and exempt. In addition, SB 7078 exempts portions of meetings of the Commission during which exempt information is discussed. Closed portions of meetings must be recorded; recordings, minutes, and notes generated during the meeting remain exempt until the information is no longer exempt.



## Trade Secrets & Proprietary Business Information

**House Bill 1311**, Bobby Payne (R-Palatka), would close meetings of the Public Service Commission at which proprietary confidential business information is discussed. The public necessity statement for this bill asserts that revealing confidential business information could impair the ability of utilities regulated by the Commission to fairly compete in the marketplace. Utilities in Florida are regulated monopolies – there is no competitive marketplace. This argument is meritless. Moreover, the ability of the public to watch the work of the Commission holds the Commission to a higher and more balanced standard of accountability. It matters that the public is watching. The House approved the

bill, with five Representatives voting no. The Senate voted on the House version – only Senator Berman voted no. The bill now heads to the Governor.

**House Bill 1055**, Tommy Gregory (R-Bradenton), was unanimously approved by the Senate Rules committee. The bill initially created a uniform definition of trade secrets and required third parties submitting information to agencies to assert that the records contained trade secret information. Failure to provide notice of trade secrets waived any claim by a third party that the record contained such information. Accordingly, a private entity had the burden to show that the information was trade secret and exempt from public disclosure. The Senate Rules committee adopted an amendment removing this language. The amendment will make it easier for private entities and government agencies to claim that information is protected as trade secret. In addition, the definition of trade secret does not exclude contract terms and the amount of money paid to third party contractors, an original provision in the bill. HB 1055 bill will do nothing to keep private entities and agencies from seeking to withhold price terms and bids from public records; the bill will contribute to the misuse of the trade secret exemption.

The Senate Rules committee approved **18** Open Government Sunset Review bills that would save from repeal exemptions for trade secret information held by the Department of Health, Department of Environmental Protection, Department of Agriculture, Space Florida, county tourism promotion agencies, and other state agencies.

All 18 OGSRs were approved by the Senate, most bills received just two no votes. Only **SB 7032** (exemption for trade secrets contained in certain prescription drug purchase lists submitted to the Department of Business and Professional Regulation) and **SB 7044** (exemption for certain trade secrets held by the Department of Citrus) received four votes in opposition.

**Senate Bill 7014**, Senate Banking and Insurance committee, saves from repeal an exemption for proprietary business information contained in filings to the Office of Insurance Regulation. The Senate voted in favor of the bill, with Senator Berman voting against SB 7014.

**Senate Bill 7026**, Regulated Industries committee, exempts confidential proprietary business information provided to the Florida State Boxing Commission pursuant to an audit of the boxing promoter's business records. SB 7026 was substituted for the House version, **HB 7003**, which was unanimously approved by the Senate.

## **Law Enforcement & Agency Investigative Information**

**Senate Bill 7036**, Senate Agriculture committee, reinstates the exemption for information held by the Department of Agriculture and Consumer Services as part of a joint investigation with another state or federal agency. The Senate substituted this bill for the House version and unanimously approved the bill.

**House Bill 971** exempts and makes confidential all information received by the Department of Legal Affairs pursuant to a violation of **House Bill 969**, regulating businesses' use of consumer data. This bill makes investigative information confidential, although criminal intelligence information or criminal investigation information pursuant to Fla. Stat. § 119.071(2)(c) is only exempt – not exempt and confidential. In addition, there are already exemptions for much of the information sought to be protected, from social security numbers to investigative information received by the Department. The House unanimously approved the measure.

**Senate Bill 1048**, Aaron Bean (R-Jacksonville), exempts reinvestigation information generated during a new investigation by a conviction integrity unit within a state attorney's office. The exemption applies for two years during an active, ongoing, and good faith investigation of a claim of actual innocence and until the claim is no longer capable of further investigation. An amendment was adopted on second reading, removing the two-year language and providing that the exemption applies for a "reasonable period of time" during an active investigation and until a claim is no longer capable of further investigation. The Senate unanimously approved SB 1048 as amended.

**House Bill 1359**, Chuck Brannan III (R-Lake City), exempts and makes confidential information received by the Department of Highway Safety and Motor Vehicles pursuant to investigations of the Department, including investigations of improperly issued certificates of title. Information is exempt until an investigation ceases to be active or administrative action taken by the Department has concluded or been made part of any hearing or court proceeding. The Senate Appropriations committee unanimously proved HB 1359.