HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB COM 21-02 Public Records
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee	16 Y, 8 N	Wright	Hamon

SUMMARY ANALYSIS

A section of the Federal Communications Decency Act (Section 230) provides immunity from liability for information service providers and social media platforms that, in good faith, remove or restrict from their services information deemed "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." While this immunity has fostered the growth of certain parts of the internet, recently, there have been criticisms of the broad federal immunity provision due to actions taken or not taken regarding the censorship of users by internet platforms. Government regulators have recently investigated and initiated cases against certain platforms for antitrust activities.

PCB COM 21-01, to which this bill is linked, requires social media platforms to meet certain requirements when they restrict speech by users. If a social media platform fails to meet such requirements, the Department of Legal Affairs (DLA) may bring an action against the social media platform under the Florida Deceptive and Unfair Trade Practices Act. The bill also allows DLA to determine if a social media platform has likely committed an antitrust violation based on a case brought by a governmental entity. If such a determination is made, the social media platform is prohibited from contracting for services with public entities.

This bill, which is linked to the passage of PCB COM 21-01, provides records exemptions for information collected for DLA investigations into:

- whether a social media platform has committed an antitrust violation based on a case brought by a governmental entity, and
- whether a social media platform has failed to meet certain requirements before restricting speech by users.

Once an investigation is completed, only the following information received by DLA will remain confidential and exempt:

- All information to which another public records exemption applies,
- Personal information,
- A computer forensic report,
- Information that would otherwise reveal weaknesses in a business's data security, and
- Information that would otherwise disclose a business's proprietary information.

Per the Open Government Sunset Review Act, this exemption will be automatically repealed on October 2, 2027, unless reenacted by the Legislature.

The bill will become effective on the same date that PCB COM 21-01 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, section 24(a) of the Florida Constitution.[1] The general law must state with specificity the public necessity justifying the exemption[2] and must be no broader than necessary to accomplish its purpose.[3]

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act[4] 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 necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.[5]

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[6]

Technology Transparency

Section 230 of the federal Communications Decency Act provides that internet platforms cannot be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the internet platform considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.[7]

Recently, there have been criticisms of the broad federal immunity provisions for internet platforms that restrict the speech of their users. While this immunity has fostered the free flow of ideas on the internet, critics have argued that the immunity provisions shield publishers from liability for harmful content or political censorship.[8]

Antitrust and Internet Platforms

[1] Art. I, s. 24(c), FLA. CONST.
[2] This portion of a public record exemption is commonly referred to as a "public necessity statement."
[3] Art. I. s. 24(c), FLA. CONST.
[4] S. 119.15, F.S.
[5] S. 119.15(6)(b), F.S.
[6] S. 119.15(3), F.S.
[7] 47 U.S.C. § 230(c).
[8] Zoe Bedell and John Major, *What's Next for Section 230? A Roundup of Proposals* Lawfare, (July 29, 2020) https://www.lawfareblog.com/whats-next-section-230-roundup-proposals (last visited Feb. 25, 2021).

Critics have argued for years that internet platforms like Google, Apple, Facebook and Amazon built sprawling empires over commerce, communications and culture, and then abused their growing power. Recently, federal and state regulators have been investigating and bringing antitrust cases against them.[9] For example, the FTC and over 40 states, including Florida, have brought an action against Facebook for allegedly buying smaller rivals to maintain market dominance.[10] Also, DOJ and 11 states, including Florida, have brought an action against Google for allegedly manipulating search engine results.[11]

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency[12] procurement of personal property and services. The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,[13] creating uniform agency procurement rules,[14] implementing the online procurement program,[15] and establishing state term contracts.[16]

Certain persons and their affiliates are prohibited from contracting with public entities for services and goods, with certain exceptions, if they have been identified by DMS as violating certain restrictions and have been placed on one of the following lists:[17]

- Convicted Vendor List,
- Discriminatory Vendor List,
- Scrutinized Companies with Activities in Sudan List,
- Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, and
- Scrutinized Companies that Boycott Israel List.

PCB COM 21-01 (2021)

PCB COM 21-01, to which this bill is linked, requires social media platforms to meet certain requirements when they restrict speech by users. If a social media platform fails to meet such requirements, DLA may bring an action against the social media platform under the Florida Deceptive and Unfair Trade Practices Act.

PCB COM 21-01 also allows DLA to determine if a social media platform has likely committed an antitrust violation based on a case brought by a governmental entity. If such a determination is made, the social media platform is prohibited from contracting for services with public entities and placed on the Antitrust Violator Vendor List.

Effect of the Bill

The public records exemptions in the bill apply to DLA investigations into:

[9] David McCabe, Cecilia Kang, and Daisuke Wakabayashi, *Google's Legal Peril Grows in Face of Third Antitrust Suit*, New York Times (Dec. 17, 2020), https://www.nytimes.com/2020/12/17/technology/google-antitrust-monopoly.html (last visited Feb. 25, 2021).
[10] *Id*; *Federal Trade Commission v. Facebook, Inc*., No. 1:20-cv-03590 (D.C. Cir. 2020).
[11] McCabe, supra note 52; *United States Department of Justice v. Google LLC*, No. 1:20-cv-03010 (D.C. Cir. 2020).
[12] Section 287.012(1), F.S., defines the term "agency" as any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.
[13] *See* ss. 287.032 and 287.042, F.S.
[14] *See* ss. 287.032(2) and 287.042(3), (4), and (12), F.S.
[15] *See* s. 287.057(23), F.S.
[16] *See* ss. 287.042(2), 287.056, and 287.1345, F.S.
[17] Ss. 287.133-135, F.S.

- whether a social media platform has committed an antitrust violation based on a case brought by a governmental entity, and
- whether a social media platform has failed to meet certain requirements or improperly restricted speech by users.

The bill provides that all information received by DLA pursuant to an investigation is confidential and exempt, until such time as the investigation is completed or ceases to be active.

During an active investigation, information made confidential and exempt may be disclosed by the DLA:
- In the performance of its official duties and responsibilities; or
- To another governmental entity in performance of its official duties and responsibilities.

Once an investigation is completed or once an investigation ceases to be active, the following information received by DLA will remain confidential and exempt:
- All information to which another public records exemption applies,
- Personal information,
- A computer forensic report,
- Information that would otherwise reveal weaknesses in a business's data security, and
- Information that would otherwise disclose a business's proprietary information.

The term "proprietary information" means information that:
- Is owned or controlled by the business,
- Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations,
- Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public,
- Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by DLA, and
- Includes trade secrets and competitive interests.

The bill's provisions are subject to the Open Government Sunset Review Act and will stand repealed on October 1, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill will become effective on the same date that PCB COM 21-01 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

B. SECTION DIRECTORY:

Section 1: Creates a public records exemption for investigations related to s. 287.137, F.S.
Section 2: Creates a public records exemption for investigations related to s. 501.2041, F.S.
Section 3: Provides a public necessity statement as required by the Florida Constitution.
Section 4: Provides an effective date of the same date that PCB COM 21-01 (2021) or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a fiscal impact on agencies responsible for complying with public records requests and 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 take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article 1, section 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public records exemption for sensitive investigative materials, which does not appear to be broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES