

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 285 Pub. Rec./Recording Notification Service

SPONSOR(S): Ethics, Elections & Open Government Subcommittee, Civil Justice Subcommittee, Hunschofsky, Daniels, and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1000

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	18 Y, 0 N, As CS	Mawn	Jones
2) Ethics, Elections & Open Government Subcommittee	16 Y, 0 N, As CS	Rando	Toliver
3) Judiciary Committee		Mawn	Kramer

SUMMARY ANALYSIS

“Real property” is a piece of land and any artificial or natural property permanently attached to it. Under Florida law, a deed is generally required to transfer title to real property from one person (the “grantor”) to another (the “grantee”). No deed is effective unless it is properly recorded in the official records of the clerk of the circuit court where the property lies, and the clerks may not record a deed unless certain statutory requirements are met, including that the grantor signed the deed in the presence of a notary public and two witnesses. Recently, there has been an increase in fraudulent real property conveyances in which a fraudster executes and records a deed purporting to convey title to or an interest in real property to himself or herself or a third party without the property owner’s knowledge or consent (“title fraud”). Such fraudulent deeds may be legally void *ab initio*, meaning they never have legal effect and thus never actually convey title or any property interest away from the true owner. However, because the clerk serves a ministerial role, the clerk may not look beyond the four corners of a deed presented to determine its validity; if it appears on the deed’s face that the statutory requirements are met, the clerk must record the deed.

In 2023, the Legislature passed CS/CS/HB 1419 which, in pertinent part, required the clerks of the circuit court (and authorized the property appraisers) to create a free recording notification service on or before July 1, 2024, to provide property owners registered for the service with early notice, by electronic mail, that a land record, such as a deed, has been filed on their property. Some clerks and property appraisers also offer related services for which a person may register to receive notice of a potentially fraudulent property transfer by an alternative form of communication (“related service”).

CS/CS/HB 285 creates a public record exemption for all electronic mail addresses, telephone numbers, personal and business names, and parcel identification numbers submitted to the clerks or property appraisers by persons who register for a recording notification service or a related service. Under the bill, such information would be confidential and exempt from public inspection except upon court order, and the exemption applies to information held by the clerks or property appraisers before, on, and after the bill’s effective date.

In accordance with the Open Government Sunset Review Act, the bill specifies that the exemption shall stand repealed on October 2, 2029, unless reviewed and saved from repeal through reenactment. The bill also provides a statement of public necessity as required by the Florida Constitution.

The bill does not appear to have a fiscal impact on state government but may have an insignificant fiscal impact on local governments.

The bill provides an effective date of upon becoming a law.

Article I, s. 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 exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Real Property Fraud

Real Property Conveyances

“Real property” is a piece of land and any artificial or natural property permanently attached to it, whether above or beneath, such as a house, barn, or other structure, or sub-surface mineral.¹ Under Florida law, a deed is generally required to transfer title to (that is, an ownership interest in) real property from one person (the “grantor”) to another (the “grantee”).² Florida law recognizes several types of deeds, which convey different warranties of title, including a:

- General warranty deed, which provides full warranties to the grantee that the grantor:
 - Holds title to the property and has the right to convey it;
 - Has not contracted to sell the property to another;
 - Promises that there are no encumbrances, such as a lien, on the property, other than those encumbrances previously disclosed;
 - Assures that the grantee and his or her heirs and assigns will enjoy the property without interruption or deprivation of possession;
 - Promises to defend the grantee against anyone who later claims title to the property after its conveyance; and
 - Assures that he or she will take any necessary affirmative steps to further cure any defects and protect the buyer, even from title defects dating back to before the grantor’s ownership of the property to be conveyed.³
- Quitclaim deed, which provides no warranties as to title and conveys only that interest which the grantor has in the property, if any.⁴

The grantor of any deed must sign the instrument in the presence of and have the instrument acknowledged by a notary public or other statutorily-designated officer vested with the authority to acknowledge legal instruments.⁵ The grantor must also sign the deed in the presence of two subscribing witnesses,⁶ who in turn must sign the deed in the presence of and have their signatures proved by a notary or other officer vested with the authority to prove signatures.⁷ No acknowledgment or proof may be taken by any notary or other officer unless such person knows, or has satisfactory proof, that the person:

- Making the acknowledgment is the individual described in, and who executed, the deed; or
- Offering to make proof is one of the subscribing witnesses to the deed.⁸

Recording Real Property Conveyances

¹ Legal Information Institute, *Real Estate*, https://www.law.cornell.edu/wex/real_estate (last visited Jan. 18, 2024).

² Real property may also be transferred in probate after the owner’s death.

³ Legal Information Institute, *Deed*, <https://www.law.cornell.edu/wex/deed> (last visited Jan. 18, 2024).

⁴ *Id.*

⁵ For a full list of persons who may legalize or authenticate an instrument conveying real property, see s. 695.03(1)-(3), F.S.

⁶ A subscribing witness is a person who witnesses the grantor sign a document and signs it thereafter to indicate that he or she witnessed the grantor’s signature thereon. Legal Information Institute, *Subscribing Witness*, https://www.law.cornell.edu/wex/subscribing_witness#:~:text=A%20subscribing%20witness%20is%20a.person%20has%20witnessed%20those%20signatures (last visited Jan. 18, 2024).

⁷ Ss. 689.01(1) and 695.03(3), F.S.

⁸ S. 695.09, F.S.

No conveyance of title to or an interest in real property is effective unless it is properly recorded in the official records of the clerk of the circuit court⁹ where the property lies.¹⁰ The clerk may not generally record any such instrument unless:

- The name of each of the instrument's executors is legibly printed, typewritten, or stamped upon such instrument immediately beneath the executor's signature and such person's post office address is legibly printed, typewritten, or stamped upon such instrument;
- The name and post office address of the person who prepared the instrument are legibly printed, typewritten, or stamped upon such instrument;
- The name of each witness to the instrument is legibly printed, typewritten, or stamped upon such instrument immediately beneath his or her signature and the post office address of each such person is legibly printed, typewritten, and stamped upon such instrument;
- The name of any notary public whose signature appears on the instrument is legibly printed, typewritten, or stamped upon such instrument immediately beneath his or her signature;
- A 3-inch by 3-inch space at the top right-hand corner on the first page and a 1-inch by 3-inch space at the top right-hand corner on each subsequent page are reserved for the clerk's use; and
- In any instrument other than a mortgage conveying or purporting to convey an interest in real property, the name and post office address of each grantee in such instrument are legibly printed, typewritten, or stamped upon such instrument.¹¹

All deeds recorded in the clerk's office are deemed to have been accepted by the clerk, and officially recorded, at the time the clerk or his or her deputy affixed on the deed the official register numbers¹² required under Florida law.¹³

Fraudulent Real Property Conveyances

In recent years, there has been an increase in fraudulent real property attempted conveyances in which a fraudster executes and records a deed purporting to convey title to or an interest in real property to himself or herself¹⁴ or a third party¹⁵ without the property owner's knowledge or consent ("title fraud").¹⁶ Such fraudulent deeds may be legally void *ab initio*, meaning they never have legal effect and thus never actually convey title or any property interest away from the true owner.¹⁷ However, because the clerk serves a ministerial¹⁸ role, the clerk and his or her employees may not look beyond the four corners of a deed presented for recording to determine its validity.¹⁹ Thus, if it appears on the deed's face that the above-mentioned statutory requirements are met, the clerk must record the deed. Upon recording, the deed appears valid, and others may purchase the property from the fraudster or the third party named as grantee in the deed in the belief that such person owns and has the right to sell the property.

⁹ The State Constitution mandates that there be an elected clerk of the circuit court ("clerk") in each of Florida's 67 counties to perform specified functions, including official records recorder. Art. V., s. 16 and art. VIII, s. 1, Fla. Const.

¹⁰ S. 695.01, F.S.

¹¹ These requirements do not apply to documents executed, acknowledged, or proved out of state. S. 695.26, F.S.

¹² The "register numbers" are the filing numbers assigned to and affixed on each instrument filed for record, which numbers the clerk must enter in a register available at each office where official records may be filed. S. 28.222, F.S.

¹³ Ss. 28.222 and 695.11, F.S.

¹⁴ See Mike DeForest, *Florida Man Accused of Using Fake Deeds to Take Ownership of Two Homes*, Click Orlando (Sept. 12, 2022), <https://www.clickorlando.com/news/investigators/2022/09/12/florida-man-used-fake-deeds-to-take-ownership-of-2-homes-court-records-claim-heres-how/> (last visited Jan. 18, 2024).

¹⁵ See Mike DeForest, *'Be Aware:' Identity Thief Uses Fraudulent Deed to Take Orange County Man's Property*, Click Orlando (May 16, 2022), <https://www.clickorlando.com/news/investigators/2022/05/16/be-aware-identity-thief-uses-fraudulent-deed-to-take-orange-county-mans-property/> (last visited Jan. 18, 2024).

¹⁶ Joseph M. Bialek, *Florida Focus: Protect Yourself from Identity Thieves Using Fraudulent Deeds*, Law Alert (Nov. 9, 2022), <https://www.porterwright.com/media/florida-focus-protect-yourself-from-identity-thieves-using-fraudulent-deeds/> (last visited Jan. 18, 2024).

¹⁷ Legal Information Institute, *Ab Initio*, https://www.law.cornell.edu/wex/ab_initio (last visited Jan. 18, 2024).

¹⁸ "Ministerial" means taking actions in a prescribed manner in obedience to the mandate of legal authority, without the exercise of the person's own judgment or discretion as to the propriety of the actions taken. S. 112.312(17), F.S.

¹⁹ See s. 28.222, F.S. (providing that the clerk of the circuit court "shall record the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law: (a) Deeds..."); art. V, s. 16, Fla. Const.

To assist property owners in uncovering title fraud, many clerks throughout the state began offering a free recording notification service that alerts a property owner who registers for the service whenever an instrument purporting to convey title to the owner's real property, such as a deed, is recorded in the county's official records.²⁰ This service does not prevent the recording of the deed, but rather puts the true property owner on notice that he or she may need to contact an attorney or law enforcement to report the fraud and take steps necessary to undo the fraudulent conveyance. However, before July 1, 2023, the service was not mandated by or standardized in Florida law.

2023 CS/CS/HB 1419

In 2023, the Legislature passed CS/CS/HB 1419 to address real property fraud in the State.²¹ The bill, in pertinent part, created s. 28.47, F.S., to require the clerks of the circuit court to, on or before July 1, 2024, create, maintain, and operate a free recording notification service, open to all persons wishing to register for the service, to provide property owners with early notice that a land record has been filed on their property. Under the provisions of the bill, a registrant provides a valid electronic mail address to the clerk along with the name and/or property address he or she wishes to monitor; the clerk then notifies the registrant by electronic mail when a land record is filed pertaining to the registrant's monitored name or property.

The bill specified that registration for the recording notification service must be made possible through an electronic registration portal, which portal must:

- Be accessible through a direct link on the home page of the clerk's official public website;
- Allow a registrant to subscribe to receive recording notifications for at least five monitored identities per valid electronic mail address provided;
- Include a method by which a registrant may unsubscribe from the service;
- List a phone number at which the clerk's office may be reached for questions related to the service during normal business hours; and
- Send an automated electronic mail message to a registrant confirming his or her successful registration for or action to unsubscribe from the service, which message must identify each monitored identity for which a subscription was received or canceled.

Further, the bill required that, when a land record is recorded for a monitored identity, a recording notification must be sent within 24 hours of the recording to each registrant who is subscribed to receive recording notifications for that monitored identity. Such notification must contain:

- Information identifying the monitored identity for which the land record was filed;
- The land record's recording date;
- The official records book and page number or instrument number assigned to the land record by the clerk;
- Instructions for electronically searching for and viewing the land record using the assigned official record book and page number or instrument number; and
- A phone number at which the clerk's office may be contacted during normal business hours with questions related to the recording notification.

²⁰ See, *example*, Clerk of the Court & Comptroller, Lee County, Florida, *Property Fraud Alert*, <https://www.leeclerk.org/services/property-fraud> (last visited Jan. 18, 2024).

²¹ Ch. 2023-238, L.O.F.

Finally, the bill provided that:

- There is no right or cause of action against, and no civil liability on the part of, the clerk with respect to the creation, maintenance, or operation of a recording notification service.
- Nothing in s. 28.47, F.S., may be construed to require the clerk to provide or allow access to a record or information which is confidential and exempt²² from s. 119.071, F.S., and s. 24(a), Art. I of the State Constitution or to otherwise violate Florida's public record laws.
- S. 28.47, F.S., applies to county property appraisers that have adopted an electronic land record notification service before the bill's effective date, but where a land record is recorded for a monitored identity, notice through the property appraiser's service must be sent within 24 hours of the instrument being reflected on the county tax roll by the property appraiser.

Some clerks and property appraisers have also begun offering related services for which a person may register to receive notification of a potentially fraudulent property transfer by an alternative form of communication ("related service").²³

Public Records

The Florida Constitution sets forth the state's public policy regarding access to government records, guaranteeing every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.²⁴ The Legislature, however, may provide by general law an exemption²⁵ from public record requirements, provided that the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.²⁶

Current law also addresses the public policy regarding access to government records, guaranteeing every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.²⁷ Furthermore, the Open Government Sunset Review Act²⁸ provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and 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."²⁹ An identifiable public purpose is served 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;
- Protects 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; or
- Protects trade or business secrets.³⁰

²² There is a difference between records the Legislature designates *exempt* from public record requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); *State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Op. Att'y Gen. Fla. 04-09 (2004).

²³ For example, the Broward County Property Appraiser's Owner Alert Program offers a text message alert for a person who registers for the Program if a change of ownership occurs on a property monitored by such person. Broward County Property Appraiser, *Terms and Conditions*, <https://web.bcpa.net/owneralert/TermsConditions> (last visited Jan. 18, 2024).

²⁴ Art. I, s. 24(a), Fla. Const.

²⁵ A public record exemption means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the Florida Constitution. See s. 119.011(8), F.S.

²⁶ Art. I, s. 24(c), Fla. Const.

²⁷ See s. 119.01, F.S.

²⁸ S. 119.15, F.S.

²⁹ S. 119.15(6)(b), F.S.

³⁰ *Id.*

Pursuant to the Open Government Sunset Review Act, a new public record exemption or substantial amendment of an existing public record exemption is repealed on October 2nd of the fifth year following enactment, unless the Legislature reenacts the exemption.³¹

Effect of Proposed Changes

CS/CS/HB 285 creates a public record exemption for all electronic mail addresses, telephone numbers, personal and business names, and parcel identification numbers submitted to the clerks or property appraisers by persons who register for a recording notification service or a related service. Under the bill, such information would be confidential and exempt from public inspection except upon court order, and the exemption applies to information held by the clerks or property appraisers before, on, and after the bill's effective date.

In accordance with the Open Government Sunset Review Act, the bill specifies that the exemption is repealed on October 2, 2029, unless reviewed and saved from repeal through reenactment. The bill also:

- Provides a statement of public necessity as required by the Florida Constitution.
- Directs the Division of Law Revision to replace the phrase "the effective date of this act" wherever it occurs in the bill with the date the bill becomes law.
- Clarifies that s. 28.47, F.S., may not be construed to require the property appraiser to provide or allow access to a record or information which is confidential and exempt under s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.

The bill provides an effective date of upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Amends s. 28.47, F.S., relating to recording notification service.

Section 2: Directs the Division of Law Revision to take specified action.

Section 3: Provides a statement of public necessity.

Section 4: Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an insignificant negative fiscal impact on clerks of the circuit court and property appraisers as staff responsible for complying with public record requests may require training relating to the newly-created public record exemption. However, any additional costs will likely be absorbed within existing resources.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

³¹ S. 119.15(3), F.S.
STORAGE NAME: h0285d.JDC
DATE: 1/19/2024

The bill may have a positive fiscal impact on the private sector to the extent that it prevents a third party from:

- Obtaining specified information submitted by a person who registers for a recording notification service or a related service and using it for fraudulent purposes, which purposes, or the legal remedies that follow, may have a financial component.
- Targeting for a fraudulent property transfer the real property of persons whose property is not being monitored through a recording notification service or a related service.

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 action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or 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 exemption. The bill creates 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 exemption. The bill creates a public record exemption; thus, it includes a public necessity statement. The public necessity statement states, in part, that the Legislature finds that it is a public necessity to protect persons who register for a recording notification service to receive notifications of real property transfers, and persons whose personal or business names or parcel identification numbers are submitted for monitoring by such persons, from becoming victims of fraud by virtue of their registration status.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created or expanded public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for specific information related to persons who register for a recording notification service: electronic mail addresses, telephone numbers, personal or business names, and parcel identification numbers. As such, the exemption does not appear broader than necessary to accomplish its purpose.

Retroactivity

The bill specifies that the public record exemption created therein applies to information held by the clerks or property appraisers before the bill's effective date; thus, it would likely have retroactive application. However, Florida courts recognize that persons do not obtain a vested right to inspect or copy public records by virtue of the Public Records Act or the Florida Constitution; rather, the courts have found that such right is a public right which the Legislature may terminate by retroactive application of a statutory exemption.³²

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On December 6, 2023, the Civil Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment modified the types of information made confidential and exempt from the public records of this state and expanded the scope of the exemption to reach information submitted to the clerks or property appraisers by a person who registers for a service related to a recording notification service.

On January 18, 2024, the Ethics, Elections & Open Government Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment made a conforming change to the public necessity statement to match the language of the exemption.

This analysis is drafted to the committee substitute as approved by the Ethics, Elections & Open Government Subcommittee.

³² *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002).