

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1491 Pub. Rec./Investigations by the Department of Legal Affairs

**SPONSOR(S):** Regulatory Reform & Economic Development Subcommittee, Tramont

**TIED BILLS:** HB 3 **IDEN./SIM. BILLS:** SB 1794

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	13 Y, 0 N, As CS	Wright	Anstead
2) State Affairs Committee			

### SUMMARY ANALYSIS

Internet usage and mobile technology have become mainstream, especially among teens and young adults, which has expanded the creation and dissemination of pornography. The majority of Americans, including minors, are exposed to pornography online regularly, and 56 percent of American high school students have viewed pornography in the last year.

Adolescents who view pornography tend to report feeling insecure about their ability to perform sexually or the way they look, display more aggression, and view women as sex objects.

HB 3, to which this bill is linked, requires a commercial entity that knowingly and intentionally publishes or distributes a substantial portion of material harmful to minors on a website or application to:

- Prohibit access to such material by any person younger than 18 years of age, and
- Use reasonable age verification methods to verify that the age of a person attempting to access the material is 18 years of age or older.

The Department of Legal Affairs (DLA), upon belief that any commercial entity is in violation of HB 3's provisions, may bring an action under the Florida Unfair or Deceptive Trade Practices Act. A private cause of action is permitted in certain limited circumstances.

This bill provides that all information received by DLA pursuant to a notification or investigation by DLA or a law enforcement agency of a violation is confidential and exempt from public record requirements. The bill provides that the information may be released by DLA during an active investigation only:

- In the furtherance of its official duties and responsibilities;
- For print, publication, or broadcast to notify the public of a data breach; or
- To another governmental entity in the furtherance of the receiving entity's official duties and responsibilities.

Once an investigation is completed, the following information remains 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 data security; and
- Information that would otherwise disclose proprietary information.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature.

**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 or public meeting 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:

#### Present Situation

##### Public Records

Article I, s. 24(a) of the State 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.<sup>1</sup> The Legislature, however, may provide by general law for the exemption of records from these requirements provided the exemption passes by 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.<sup>2</sup>

Public policy regarding access to government records is also addressed by statute. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.<sup>3</sup> Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose that is sufficiently compelling to override the strong public policy of open government and that cannot be accomplished without the exemption.<sup>5</sup> An identifiable public purpose is served if the exemption meets one of the following purposes:

- 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.<sup>6</sup>

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>7</sup>

##### Effects of Harmful Content on Children

Internet usage and mobile technology has become mainstream, especially among teens and young adults.<sup>8</sup> The majority of Americans come across pornography online and roughly half will seek it out.<sup>9</sup> Twenty-seven percent of young adults first view pornography before the onset of puberty,<sup>10</sup> 70 percent

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> Art. I, s. 24(c), Fla. Const.

<sup>3</sup> 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 Art. I, s. 24 of the State Constitution. *See* s. 119.011(8), F.S.

<sup>4</sup> S. 119.15, F.S.

<sup>5</sup> S. 119.15(6)(b), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> S. 119.15(3), F.S.

<sup>8</sup> Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19(1-2) SEXUAL ADDICTION & COMPULSIVITY 99, 99-100 (2012); *See also* PEW RESEARCH CENTER, *Teens, Social Media & Technology Overview 2015: Smartphones Facilitate Shifts in Communication Landscape for Teens*, <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> (last visited Jan. 7, 2024).

<sup>9</sup> Josh McDowell Ministry, *THE PORN PHENOMENON: THE IMPACT OF PORNOGRAPHY IN THE DIGITAL AGE* (2016), research summary available at <https://www.barna.com/research/porn-in-the-digital-age-new-research-reveals-10-trends/> (last visited Jan. 7, 2024).

<sup>10</sup> *Id.*

of teens accidentally stumble upon pornography online,<sup>11</sup> and teens may have experienced an increase in unwanted exposure to pornographic content online.<sup>12</sup> A sample of American high school students in 2021 found that 56 percent viewed pornography in the prior year.<sup>13</sup>

Research suggests that adolescents who view pornography tend to have more sexually permissive attitudes, have more sexual partners in their lifetime, and are more likely to engage in certain sexual acts.<sup>14</sup> Similarly, adolescents who viewed pornography tended to display more aggression, have more traditional gender role attitudes, and view women as sex objects.<sup>15</sup>

Adolescents who view pornography report feeling insecure about their ability to perform sexually or how they look, and tend to decrease their pornography use as their self-confidence increases or they develop positive relationships with friends and family.<sup>16</sup>

To attempt to reduce such effects on kids, Utah, Arkansas, Louisiana, and Ohio recently enacted laws to require commercial entities that have a substantial amount of material harmful to minors on their website to verify user age and prohibit access to minors under 18.<sup>17</sup>

### Department of Legal Affairs

The Office of the Attorney General, also known as the Department of Legal Affairs (DLA), provides a wide variety of legal services, including defending the state in civil litigation cases, representing the people of Florida in criminal appeals in state and federal courts, protecting rights of children, consumers, and victims through its various protection programs, and investigating and litigating against businesses that seek to limit competition and defraud taxpayers.<sup>18</sup>

### HB 3

HB 3, to which this bill is linked, requires commercial entities that knowingly and intentionally publishes or distributes a substantial portion of material harmful to minors on a website or application to:

- Prohibit access to such material by any person younger than 18 years of age, and
- Use reasonable age verification methods to verify that the age of a person attempting to access the material is 18 years of age or older.

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<sup>11</sup> KAISER FAMILY FOUNDATION, *Generation Rx.com: How Young People Use the Internet for Health Information*, December 2001, at 12, available at <https://kaiserfamilyfoundation.files.wordpress.com/2001/11/3202-genrx-report.pdf>.

<sup>12</sup> Kimberly J. Mitchell et al., *Trends in Youth Reports of Sexual Solicitations, Harassment and Unwanted Exposure to Pornography on the Internet*, 40 JOURNAL OF ADOLESCENT HEALTH 116, 124 (2007), available at: <http://unh.edu/ccrc/pdf/CV135.pdf> (last visited Jan. 7, 2023).

<sup>13</sup> Amanda Giordano, *What to Know About Adolescent Pornography Exposure*, Psychology Today, Feb. 27, 2022, <https://www.psychologytoday.com/us/blog/understanding-addiction/202202/what-know-about-adolescent-pornography-exposure> (last visited Jan. 7, 2024).

<sup>14</sup> Debra K. Braun-Corville & Mary Rojas, *Exposure to Sexually Explicit Web Sites and Adolescent Sexual Attitudes and Behaviors*, 45(2) J ADOLESCENT HEALTH 153, 156-162 (2009). See also Jane D. Brown & Kelly L. L'Engles, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 36 COMM. RSCH. 129-151 (2009). Contra Marie-Therese Luder et al., *Associations between Online Pornography and Sexual Behavior among Adolescents: Myth or Reality?*, 40(5) ARCHIVES OF SEXUAL BEHAVIOR 1027-1035 (2011) (finding that pornography use had no association with early sexual imitation or risky sexual behaviors).

<sup>15</sup> Eileen M. Alexy et al., *Pornography as a Risk Marker for an Aggressive Pattern of Behavior among Sexually Reactive Children and Adolescents*, 14(6) J AM. PSYCHIATRIC NURSES ASS'N 442, 450 (2009). See also Elisabet Haggstrom-Nordin et al., *Experiences of and Attitudes towards Pornography among a Group of Swedish High School Students*, 14 EURO. J CONTRACEPTION AND REPRODUCTIVE HEALTHCARE 277, 277-284 (2009).

<sup>16</sup> Lotta Lofgren-Martenson & Sven-Axel Mason, *Lust, Love, and Life: A Qualitative Study of Swedish Adolescents' Perceptions and Experiences with Pornography* 47 J SEX RSCH. 568, 575 (2010).

<sup>17</sup> Ch. 498, Laws of Utah 2023; Act No. 441, 2023 La. Acts; 2023 Ark. Acts 689; Ohio House Bill 33 - 135th General Assembly.

<sup>18</sup> OPPAGA, Office of the Attorney General (Department of Legal Affairs), <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=1026> (last visited Mar. 31, 2023).

The Department of Legal Affairs (DLA), upon belief that any commercial entity is in violation of HB 3's provisions, may bring an action under the Florida Unfair or Deceptive Trade Practices Act. A private cause of action is permitted in certain limited circumstances.

### Effect of Proposed Changes

The bill creates a public record exemption for all information received by DLA pursuant to a notification or investigation by DLA or a law enforcement agency of a violation of certain statutory requirements. Such information is made confidential and exempt<sup>19</sup> from public record requirements.

During an active investigation, information made confidential and exempt may be disclosed by DLA:

- In the furtherance of its official duties and responsibilities;
- For print, publication, or broadcast if DLA determines that such release would assist in notifying the public or locating or identifying a person that DLA believes to be a victim of a data breach or improper use or disposal of customer records, except that information made confidential and exempt after an investigation may not be released in this manner; or
- To another governmental entity in the furtherance of the receiving entity's official duties and responsibilities.

Once an investigation is completed or once an investigation ceases to be active, the following information received by DLA remains 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 an commercial entity's data security; and
- Information that would otherwise disclose an commercial entity's proprietary information.

The bill defines the term "proprietary information" to mean information that:

- Is owned or controlled by the commercial entity;
- Is intended to be private and is treated by the commercial entity as private because disclosure would harm the commercial entity or its business operations;
- Has not been disclosed except as required by law or through 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 provides a public necessity statement as required by article I, s. 24(c) of the Florida Constitution. The public necessity statement provides that, if released, information received by DLA pursuant to an investigation by DLA or a law enforcement agency could:

- Frustrate or thwart the investigation and impair the ability of DLA to perform assigned functions;
- Undo a specific statutory exemption protecting the information;
- Be used for the purpose of identity theft;
- Result in the identification of vulnerabilities; and
- Result in economic harm.

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<sup>19</sup> There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems 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); *City of Rivera 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. (1985).

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2029, unless the Legislature reviews and reenacts the exemption by that date.

The bill will become effective on the same date that HB 3 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 record exemption for investigations related to s. 501.1737, F.S.
- Section 2:** Provides a public necessity statement as required by the Florida Constitution.
- Section 3:** Provides an effective date of the same date that HB 3 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:  
See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

- 1. Revenues:  
None.
- 2. Expenditures:  
None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill may have a minimal fiscal impact on DLA because agency staff responsible for complying with public records requests may require training related to the creation of the public record exemption. DLA could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed by existing resources, as they are part of the day-to-day responsibilities of agencies.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

- 1. Applicability of Municipality/County Mandates Provision:  
Not applicable. The bill does not appear to affect county or municipal governments.
- 2. Other:

### Vote Requirement

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

### Public Necessity Statement

Article I, s. 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 creates a public record exemption; thus, it includes a public necessity statement. The public necessity statement provides that, if released, information received by DLA pursuant to an investigation could frustrate or thwart the investigation and impair the ability of DLA to perform assigned functions, undo a specific statutory exemption protecting the information, be used for the purpose of identity theft, result in the identification of vulnerabilities, and result in economic harm.

### Breadth of Exemption

Article I, s. 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 record exemption for sensitive investigative materials and personal information, 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**

On January 11, 2024, the Regulatory Reform & Economic Development Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute replaces “online platform” with “commercial entity” throughout the bill, to conform with the linked bill, HB 3.

This analysis is drafted to the committee substitute as passed by the Regulatory Reform & Economic Development Subcommittee.