

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 7036

INTRODUCER: Infrastructure and Security Committee

SUBJECT: OGSR/Payment of Toll on Toll Facilities/Identifying Information

DATE: March 5, 2019

REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION                                |
|----|---------|----------------|-----------|---------------------------------------|
|    | Price   | Miller         |           | <b>IS Submitted as Committee Bill</b> |
| 1. | Hackett | McVane         | GO        | <b>Pre-meeting</b>                    |
| 2. |         |                | RC        |                                       |

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**I. Summary:**

SB 7036 amends s. 388.155, F.S., to save from repeal the exemption from public inspection and copying for personal identifying information held by the Department of Transportation, a county, a municipality, or an expressway authority for the purpose of paying, prepaying, or collecting tolls and associated administrative charges due for the use of toll facilities. The bill removes the scheduled repeal date, resulting in the continuation of the exemption.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2019.

**II. Present Situation:**

**Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(a).

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that:

[i]t is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.<sup>9</sup> The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>10</sup> A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.<sup>11</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>12</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.

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<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” to mean “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>12</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>13</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (“OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>14</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>15</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>16</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>17</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>18</sup> or
- It protects trade or business secrets.<sup>19</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>20</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote

<sup>13</sup> *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

<sup>14</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> Section 119.15(6)(b), F.S.

<sup>17</sup> Section 119.15(6)(b)1., F.S.

<sup>18</sup> Section 119.15(6)(b)2., F.S.

<sup>19</sup> Section 119.15(6)(b)3., F.S.

<sup>20</sup> Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>21</sup> FLA. CONST. art. I, s. 24(c).

for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>22</sup>

### **Payment of Tolls**

Subject to limited exemptions, current law prohibits persons from using any toll facility without payment.<sup>23</sup> The Department of Transportation (FDOT) is authorized to adopt rules relating to the payment, collection, and enforcement of tolls, including, but not limited to, rules for the implementation of video or other image billing and variable pricing.<sup>24</sup> FDOT has implemented two programs for electronic toll collection, SunPass and Toll-By-Plate.

SunPass<sup>25</sup> is a prepaid electronic system of toll collection that utilizes a prepaid account system and electronic devices called transponders that attach to the inside of a vehicle's windshield. When a vehicle equipped with SunPass goes through a tolling location, the transponder sends a signal and the toll is deducted from the customer's prepaid account. SunPass customers typically fund prepaid accounts using credit cards, debit cards, and checks. SunPass account information includes the license plate number, address, and credit card information.<sup>26</sup>

The Toll-By-Plate program<sup>27</sup> is an image-based system of toll collection. Toll-By-Plate takes a photo of a license plate as a vehicle travels through a tolling location, and the system mails a monthly bill for the tolls, including an administrative charge, to the registered owner of the vehicle. Accounts may be set up as pre-paid or post-paid.<sup>28</sup> Accounts may require name, address, email, driver's license number, day time phone number, and credit and debit card numbers.<sup>29</sup>

SunPass is accepted on all Florida toll roads, including Florida express lanes and most bridges. Travelers may also use the system to pay tolls to certain Florida expressway authorities,<sup>30</sup>

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<sup>22</sup> Section 119.15(7), F.S.

<sup>23</sup> Section 338.155(1), F.S. The exemptions generally include toll employees on official state business, state military personnel on official military business, persons exempted by the authorizing resolution for bonds issued to finance the facility, a law enforcement officer operating an official vehicle while on official law enforcement business, a person operating a fire vehicle or a rescue vehicle while on official business, a person participating in the funeral procession of a law enforcement officer killed in the line of duty, and a person with a disability.

<sup>24</sup> *Id.*

<sup>25</sup> See Rule 14-15.0081, F.A.C., for information relating to FDOT's Toll Facilities Description and Toll Rate Schedule.

<sup>26</sup> SunPass, *Open A Private Account*, available at

<https://www.sunpass.com/en/signup/tsignupacknowledge.shtml?acttype=private>. (Last visited December 19, 2018).

<sup>27</sup> See Rule 14-100.005, F.A.C., for additional program information.

<sup>28</sup> *Id.*

<sup>29</sup> For additional information, see Florida's Turnpike Traveler Info, *All Electronic Tolling FAQ, TOLL-BY-PLATE*, available at <http://www.floridasturnpike.com/travelerInfo.html>. (Last visited December 19, 2018).

<sup>30</sup> For example, users of toll facilities of the Central Florida Expressway Authority (CFX) may pay for use of tolls of the FDOT, and vice versa, with either the CFX's E-Pass or the FDOT's SunPass. See Central Florida Expressway Authority, *Differences Between E-Pass & SunPass*, available at: <https://www.cfxway.com/faqs/e-pass-vs-sunpass/>. (Last visited December 18, 2018).

counties, or municipalities,<sup>31</sup> and to use toll facilities in Georgia and North Carolina.<sup>32</sup> Similarly, expressway authorities, counties, and municipalities may collect tolls through the FDOT's Toll-By-Plate system and, in limited cases, local entities may simply collect tolls through their own collection systems.<sup>33</sup>

Regardless of the collection method, customers must provide the required personal identifying information (such as name, address, debit/credit card numbers, checking account numbers, driver license numbers, license plate numbers, etc.) to set up toll payment accounts.

**Open Government Sunset Review of the Public Records Exemption for Personal Identifying Information of Users of Toll Facilities Held by the FDOT, a County, a Municipality, or an Expressway Authority**

Originally enacted in 1996,<sup>34</sup> the subject exemption was most recently amended in 2014<sup>35</sup> to apply the exemption to the specified personal identifying information held by a municipality, in addition to the FDOT, a county, or an expressway authority, for the purpose of paying, prepaying, or collecting tolls and associated administrative charges due for the use of toll facilities. In revising the exemption, the Legislature found that exempting personal identifying information about individuals held by the FDOT, a county, a municipality, or an expressway authority<sup>36</sup> for the identified purpose is a public necessity.

The Legislature further found that the exemption:

- Puts individuals who pay for tolls by Toll-By-Plate, which is video billed, on equal footing with individuals who pay for tolls by check, debit card, or credit card, or who pay cash at the toll booth.
- Protects the health and safety of the public by making exempt information regarding the locations, travel patterns, and travel activity of individuals as they use the toll road system.
- Protects the anonymity of all travelers on toll roads, not just cash customers, regardless of the method of payment of tolls.
- Promotes the use of the electronic toll collection system, a more efficient and effective government collection system for tolls, because paying for tolls, regardless of the implemented collection methods, saves individuals time when passing through toll facilities, compared to individuals who pay for tolls with cash, but costs much less to administer.
- Protects the privacy of individuals and promotes their right to be let alone from unreasonable government intrusion by prohibiting the public disclosure of private information about the finances and location of the individual using the toll road system.

<sup>31</sup> For example, users of the Broad Causeway in the Town of Bay Harbor Islands pay the tolls through the SunPass System. See Miami Herald, *Bay Harbor Islands toll booths going electronic*, May 20, 2013, available at: <https://www.miamiherald.com/news/local/community/article1951693.html>. (Last visited December 28, 2018).

<sup>32</sup> Additional information on SunPass is available at: <https://www.sunpass.com/en/about/program.shtml>. (Last visited December 18, 2018.) See also SunSentinel, *SunPass now good in both Georgia, N.C.*, November 12, 2014, available at: <http://www.sun-sentinel.com/local/broward/fl-sunpass-georgia-20141112-story.html>. (Last visited December 18, 2018).

<sup>33</sup> For both SunPass and Toll-By-Plate systems, the FDOT often performs “back-office” toll collection for other owners of Florida toll facilities through interoperability agreements authorized by s. 338.161(5), F.S.

<sup>34</sup> Ch. 96-178, Laws of Fla.

<sup>35</sup> Ch. 2014-217, Laws of Fla.

<sup>36</sup> Before, on, or after the effective date of the amended exemption.

Section 338.155(6), F.S., is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

Based upon a review of this public records exemption under the Open Government Sunset Review Act, as well as discussions with and recommendations of the FDOT and various counties, municipalities, and expressway authorities, the professional staff of the Senate Infrastructure and Security Committee recommends that the Legislature retain the public records exemption established in s. 338.155(6), F.S.

### **III. Effect of Proposed Changes:**

The bill is based on an Open Government Sunset Review of a public records exemption for personal identifying information held by the FDOT, a county, a municipality, or an expressway authority for the purpose of paying, prepaying, or collecting tolls and associated administrative charges due for the use of toll facilities.

The bill amends s. 338.155(6), F.S., to continue the current public records exemption created in 2014. Records containing the specified personal identifying information will continue to be exempt from public disclosure.

By removing the scheduled repeal of the exemption, the exemption is no longer subject to review under the Open Government Sunset Review Act.

The bill takes effect October 1, 2019.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds, nor does it reduce the authority of counties or municipalities to raise revenue.

#### **B. Public Records/Open Meetings Issues:**

##### ***Vote Requirement***

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

##### ***Public Necessity Statement***

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity

justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

***Breadth of Exemption***

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect personal identifying information related to the payment of tolls for the use of roads. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost associated with an agency making redactions in response to a public records request.

C. Government Sector Impact:

Governmental agencies will continue to incur costs related to the redaction of records in responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 338.155 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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