

vehicles, their officers, employees, or contractors, fourteen exceptions to the general prohibition follow.² States may adopt the permissible exceptions or may enact more restrictive measures than the DPPA requires. However, states may not allow more permissive access to motor vehicle records than the DPPA allows. The DPPA authorizes the Attorney General to impose civil fines against states found in to be in noncompliance and, additionally, allows civil suits against states by individuals for violations.

The bill reenacts the public records exemption in s. 119.0712(2), F.S., relating to personal information contained in a motor vehicle record. This exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2009, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill also amends s. 119.0712(2), F.S. by removing the codification of the federal law and clarifies that personal information, including highly restricted personal information, contained in a motor vehicle record is confidential pursuant to the DPPA by cross-referencing the federal law and its protections. The bill maintains the public record exemption for emergency contact information. The bill also maintains prohibition against the use of information received pursuant to the DPPA for the mass commercial solicitation of clients for litigation against motor vehicle dealers.

This bill does not expand the scope of the existing public-records exemption and therefore does not require a two-thirds vote by each house of the Legislature.

This bill amends and reenacts s. 119.0712(2) of the Florida Statutes.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.³ In 1992, Floridians adopted an amendment, article I, section 24, to the State Constitution that raised the statutory right of access to public records to a constitutional level.

The Public Records Act⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁵ records are available for public inspection. Section 119.011(12), F.S., defines *public record* very broadly to include “all documents, . . . tapes, photographs, films, sound recordings, . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are

² Section 2721(b)(1)-(14).

³ Sections 1390, 1391, F.S. (Rev. 1892).

⁴ Chapter 119, F.S.

⁵ Section 119.011(2), F.S., defines *agency* as “any state, county, . . . or municipal officer, department, . . . or other separate unit of government created or established by law . . . and any other public or private agency, person, . . . acting on behalf of any public agency.”

“intended to perpetuate, communicate, or formalize knowledge.”⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption.⁸ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁹ A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act¹¹ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹² An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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.¹³ An exemption meets the statutory criteria if it:

- 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 information of a sensitive personal nature concerning individuals, the release of which ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.¹⁴

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁵

Motor Vehicle Records

The DHSMV holds motor vehicle records containing personal information about drivers and motor vehicle owners. “Motor vehicle record” is defined as “. . . any record that pertains to a

⁶ *Shevin v. Byron, Harless, Shaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁸ Art. 1, § 24(c), Fla. Const.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(b), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S.

motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by the Department of Highway Safety and Motor Vehicles.”

Currently, all drivers' licenses issued by the DHSMV must bear a full-face photograph or digital image of the licensee. Specifically, s. 322.142, F.S., authorizes the DHSMV, upon receipt of the required fee, to issue to each qualified applicant for an original driver's license a color photographic or digitally imaged driver's license bearing a full-face photograph or digital image of the applicant. The requirement of a full-face photograph or digital image of the driver license cardholder may not be waived, regardless of the provisions of ch. 761, F.S.

Section 322.142(4), F.S., provides that the DHSMV may maintain a film negative or print file. The DHSMV is required to maintain a record of the digital image and signature of the licensees, together with other data required by the DHSMV for identification and retrieval. Reproductions from the file or digital record are exempt from the provisions of s. 119.07(1), F.S. In addition, this section specifies that digitized driver's license photographs (images) are available for DHSMV administrative purposes; for the issuance of duplicate licenses; in response to law enforcement agency requests; to the Department of State pursuant to an interagency agreement to facilitate determinations of eligibility of voter registration applicants and registered voters; to the Department of Revenue pursuant to an interagency agreement for use in establishing paternity and establishing, modifying, or enforcing support obligations in Title IV-D cases; to the Department of Children and Family Services pursuant to an interagency agreement to conduct protective investigations; or to the Department of Financial Services pursuant to an interagency agreement to facilitate the location of owners of unclaimed property, the validation of unclaimed property claims, and the identification of fraudulent or false claims.

Section 322.125, F.S., provides that reports received or made by the Medical Advisory Board (Board) or its members for the purpose of assisting the DHSMV in determining whether a person is qualified to be licensed are for the confidential use of the Board or the DHSMV and may not be divulged to any person except the licensed driver or applicant or used as evidence in any trial, and are exempt from the provisions of s. 119.07(1), F.S., except that the reports may be admitted in proceedings under s. 322.271 or s. 322.31, F.S.

Section 322.126, F.S., authorizes a physician, person, or agency having knowledge of any licensed driver or applicant's mental or physical disability to drive or need to obtain or to wear a medical identification bracelet to report such knowledge in writing. The DHSMV, assisted by the Medical Advisory Board, must define mental or physical disabilities affecting the ability of a person to safely operator a motor vehicle and develop and keep current coded restrictions to be placed upon drivers' licenses of persons who are required to wear medical identification bracelets when operating a motor vehicle. The section further provides that the reports authorized by this section are confidential and exempt from the provisions of s. 119.07(1), F.S., and must be used solely for the purpose of determining the qualifications of any person to operate a motor vehicle on the highways of this state. In addition, no report forwarded under the provisions of this section shall be used as evidence in any civil or criminal trial or in any court proceeding.

The DHSMV allows an individual who holds a current Florida driver license or identification card to provide emergency contact information. According to the DHSMV's website, this information may save crucial time if ever it becomes necessary to contact family members or

other loved ones. Section 119.0712(2), F.S., provides that personal information, which includes emergency contact information, is confidential and exempt. Emergency contact information may be released only to law enforcement agencies for purposes of contacting those listed in the event of an emergency.

Drivers Privacy Protection Act

Congress enacted the DPPA as part of the Violent Crime Control and Law Enforcement Act of 1994. Section 2721 of the DPPA provides:

- a) In General – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.
- b) Permissible Uses – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of the Automobile Information Disclosure Act, the Motor Vehicle Information and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, and the Clean Air Act, and may be disclosed as follows

The DPPA further requires states to comply with its provisions by 1997. Florida came into compliance with DPPA (1994) in 1997, when ch. 97-185, L.O.F., became law; however, in 1999, Congress changed a provision in the DPPA from an “opt out” alternative to an “opt in” alternative. Under DPPA (1999), states may not imply consent from a driver’s failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver’s affirmative consent to disclose the driver’s personal information. Florida did not amend the state’s public records laws to conform to DPPA (1999) until May 13, 2004. During the period 2000-2004, Florida continued to disclose driver and motor vehicle information as required by its public records law rather than federal law.

In 2000, Congress changed a provision in the DPPA to limit the circumstances under which states may disclose “highly restricted personal information.” The DPPA (2000) defines “highly restrictive personal information” to mean an individual’s photograph or image, social security number, or medical or disability information. Correspondence received by the DHSMV from the U.S. Department of Justice had questioned Florida’s compliance and “. . . strongly urge[d] Florida to conform its public laws to ensure there is no question that it is in full compliance with this important provision.” Florida amended the state’s public records laws to conform to the DPPA (2000) during the 2007 Legislative Session.

Any state department of motor vehicles determined to be in substantial noncompliance with the DPPA is subject to a civil penalty of up to \$5,000 per day. In addition, the DPPA provides for a criminal fine and civil remedy against any person who knowingly violates the DPPA. Persons injured by the unauthorized disclosure of their motor vehicle records may bring a civil action in a United States District Court, which has, in fact, led to a lawsuit (see *Collier, et al. v. Dickinson, et al.* explained in more detail below).

Exemption for Personal Information in Motor Vehicle Records

Under s. 24, Art. I of the State Constitution and s. 119.071(1)(a), F.S., the DHSMV is required to make all motor vehicle records available to the public unless the Legislature has enacted an exemption to protect the record. Section 119.0712(2), F.S., makes confidential and exempt personal information contained in a motor vehicle record that identifies an individual of that record. "Personal information" is defined by the section to include, but not be limited to, an individual's ". . . social security number, driver identification number or identification card number, name, address, telephone number, medical or disability information, and emergency contact information, but does not include information on vehicular crashes, driving violations, and driver status."

There are numerous exceptions in s. 119.0712(2), F.S., to the exemption for motor vehicle records that require disclosure. Personal information is available for the following purposes:

1. For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles and dealers by motor vehicle manufacturers; and removal of nonowner records from the original owner records of motor vehicle manufacturers, to carry out the purposes of Titles I and IV of the Anti-Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. ss. 1231 et seq.), the Clean Air Act (42 U.S.C. ss. 7401 et seq.), and chapters 301, 305, and 321-331 of Title 49, United States Code.
2. For use by any government agency, including any court of law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a federal, state, or local agency in carrying out its functions.
3. For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts, and dealers; motor vehicle market research activities, including survey research; and removal of nonowner records from the original owner records of motor vehicle manufacturers.
4. For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only:
 - a. To verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
 - b. If such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.
5. For use in connection with any civil, criminal, administrative, or arbitral proceeding in any court or agency or before any self-regulatory body for:

- a. Service of process by any certified process server, special process server, or other person authorized to serve process in this state.
 - b. Investigation in anticipation of litigation by an attorney licensed to practice law in this state or the agent of the attorney; however, the information may not be used for mass commercial solicitation of clients for litigation against motor vehicle dealers.
 - c. Investigation by any person in connection with any filed proceeding; however, the information may not be used for mass commercial solicitation of clients for litigation against motor vehicle dealers.
 - d. Execution or enforcement of judgments and orders.
 - e. Compliance with an order of any court.
6. For use in research activities and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
 7. For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, anti fraud activities, rating, or underwriting.
 8. For use in providing notice to the owners of towed or impounded vehicles.
 9. For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection. Personal information obtained based on an exempt driver's record may not be provided to a client who cannot demonstrate a need based on a police report, court order, or a business or personal relationship with the subject of the investigation.
 10. For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under 49 U.S.C. ss. 31301 et seq.
 11. For use in connection with the operation of private toll transportation facilities.
 12. For bulk distribution for surveys, marketing, or solicitations when the department has obtained the express consent of the person to whom such personal information pertains.
 13. For any use if the requesting person demonstrates that he or she has obtained the written consent of the person who is the subject of the motor vehicle record.
 14. For any other use specifically authorized by state law, if such use is related to the operation of a motor vehicle or public safety.
 15. For any other uses if the person to whom the information pertains has given express consent in a format prescribed by DHSMV. Such consent shall remain in effect until it is revoked by the person on a form prescribed by DHSMV.

In 2007, the public records exemption was further amended to create a two-tiered system for the release of personal information within motor vehicle records by placing additional restrictions on the availability and use of social security numbers, photographs and images, medical disability information, and emergency contact information.

Currently, the motor vehicle public records exemption is scheduled for repeal in October 2009, and is required to be reviewed by the Legislature under the provisions of the Open Government Sunset Review Act. Because of the amendments creating a two-tiered system mentioned in the paragraph above, the exemption will again be subject to the Open Government Sunset Review Act and repealed October 2, 2012, unless it is reviewed and reenacted by the Legislature.

In the public necessity statement creating the exemption, the Legislature found the exemption was necessary to protect personal information in motor vehicle records because such information, "if readily available for public inspection and copying, could be used to invade the personal privacy of the persons named in the records or it could be used for other purposes, such as solicitation, harassment, stalking, and intimidation. Limiting access to the state's motor vehicle records will protect the privacy of persons who are listed in those records and minimize the opportunity for invading that privacy." In addition, the exemption is necessary to conform state law to federal law (DPPA), which prohibits disclosure of such information of a sensitive, personal nature, with specified exceptions. The DPPA substantially limits the liability of states for disclosures of information pursuant to state policy or practice. Only the U.S. Attorney General is authorized to enforce the DPPA against a state for information releases pursuant to state policy or practice. The only relief for enforcement of the DPPA permitted by statute is a fine of up to \$5,000 a day for "substantial noncompliance." In addition, the DPPA also authorizes actions against individual state officials and permits damages, including liquidated damages of "not less than" \$2,500 for each wrongful disclosure.

Collier, et al. v. Dickinson, et al. Case No. 04-21351-DV-JEM (S.D. Fla.) On June 7, 2004, a potential class action lawsuit was filed against present and former employees of the DHSMV as defendants and alleged damages to the potential class due to the continued disclosure of personal information maintained by the DHSMV and obtained from motor vehicle and driver license records in violation of 18 U.S.C. ss. 2721-2725 (DPPA). The DPPA was effective June 1, 2000. Florida law allowed the disclosure of this information from June 1, 2000 until September 30, 2004 when s. 119.0712(2), F.S., was amended to mirror the DPPA. The above legal action led to the change in Florida law. The initial complaint demanded approximately \$39 billion in damages or \$2,500 per release of information.

The above-mentioned lawsuit resulted in three separate mediation sessions. The mediated agreement reached on June 5, 2008, provides that all motor vehicle registrants who are class members (all natural persons who had a valid driver license, identification card or motor vehicle registration) will receive a \$1 credit on the renewal of their motor vehicle registration during the period of July 1, 2009, through June 30, 2010. The total amount of the credit will be approximately \$10.4 million. There will also be equitable relief, which includes change in the procedures of the DHSMV regarding disclosure of personal information. Additionally, the DHSMV will maintain a website informing the public of their rights under the DPPA. The Division of Risk Management will pay each of the four named plaintiffs \$3,000, plaintiffs'

attorney fees in the amount of \$2.85 million, and costs of publication totaling approximately \$20,000.00. This agreement was accepted by the Florida Cabinet on August 12, 2008; however, the \$1 credit for the settlement class is contingent upon approval and appropriation by the Legislature.

In addition to the above-mentioned lawsuit, the U.S. Department of Justice has filed an action to assess civil penalties in the amount of \$2,535,000 against the State of Florida, pursuant to 18 U.S.C. s. 2723(b), for violations of the DPPA.

III. Effect of Proposed Changes:

The bill reenacts the public records exemption in s. 119.0712(2), F.S., relating to personal information contained in a motor vehicle record. The bill also amends s. 119.0712(2), F.S. by removing the codification of the federal law and clarifies that personal information, including highly restricted personal information, contained in a motor vehicle record is confidential pursuant to the DPPA by cross-referencing the federal law and its protections. The bill maintains the public record exemption for emergency contact information. The bill also maintains prohibition against the use of information received pursuant to the DPPA for the mass commercial solicitation of clients for litigation against motor vehicle dealers.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains an existing public records exemption. This bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public records exemptions in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Governmental Oversight and Accountability on April 7, 2009:

The committee substitute removes provisions that are duplicative of the federal prohibition on the release and use of personal information contained in state motor vehicle records under the federal Driver's Privacy Protection Act of 1994. It also references the federal law as controlling with respect to the confidentiality and release of such records and makes editorial and conforming changes.

B. Amendments:

None.