

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.)

Prepared By: The Professional Staff of the Committee on Infrastructure and Security

BILL: SPB 7094

INTRODUCER: Infrastructure and Security Committee

SUBJECT: Highway Safety and Motor Vehicles

DATE: April 3, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Proctor	Miller		IS Submitted as Comm. Bill/Fav

I. Summary:

SPB 7094 is a bill relating the Department of Highway Safety and Motor Vehicles (DHSMV), which contains public record exemptions for:

- Personal information, including highly restricted personal information, contained in any record that pertains to a vessel title or vessel registration issued by the DHSMV;
- Verified e-mail addresses and cellular telephone numbers collected by the DHSMV; and
- Information received by the DHSMV as a result of an investigation or examination, until the investigation or examination ceases to be active or administrative action taken by the DHSMV has concluded or been made part of any hearing or court proceeding.

SPB 7094 is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2024, unless reviewed and reenacted by the Legislature. The bill contains a public necessity statement as required by the Florida Constitution. Because this bill creates a new public records exemption, a two-thirds vote of the members present and voting in each house of the Legislature is required for passage.

SB 7094 takes effect on the same date that SPB 7090 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

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.¹ 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.²

¹ FLA. CONST., art. I, s. 24(a).

² 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.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

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.⁹ 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.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature.

³ 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.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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.”

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

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

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *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.

¹² 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.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵ 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.¹⁶ 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;¹⁷
- 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;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ 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.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote

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

¹⁴ 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ 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?

²¹ 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.²²

III. Effect of Proposed Changes:

Public records exemptions for certain information received by the DHSMV in the following areas:

Subpoena and Investigative Authority

Present Situation

The DHSMV has jurisdiction over multiple chapters of Florida Statutes, for which they do not have subpoena authority, without which they are often unable to obtain documents and testimony from third-party entities (banks, tow companies, etc.) to conduct administrative or criminal investigations.

Effect of Proposed Changes

SPB 7090 creates s. 322.71, F.S., and amends ss. 319.25 and 320.861, F.S., authorizing DHSMV to exercise the power of subpoena and to administer oaths or affirmations, examine witnesses, require affidavits, take depositions, and compel the attendance of witnesses and the production of books, papers, documents, records, and other evidence. The subpoena is to be used for investigations or examinations conducted by DHSMV of suspected violations of Chapters 319, 320, or 322, F.S., and may be served by an authorized representative of DHSMV.

SPB 7094 creates a confidential and exempt standard for information received by the department as a result of an investigation or examination conducted pursuant to ss. 319.1414, 319.25, and 320.861, F.S. and Chapter 322, F.S.

SPB 7094 requires that such information may be disclosed when the investigation or examination ceases to be active or administrative action taken by the DHSMV has concluded or been made part of any hearing or court proceeding. The DHSMV may release information that is made confidential and exempt in furtherance of its official duties and responsibilities or, if released to another governmental agency, in the furtherance of that agency's official duties and responsibilities.

Enhanced Customer Notification

Present Situation

The DHSMV lacks statutory authority to collect and use cellular telephone numbers as a method to communicate with customers in an expedited manner. Florida Statutes already allows for the collection of email addresses and the use of email, in lieu of USPS, to provide motor vehicle

²² Section 119.15(7), F.S.

registration renewal notices. However, current law does not allow the e-mail to be used for other business purposes.^{23 24 25 26 27}

Effect of Proposed Changes

SPB 7090 amends ss. 319.40, 320.95(2), 322.08, 328.30, and 328.80, F.S., authorizing DHSMV to collect and use e-mail addresses and cellular telephone numbers to contact customers for business reasons other than vehicle registration, vessel registration, and driver license renewal notices. The DHSMV advised some of the business reasons for which a customer's email and cellular telephone number may be used would be: allowing customers to subscribe to services such as receiving email alerts and text messages when it's time to renew their driver license or motor vehicle registrations, or to notify them when adverse action has been taken against their license due to failing to maintain insurance, failing to pay child support, or for accumulating too many points. It could also be used to communicate online order statuses and as part of a multi-factor authentication process to verify a user's identity.²⁸

SPB 7094 creates a confidential and exempt standard for e-mail addresses and cellular telephone numbers collected by the DHSMV pursuant to chapters 319, 320, 322, 324, or chapter 328, F.S. In order to communicate more effectively with motorists through enhancements in information technology the DHSMV seeks to increase communications with motorists through e-mail and text messaging. If the e-mail addresses or cellular telephone numbers of motorists are made available to the public, the DHSMV believes the impact on motorist privacy and risk of unsolicited commercial solicitation by e-mail or text message would have an undesirable chilling effect on motorists' voluntary use of electronic portals to communicate with the DHSMV, thereby undermining the effective use of enhancements in information technology.

SPB 7094 requires that such information may be disclosed to a tax collector if, by interagency agreement, the DHSMV authorizes the tax collector to send electronic communications to such e-mail addresses or cellular telephone numbers for the purpose of providing information about the issuance of titles, registrations, disabled parking permits, driver licenses, and identification cards; renewal notices; or the tax collector's office locations, hours of operation, contact information, driving skills testing locations, appointment scheduling information, or website information.

This exemption applies to e-mail addresses and cellular telephone numbers held before, on, or after the effective date of this exemption.

²³ Section 319.40, F.S.

²⁴ Section 320.95, F.S.

²⁵ Section 322.08(10), F.S.

²⁶ Section 328.30, F.S.

²⁷ Section 328.80, F.S.

²⁸ Email from Kevin Jacobs, Deputy Legislative Affairs Director, Department of Highway Safety and Motor Vehicles, DHSMV Package - Fiscal, (March 21, 2019).

Administration of vessel registration and titling laws; records

Present Situation

The DHSMV has the authority to protect personal information contained in a motor vehicle record under the federal Driver's Privacy Protection Act of 1994 and s. 119.0712(2), F.S., and an entity that is allowed to receive motor vehicle record information may not use it for mass commercial solicitation of clients for litigation against motor vehicle dealers. No such protection for personal information contained in a vessel title or registration exists.

Effect of Proposed Changes

SPB 7090 amends s. 328.40, F.S., to allow the DHSMV to protect personal information contained in a vessel registration and title, subject to inspection and copying, as provided in chapter 119.

SPB 7094 creates a confidential and exempt standard for personal information, including highly restricted personal information, contained in any record that pertains to a vessel title or vessel registration issued by the DHSMV.

SPB 7094 requires that such information may be disclosed in the same manner provided for a motor vehicle record pursuant to the federal Driver's Privacy Protection Act of 1994, 18 U.S.C. ss. 2721 et seq.:

- 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 titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321–331 of title 49.
- For use by any government agency, including any court or 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.
- 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 non-owner records from the original owner records of motor vehicle manufacturers.
- For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—
 - to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
 - 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.
- For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or

enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

- 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.
- 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, antifraud activities, rating or underwriting.
- For use in providing notice to the owners of towed or impounded vehicles.
- For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.
- 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 chapter 313 of title 49.
- For use in connection with the operation of private toll transportation facilities.
- For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.
- For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.
- For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.
- For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

This exemption applies to vessel records held before, on, or after the effective date of this exemption.

Effective Date

SPB 7094 takes effect on the same date that SPB 7090 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

SPB 7094 is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

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. Statutes Affected:

The bill substantially amends sections 119.0712, 319.1414, 319.25, 320.861, and 322.71 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:

SPB by Infrastructure and Security on April 2, 2019:

- The SPB was amended to incorporate the linked bill number of SB 7090.
- The SPB was amended to change the phrase “verified texting” number to “cellular telephone” number.