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 Community Affairs Committee

BILL:	SPB 7044
INTRODUCER:	For consideration by the Community Affairs Committee
SUBJECT:	Paratransit Services- Open Government Sunset Review
DATE:	February 5, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Molloy	Yeatman		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The proposed committee bill reenacts and expands the public records exemption for personal identifying information of an applicant for or recipient of paratransit services. The exemption is expanded for information identifying an applicant for or a recipient of paratransit services to include all agencies.

This bill substantially amends s. 119.011 of the Florida Statutes.

II. Present Situation:

Florida Public Records Law - Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, the electors of Florida approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level. Section 24(a), Art. I of the State Constitution provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created there under; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law[1] specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

Section 119.011(11), F.S., defines the term "public record" to include:

> 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.

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 "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions to open government requirements.[5] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[6] A bill enacting an exemption[7] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[8]

There is a difference between records that the Legislature makes exempt from public inspection and those that are made confidential and exempt from public inspection. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such record may not be released by an agency to anyone other than to the persons or entities designated in the statute.[9] If a record is not made confidential but is simply exempt from

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[1] Chapter 119, F.S.

[2] "Agency" is defined in s. 119.011(2), F.S., 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." The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

[3] *Shevin v. Byron, Harless, Shaffer, Reid, and Assocs., Inc*., 379 So. 2d 633, 640 (Fla. 1980).

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

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).

[7] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

[8] Art. I, s. 24(c) of the State Constitution.

[9] Attorney General Opinion 85-62.

mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[10]

Open Government Sunset Review Act[11] **-** The Open Government Sunset Review Act establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, expanded or maintained only if: (1) it serves an identifiable public purpose; and (2) if it is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three statutory purposes 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. The three statutory purposes are if the exemption

- "[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption."

- "[p]rotects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals."

- "[p]rotects 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 information would injure the affected entity in the marketplace."[12]

Section 119.15(6)(a), F.S., requires, as part of the review process, the Legislature must consider the following:

- 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?

[10] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[11] Section 119.15, F.S.
[12] Section 119.15(6)(b), F.S.

- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.[13] The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes it explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act chapter is guilty of a noncriminal infraction, punishable by a fine not to exceed $500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Any person who willfully and knowingly violates the provisions of s. 119.105, F.S., relating to the release of exempt and confidential information contained in police reports, commits a third degree felony, punishable by potential imprisonment not to exceed five years, or a fine of not more than $5,000, or both.

Health Insurance Portability and Accountability Act of 1996 – "HIPAA" and the Privacy Rule[14] - The Privacy Rule (rule) adopted by the U.S. Department of Health and Human Services (HHS) was required by the HIPAA[15] to address the use and disclosure of personal health information. The requirements of the rule apply to individual and group health plans that provide or pay the cost of medical care, every health care provider that electronically transmits health information in connection with certain transactions, and health care clearinghouses that process nonstandard information received from another entity into a standard format or that process standard information into a nonstandard format.

Under the rule, all "individually identifiable health information" is protected. Such information includes demographic data such as an individual's name, address, date of birth, and social security number; the individual's past, present, or future physical or mental health condition; the provision of health care to such individual, or payments made or to be made for the provision of

[13] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)
[14] See "Summary of the HIPAA Privacy Rule", published the U.S. Department of Health and Human Services, as revised in May 2003m
[15] 45 CFR Parts 160, 162 and 164 as published by the Office for Civil Rights, U.S. Department of Health and Human Services.

health care to the individual. Unless for the purposes authorized by the rule, protected health information may not be disclosed without the written authorization of the protected individual.

State laws that are contrary to the rule are preempted unless the state law is more stringent than a standard adopted under the rule. A state law is more stringent when it:

- Prohibits or restricts a use or disclosure otherwise permitted under the HIPAA,
- Allows the protected individual great rights of access or amendment to the protected information,
- Requires the greatest amount of protected information to be released to the protected individual,
- Provides greater restrictions on the scope or duration of how and when protected information may be released,
- Provides for a longer reporting and retention period of protected information, or when it
- Provides greater privacy protection for the individual who is the subject of the individually identifiable health information. [16]

American with Disabilities Act (ADA) and Paratransit Services[17] - The ADA requires that public entities that operate a fixed route system must provide paratransit and other special transportation services to disabled individuals, including individuals using wheelchairs, at a level of service that is comparable to the service provided to persons without disabilities, and the service must be provided in a comparable response time. Origins and destinations must be within corridors that are three-quarters of a mile on each side of the fixed route. Eligible recipients of paratransit and special transportation services include:

- Individuals who are unable to get on or off public transit without assistance.
- Individuals who need to use a wheelchair lift on public transportation but such public transportation isn't available when needed.
- Disabled individuals with a specific impairment that prevents travel to a point of departure or travel from a disembarking location.

Commuter bus, commuter rail, and intercity rail systems are not required to provide complementary paratransit services. Federal law defines "paratransit" as "comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems." A "fixed route system" is defined as "a system of transporting individuals, other than by aircraft, including the provision of designated public transportation service by public entities and the provision of transportation service by private entities, including, but not limited to, specified public transportation service, on which a vehicle is operated along a prescribed route according to a fixed schedule." Paratransit services for ADA eligible persons are point-of-origin to destination services, and are not required in areas where fixed-route services are not provided.

Federal law requires that each public entity required to provide complementary paratransit service establish a process for determining eligibility, and provide documentation when a person

[16] 45 CFR 160.202
[17] 49 CFR 37, Subpart F

has been determined to be eligible, an expiration date for eligibility, and conditions and limitations on the individual's eligibility, including the use of a personal care attendant. The federal process does not require any eligibility criteria beyond a requirement that the process be limited to persons eligible for service under the ADA. Service providers may charge up to twice the fare paid by users of the fixed-route system, exclusive of discounts.

Medicaid Non-emergency Transportation Program (Medicaid NET Services) - In providing for the administration of the Social Security Act, federal law (42 CFR 431.53) requires that each state plan to provide Medicaid services "specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and describe the methods that the agency will use to meet this requirement." In Florida, the agency in charge of the Medicaid program is the Agency for Health Care Administration (AHCA). Provisions in s. 427.0135, F.S., require that AHCA purchase Medicaid transportation services through the Transportation Disadvantaged Program's designated community transportation coordinator (CTC) unless the service is not cost-effective or the CTC does not coordinate Medicaid transportation services.[18] These services are known as the Medicaid Non-emergency Transportation Services (Medicaid NET Services), and in June of 2004, AHCA transferred management of the Medicaid NET System to the Commission for the Transportation Disadvantaged, as a cost-saving measure and to reduce fraud and abuse.[19]

Commission for the Transportation Disadvantaged[20] - Part I of ch. 427, F.S., establishes the Commission for the Transportation Disadvantaged (commission) with a purpose of coordinating transportation services provided to the transportation disadvantaged and a goal of providing cost-effective transportation by qualified community transportation coordinators or operators. The commission contracts with a Community Transportation Coordinator (CTC) and a planning agency in each county to ensure that transportation services are provided. In fiscal year 2005-2006, the commission contracted with 48 providers to provide service in all of Florida's 67 counties. Providers included 20 private non-profit entities, 3 private for-profit entities, 19 county governments, 4 public transit authorities, 1 city government, and 1 metropolitan planning organization.

Applicant qualifying criteria are developed by the local coordinating board which is appointed and staffed by the planning agency, and which oversees and annually evaluates the CTC. The qualifying criteria are used by the CTC to determine eligibility for services.

Under s. 427.011, F.S., "transportation disadvantaged" means "persons who because of physical or mental disability, income status, or age are unable to transport themselves or to purchase transportation and are therefore, dependent upon others to obtain access to health care,

[18] As an example, Palm Beach County's "Palm Tran Connection" program provides paratransit services to eligible ADA applicants and other approved transportation disadvantaged individuals, but Medicaid NET Service is provided by MV Transportation, Inc., a private, for-profit corporation which also serves as a CTC in other areas of the state.
[19] "Annual Performance Report, Commission for the Transportation Disadvantaged", January 1 2007
[20] The CTD is housed within the Florida Department of Transportation and consists of seven members appointed by the Governor, five of whom must have experience in operating a business and two of whom must have a disability and use the transportation disadvantaged system. In addition, seven ex officio, nonvoting advisers serve the CTD: the Secretaries of Transportation, Children & Families, Elder Affairs, Veterans' Affairs, and Agency for Health Care Administration; the directors of the Agency for Workforce Innovation and the Agency for Persons with Disabilities, and a county manager or administrator.

employment, education, shopping, social activities, or other life-sustaining activities, or children who are handicapped or high-risk or at-risk as defined in s. 411.202," and "paratransit" means "those elements of public transit which provide service between specific origins and destinations selected by the individual user with such service being provided at a time that is agreed upon by the user and provider of the service. Paratransit services are provided by taxis, limousines, "dial-a-ride", buses, and other demand-responsive operations that are characterized by their nonscheduled, nonfixed, route nature."

The transportation disadvantaged program is funded through legislative appropriations and by a $1.50 nonrefundable fee collected on the initial and renewable registration of privately used automobiles, and on the initial and renewable registration of each truck with a net weight of 5,000 pounds or less. The fees are deposited into the Transportation Disadvantaged Trust Fund and used to carry out the commission's responsibility in providing services to the transportation disadvantaged. Priority is to be given to the transportation needs of persons who are unable to transport themselves due to age, or physical or mental disability, and who are dependent upon others for access to health care, employment, education, shopping, or life activities. The appropriation for FY 2007-2008 to the commission is $40.4 million for services for ADA and transportation disadvantaged individual services, and about $73 million for Medicaid NET Services.

Public Records Exemption: Eligibility for Paratransit Services and the Transportation Disadvantaged Program - The paratransit service public records exemption is scheduled for repeal in October 2008 and is required to be reviewed by the Legislature under the provisions of the Open Government Sunset Review Act.

Personal health care information for persons qualified for paratransit services as required under Title II of the ADA or the state's Transportation Disadvantaged Program was not protected until the Florida Legislature enacted ch. 2003-110, Laws of Florida, to provide a public records exemption for all personal identifying information in records relating to a person's health held by local governmental entities or their service providers for the purpose of determining eligibility for paratransit services under the ADA or the state program. The new exemption was created in s. 119.07, F.S., which provides for general public records exemptions. In 2005, the exemption was moved to the newly created s. 119.0713, F.S., and modified to exclude records held by service providers[21] under a general assumption that "local governmental entities" included local governments and their service providers as provided in the definition of "agency" in s. 119.011, F.S.

III. Effect of Proposed Changes:

The proposed committee bill reenacts and expands the public records exemption for personal identifying information of an applicant for or recipient of paratransit services. Below is a section by section analysis of the bill.

[21] See s. 35, ch. 2005-251, Laws of Florida, creating s. 119.0713, F.S., entitled "Local government agency exemptions from inspection or copying of public records."

Section 1 amends s. 119.011, F.S. to create a definition for paratransit for purposes of the public records law which has the same meaning as s. 427.011, F.S. "Paratransit" means those elements of public transit which provide service between specific origins and destinations selected by the individual user with such service being provided at a time that is agreed upon by the user and provider of the service. Paratransit service is provided by taxis, limousines, "dial-a-ride," buses, and other demand-responsive operations that are characterized by their nonscheduled, nonfixed route nature.

Section 2 amends s. 119.071, F.S., to expand the current public records exemption for personal identifying information of an applicant for or recipient of paratransit services so that the exemption applies to all agencies. This section also provides for future repeal of the exemption under the Open Government Sunset Review Act.

Section 3 repeals the prior exemption provided for paratransit information.

Section 4 provides a statement of public necessity.

Section 5 repeals s. 2 of chapter 2003-110, Laws of Florida, which provided for the repeal of the paratransit exemption.

Section 6 corrects a cross-reference.

Section 7 corrects a cross-reference.

Section 8 provides an effective date of October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The proposed committee bill retains an existing public records exemption. The bill complies with the requirement of Section 24 of Article I of the State 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.)

None.

B. Amendments:

None.