

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 Governmental Oversight and Accountability

BILL: CS/SB 7040

INTRODUCER: Governmental Oversight and Accountability Committee and Transportation Committee

SUBJECT: Public Records/Electronic Mail Addresses/Department of Highway Safety and Motor Vehicles

DATE: March 24, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Jones</u>	<u>Eichin</u>		TR Submitted as Committee Bill
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Fav/CS
2.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 7040 creates a new exemption from the public records inspection and access requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S., for certain customer e-mail addresses held by the Department of Highway Safety and Motor Vehicles (DHSMV). Specifically, the bill creates an exemption for e-mail addresses collected by the DHSMV for conducting driver license and motor vehicle record transactions.

The bill provides for repeal of the exemption on October 2, 2020, unless reviewed and reenacted by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

Because the bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

II. Present Situation:

Public Records

The Florida Constitution provides that the public has the right to access government records. The public may 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 of persons acting on their

behalf.¹ In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records. The Public Records Act² guarantees every person's right to inspect and copy any state or local government public record.³

The Legislature may create an exemption to public records requirements.⁴ An exemption must specifically state the public necessity justifying the exemption⁵ and must be tailored to accomplish the stated purpose of the law.⁶

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 exemptions.⁷ 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.⁸

The OGSR provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.⁹ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁰
- 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;¹¹ or

¹ FLA. CONST., art. I, s. 24(a).

² Chapter 119, F.S.

³ 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" to mean 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 Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to section 11.0431, F.S.

⁴ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). 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).

⁵ FLA. CONST., art. I, s. 24(c).

⁶ FLA. CONST., art. I, s. 24(c).

⁷ Section 119.15, F.S. Section 119.15(4)(b), F.S. provides that an exemption is considered to be substantially amended if it 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.

⁸ Section 119.15(3), F.S.

⁹ Section 119.15(6)(b), F.S.

¹⁰ Section 119.15(6)(b)1., F.S.

¹¹ Section 119.15(6)(b)2., F.S.

- It protects trade or business secrets.¹²

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's public policy favoring open government and that the purpose of the exemption cannot be accomplished without the exemption.¹³

The OGSR also requires specific questions to be considered during the review process.¹⁴ 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.¹⁵ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote 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.¹⁶

Public Records Status of E-mail Addresses and Agency Website Notice

Under Florida law, e-mail addresses are public records.¹⁷ Agency¹⁸ websites that use e-mail are required to post a notice to users making them aware of this fact and advising them not to send e-mail to the agency if they do not want their e-mail address released in response to a public records request.¹⁹

¹² Section 119.15(6)(b)3., F.S.

¹³ Section 119.15(6)(b), F.S.

¹⁴ 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?

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ Section 119.15(7), F.S.

¹⁷ Section 119.011(12), F.S., defines "public records" as "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." See Attorney General Opinion 96-34, May 15, 1996.

¹⁸ 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."

¹⁹ Section 668.6076, F.S.

DHSMV

The DHSMV is the custodian of motor vehicle records²⁰ containing personal information about drivers and motor vehicle owners. Florida's motor vehicle records contain personal information such as a driver's social security number, driver license number, name, address, telephone number, and medical or disability information. Additionally, the DHSMV is authorized to collect e-mail addresses from customers and use e-mail for notification when conducting certain driver license and motor vehicle transactions.²¹

Driver's Privacy Protection Act

Congress enacted the federal Driver's Privacy Protection Act (DPPA) as part of the Violent Crime Control and Law Enforcement Act of 1994. The DPPA prohibits the release and use of certain personal information from State motor vehicle records, and provides permissible uses and authorized disclosures of such information.²² The DPPA defines "personal information" as information that identifies an individual, including the individual's:

- Photograph;
- Social security number;
- Driver identification number;
- Name;
- Address;
- Telephone number; and
- Medical or disability information.²³

The DPPA also defines "highly restricted personal information" as:

- An individual's photograph or image
- Social security number
- Medical or disability information.²⁴

Section 119.0712(2), F.S., provides that "personal information," including "highly restricted personal information," contained in a motor vehicle record, as defined by the DPPA, is confidential. This "personal information" may be released only as authorized by the DPPA. Furthermore, emergency contact information, including emergency contact e-mail addresses, contained in a motor vehicle record is confidential and exempt from the state's public records laws.²⁵ Without the express consent to whom such emergency contact information applies, the information may be released only to law enforcement agencies to contact those listed in the event of an emergency.²⁶

²⁰ Section 119.0712(2)(a), defines the term "motor vehicle record" to mean "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by the Department of Highway Safety and Motor Vehicles."

²¹ See ss. 319.40(3), 320.95(2), and 322.08(8), F.S.

²² 18 U.S.C. s. 2721.

²³ 18 U.S.C. s. 2725(3).

²⁴ 18 U.S.C. s. 2725(4).

²⁵ Section 119.0712(2)(c), F.S.

²⁶ *Id.*

E-mail Addresses and Crimes

The DHSMV was the subject of an e-mail phishing incident in which fraudsters used the Department's name and e-mail address, DoNotReply@flhsmv.gov, to send e-mails containing transactional receipts to the public. The e-mails directed the recipient to visit a third party website, which may have contained computer programs designed to harm the user.²⁷

The Better Business Bureau posted an alert on its website, as well, warning individuals of e-mail phishing scams. They specifically address e-mails containing confirmation messages for recent driver license and vehicle registration renewals appearing to come from the DHSMV.²⁸ The e-mail includes a link directing the individual to a third-party website meant to download malware, which may be used to scan a computer for personal information that could be used for identity theft.

III. Effect of Proposed Changes:

The bill makes customer e-mail addresses collected by the DHSMV exempt from the state's public records laws if the e-mail addresses are collected by the DHSMV specifically for:

- Sending a notification regarding motor vehicle titles, pursuant to s. 319.40(3), F.S.;
- Providing a renewal notice for a motor vehicle license or registration, pursuant to 320.95(2), F.S.; and
- Providing a renewal notice for a driver license or identification card, pursuant to 322.08(8), F.S.

The bill includes a retroactivity clause, therefore e-mail addresses which DHSMV previously collected for the aforementioned purposes will also be made exempt from public disclosure. The bill does not exempt e-mail addresses collected or held by the DHSMV for any purpose other than the ones enumerated above.

The bill provides a statement of public necessity as required by the State Constitution. The public necessity states the Legislature finds e-mail addresses are unique to an individual and, when combined with other personal identifying information, can be used for identity theft, consumer scams and invasive contacts. The public necessity statement provides that the exemption helps protect customers from this increased risk and outweighs the state's public policy favoring open government.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and reenacted by the Legislature.

The bill takes effect on July 1, 2015.

²⁷ Department of Highway Safety and Motor Vehicles, *Fraudsters Use Agency's Name and Email Address for Phishing Expedition- Highway safety agency warns of email spam*, Press Release, Feb. 7, 2013, available at <http://www.flhsmv.gov/news/pdfs/PR020713a.pdf> (Last visited on March 1, 2015).

²⁸ Better Business Bureau, *Phishing Email Poses as Florida DMV*, Feb. 22, 2013, <http://www.bbb.org/blog/2013/02/phishing-email-poses-as-florida-dmv/> (Last visited March 1, 2015).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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 newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for customer e-mail addresses collected by the DHSMV; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for customer e-mail addresses collected by the DHSMV; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption limited to the e-mail address of DHSMV customers when those e-mail addresses are collected for the purposes named in the bill. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides greater consumer protection of DHSMV customer's e-mail addresses.

C. Government Sector Impact:

The bill may have a minimal fiscal impact on the DHSMV due to costs associated with training staff to comply with the new public records exemption, and redacting information prior to releasing a record.

To the extent this exemption encourages customers to choose to conduct driver license and motor vehicle record transactions via e-mail, the DHSMV will reduce the amount of money spent on postage.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 119.0712 of the Florida Statutes.

IX. 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 March 23, 2015:**

- The CS includes a clause providing for retroactive application of the exemption.
- The CS removes the term “electronic mail” and replaces it with “e-mail.”

B. Amendments:

None.