

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 Appropriations Subcommittee on Transportation, Tourism, and Economic Development

BILL: SB 7094

INTRODUCER: Infrastructure and Security Committee

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

DATE: April 15, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Proctor</u>	<u>Miller</u>		IS Submitted as Committee Bill
1.	<u>Wells</u>	<u>Hrdlicka</u>	<u>ATD</u>	Recommend: Favorable
2.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

I. Summary:

SB 7094 creates public records exemptions for records held by the Department of Highway Safety and Motor Vehicles (DHSMV):

- 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 email addresses and cell phone 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.

The exemptions created by the bill will be repealed on October 2, 2024, unless reviewed and reenacted by the Legislature.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 the bill creates a new public records exemption and expands a current public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill takes effect on the same date that SB 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

¹ FLA. CONST., art. I, s. 24(a).

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

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

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes relating to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the Legislature.

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

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

Only the Legislature may create an exemption to public records requirements.¹⁰ An exemption must be created by general law and must specifically state the public necessity justifying the

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

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 119.07(1)(a), F.S.

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹⁰ FLA. CONST., art. I, s. 24(c).

exemption.¹¹ An exemption serves an identifiable purpose if it meets one of the following statutory purposes, the Legislature finds that the purpose of the exemption outweighs open government policy, *and* the purpose 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;¹²
- 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;¹³ or
- It protects trade or business secrets.

Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill enacting an exemption may not contain other substantive provisions¹⁴ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁵

When creating or expanding a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”¹⁶ Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature or pursuant to a court order. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act (the act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁸ with specified exceptions.¹⁹ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²⁰ The act 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 to meet such public purpose.²¹

¹¹ *Id.*

¹² Section 119.15(6)(b)1., F.S.

¹³ Section 119.15(6)(b)2., F.S.

¹⁴ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ 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 Sch. Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁷ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁸ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹⁹ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

²⁰ Section 119.15(3), F.S.

²¹ Section 119.15(6)(b), F.S. In examining an exemption, the Review Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption, and specifically requires that the Legislature consider the following questions:

III. Effect of Proposed Changes:

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

SB 7090 creates ss. 319.1414 and 322.71, F.S., and amends ss. 319.25 and 320.861, F.S., authorizing the 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 (sections 25, 34, and 48 of SB 7090). The subpoena is to be used for investigations or examinations conducted by the DHSMV of suspected violations of chs. 319, 320, or 322, F.S., and may be served by an authorized representative of the DHSMV.

This bill 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, 320.861, F.S., and ch. 322, F.S. (amending s. 322.71, F.S.) (**sections 3, 4, 5, and 6**).

The bill 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.

The bill includes a public necessity statement, stating that release of such information could jeopardize the integrity of the investigation or examination and impair the DHSMV's ability to perform its official duties and responsibilities under the laws (**Section 7**).

The exemptions are repealed October 2, 2024, unless reviewed and saved from repeal by the Legislature.

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- 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?

Collection and Use of Cellular Telephone Numbers

Present Situation

The DHSMV lacks statutory authority to collect and use cell phone numbers as a method to communicate with customers in an expedited manner. Florida Statutes already allow the DHSMV to collect email addresses. Email addresses may be used, in lieu of the U.S. Postal Service, to provide certain renewal notices, including registration renewal notices, driver license renewal notices, and vessel registration renewal notices. However, current law does not allow the e-mail to be used for other business purposes.²²

Email address collected by the DHSMV for registration purposes are currently exempt from public records under s. 119.0712(2), F.S. The current exemption expires on October 2, 2020, unless reviewed and saved from repeal by the Legislature.

Effect of Proposed Changes

SB 7090 amends ss. 319.40, 320.95, 322.08, 328.30, and 328.80, F.S. (sections 26, 35, 41, 56, and 59 of SB 7090), to authorize the DHSMV and tax collectors to collect and use email addresses and cell phone numbers to contact customers for business reasons other than purposes related to motor vehicle, vessel, and driver license registration and renewal. This must be done in accordance with ch. 119, F.S., and the federal Driver Privacy Protection Act.

Providing an email address or cell phone number is optional for the applicant, and before collecting an email mail address or cell phone number the DHSMV or tax collector must disclose to the applicant the purposes for which the contacts may be used.

The DHSMV provided some examples of business reasons for which a customer's email and cell phone number may be used: allowing customers to subscribe to services such as receiving email alerts and text messages when it is time to renew driver license or motor vehicle registrations; to notify customers when adverse action has been taken against their licenses; to communicate online order statuses; and as part of a multi-factor authentication process to verify a user's identity.²³

This bill expands the current exemption for email addresses and creates a confidential and exempt standard for email addresses and cell phone numbers collected by the DHSMV pursuant to chs. 319, 320, 322, 324, or 328, F.S. (**section 1**, amending current s. 119.0712(2)(c), F.S.).

The bill requires the disclosure of an email address or cell phone number to tax collector if, by interagency agreement, the DHSMV authorizes the tax collector to send electronic communications to such email addresses or cell phone 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.

²² See ss. 319.40, 320.95, 322.08(10), 328.30, and 328.80, F.S.

²³ Email from Kevin Jacobs, Deputy Legislative Affairs Director, Department of Highway Safety and Motor Vehicles, *DHSMV Package - Fiscal* (March 21, 2019) (on file with the Senate Infrastructure and Security Committee).

This exemption applies to email addresses and cell phone numbers held before, on, or after the effective date of the bill.

The bill includes a public necessity statement, stating that the computer system enhancements being made by the DHSMV will increase the ability of the department to communicate more effectively with customers and through email or text messaging (**section 2**). It further states that the impact on motorist privacy and risk of unsolicited commercial solicitations will have a chilling effect on motorists' voluntary use of electronic portals to communicate with the DHSMV, thereby undermining the effective use of the computer system enhancements. The retroactive nature of the exemption is remedial in nature.

The exemption is repealed October 2, 2024, unless reviewed and saved from repeal by the Legislature.

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 Privacy Protection Act 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

SB 7090 amends s. 328.40, F.S., to provide that the DHSMV must protect personal information contained in a vessel registration and title, subject to inspection and copying, as provided in ch. 119, F.S. (section 57 of SB 7090).

This bill 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 (**section 1**, creating s. 119.0712(2)(c), F.S).

The bill allows the release of such information in the same manner provided for a motor vehicle record pursuant to the federal Driver Privacy Protection Act. These uses include:²⁴

- 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, parts, and dealers; motor vehicle market research activities; and removal of non-owner records from the original owner records of motor vehicle manufacturers.
- 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.
- In the normal course of business by a legitimate business or its agents, employees, or contractors:

²⁴ 18 USC ss. 2721 et seq.

- 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.
- 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 a court order.
- In research activities and in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
- 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.
- In providing notice to the owners of towed or impounded vehicles.
- By any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.
- By an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license.
- In connection with the operation of private toll transportation facilities.
- In response to requests for individual motor vehicle records or for bulk distribution for surveys, marketing, or solicitation if the state has obtained the express consent of the person to whom such personal information pertains.
- By any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

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

The bill includes a public necessity statement, stating that federal law requires personal motorist information to be confidential when held by the DHSMV (**section 2**). It further states that while the federal law does not apply direct to vessel registration information, the personal information in vessel registrations is similar to the information contained in motor vehicle records. The unprotected status of the similar information in the vessel registrations undermines the protections of the federal law, "eroding the privacy and safety of motorists." The retroactive nature of the exemption is remedial in nature.

The exemption is repealed October 2, 2024, unless reviewed and saved from repeal by the Legislature.

Effective Date

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

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 bill creating or expanding an exemption to the public records requirements. The bill expands an existing exemption and creates several exemptions. Therefore, the bill requires a two-thirds vote to be enacted.

Public Necessity Statement

Article I, s. 24(c), of the State Constitution requires a bill that creates or expands an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. **Sections 2 and 7** of the bill contain statements of public necessity for the exemptions.

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 public necessity statement notes that:

- Release of investigation or examination information could obstruct or jeopardize the integrity of the investigation or examination.
- Vessel registration information contains similar information to information that is already protected in motor vehicle registrations.
- Release of customers' email addresses or cell phone numbers could chill the use of the computer system enhancements of the DHSMV.

For these reasons, the exemptions do not appear broader than necessary to accomplish the stated 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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill substantially amends the following sections of the Florida Statutes: 119.0712, 319.1414, 319.25, 320.861, and 322.71.

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.