

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 Appropriations

BILL: HB 1359, 1st Eng.

INTRODUCER: Representative Brannan III

SUBJECT: Pub. Rec./Department of Highway Safety and Motor Vehicles

DATE: April 21, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Hrdlicka</u>	<u>Sadberry</u>	<u>AP</u>	Favorable

I. Summary:

HB 1151, to which this bill is linked, provides the Department of Highway Safety and Motor Vehicles (DHSMV) with investigative and subpoena power and the ability to administer oaths or affirmations, examine witnesses, require affidavits, take depositions, and compel the attendance of witnesses and the production of documents, records, and other evidence for use in conducting investigations or examinations.

This bill, which is linked to the passage of HB 1151, creates four public records exemptions, each making confidential and exempt from public disclosure information received by DHSMV as part of its investigations or examinations of suspected violations:

- By private rebuilt inspection providers or any contract entered into by such a provider;
- Of ch. 319, F.S., relating to motor vehicle titles, or any rule or order;
- Of ch. 320, F.S., relating to motor vehicle registrations and motor vehicle dealer and manufacturer licensing, or any rule or order; and
- Of ch. 322, F.S., relating to driver licenses and identification cards, or any rule or order.

The above exemptions shield investigative records until the investigation ceases to be active or administrative action taken by DHSMV has concluded or been made part of any hearing or court proceeding, after which the investigative records are no longer confidential and exempt. However, the DHSMV may release information in furtherance of its official duties and responsibilities.

The bill is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2026, unless reviewed and reenacted by the Legislature.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.

The bill takes effect on the same date that HB 1151 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

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, section 24(a) of the Florida Constitution. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is addressed further in ch. 119, F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.¹ Furthermore, the Open Government Sunset Review Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose.² In addition, it may be no broader than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.³
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.⁴
- Protect trade or business secrets.⁵

The Open Government Sunset Review Act requires the automatic repeal of a newly created public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁶

Subpoenas

A subpoena is a written order to compel an individual to give testimony on a particular subject, often before a court, but sometimes in other proceedings.⁷ A subpoena duces tecum is a type of subpoena that requires the witness to produce a document or documents pertinent to a proceeding.⁸ Section 27.04, F.S., "allows the state attorney to issue subpoenas duces tecum for records as part of an ongoing investigation."⁹ The state does not need to establish the relevance

¹ Section 119.017(1)(a), F.S.

² Section 119.15, F.S.

³ Section 119.15(6)(b)1., F.S.

⁴ Section 119.15(6)(b)2., F.S.

⁵ Section 119.15(6)(b)3., F.S.

⁶ Section 119.15(3), F.S.

⁷ *Subpoena*, Legal Information Institute (available at <https://www.law.cornell.edu/wex/subpoena>)(last visited March 15,2021).

⁸ *Subpoena duces tecum*, Legal Information Institute, (available at https://www.law.cornell.edu/wex/subpoena_duces_tecum)(last visited March 15,2021).

⁹ *State v. Investigation*, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001).

and materiality of the information sought through an investigative subpoena,¹⁰ but the subject matter of the investigation must be confined to violations of criminal law.¹¹

Section 92.605(2), F.S., describes subpoenas, court orders, and warrants issued in compliance with the Electronic Communications and Privacy Act.¹² The federal act and its Florida counterpart, s. 934.23, F.S., authorize a law enforcement officer, state attorney, or judge to subpoena the records of an out-of-state corporation that provides electronic communication services or remote computing services to the public. A corporation must comply within 20 days after receipt of the subpoena. However, if the recipient cannot comply within that time period, it must notify the law enforcement officer who sought the subpoena within the 20-day time period that the records cannot be provided and comply as soon as possible.¹³ An “out-of-state corporation,” i.e., any corporation qualified to do business in Florida under s. 607.1501, F.S., is “properly served,” by subpoena or otherwise, when service is effected on that corporation’s registered agent.¹⁴

DHSMV Investigative Authority

The DHSMV has jurisdiction to administer multiple chapters of the Florida Statutes with various degrees of investigative authority. For example, the DHSMV is required to cancel improperly issued certificates of title, but does not appear to have the authority to investigate and examine violations related to motor vehicle titles.¹⁵ Additionally, while the DHSMV has the authority to inspect books and records of motor vehicle manufacturers and dealers, it does not appear to have the authority to investigate other violations of ch. 320, F.S., relating to motor vehicle dealers.¹⁶ The DHSMV also does not appear to have statutory authority to investigate persons suspected of violating ch. 322, F.S., relating to driver licenses.

HB 1151, to which this bill is linked, provides DHSMV with investigative and subpoena power and the ability to administer oaths or affirmations, examine witnesses, require affidavits, take depositions, and compel the attendance of witnesses and the production of documents, records, and other evidence for use in conducting investigations or examinations into:

- Authorized private rebuilt inspection providers;
- Persons suspected of violating or of having violated ch. 319, F.S., relating to motor vehicle title certificates;
- Persons suspected of violating or of having violated ch. 320, F.S., relating to motor vehicles manufacturers and distributors; and
- Persons suspected of violating or of having violated ch. 322, F.S., relating to driver licenses.

¹⁰ *Id.*

¹¹ *Morgan v. State*, 309 So. 2d 552, 553 (Fla. 1975).

¹² 18 U.S.C. s. 2701 et seq.

¹³ Section 92.605(2)(b), F.S. If the entity seeking the subpoena shows and the court finds that failure to produce the requested records would produce an “adverse result,” i.e., physical harm, flight from prosecution, destruction of evidence, intimidation of witnesses, or jeopardy to the investigation, the court may order the records be produced earlier than 20 days. The court may also extend the time to comply with a subpoena if doing so will not cause an adverse result. Section 92.605(2)(c) and (1)(a), F.S.

¹⁴ Section 92.605(1)(e) and (h), F.S. Per s. 607.0505, F.S., a foreign corporation doing business in Florida must have a registered agent, and per s. 607.1507, F.S., such agent must be located in or authorized to transact business in Florida.

¹⁵ *See* s. 319.25, F.S.

¹⁶ *See* s. 320.861, F.S.

III. Effect of Proposed Changes:

The bill amends ss. 319.1414,¹⁷ 319.25, 320.861, and 322.71, F.S., to provide that information received by the DHSMV as a result of an investigation or examination is confidential and exempt from the disclosure requirements in s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution 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 bill provides 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 is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2026, 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.

The bill contains a statement of public necessity, which includes:

- The Legislature finds that it is a public necessity that information received by the DHSMV as a result of an investigation or examination conducted pursuant to ss. 319.1414 and 319.25, F.S., and ch. 320, F.S., as provided in s. 320.861, F.S., or ch. 322, F.S., as provided in s. 322.71, F.S., be made confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Article I of the Florida Constitution 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 release of such information about a pending investigation or examination of violations of ss. 319.1414 and 319.25, F.S., and chs. 320 and 322, F.S., could obstruct or jeopardize the integrity of the investigation or examination and impair the ability of the DHSMV to perform its official duties and carry out its responsibilities under ss. 319.1414 and 319.25, F.S., and chs. 320 and 322, F.S.
- Therefore, the Legislature finds that it is a public necessity to make such information confidential and exempt from public records requirements.

The bill has an effective date on the same date that HB 1151 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.

¹⁷ Section 319.1414, F.S., is created in HB 1151.

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. This bill enacts a new exemption for information received by the DHSMV as a result of an investigation or examination.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. Section 2 of the bill contains a statement of public necessity for the exemption.

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 purpose of the law is to protect information received by the DHSMV as a result of an investigation or examination. This bill exempts only information received by the DHSMV as a result of an investigation or examination. The exemption does not appear to be broader than necessary to accomplish the 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:

This bill substantially amends the following sections of the Florida Statutes: 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:

None.