



The Florida Senate

Interim Report 2009-216

October 2008

Committee on Transportation

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.0712(2), F.S., PERSONAL INFORMATION CONTAINED IN MOTOR VEHICLE RECORDS

Issue Description

Article I, s. 24 of the State Constitution, establishes a substantive right for any person to inspect and copy public records and to attend public meetings. This same provision authorizes the Legislature to create exemptions to open government requirements. Florida's motor vehicle records held by the Department of Highway Safety and Motor Vehicles (DHSMV) contain personal information about licensees and motor vehicle owners. Section 119.0712(2), F.S., provides personal information contained in a motor vehicle record that identifies an individual is confidential and exempt. Personal information includes, but is not limited to, a driver's social security number, driver's license number or identification card number, name, address, telephone number, medical or disability information, and emergency contact information. The Driver's Privacy Protection Act (DPPA) is a federal statute requiring the states to restrict public access to state motor vehicle records. Although the DPPA begins with a general prohibition against disclosure of personal information¹ gathered by state departments of motor vehicles, their officers, employees, or contractors, fourteen exceptions to the general prohibition follow.² States may adopt the permissible exceptions or may enact more restrictive measures than the DPPA requires. However, states may not allow more permissive access to motor vehicle records than the DPPA allows. The DPPA authorizes the Attorney General to impose civil fines against states found in non-compliance and, additionally, allows civil suits against states by individuals for violations.

The Open Government Sunset Review Act establishes a process for the review and sunset of exemptions to public records or meetings requirements in the 5th year after their enactment. The exemptions in s. 119.0712(2), F.S., will sunset unless saved from repeal during the 2009 legislative session.

Background

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:

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 thereunder; counties, municipalities, and districts; and each constitutional officer; board, and commission, or entity created pursuant to law or this Constitution.

¹ Section 2725(3) of the DPPA defines personal information as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violation, and driver's status."

² Section 2721(b)(1)-(14).

Open Government Sunset Review of Section 119.0712(2), F.S., Personal Information Contained in Motor Vehicle Records

The Public Records Law³ specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides every person who has custody of a public record must permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency⁴ records are to be available for public inspection. Section 119.011(12), 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.”⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ 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.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

There is a difference between records the Legislature has made exempt from public inspection and those that are confidential and exempt. 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.¹¹ If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹²

Open Government Sunset Review Act

Open Government Sunset Review Act¹³ 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.

³ Chapter 119, F.S.

⁴ “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 of 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.

⁵ *Shevin v. Byron, Harless, Shaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁶ *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ *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).

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Article I, s. 24(c) of the State Constitution.

¹¹ Attorney General Opinion 85-62.

¹² *Williams v. City of Minneola*, 575 So.2d 683,687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹³ Section 119.15, F.S.

The act states 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 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects 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.¹⁴

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?
- 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 exemption review process, one session of the Legislature cannot bind another.¹⁵ 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(8), F.S., makes it explicit:

... 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 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.

¹⁴ Section 119.15(6)(b), F.S.

¹⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Motor Vehicle Records

The DHSMV¹⁶ holds motor vehicle records containing personal information about drivers and motor vehicle owners. “Motor vehicle record” means:

. . . 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. .¹⁷

Currently, all drivers’ licenses issued by the DHSMV must bear a full-face photograph or digital image of the licensee. Specifically, s. 322.142, F.S., authorizes the DHSMV, upon receipt of the required fee, to issue to each qualified applicant for an original driver’s license a color photographic or digitally imaged driver’s license bearing a full-face photograph or digital image of the applicant. The requirement of a full-face photograph or digital image of the driver license cardholder may not be waived, regardless of the provisions of ch. 761, F.S.¹⁸

Section 322.142(4), F.S., provides the DHSMV may maintain a film negative or print file. Also, the DHSMV is required to maintain a record of the digital image and signature of the licensees, together with other data required by the DHSMV for identification and retrieval. Reproductions from the file or digital record are exempt from the provisions of s. 119.07(1), F.S. In addition, this section specifies digitized driver’s license photographs (images) are available for DHSMV administrative purposes; for the issuance of duplicate licenses; in response to law enforcement agency requests; to the Department of State pursuant to an interagency agreement to facilitate determinations of eligibility of voter registration applicants and registered voters; to the Department of Revenue pursuant to an interagency agreement for use in establishing paternity and establishing, modifying, or enforcing support obligations in Title IV-D cases; to the Department of Children and Family Services pursuant to an interagency agreement to conduct protective investigations; or to the Department of Financial Services pursuant to an interagency agreement to facilitate the location of owners of unclaimed property, the validation of unclaimed property claims, and the identification of fraudulent or false claims.

Section 322.125, F.S., provides reports received or made by the Medical Advisory Board (Board) or its members for the purpose of assisting DHSMV in determining whether a person is qualified to be licensed are for the confidential use of the Board or DHSMV and may not be divulged to any person except the licensed driver or applicant or used as evidence in any trial, and are exempt from the provisions of s. 119.07(1), F.S., except the reports may be admitted in proceedings under s. 322.271 or s. 322.31, F.S.

Section 322.126, F.S., authorizes a physician, person, or agency having knowledge of any licensed driver or applicant’s mental or physical disability to drive or need to obtain or to wear a medical identification bracelet to report such knowledge in writing. The DHSMV, assisted by the Medical Advisory Board, must define mental or physical disabilities affecting the ability of a person to safely operator a motor vehicle and develop and keep current coded restrictions to be placed upon drivers’ licenses of persons who are required to wear medical identification bracelets when operating a motor vehicle. The section further provides the reports authorized by this section are confidential and exempt from the provisions of s. 119.07(1), F.S., and must be used solely for the purpose of determining the qualifications of any person to operate a motor vehicle on the highways of this state. In addition, no report forwarded under the provisions of this section shall be used as evidence in any civil or criminal trial or in any court proceeding.

The DHSMV allows an individual who holds a current Florida driver license or identification card to provide emergency contact information. According to DHSMV’s website, this information may save crucial time if ever it becomes necessary to contact family members, or other loved ones. Section 119.0712(2), F.S., provides personal information, which includes emergency contact information, is confidential and exempt. Emergency contact

¹⁶ The department is statutorily-created in s. 20.24, F.S. The head of the department is the Governor and Cabinet. The department consists of a Division of Florida Highway Patrol; Division of Driver Licenses; and a Division of Motor Vehicles.

¹⁷ Section 119.0712(2), F.S.

¹⁸ Chapter 761, F.S., provides the state must not substantially burden a person’s exercise of religion unless the state demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding.

information may be released only to law enforcement agencies for purposes of contacting those listed in the event of an emergency.

Drivers Privacy Protection Act

Congress enacted the DPPA¹⁹ as part of the Violent Crime Control and Law Enforcement Act of 1994. Section 2721 of the DPPA provides

- (a) In General – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.
- (b) Permissible Uses – Personal information referred to in subsection (a) shall be disclosed 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 the Automobile Information Disclosure Act, the Motor Vehicle Information and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, and the Clean Air Act, and may be disclosed as follows . . .

The DPPA further requires states comply with its provisions by 1997. Florida came into compliance with DPPA (1994) in 1997, when ch. 97-185, L.O.F., became law; however, in 1999, Congress changed a provision in the DPPA from an “opt out” alternative to an “opt in” alternative.²⁰ Under DPPA (1999), states may not imply consent from a driver’s failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver’s affirmative consent to disclose the driver’s personal information. Florida did not amend the state’s public records laws to conform to DPPA (1999) until May 13, 2004.²¹ During the period 2000-2004, Florida continued to disclose driver and motor vehicle information as required by its public records law rather than federal law.

In 2000, Congress changed a provision in the DPPA to limit the circumstances under which states may disclose “highly restricted personal information.”²² The DPPA (2000) defines highly restrictive personal information to mean an individual’s photograph or image, social security number, or medical or disability information. Correspondence received by DHSMV from the U.S. Department of Justice had questioned Florida’s compliance and “. . . strongly urge[d] Florida to conform its public laws to ensure there is no question that it is in full compliance with this important provision.” Florida amended the state’s public records laws to conform to DPPA (2000) during the 2007 Legislative Session.²³

Any state department of motor vehicles in substantial noncompliance with DPPA is subject to a civil penalty of up to \$5,000 per day. In addition, DPPA provides for a criminal fine and civil remedy against any person who knowingly violates the DPPA. Persons injured by the unauthorized disclosure of their motor vehicle records may bring a civil action in a United States District Court, which has in fact led to a lawsuit explained in more detail on page 8.

Exemption for Personal Information in Motor Vehicle Records

Under Article I, s. 24 of the State Constitution, and s. 119.071(1)(a), F.S., the DHSMV is required to make all motor vehicle records available to the public unless the Legislature has enacted an exemption to protect the record. Section 119.0712(2), F.S., makes confidential and exempt personal information contained in a motor vehicle record that identifies an individual of that record. “Personal information” is defined by the section to include, but not be limited to, an individual’s “. . . social security number,²⁴ driver identification number or identification card number,

¹⁹ 18 U.S.C. s. 2721 *et seq.*

²⁰ *See*, Public Law 106-69, 113 Stat. 1025, (October 9, 1999).

²¹ *See*, ch. 2004-62 L.O.F.

²² *See*, Public Law 106-346, 114 Stat. 1356, (October 23, 2000).

²³ *See*, ch. 2007-94 L.O.F.

²⁴ While there are numerous statutory provisions authorizing or requiring collection of SSNs, there are numerous exemptions

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name, address, telephone number, medical or disability information, and emergency contact information, but does not include information on vehicular crashes, driving violations, and driver status.”

There are numerous exceptions in s. 119.0712(2), F.S., to the exemption for motor vehicle records that require disclosure. Personal information is available for the following purposes:

1. 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 nonowner 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. ss. 1231 et seq.), the Clean Air Act (42 U.S.C. ss. 7401 et seq.), and chapters 301, 305, and 321-331 of Title 49, United States Code.
2. For use by any government agency, including any court of 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.
3. 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 nonowner records from the original owner records of motor vehicle manufacturers.
4. For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only:
 - a. To verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
 - b. 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.
5. For use in connection with any civil, criminal, administrative, or arbitral proceeding in any court or agency or before any self-regulatory body for:
 - a. Service of process by any certified process server, special process server, or other person authorized to serve process in this state.
 - b. Investigation in anticipation of litigation by an attorney licensed to practice law in this state or the agent of the attorney; however, the information may not be used for mass commercial solicitation of clients for litigation against motor vehicle dealers.
 - c. Investigation by any person in connection with any filed proceeding; however, the information may not be used for mass commercial solicitation of clients for litigation against motor vehicle dealers.
 - d. Execution or enforcement of judgments and orders.
 - e. Compliance with an order of any court.

for SSNs also. Section 119.071(5), F.S., is a general exemption for SSNs but *by the express terms of the exemption, it does not supersede other SSN exemptions existing prior to May 13, 2002, or created thereafter.*²⁴ Thus, if a specific exemption for SSNs exists, the requirements of that exemption control, not the general exemption. As a result, the exemption for SSNs in s. 119.0712(2), F.S., controls for motor vehicle records.

6. 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.
7. 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, anti-fraud activities, rating, or underwriting.
8. For use in providing notice to the owners of towed or impounded vehicles.
9. For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection. Personal information obtained based on an exempt driver's record may not be provided to a client who cannot demonstrate a need based on a police report, court order, or a business or personal relationship with the subject of the investigation.
10. 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 49 U.S.C. ss. 31301 et seq.
11. For use in connection with the operation of private toll transportation facilities.
12. For bulk distribution for surveys, marketing, or solicitations when the department has obtained the express consent of the person to whom such personal information pertains.
13. For any use if the requesting person demonstrates that he or she has obtained the written consent of the person who is the subject of the motor vehicle record.
14. For any other use specifically authorized by state law, if such use is related to the operation of a motor vehicle or public safety.
15. For any other uses if the person to whom the information pertains has given express consent in a format prescribed by DHSMV. Such consent shall remain in effect until it is revoked by the person on a form prescribed by DHSMV.

In 2007, the public records exemption was further amended to create a two-tiered system for the release of personal information within motor vehicle records by placing additional restrictions on the availability and use of social security numbers, photographs and images, medical disability information, and emergency contact information.²⁵

Currently, the motor vehicle public records exemption is scheduled for repeal in October 2009, and is required to be reviewed by the Legislature under the provisions of the Open Government Sunset Review Act. Because of the amendments creating a two-tiered system mentioned in the paragraph above, the exemption will again be subject to the Open Government Sunset Review Act and repealed October 2, 2012, unless it is reviewed and reenacted by the Legislature.²⁶

Findings

Legislative considerations under s. 119.15(6)(a), F.S.

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

1. What specific records or meetings are affected by the exemption?

The public records exemption under review makes confidential and exempts from public disclosure personal information contained in a motor vehicle record that identifies an individual. Section 119.0712(2)(a), F.S., defines personal information to include, but not limited to, an individual's social security number, driver identification number or identification card number, name, address, telephone number, medical or disability information, and

²⁵ See, ch. 2007-94 L.O.F.

²⁶ *Id.*

emergency contact information. In addition, records of an individual's photograph or image are affected by the exemption.

2. Whom does the exemption uniquely affect, as opposed to the general public?

The exemption applies to specific information obtained by DHMSV regarding an individual who has a driver's license, motor vehicle title or registration, or identification card issued by DHSMV.

3. What is the identifiable public purpose or goal of the exemption?

In the public necessity statement creating the exemption, the Legislature found the exemption was necessary to protect personal information in motor vehicle records because such information, "if readily available for public inspection and copying, could be used to invade the personal privacy of the persons named in the records or it could be used for other purposes, such as solicitation, harassment, stalking, and intimidation. Limiting access to the state's motor vehicle records will protect the privacy of persons who are listed in those records and minimize the opportunity for invading that privacy."²⁷ In addition, the exemption is necessary to conform state law to federal law (DPPA), which prohibits disclosure of such information of a sensitive, personal nature, with specified exceptions. DPPA substantially limits the liability of states for disclosures of information pursuant to state policy or practice. Only the U.S. Attorney General is authorized to enforce DPPA against a state for information releases pursuant to state policy or practice. The only relief for enforcement of DPPA permitted by statute is a fine of up to \$5,000 a day for "substantial noncompliance."²⁸ In addition, DPPA also authorizes actions against individual state officials and permits damages, including liquidated damages of "not less than" \$2,500 for each wrongful disclosure.²⁹

Collier, et al. v. Dickinson, et al. Case No. 04-21351-DV-JEM (S.D. Fla.) On June 7, 2004, a potential class action lawsuit was filed against present and former employees of DHSMV as defendants and alleged damages to the potential class due to the continued disclosure of personal information maintained by DHSMV and obtained from motor vehicle and driver license records in violation of 18 U.S.C. ss. 2721-2725 (DPPA). DPPA was effective June 1, 2000. Florida law allowed the disclosure of this information from June 1, 2000 until September 30, 2004 when s. 119.0712(2), F.S., was amended to mirror DPPA.³⁰ The above legal action led to the change in Florida law. The initial complaint demanded approximately \$39 billion in damages or \$2,500 per release of information.

The above mentioned law suit resulted in three separate mediation sessions. The mediated agreement reached on June 5, 2008, provides all motor vehicle registrants who are class members (all natural persons who had a valid driver license, identification card or motor vehicle registration) would receive a \$1 credit on the renewal of their motor vehicle registration during the period of July 1, 2009, through June 30, 2010. The total amount of the credit would be approximately \$10.4 million. There will also be equitable relief which includes changing the procedures of DHSMV regarding disclosure of personal information. Additionally, DHSMV will maintain a website informing the public of their rights under DPPA. Also, the Division of Risk Management would pay each of the four named Plaintiffs \$3,000, Plaintiffs' attorney fees in the amount of \$2.85 million, and costs of publication totaling approximately \$20,000.00. This agreement was accepted by the Cabinet on August 12, 2008; however, the \$1 credit for the settlement class is contingent upon approval and appropriation by the Legislature.

In addition, to the above mentioned law suit, the U.S. Department of Justice is now considering the imposition of civil penalties against the State of Florida, pursuant to 18 U.S.C. s. 2723(b), for violations of DPPA.

4. Can the information contained in the records be readily obtained by alternative means? If so, how?

The protected information contained in the records could not be readily obtained by alternative means.

5. Is the record protected by another exemption?

Some of the information received and held by DHSMV is protected by other public exemptions. For example, to the extent the information held by DHSMV may include Social Security numbers of individuals with a motor

²⁷ Section 3, ch. 2004-62, L.O.F.

²⁸ 18 U.S.C. s. 2723.

²⁹ 18 U.S.C. s. 2724.

³⁰ Chapter 2004-62, L.O.F., became effective October 1, 2004.

vehicle record, pursuant to s. 119.071(5)(a)5, F.S., all Social Security numbers not protected by other specific exemptions held by an agency are confidential and exempt. Medical disability information contained in reports received or made by the Board or its members for the purpose of assisting DHSMV in determining whether a person is qualified to be licensed to operate a motor vehicle on the highways of this state are for the confidential use of the Board or DHSMV and may not be divulged to any person except the licensed driver or applicant or used as evidence in any trial, and are exempt. See ss. 322.125 and 322.126, F.S. In addition, photographs or images of licenses issued and held by DHSMV are exempt from public disclosure except to specified agencies under certain circumstances. See s. 322.142, F.S.

6. Are there multiple exemptions for the same type of record that it would be appropriate to merge?

Chapter 119, F.S., addresses public records generally and, because DPPA is a general prohibition against the disclosure of personal information in records gathered in this instance by DHSMV (governed by chs. 316-324, F.S.), the professional staff considers the DPPA prohibitions appropriately located. The exemptions referenced in paragraph 5 above (medical disability information and photographs), are specific exemptions relating to driver's licenses (ch. 322, F.S.); therefore, professional staff considers those exemptions appropriately located. Merging the general exemptions found in DPPA (relating to motor vehicle records) with the specific exemptions in ch. 322, F.S., (solely driver's licenses) would not be appropriate.

Issues regarding s. 119.0712(2)(b)5.b. and c., F.S.

In addition to permissible exceptions, the DPPA authorizes states to adopt more restrictive measures. Florida's permissible exceptions mostly mirror those specifically included in the DPPA; however, s. 119.0712(2)(b)5.b. and c., F.S., are more restrictive than provisions found in DPPA. They prohibit the use of personal information obtained from motor vehicle records for the "mass commercial solicitation of clients for litigation against motor vehicle dealers."

Opponents of these restrictive provisions argue they are unjustifiably overbroad, because they are not contained in DPPA. In addition, opponents argue the prohibition of the commercial use of legally obtained information, which is specifically applied to licensed attorneys conducting investigations in anticipation of litigation and for other persons conducting investigations in connections with filed proceedings, is unconstitutional.

Proponents of these restrictive provisions maintain the provisions protect such information from over-zealous trial attorneys looking to create new litigation against motor vehicle dealers.

In the enacting legislation³¹, the Legislature specifically addressed the purpose for the prohibitions found in s. 119.0712(2)(b)5.b. and c., F.S., by stating in the public necessity statement: "[a]ccess to such exempt information should also be provided for investigation in anticipation of litigation or for a filed proceeding, but the Legislature finds that authorizing access to motor vehicle records for these limited purposes should not be construed to permit mass commercial solicitation of clients for litigation against motor vehicle dealers because it would be contrary to the limited access contemplated by the exceptions to the exemption and would further invade the privacy of persons named in these records."

Section 877.02(1), F.S., provides it shall be unlawful for any person or her or his agent, employee or any person acting on her or his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the Supreme Court of Florida. This provision has been determined to be constitutional. See *Carricarte v. State*, 384 So.2d 1261 (1980), certiorari denied 101 S.Ct. 215, 449 U.S. 874, 66 L.Ed.2d 95.

³¹ See, s. 3, ch. 2004-62, L.O.F.

Based upon the information above, the Legislature appears to have expressed a reasonable state interest in prohibiting the use of personal information obtained from motor vehicle records for the mass commercial solicitation of clients for litigation against motor vehicle dealers.

Recommendations

There is sufficient support for the reenactment of the exemption in s. 119.0712(2), F.S. The exemption for personal information contained in motor vehicle records held by the DHSMV meets the identifiable public purpose required by s. 119.15, F.S., of protecting information of a sensitive personal nature concerning individuals, the release of which could jeopardize their safety.³² Accordingly, professional staff recommends the exemption in s. 119.0712(2), F.S., be reenacted and thereby saved from repeal.

³² Section 119.15(6)(b)2., F.S.