



# The Florida Senate

Issue Brief 2012-312

September 2011

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Committee on Banking and Insurance

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## **OPEN GOVERNMENT SUNSET REVIEW OF SECTION 324.242, F.S., PERSONAL IDENTIFYING INFORMATION IN INSURANCE POLICY PERSONAL INJURY PROTECTION (PIP) AND PROPERTY DAMAGE LIABILITY INSURANCE POLICIES**

### **Statement of the Issue**

Section 324.242, F.S., exempts from public records requirements personal identifying information and the insurance policy number contained in personal injury protection (PIP) and property damage liability motor vehicle insurance policies. The records held by the department include the insurance company, the policy number, driver's license number, personal identifying information (name and address), and information identifying the vehicle (vehicle identification number plus the make, model, and year of the vehicle). The public records exemption in s. 324.242, F.S., is similar to the public records exemption in s. 627.736(9), F.S., which was repealed on October 1, 2007, as part of the repeal of the Florida Motor Vehicle No-Fault Law. The public records exemption is subject to the Open Government Sunset Review Act and shall stand repealed October 2, 2012, unless reviewed and reenacted by the Legislature.

Section 324.0221, F.S., requires each insurer that issues a policy providing personal injury protection or property damage liability coverage to report to the Department of Highway Safety and Motor Vehicles (department or DHSMV) the renewal, cancellation, or nonrenewal of the policy within 45 days of the effective date. The insurer must report the issuance of a new policy to a named insured who was not previously insured by the insurer during the calendar year. Insurers are also required to notify the named insured in writing of the cancellation or nonrenewal of the policy and that failure to maintain PIP and property damage coverage when required by law can result in the loss of registration and driving privileges along with the imposition of reinstatement fees.

Upon written receipt by the department of a written request and copy of a crash report as specified, the department must release the policy number for a vehicle involved in a motor vehicle accident to any person involved in such accident, the attorney of any person involved in the accident, or a representative of the insurer of any person involved in the accident.

### **Motor Vehicle Financial Responsibility Requirements**

Florida places minimum financial responsibility requirements on every owner and registrant of a motor vehicle. Each registrant must obtain and provide proof of holding a motor vehicle insurance policy that includes \$10,000 in PIP benefits and \$10,000 in property damage liability coverage. Section 627.733, F.S., requires every owner or registrant of a motor vehicle to maintain security that remains in effect continuously throughout the registration or licensing period.<sup>1</sup> This requirement may be met by:

- An insurance policy issued pursuant to the Florida Motor Vehicle No-Fault law that provides at least \$10,000 in PIP benefits.
- Pursuant to s. 324.031(2), F.S., posting with the Department of Highway Safety and Motor Vehicles (DHSMV) a satisfactory bond of a surety company authorized to do business in Florida that will provide payment of \$10,000 because of bodily injury to, or death of one person in a crash and \$20,000 because of bodily injury or death of two or more persons in any one crash. The bond must also provide \$10,000 to respond to liability for property damage.

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<sup>1</sup> This requirement does not apply to a limousine or a vehicle used as a school bus pursuant to s. 1006.25, F.S.

- Pursuant to s. 324.031 (3), F.S., furnishing a certificate of the DHSMV showing a deposit of cash or securities in accordance with s. 324.161, F.S.<sup>2</sup>
- Furnishing a certificate of self insurance issued by the department in accordance with s. 324.171.
- The state and its agencies and subdivisions may self-insure as authorized by s. 768.28(16), F.S.

Section 324.022, F.S., requires each owner or operator of each Florida-registered motor vehicle to maintain the ability to pay for at least \$10,000 in property damage arising out of the use of the motor vehicle. The financial responsibility requirement may be met through various methods including maintaining an insurance policy that provides at least \$10,000 in property damage liability coverage or a policy that provides at least \$30,000 for combined property damage and bodily injury liability coverage.

The state has higher financial responsibility requirements for various other actors. Commercial motor vehicles must maintain a minimum level of bodily injury (BI) coverage, with the minimum limit based on the weight of the vehicle.<sup>3</sup> Owners and operators of taxicabs<sup>4</sup> and for-hire passenger transportation vehicles<sup>5</sup> also have additional financial responsibility requirements. The owner or operator of a vehicle that must be registered who has been found guilty or plead nolo contendere to driving under the influence must carry \$100,000 in bodily injury coverage for injuries to one person, \$300,000 in BI coverage for injuries to multiple persons, and \$50,000 in property damage coverage for at least three years.<sup>6</sup>

## **Discussion**

### **Public Records**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>7</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>8</sup> Article I, s. 24 of the State Constitution, provides that:

- (a) 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.

In addition to the State Constitution, the Public Records Act,<sup>9</sup> which predates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>10</sup> Section 119.07(1) (a), F.S., states:

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<sup>2</sup> For all entities other than natural persons that use surety bond or a deposit of cash or securities to meet the financial responsibility requirements, the bond or deposit must equal the number of vehicles owned times \$30,000 to a maximum of \$120,000, and must maintain insurance providing excess coverage with minimum limits of \$125,000 in bodily injury benefits to any one person, \$250,000 in bodily injury benefits to multiple persons, and \$50,000 in property damage coverage (or \$300,000 in combined single limits).

<sup>3</sup> Section 627.7415, F.S.

<sup>4</sup> Section 324.031, F.S.

<sup>5</sup> Section 324.032, F.S.

<sup>6</sup> Section 324.023, F.S.

<sup>7</sup> Sections 1390, 1391 F.S. (Rev. 1892).

<sup>8</sup> Article I, s. 24 of the State Constitution.

<sup>9</sup> Chapter 119, F.S.

<sup>10</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf,

Every person who has custody of a public record shall permit the record to be inspected and examined 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 agency records are available for public inspection. The term “public record” is broadly defined 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.<sup>11</sup>

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 used to perpetuate, communicate or formalize knowledge.<sup>12</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>13</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>14</sup> 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.<sup>15</sup> A bill enacting an exemption<sup>16</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>17</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>18</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

The Open Government Sunset Review Act<sup>20</sup> provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption 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 specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

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except those records exempted by law or the state constitution.

<sup>11</sup> Section 119.011(11), F.S.

<sup>12</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>13</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>14</sup> Article I, s. 24(c) of the State Constitution.

<sup>15</sup> *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).

<sup>16</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>17</sup> Art. I, s. 24(c) of the State Constitution.

<sup>18</sup> Attorney General Opinion 85-62.

<sup>19</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>20</sup> Section 119.15, F.S.

- (2) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- (3) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>21</sup>

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) 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 may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>22</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

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

### **Analysis of Section 324.242, F.S. Pursuant to the Open Government Sunset Review Act**

Section 324.242, F.S., specifically protects all personal identifying information of insureds and former insureds and the policy number of each insurance policy. Representatives from the Department of Highway Safety and Motor Vehicles indicate that detailed information identifying the policyholder, the insured vehicle, and contents of the insurance policy are held by the department. This information includes the insurance company code; the insurance policy number; transaction type; vehicle identification number (VIN); the model, make, and year of the vehicle; the full name and address of the insured; the insured's driver's license number or federal tax ID; and the effective date of the policy.

The exemption uniquely affects motor vehicle insurance policyholders and the insurance companies that write such policies. The public records exemption serves two of the three statutory criteria requiring that the exemption serve an identifiable public purpose. First, the exemption protects information of a sensitive personal nature concerning individuals that would jeopardize their safety or reputation if released. The personal identifying information held by the DHSMV includes the personal particulars (name, address; etc.) of individual insureds, driver's license numbers, and vehicle identification numbers, which could be used for purposes of identity theft. Second, the exemption protects confidential information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace. The DHSMV essentially holds personal identifying information for each insurer's motor vehicle insurance book of business that includes the contact information of all the insurer's customers paired with insurance policy numbers, vehicle identification numbers, and policy details. Insurers would face irreparable harm should

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<sup>21</sup> Section 119.15(4)(b), F.S.

<sup>22</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

competitors obtain this data, which could be used to solicit the policyholders of particular insurance companies, policyholders that meet certain criteria, or for other uses.

The information held by the department cannot be readily obtained by alternate means. The identifying information of each insurer's policyholders paired with insurance policy information is unavailable to the general public. Only individual insurance companies would have this information in the aggregate and consider it a trade secret. Committee staff and representatives of the DHSMV are unable to identify another public records exemption that protects such information when held by the Department and did not identify additional exemptions for these types of records that it would be appropriate to merge. Committee staff also contacted representatives from the First Amendment Foundation, which does not oppose reenactment of s. 324.242, F.S., in its current form.

Banking and Insurance professional staff recommends that the current exemption should be reenacted and saved from repeal. This public records exemption benefits policyholders by preventing the disclosure personal identifying information paired with driver's license numbers, which could potentially be used for identity theft. The public records exemption also benefits the insurers by preventing disclosure of information that would essentially allow competitors access to trade secret information that details each individual insurer's book of business.