

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 19 Public Records/Yellow Dot Critical Motorist Medical Information Program

**SPONSOR(S):** Slosberg

**TIED BILLS:** HB 17 **IDEN./SIM. BILLS:** SB 350

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Highway Safety Subcommittee		Thompson	Miller
2) Government Operations Subcommittee			
3) Economic Affairs Committee			

### SUMMARY ANALYSIS

HB 17 authorizes the governing body of a county to create a “yellow dot critical motorist medical information program” for the purpose of assisting emergency medical responders and program participants in the event of a motor vehicle accident or a medical emergency involving a participant’s vehicle. After submitting a completed application, participants are given a yellow dot decal to affix onto the lower left corner of his or her vehicle’s rear window (or a clearly visible location on a motorcycle), a yellow dot folder, and a form that contains certain personal and medical information about the participant.

This bill (HB 19), which is linked to HB 17, provides a public record exemption for participants in a yellow dot critical motorist medical information program. Specifically, the bill provides that the following is confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution:

- the name, identifying photograph, and medical records of a participant in a yellow dot critical motorist medical information program; and
- any medical information pertaining to such participant, including, but not limited to, the participant’s medical conditions, medications, emergency contact information, primary care doctor, preferred hospital, allergies, or blood type, contained within a yellow dot folder distributed by the governing body of a county participating in a yellow dot critical motorist medical information program.

The bill provides an exception to the exemption for information, photographs, and records that are used in evidentiary proceedings in accordance with part III of chapter 499, F.S.

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and stands repealed on July 1, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill as drafted may conflict with certain constitutional and statutory requirements, and may contain drafting inconsistencies (See Comments Section below for details).

The bill may have an insignificant negative fiscal impact on local governments that opt to participate in a yellow dot program (See Fiscal Comments Section below for details). The bill does not appear to have a fiscal impact on the state.

The bill will take effect on the same date that HB 17 or similar legislation takes effect.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Public Records

Article I, s. 24(a) of the State 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, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 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.
- Protects trade or business secrets.

##### Yellow Dot Program

The yellow dot program is a system to alert first responders at an accident scene to search for medical information about the injured—especially if the injured is unconscious or unable to speak. The program provides medical personnel with vital information about the victims during the first critical hours after injury, often called the “crucial golden hour”, when prompt treatment is most effective.<sup>3</sup>

According to the newspaper USA Today, “... [p]articipants in the free program receive a yellow dot to place on their rear window; it alerts emergency services personnel to look for a corresponding yellow folder in the glove box.”<sup>4</sup> The yellow folder may include the injured participant's name, photograph, emergency contact information, medical information, hospital preference, and other vital information.

The program began in Connecticut in 2002, and now, with slight variations, is in counties scattered across at least eight other states: Kansas, Illinois, Iowa, Minnesota, Massachusetts, Virginia, Alabama and New York.<sup>5</sup>

##### HB 17

HB 17, the companion to this bill, authorizes the governing body of a county to create a yellow dot critical motorist medical information program for the purpose of assisting emergency medical responders and program participants in the event of a motor vehicle accident or a medical emergency involving a participant's vehicle. After submitting a completed application, participants are given a

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> See s. 119.15, F.S.

<sup>3</sup> Additional information about the Yellow Dot program at [www.yellow-dot.com](http://www.yellow-dot.com) (Last viewed on 1/2/14).

<sup>4</sup> “Yellow Dot car program speeds to help crash victims.” Larry Copeland, USA Today (5/24/2011) at [http://usatoday30.usatoday.com/news/nation/2011-05-23-yellow-dot-seniors-drivers-baby-boomers\\_n.htm](http://usatoday30.usatoday.com/news/nation/2011-05-23-yellow-dot-seniors-drivers-baby-boomers_n.htm) (Last viewed on 1/2/14).

<sup>5</sup> *Id.*

yellow dot decal to affix onto the lower left corner of his or her vehicle's rear window (or a clearly visible location on a motorcycle), a yellow dot folder, and a form for the participant's information.

The form, which is to be placed inside the yellow dot folder, is to contain the following information:

- the participant's name;
- the participant's photograph;
- emergency contact information of no more than two persons;
- the participant's medical information, including medical conditions, recent surgeries, allergies and medications;
- the participant's hospital preference; and
- contact information for no more than two physicians.

### **Effect of Proposed Changes**

The bill provides a public record exemption for participants in a yellow dot critical motorist medical information program. Specifically, the bill provides that the following is confidential and exempt<sup>6</sup> from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution:

- the name, identifying photograph, and medical records of a participant in a yellow dot critical motorist medical information program; and
- any medical information pertaining to such participant, including, but not limited to, the participant's medical conditions, medications, emergency contact information, primary care doctor, preferred hospital, allergies, or blood type, contained within a yellow dot folder distributed by the governing body of a county participating in a yellow dot critical motorist medical information program.

The bill provides that information, photographs, and records held exempt may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with part III of chapter 499, Florida Statutes.<sup>7</sup>

The bill provides that the public records exemption is subject to the Open Sunset Review Act and stands repealed on July 1, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.<sup>8</sup>

The bill provides an effective date contingent upon the passage of HB 17 or similar legislation.

#### **B. SECTION DIRECTORY:**

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|-----------|--|
| Section 1 | Creates an unnumbered section of law exempting from public records requirements information of participants in a yellow dot critical motorist medical information program. |
| Section 2 | Provides a statement of public necessity.  |
| Section 3 | Provides an effective date contingent upon the passage of HB 17 or similar legislation.  |

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<sup>6</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. See Attorney General Opinion 85-62 (August 1, 1985).

<sup>7</sup> Part III of chapter 499, F.S., does not exist. See comment under part III C. of this analysis.

<sup>8</sup> Section 24(c), Art. I of the State Constitution.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

Participation in the yellow dot program by a county is not mandatory. The bill could create a minimal fiscal impact on the governing body of a county that opts to create a yellow dot program, because staff responsible for complying with public records requests could require training related to the creation of the public records exemption. In addition, the governing body of a participating county could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of county government.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill creates a public records exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public records exemption; thus, it includes a public necessity statement. However, portions of the public necessity statement do

not accurately reflect the confidential and exempt nature of the public record exemption, are superfluous, or are not consistent with HB 17 (See Drafting Issues for more specific line references).

#### Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. HB 17 authorizes the yellow dot program and requires the yellow dot form to contain the participant's name, photograph, emergency contact information for two people, medical information (including medical conditions, recent surgeries, allergies, and medications being taken), hospital preference, and two physicians contact information. The exemption in this bill (HB 19) protects the name, photograph, and medical records of a participant in a yellow dot program, and any medical information pertaining to such participant, including, but not limited to, the participant's medical conditions, medications, emergency contact information, primary care doctor, preferred hospital, allergies, or blood type, contained within a yellow dot folder distributed by the governing body of a participating county. Consequently, the exemption (HB 19) may be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

#### Right to Privacy

Article I, Section 23 of the State Constitution grants all Florida citizens the right to privacy. Consequently, Florida courts have recognized patients' rights to secure the confidentiality of their health information (medical records); however, that right must be balanced with and yields to any compelling state interest.<sup>9</sup> These rights would apply to participants in a yellow dot critical motorist medical information program.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Drafting Issues

Lines 15-25 delineate the specific yellow dot critical motorist medical information that the bill exempts from public records requirements. However, this information does not correspond with the information that a program participant would be required to submit pursuant to HB 17.

Lines 26-30 provide an exception to the exemption for information, photographs, and records that are used in evidentiary proceedings in accordance with part III of chapter 499, F.S. However, part III of chapter 499, F.S., does not exist. This provision is not related to the bill.

Line 33 sets the repeal date for July 1, 2019. This conflicts with the Open Government Sunset Review Act requirement for an exemption to be repealed on October 2<sup>nd</sup> of the fifth year after enactment.

Lines 69, 75, and 79, of the public necessity statement do not accurately reflect the confidential and exempt nature of the public record exemption. Lines 70 through 72, of the public necessity statement are superfluous. Lines 70 through 72, 75 through 77, and 80, of the public necessity statement are not consistent with HB 17.

##### Other Comments: Retroactive Application

The Supreme Court of Florida has ruled that a public records exemption is not to be applied retroactively unless the legislation clearly expresses the intent that such exemption is to be applied retroactively.<sup>10</sup> The bill does not expressly provide that the public records exemption be applied retroactively. As such, the bill will apply prospectively.

<sup>9</sup> See *State v. Johnson*, 814 So.2d 390 (Fla.2002) distinguished in *Limbaugh v. State of Florida* 2004 WL 2238978 (4th DCA October 6, 2004); and *Rasmussen v. S. Fla. Blood Serv. Inc.*, 500 So.2d 533 (Fla.1987) (privacy interests of blood donors defeated AIDS victims claim to obtain via subpoena names and addresses of blood donors who may have contributed the tainted blood).

<sup>10</sup> A statute affecting the right to public records access is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 so. 2d 438 (Fla. 2001). The Supreme Court ruled that a statute providing an exemption from open government requirements for meetings and records of private

#### Other Comments: Records of Emergency Calls

Section 401.30, F.S., requires emergency medical services (EMS) entities that are licensed<sup>11</sup> by the Department of Health (DOH) to maintain accurate records of emergency calls. Such records that contain patient examination or treatment information are confidential and exempt from public record disclosure requirements, and are not to be disclosed without the consent of the person to whom they pertain.<sup>12</sup> As this exemption only applies to records that are acquired by emergency medical services as a result of an emergency call, it does not appear to protect yellow dot critical motorist information held by a participating county as provided in HB 17.

#### Other Comments: The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule<sup>13</sup> protects individually identifiable health information held by "covered entities." The information protected is referred to as protected health information or PHI. Covered entities include health plans, health care clearinghouses, and health care providers who conduct certain financial and administrative transactions electronically. If a state, county, or local government, performs functions that make it a covered entity (i.e., those activities that make it a provider who conducts certain transactions electronically, a health plan or a health care clearinghouse), or otherwise meets the definition of a covered entity, compliance with the HIPAA Privacy Rule is required.<sup>14</sup> HIPPA defines a health care provider as any person or organization who furnishes, bills, or is paid for health care in the normal course of business.<sup>15</sup> As such, a governing body of a county, as it relates to the participation in a yellow dot critical motorist medical information program, is not considered to be a health care provider under HIPPA, and thus, the PHI collected under the program would not appear to be covered under the HIPPA Privacy Rule.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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corporations leasing hospitals from public taxing authorities did not apply to records created prior to the effective date of the statute. *See also Baker County Press, Inc. v. Baker County Medical Services*, 870 so. 2d 189, 192-193 (Fla. 1st DCA 2004). Generally, the critical date in determining whether a document is subject to disclosure is the date the public records request is made; the law in effect on that date applies.

<sup>11</sup> s. 401.23(13), F.S., defines "licensee" as any basic life support service, advanced life support service, or air ambulance service licensed pursuant to this part, by DOH.

<sup>12</sup> s. 401.30(4), F.S.

<sup>13</sup> Pub.L. 104-191, 110 Stat. 1936.

<sup>14</sup> *See* 45 CFR 160.103, for more information regarding HIPPA definitions of covered entity, health care provider, health plan and health care clearinghouse.

<sup>15</sup> 45 CFR 160.103.