

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 1409 Pub. Rec./Records of Insurers/Department of Financial Services

**SPONSOR(S):** Oversight, Transparency & Public Management Subcommittee, Grant, M.

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 1188

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**FINAL HOUSE FLOOR ACTION:** 118 Y's      0 N's      **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 1409 passed the House on March 9, 2020, and subsequently passed the Senate on March 10, 2020.

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of the legislative, executive, or judicial branches of government. However, the Legislature may provide by general law for the exemption of records from the constitutional requirements.

Florida law provides for guaranty associations to ensure that policyholders of insolvent insurers are protected with respect to insurance premiums paid and settlements of outstanding claims. Insurers are required to participate in the guaranty associations as a condition to transacting insurance business in Florida. Currently, personal financial and health information of a consumer, all underwriting files of a type customarily maintained by an insurer transacting lines of insurance similar to lines transacted by the insurer, all personnel and payroll records of the insurer, and consumer claim files are protected from disclosure when held by insurers or insurance company. However, when insurance companies become insolvent, this information is no longer protected and can be disclosed. The bill creates a public records exemption to protect insurers and insureds from the release of information if an insurance company goes insolvent.

The bill provides that the following records held by the Department of Financial Services (DFS) are confidential and exempt from public records requirements:

- All personal financial and health information of a consumer, including a family member or dependent;
- Underwriting files of a type customarily maintained by an insurer transacting lines of insurance similar to lines transacted by the insurer;
- Personnel and payroll records of the insurer;
- Consumer claim files;
- A U.S. Own Risk and Solvency Assessment (ORSA) summary report, a substantially similar ORSA summary report, and any supporting documents submitted to the Office of Insurance Regulation (OIR);
- A corporate governance annual disclosure and any supporting documents submitted to (OIR); and
- Information received from the National Association of Insurance Commissioners, a governmental entity of any state, the Federal Government, or a government of another nation which is confidential and is held by Department of Financial Services for use relating to insurer solvency.

The bill provides specified circumstances under which the confidential and exempt information may be released.

The exemptions in the bill are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2025 unless reviewed and reenacted by the Legislature.

The bill has no fiscal impact on state or local government revenue or expenditures.

The bill was approved by the Governor on June 29, 2020, ch. 2020-142, L.O.F., and will become effective on July 1, 2020.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Current Situation

##### Public Records

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of the legislative, executive, or judicial branches of government.<sup>1</sup> The Legislature, however, may provide by general law for the exemption of records from the constitutional requirements.<sup>2</sup> An exemption must state with specificity the public necessity justifying the exemption and may be no broader than necessary to accomplish the stated purpose of the law.<sup>3</sup> A bill enacting an exemption must pass by a two-thirds vote of the members present and voting.<sup>4</sup>

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.<sup>5</sup> A public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served, if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a government program, which administration would be significantly impaired without the exemption;
- Protects personal identifying information that, if released, would be defamatory or would jeopardize an individual's safety; or
- Protects trade or business secrets.<sup>6</sup>

The Act requires the automatic repeal of an exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

##### Guaranty Associations

Under federal law, insurance companies cannot file for bankruptcy.<sup>7</sup> Instead, they are either rehabilitated or liquidated by their state of domicile. Florida law establishes the system for the treatment of impaired or insolvent insurers<sup>8</sup> and sets up guaranty payments where necessary.<sup>9</sup> Florida law provides for guaranty associations to ensure that policyholders of insolvent insurers are protected with respect to insurance premiums paid and settlement of outstanding claims, up to limits provided by law.<sup>10</sup> A guaranty association is a not-for-profit corporation created by law and directed to protect policyholders from financial losses and delays in claim payments and settlements due to the insolvency of an insurer.<sup>11</sup> Insurers are required to participate in the guaranty associations as a condition of transacting insurance business in Florida. Florida operates four guaranty associations, including Florida Insurance Guaranty Association,<sup>12</sup> Florida Life and Health Insurance Guaranty Association,<sup>13</sup> Florida Health Maintenance Organization Consumer Assistance Plan,<sup>14</sup> and Florida Workers' Compensation Insurance Guaranty Association.<sup>15</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(c).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> S. 119.15, F.S.

<sup>6</sup> S. 119.15(6)(b), F.S.

<sup>7</sup> 11 U.S.C. § 109(b)(2).

<sup>8</sup> An "insolvent insurer" means an insurer that was authorized to transact insurance in this state, either at the time the policy was issued or when the insured event occurred, and against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction if such order has become final by the exhaustion of appellate review. S. 631.904 (4), F.S.

<sup>9</sup> Ch. 631, F.S.

<sup>10</sup> *Id.*

<sup>11</sup> See e.g., ss. 631.51 and 631.902, F.S.

<sup>12</sup> Ch. 631, part II, F.S.

<sup>13</sup> Ch. 631, part III, F.S.

<sup>14</sup> Ch. 631, part IV, F.S.

<sup>15</sup> Ch. 631, part V, F.S.

### Insurer Solvency Records

Insurance companies must keep records of policyholders and claimants during the normal course of business. As long as an insurer remains solvent, these records are not freely available to any person who requests such information, unless there is a valid reason for the request. DFS's current ability to withhold information regarding a consumer who is covered by an insolvent insurer is limited to the exemptions outlined in s. 119.071, F.S. Such information includes social security numbers of agency personnel,<sup>16</sup> as well as home addresses, telephone numbers, dates of birth, and photographs of various personnel.<sup>17</sup> When an insurer becomes insolvent, current law does not provide a public record exemption for a consumer or family member's medical and health history, private financial information, or insurance coverage. In such cases, policyholders and claimants no longer receive the same protections and anyone can request access to their information.

### Regulation by OIR: Solvency Regulation and NAIC Accreditation

The regulatory oversight of insurance companies is generally reserved to the states. In Florida, the Office of Insurance Regulation (OIR) is responsible for all activities concerning insurers and other risk bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, and premium financing. Solvency regulation is designed to protect policyholders against the risk that insurers will not be able to meet their financial responsibilities, namely, the payment of claims. Solvency regulations include the initial and maintenance requirements for an insurer's authority to transact insurance in this state, monitoring the financial condition of insurers through examinations, audits, and procedures for the rehabilitation, or liquidation of an insurance company if found to be in an unsound financial condition or insolvent.<sup>18</sup>

The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance departments that regulate the conduct and solvency of insurers in their respective states or territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer reviews, and coordinate their regulatory oversight.<sup>19</sup> As a member of the NAIC, the OIR is required to participate in the organization's Financial Regulation Standards and Accreditation Program.<sup>20</sup> NAIC accreditation is a certification that legal, regulatory, and organizational oversight standards and practices are being fulfilled by a state insurance department to promote sound insurer financial solvency regulation.

### Insurer Regulatory Reporting

The NAIC has adopted two insurance model acts that give state insurance regulators like the OIR new solvency regulatory tools – the Own Risk and Solvency Assessment (ORSA) and the Corporate Governance Annual Disclosure (CGAD).<sup>21</sup>

#### **ORSA**

In 2011, as part of the NAIC's Solvency Modernization Initiative, the NAIC adopted the ORSA as a new insurance regulatory tool. The ORSA<sup>22</sup> requires insurance companies to issue their own assessment of their current and future risk through an internal risk self-assessment process, allowing regulators to form an enhanced view of an insurer's ability to withstand financial stress.<sup>23</sup> In conducting an ORSA, an

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<sup>16</sup> S. 119.071(4)(a)1., F.S.

<sup>17</sup> These exemptions include, but are not limited to, the records of current or past law enforcement personnel, firefighters, court justices, state attorneys, probation officers, investigators, and child advocacy employees. ss. 119.071(4)(d)2.a.–119.071(4)(d)2.t., F.S.

<sup>18</sup> See ch. 631, F.S.

<sup>19</sup> NAIC, *About the NAIC*, [http://www.naic.org/index\\_about.htm](http://www.naic.org/index_about.htm) (last visited Jan. 31, 2020).

<sup>20</sup> NAIC, *Financial Regulation Standards and Accreditation Program*, [https://www.naic.org/documents/cmte\\_f\\_frsa\\_pamphlet.pdf](https://www.naic.org/documents/cmte_f_frsa_pamphlet.pdf) (last visited Jan. 30, 2020).

<sup>21</sup> S. 628.8015, F.S.

<sup>22</sup> The term "own-risk and solvency assessment" means an internal assessment, appropriate to the nature, scale, and complexity of an insurer or insurance group, conducted by that insurer or insurance group, of the material and relevant risks associated with the business plan of an insurer or insurance group and the sufficiency of capital resources to support those risks. S. 628.8015, F.S.

<sup>23</sup> NAIC, *Own Risk and Solvency Assessment*, [http://www.naic.org/cipr\\_topics/topic\\_own\\_risk\\_solvency\\_assessment.htm](http://www.naic.org/cipr_topics/topic_own_risk_solvency_assessment.htm) (last visited Jan. 31, 2020).

insurer or insurance group references highly sensitive and strategic financial information. Each insurer must submit an ORSA summary report<sup>24</sup> to OIR every year.<sup>25</sup>

### CGAD

Insurers must submit a CGAD<sup>26</sup> to OIR each year.<sup>27</sup> In the CGAD, insurers must document highly confidential information about their corporate governance framework, including the structure and policies of their boards of directors and key committees, the frequency of their meetings, and procedure for the oversight of critical risk areas and appointment practices, among other things. Insurers must also disclose the policies and practices used by their board of directors for directing senior management on critical areas, including a description of codes of business conduct and ethics, and processes for performance evaluation, compensation practices, corrective action, succession planning and suitability standards. The disclosure must be as descriptive as possible,<sup>28</sup> and include material and relevant information sufficient to enable OIR to understand the corporate governance structure, policies, and practices used by the insurer or insurance group.<sup>29</sup>

### Effect of the Bill

The bill provides that the following records held by DFS before, on, or after July 1, 2020, are confidential and exempt<sup>30</sup> from public records requirements:

- All personal financial and health information of a consumer, including a family member or dependent;
- Underwriting files of a type customarily maintained by an insurer transacting lines of insurance similar to lines transacted by the insurer;
- Personnel and payroll records of the insurer; and
- Consumer claim files.

The bill defines personal financial and health information as:

- A consumer's personal health condition, disease or injury;
- A history of a consumer's personal medical diagnosis or treatment;
- The existence, nature, source, or amount of a consumer's personal income or expenses;
- Records of, or relating to, a consumer's personal financial transactions of any kind;
- The existence, identification, nature, or value of a consumer's assets, liabilities, or net worth;
- The existence or content of, or any individual coverage or status under a consumer's beneficial interest in, any insurance policy or annuity contract; or
- The existence, identification, nature, or value of a consumer's interest in any insurance policy, annuity contract, or trust.

The bill provides public records exemptions for several internal documents required by OIR and held by DFS before, on, or after July 1, 2020. The following records are confidential and exempt from public records requirements:

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<sup>24</sup> The term "ORSA summary report" means a high-level ORSA summary of an insurer or insurance group, consisting of a single report or combination of reports. S. 628.8015(1)(f), F.S.

<sup>25</sup> S. 628.8015(2)(c)1.a.(I), F.S.

<sup>26</sup> See s. 628.8015(1)(a), F.S.

<sup>27</sup> S. 628.8015(3)(b)1.a., F.S.

<sup>28</sup> S. 628.8015 (3)(c)2., F.S.

<sup>29</sup> S. 628.8015 (3)(c)3., F.S.

<sup>30</sup> There is a difference between records the Legislature designates 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. Sch. Bd. 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 683, 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 statute. See Op. Att'y Gen. Fla. 85-62 (1985).

- An ORSA summary report, a substantially similar ORSA summary report, and any supporting documents submitted to OIR;<sup>31</sup>
- A CGAD and any supporting documents submitted to OIR;<sup>32</sup> and
- Information received from the NAIC, a governmental entity of any state, the Federal Government, or a government of another nation which is confidential and is held by DFS for use relating to insurer solvency.

Records or portions of records made confidential and exempt by this bill may be released under the following circumstances:

- To any state or federal agency, upon written request, if disclosure is necessary for the agency's performance of its duties and responsibilities. The receiving agency must maintain the confidential and exempt status of the records.
- To comply with a properly authorized civil, criminal, or regulatory investigation or a subpoena or summons by a federal, state, or local authority.
- To the NAIC, or its affiliates and subsidiaries, if the recipient agrees in writing to maintain the confidential and exempt status of the records.
- To the guaranty associations and funds of the various states which are receiving, adjudicating, and paying claims of an insolvent insurer subject to delinquency proceedings. The receiving association must maintain the confidential and exempt status of the records.
- To persons identified as employees whose responsibilities include the investigation and disposition of claims relating to suspected fraudulent insurance acts<sup>33</sup> upon written request.
- Records containing personal financial and health information of a consumer may be released upon written request of the consumer or the consumer's legally authorized representative.

The listed exemptions are applicable even when an insurer or insurance company becomes insolvent.

The public records exemptions are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2025, unless reviewed and saved through reenactment by the Legislature.

## 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:

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<sup>31</sup> See s. 628.8015, F.S.

<sup>32</sup> *Id.*

<sup>33</sup> See s. 626.989(4)(d), F.S.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.