

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 7014

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Office of Insurance Regulation

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Johnson</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7014 amends s. 624.4212, F.S., to save from repeal the public records exemption relating to insurer reporting of certain proprietary business and other information that is held by the Office of Insurance Regulation. The proprietary business information includes, but is not limited to, reports submitted by insurers, such as the enterprise risk report, the own risk and solvency assessment (ORSA) summary report or a substantially similar ORSA report, the corporate governance annual disclosure (CGAD), and supporting documentation. This information will continue to be confidential and exempt from public disclosure beyond October 2, 2020.

By saving s. 624.4212, F.S., from repeal, the bill also prevents the repeal of amendments made to s. 628.8015, F.S., and s. 628.803, F.S., implementing the following National Association of Insurance Commissioners Model Acts and Regulations:

- Risk Management and Own-risk and Solvency Assessment Model Act.
- Corporate Governance and Disclosure Model Act; and the corresponding Corporate Governance Annual Disclosure Model Regulation.

The bill is not expected to impact state or local government revenues and expenditures.

The bill takes effect October 1, 2021.

II. Present Situation:

Access to Public Records – Generally

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ The right to inspect or copy applies

¹ FLA. CONST. art. I, s. 24(a).

to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

Executive Agency Records – The Public Records Act

Chapter 119, F.S., known as the Public Records Act, provides that all state, county and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.³ A public record includes virtually any document or recording, regardless of its physical form or the method of transmission.⁴ The Florida Supreme Court has interpreted the statutory definition of “public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”⁵

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.⁸ The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.⁹

General exemptions from the public records requirements are contained in the Public Records Act.¹⁰ Specific exemptions often are placed in the substantive statutes relating to a particular

² *Id.*

³ Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” 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 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.”

⁴ Section 119.011(12), F.S., defines “public record” 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.”

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

⁶ Section 119.07(1)(a), F.S.

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁸ FLA. CONST. art. I, s. 24(c).

⁹ *Id.* See, e.g., *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

¹⁰ See, e.g., s. 119.071(1)(a), F.S. (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

agency or program.¹¹ When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.¹² Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁴ (the Act) prescribes a legislative review process for newly created or substantially amended¹⁵ public records or open meetings exemptions, with specified exceptions.¹⁶ It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹⁷

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁸ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;¹⁹
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²⁰ or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.²¹

The Act also requires specified questions to be considered during the review process.²² In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

¹¹ See, e.g., s. 213.053(2)(a), F.S. (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

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

¹³ *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹⁴ Section 119.15, F.S.

¹⁵ An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

¹⁶ Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁷ Section 119.15(3), F.S.

¹⁸ Section 119.15(6)(b), F.S.

¹⁹ Section 119.15(6)(b)1., F.S.

²⁰ Section 119.15(6)(b)2., F.S.

²¹ Section 119.15(6)(b)3., F.S.

²² Section 119.15(6)(a), F.S. The specified questions are:

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.²³ If the exemption is continued without substantive changes or if the exemption is continued and narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁴

Regulation of Insurance in Florida

States are the primary regulators of insurance companies. In Florida, the Office of Insurance Regulation (OIR)²⁵ is primarily responsible for licensing insurance companies, monitoring the solvency of regulated insurers, examining insurers to determine compliance with applicable laws, and taking administrative action, if necessary.

In 2016, the Legislature enacted laws²⁶ implementing the National Association of Insurance Commissioners' (NAIC)²⁷ Risk Management and Own-risk and Solvency Assessment (ORSA) Model Act²⁸ and the Corporate Governance and Disclosure Model Act and the corresponding Corporate Governance Annual Disclosure Model Regulation²⁹ (CGAD). The ORSA Model Act requires insurers to conduct an internal assessment of all relevant material risks (e.g., underwriting, credit, market) potentially affecting their ability to meet policyholder obligations. The ORSA Model Act requires insurers (or an insurance group, as applicable) to conduct an ORSA at least annually and file an ORSA summary report based with their domestic regulator or lead state (for an insurance group).

The CGAD Model Act and Regulation, which specify requirements for extensive disclosure of regulated insurers' corporate governance practices, are designed to provide insurance regulators with sufficient information on insurers' governance practices through an annual reporting.

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- 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?

²³ See generally s. 119.15, F.S.

²⁴ Section 119.15(7), F.S.

²⁵ Section 20.121(3)(a), F.S.

²⁶ Ch. 2016-206, Laws of Fla. The ORSA and CGAD requirements are codified in ss. 628.8015, F.S. Section 628.803, F.S., provides sanctions for noncompliance with reporting requirements.

²⁷ The OIR is a member of the National Association of Insurance Commissioners (NAIC), which is an association of state insurance regulators. The NAIC coordinates regulation and examination of multistate insurers, and promotes uniform model laws among the states. The NAIC accreditation is a certification that a state insurance regulator is fulfilling legal, financial, and organizational standards. The NAIC establishes accreditation effective dates for states to adopt in substantially similar form models and acts for purposes of NAIC accreditation review. The OIR is accredited by the NAIC.

²⁸ National Association of Insurance Commissioners, The Risk Management and Own Risk and Solvency Assessment Model Act (2012) <https://content.naic.org/sites/default/files/inline-files/MDL-505.pdf?64> (last viewed Oct. 26, 2020).

²⁹ National Association of Insurance Commissioners, Corporate Governance Annual Disclosure Model Act, (2014) <https://content.naic.org/sites/default/files/inline-files/MDL-305.pdf> and the Corporate Governance Annual Disclosure Model Regulation (2014) <https://content.naic.org/sites/default/files/inline-files/MDL-306.pdf> (last viewed October 26, 2020).

Insurers or insurer groups must file a Corporate Governance Annual Disclosure (CGAD) with their domestic regulator or the lead state regulator (for an insurance group). The CGAD Model and Regulation require insurers to document highly confidential information about their corporate governance framework, and submit annual disclosures to the insurance regulator. This includes the policies of their boards of directors, procedure for the oversight of critical risk areas, and appointment practices. Provisions in the model act and regulation require that states must keep ORSA and CGAD documents confidential.

Open Government Sunset Review of the Public Records Exemption for Insurer Reporting of Proprietary Business Information

Section 624.4212, F.S., defines insurer “proprietary business information”³⁰ and makes such information and related information held by the OIR confidential and exempt³¹ from s. 119.07(1), F. S., and Art. I, s. 24(a) of the State Constitution.³² This includes proprietary business information and supporting documents contained in documents, such as the actuarial opinion summary, principle-based valuation report, enterprise risk report, insurance holding company registration, ORSA summary report, and corporate governance annual disclosure. In some instances, the OIR may disclose this confidential and exempt proprietary business information to other state, federal, and international agencies.³³

In 2016, the Legislature amended s. 624.4212, F.S., to provide that, except for information obtained by the OIR which would otherwise be available for public inspection, that ORSA summary reports, substantially similar ORSA reports, CGAD annual disclosure, and supporting documents held by the OIR pursuant to s. 628.8015, F.S.,³⁴ are confidential and exempt from s. 119.07(1) and Art. I, s. 24(a) of the State Constitution. In creating the exemption, the Legislature found that exempting the ORSA reports and CGAD disclosures, and supporting information is a public necessity. The Legislature recognized that the release of the ORSA reports, the CGAD annual disclosures, and supporting documents would injure the insurer in the marketplace by providing competitors with the insurer’s confidential business information.

Section 624.4212, F.S., is repealed on October 2, 2021, unless reviewed and saved from repeal by the Legislature pursuant to the Act. Further, the 2016 law³⁵ enacting the amendments to s. 624.4212, F.S., provides that s. 628.8015, F.S., and the amendments made by this law to s. 628.803, F.S., are repealed on October 2, 2021, unless, before that date, the Legislature saves

³⁰ Section 624.4212(1), F.S.

³¹ There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *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 (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 2004); and *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, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See 85-62 Fla. Op. Att’y Gen. (1985).

³² Ch. 2014-100, Laws of Fla.

³³ Section 624.4212(2), F.S.

³⁴ Ch. 2016-206, Laws of Fla.

³⁵ See s. 3, ch. 2016-206, Laws of Fla. See Notes to Sections 628.8015 and 628.803, F.S.

from repeal through reenactment the amendments to s. 624.4212, F.S., made by SB 1416³⁶ or similar legislation.³⁷

Senate Banking and Insurance Committee staff surveyed the OIR to ascertain whether the public records exemption in s. 624.4212, F.S., remains necessary. Staff reviewed the OIR's responses to the questions to be considered by the Legislature in accordance with s. 119.115(6)(a), F.S. The OIR recommends that the Legislature reenact this public records exemption. The exemption in s. 624.4212, F.S., is adequately meeting its goal and the OIR does not find a need to expand the exemption at this time.³⁸

III. Effect of Proposed Changes:

Section 1 amends s. 624.4212, F.S., to delete the scheduled repeal of the current public records exemption of insurer proprietary business information and other information. This information will continue to be confidential and exempt from public disclosure. Further, the Office of Insurance Regulation is authorized to disclose³⁹ such proprietary business information and other information to the Office of Insurance Consumer Advocate within the Department of Financial Services.

By saving s. 624.4212, F.S., from repeal, the bill also prevents the repeal of amendments made to s. 628.8015, F.S., and s. 628.803, F.S., implementing the following National Association of Insurance Commissioners Model Acts and Regulations:

- Risk Management and Own-risk and Solvency Assessment Model Act.
- Corporate Governance and Disclosure Model Act; and the corresponding Corporate Governance Annual Disclosure Model Regulation.

Section 2 provides the bill takes effect October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not 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.

³⁶ Ch. 2016-205, Laws of Fla.

³⁷ Section 628.803, F.S., authorizes the OIR to impose sanctions for specified violations of the Insurance Code. If s. 624.4212, F.S., was not reenacted, the amendments in s. 628.803(1) and (4), F.S., provides sanctions

³⁸ Correspondence from the OIR (Aug. 10, 2020) on file with Senate Banking and Insurance Committee.

³⁹ The recipient, here the Office of Insurance Consumer Advocate, must agree in writing to maintain the confidential and exempt status of the information.

B. Public Records/Open Meetings Issues:**Vote Requirement**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill continues a current public records exemption beyond its current date of repeal; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article 1, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill continues a current public records exemption without expansion. Thus, a statement of public necessity is not required.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of this law is to protect all images obtained from an automatic license plate recognition system as well as any personal identifying information in any data generated from images obtained from such a system. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The reenactment of the public records exemption will protect sensitive business information about an insurer or insurer group that is reported to the OIR.

C. Government Sector Impact:

The OIR will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 624.4212 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.