

STORAGE NAME: h1887s1a.fs

DATE: February 18, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FINANCIAL SERVICES
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 1887

RELATING TO: Creates public records and public meetings exemptions for the Florida Automobile Joint Underwriting Association

SPONSOR(S): Committee on Governmental Operations and Representative Ball

COMPANION BILL(S): SB 746 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS YEAS 3 NAYS 0
- (2) FINANCIAL SERVICES YEAS 8 NAYS 0
- (3)

I. SUMMARY:

Under the Public Records Law, the Government in the Sunshine Law, and Article I, Section 24 of the State Constitution, records and meetings of public bodies must be open to the public. The Attorney General has issued an opinion which concludes that the Florida Windstorm Underwriting Association is subject to these laws. The Attorney General's rationale is equally applicable to the Florida Automobile Joint Underwriting Association (FJUA).

CS/HB 1887 states that the FJUA is subject to the Public Records and Government in the Sunshine Laws, and exempts from disclosure certain records relating to open claims files, underwriting files, open internal audits, privileged attorney-client communications, proprietary information, employee records, and ongoing negotiations. CS/HB 1887 also exempts portions of meetings relating to open claims files and underwriting files. A court reporter must record all closed meetings and those notes must be retained by FJUA for 5 years. A copy of the transcript of closed portions of meetings, less any exempt matters, during which claims are discussed becomes public after the claim is settled. This bill provides a public necessity statement for the exemptions, as is required by Article I, s. 24, of the State Constitution, and the exemptions are made subject to the Open Government Sunset Review Act of 1995.

The exemptions in this bill are almost identical to those created in 1995 for the Residential Property and Casualty Joint Underwriting Association by Chapter 95-233, Laws of Florida.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Public Records Law

Article I, s. 24, Florida Constitution, expresses Florida's public policy regarding access to government records in providing that:

(a) Every person has the right to inspect or copy any public records 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.

Article I, s. 24, Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law exempting the records must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07, F.S., provides:

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 a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Section 119.15, F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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:

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;
2. 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. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 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.

Applicability of the Public Records and Public Meetings Laws to the Florida Automobile Joint Underwriting Association

On April 12, 1994, in response to a request from the Insurance Commissioner, the Attorney General issued Attorney General's Opinion 94-32, wherein he concluded that the Florida Windstorm Underwriting Association is subject to the Public Records Law and the Government in the Sunshine Law. The Attorney General relied on several leading cases construing these laws (see, e.g., Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969), Times Publishing Co. v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969), City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971), Wood v. Marston, 442 So.2d 934 (Fla. 1983)) as well as a series of earlier Attorney General's Opinions.

The Florida Windstorm Underwriting Association (FWUA) is a private, nonprofit entity created pursuant to statute for the purpose of providing windstorm coverage when such coverage is otherwise unavailable in certain areas of the state. The association is subject to regulation and supervision by the Department of Insurance. With respect to the Government in the Sunshine Law, the Attorney General noted that private organizations are generally not subject to that law, but that the law has been held applicable to such organizations to avoid circumvention of the statute. In determining whether the law applies, the Attorney General considers "all the factors relating to the responsibilities of the private entity and the public agency." (AGO 94-32 at 693) Previously, the Attorney General had opined that Enterprise Florida, Inc., a statutorily-created corporation with duties prescribed by statute (see AGO 92-80), was subject to Government in the Sunshine Law, and that a nongovernmental advisory committee appointed by a private nonprofit corporation for the purpose of providing technical advice with respect to recodification of county zoning laws was also subject to that law (see AGO 83-95). Because "the FWUA is created pursuant to a plan adopted by departmental rule, which carries out a governmental function through a board supervised by the department," the Attorney General concluded that the Government in the Sunshine Law applies to the FWUA.

In determining whether the Public Records Law applies, the Attorney General considers the creation, funding, regulation, decision-making process, and goals of an entity (AGO 94-32 at 694; see also AGO 92-37). In light of the same considerations that led to the conclusion that the FWUA was subject to the Government in the Sunshine Law, the Attorney General ruled that the FWUA was subject to the Public Records Law.

Furthermore, the Attorney General has opined that the non-profit corporation, Shared Market Insurance Services, Inc., (SMISI) like the Florida Residential Property and Casualty Joint Underwriting Association (RPCJUA), is subject to the public records law. (AGO 95-58) The RPCJUA is an insurance mechanism created pursuant to s. 627.351, F.S., to provide residential property insurance coverage to property owners within the state who are unable to secure such coverage in the private marketplace. In 1993, SMISI was established. SMISI is subordinate to and supervised by the RPCJUA.

The Florida Legislature passed a law in 1995 establishing public records and public meetings exemptions for the RPCJUA. See Chapter 95-233, Laws of Florida. (The exemptions in this bill are substantially the same as those created for RPCJUA; the key difference is that the RPCJUA provision allows for release of information to the Market Assistance Plan under s. 627.3515.)

Like the FWUA and SMISI, the Florida Automobile Joint Underwriting Association (FJUA) is a nonprofit entity created by statute for the public purpose of providing insurance where otherwise unavailable, operating under a plan approved by the Department of Insurance. Accordingly, one could reasonably conclude that the Public Records Law and the Government in the Sunshine Law are applicable to the FJUA.

The laws governing the FJUA, ss. 627.311 and 627.351(1), F.S., do not contain any exemptions from the Government in the Sunshine Law or the Public Records Law.

B. EFFECT OF PROPOSED CHANGES:

The effects of this bill are discussed in the Section-by-Section analysis, below.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

This bill requires that the FJUA keep certain records and meetings confidential and that a court reporter be present at all closed meetings.

(3) any entitlement to a government service or benefit?

No

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

This bill requires that the FJUA keep certain records and meetings confidential and that a court reporter be present at all closed meetings.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends s. 627.311

E. SECTION-BY-SECTION RESEARCH:

Section 1 amends s. 627.311, F.S., and specifies that the Florida Automobile Joint Underwriting Association (FJUA) is subject to the public records requirements of chapter 119, F.S., and the public meetings requirements of s. 286.011, F.S. However, the following records held by the FJUA are made confidential and exempt:

Underwriting files (except that a policyholder or applicant has access to his or her own underwriting files).

Claims files, until termination of all litigation and settlement of all claims arising out of the same incident; however, confidential claims files may be released to governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in the bill.

Records obtained or generated by an internal auditor. If the report is pursuant to a routine audit, the report is confidential until the audit is completed; if the report is part of an investigation, it is confidential until the investigation is closed or ceases to be active. "Active" is defined.

Matters reasonably encompassed in privileged attorney-client communications.

Proprietary information licensed to the FJUA under contract, if the contract provides for the confidentiality of such information.

Information relating to the medical condition or medical status of a FJUA employee which is not relevant to the employee's capacity to perform his or her duties, and records relating to an employee's participation in a employee assistance program designed to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance.

Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations.

Minutes of closed meetings regarding underwriting files or open claims files until termination of all litigation and settlement of all claims with regard to that claim, except that otherwise confidential or exempt information must be redacted (i.e. blacked out in the copy to be released).

This bill also provides that an insurer considering underwriting a risk insured by the FJUA may have access to relevant underwriting files and claims files provided the insurer agrees in writing, notarized and under oath, to maintain their confidentiality. The FJUA may also release the following information to insurance agents, who must maintain the confidentiality of the information: name, address, and telephone number of the automobile owner or insured; location of the risk; rating information; loss history; and policy type.

In addition to these exemptions, this bill provides for confidentiality of those portions of meetings in which confidential underwriting files or confidential open claims files are discussed. These closed portions of meetings must be recorded by a court reporter. No portion of a closed meeting may be off the record. The FJUA must retain the court reporter's notes for at least 5 years. A copy of the transcript of closed portions of meetings, less any exempt matters, during which claims are discussed becomes public after the claim is settled.

These exemptions are made subject to the Open Government Sunset Review Act of 1995, s. 119.15, F.S., and will repeal on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 provides a public necessity statement for the exemptions as is required by Article I, Section 24 of the State Constitution. The public necessity statement provides that employee medical records contain personal, sensitive information that would harm an employee if disclosed; that underwriting files contain personal financial and medical information the disclosure of which would harm insureds, in addition to proprietary confidential business information; that disclosure of privileged attorney-client communications could jeopardize litigation or other business matters; that disclosure of open claims files would result in higher awards and settlements to be paid by the FJUA and ultimately the consumer; that disclosure of information relating to ongoing audits or investigations would jeopardize investigations and may result in the release of inaccurate information; and that disclosure of information relating to negotiations for financing, reinsurance, depopulation, or contractual services, the parties with which the FJUA is negotiating would have an economic advantage over the FJUA, increasing costs to the consumer.

Section 3 provides that the act takes effect upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

A person who has a claim against the FJUA would be in the same position as a person with a claim against any other insurer; that is, the person would not have access to information about the negotiation strategies and claims settlement practices of the FJUA (however, such a person would have access to such information with respect to closed claims, which information is not available to the public with respect to claims against other insurers).

2. Direct Private Sector Benefits:

As stated in the public necessity statement of the bill (Section 2), if the records and meetings made confidential by the bill were not exempt from the Government in the Sunshine and Public Records Law, claimants would have unfettered access to evidence, negotiation strategies, and claim evaluation and settlement considerations, and, as a result, the amount of the awards and settlements paid out by the FJUA, and ultimately the premiums paid by consumers, would be likely to increase dramatically.

3. Effects on Competition, Private Enterprise and Employment Markets:

See above.

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Governmental Operations adopted two amendments, and passed the bill out as a committee substitute. The first amendment was technical and renumbered a paragraph as needed as a result of the passage of Chapter 97-214, Laws of Florida. The second amendment changed the automatic repeal date from October 2, 2002, to October 2, 2003.

STORAGE NAME: h1887s1a.fs

DATE: February 18, 1998

PAGE 11

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Legislative Research Director:

J. Marleen Ahearn

Jimmy O. Helms

AS REVISED BY THE COMMITTEE ON FINANCIAL SERVICES:

Prepared by:

Legislative Research Director:

Leonard Schulte

Stephen Hogge