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DATE: April 9, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
INSURANCE
ANALYSIS**

BILL #: PCS/HB 1103
RELATING TO: Public Records
SPONSOR(S): Representative Gannon
TIED BILL(S): HB 1101

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

- (1) INSURANCE
 - (2) STATE ADMINISTRATION
 - (3) COMPETITIVE COMMERCE
 - (4)
 - (5)
-

I. SUMMARY:

Under Article I, Section 24, Florida Constitution, records and meetings of public bodies must be open to the public in the absence of an express exemption. The Legislature may grant exemptions by general law.

The Department of Insurance, acting as the court-appointed Receiver, assumes control of impaired and insolvent insurers for the purpose of rehabilitation or liquidation of the insurer. The Receiver has a duty to maximize the value of the estate for the benefit of the claimants in the estate and to avoid the impact of the insolvency on the guaranty associations and, subsequently, the insurance-buying public. In a delinquency proceeding, all assets and property of the insurer come under the control of the Receiver, and the Receiver pursues recovery actions to return property and assets to the estate of the insurer.

The proposed committee substitute would exempt certain records from the public records law. The Receiver would not be required to make the following records available for public copying or inspection:

- underwriting files;
- records that would not be discoverable, but for the receivership;
- medical records;
- non-managerial personnel and payroll records; and
- personally-identifying claims information.

These exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2006, unless reenacted by the Legislature.

This proposed committee substitute would not have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted the first law affording access to public records in 1909.¹

In 1992, Floridians voters approved an open government amendment to the State Constitution, elevating the right of public access to public records and public meetings from a statutory to a constitutional right. Under Article I, s. 24, of the State Constitution:

"(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"

In addition to Article I, s. 24 of the State Constitution, the Public Records Law² specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The Public Records Law states that, unless specifically exempted, all agency³ records are to be available for public inspection and copying. The term "public record" is 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.⁴

The Florida Supreme Court has interpreted this definition as encompassing all materials made or received by an agency in connection with official business, which are used to perpetuate,

¹ Section 1, ch. 5942 (1909).

² Chapter 119, F.S.

³ 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."

⁴ Section 119.011(1), F.S.

communicate or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Exemptions from Article I, s. 24, of the State Constitution are permitted. Article I, s. 24(c), of the State Constitution, requires:

- The Legislature to create exemptions in general law;
- A law creating an exemption to specifically state the public necessity justifying the exemption; and
- That an exemption be no broader than necessary to accomplish the stated purpose of the law.

Further, the Open Government Sunset Review Act of 1995,⁷ provides that a public records 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.” Under the Act, an “identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government that cannot be accomplished without the exemption and the exemption meets one of the following purposes:

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption protects information of a sensitive personal nature concerning individuals, the release of which 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
- The exemption 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.

Any bill containing an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.⁸

The Department of Insurance as Receiver

When solvency protections fail, the Department may seek to be appointed receiver through a judicial proceeding for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The goal of rehabilitation is to restore the financial solvency of the insurer. When the company is beyond rehabilitation, the Department acts to secure and maximize the assets of the insolvent company for

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

⁶ Wait v. Florida Power & Light Company, 372 So.2d 420 (1979).

⁷ Section 119.15, F.S.

⁸ Article I, s. 24(c), of the State Constitution.

the benefit of its policyholders through liquidation. Insurers are generally exempt from federal bankruptcy laws. State law is the “sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer.”

The Receiver assumes control of the insurer and marshals all of the insurer’s assets and property to accomplish the rehabilitation or liquidation. The records of the insurer are among the property that is marshaled by the Receiver. These records and records developed by the Receiver in investigating the insolvency may be public records under chapter 119, F.S., and the Florida Constitution.

C. EFFECT OF PROPOSED CHANGES:

Public Records

Certain records held by the Receiver would be classified as exempt under the Public Records Law. As a result, the Receiver would not be required to permit the public to copy or inspect the following records:

- Underwriting files of a type customarily maintained by an insurer transacting lines of insurance similar to those lines transacted by the insurer subject to delinquency proceedings. [*Stated justification: underwriting files contain sensitive personal information.*]
- Records of the Receiver, or a guaranty association, subject to discovery under the Florida Rules of Civil Procedure, or other applicable law, which would be privileged against discovery, but for the receivership. [*Stated justification: these records contain attorney work product, which is privileged information; the release of otherwise privileged information would disadvantage the effort to maximize the value of the estate and prejudice claimants of the receivership estate.*]
- All medical records. [*Stated justification: medical records contain sensitive personal information.*]
- Non-managerial personnel and payroll records of the insurer. [*Stated justification: personnel and payroll records contain sensitive personal information.*]
- Claims information that identifies an insured or a claimant. [*Stated justification: personally identifying information is sensitive personal information.*]

Sunset Review

The public records and public meetings exemptions would be made subject to review in accordance with the Open Government Sunset Review Act and stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Statement of Public Necessity

As required by Article I, s. 24, Florida Constitution, the proposed committee substitute would include a public necessity statement.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. 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:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

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B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The proposed committee substitute differs from the original bill in that the proposed committee substitute would exempt only underwriting files, information that would not otherwise be discoverable, medical records, non-managerial personnel and payroll records, and personally identifying claims information. The original bill proposed to exempt virtually all materials that would come into the possession of the Receiver or be generated by the delinquency proceeding.

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

Staff Director:

Eric Lloyd

Stephen T. Hogge