

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1458

SPONSOR: Banking and Insurance Committee and Senator Klein

SUBJECT: Public Records Exemption- Receivership Records

DATE: April 16, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Favorable/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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 and 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.

According to the department, when insolvent insurer records come into the possession of the department (acting as receiver), such records become public. These records, often containing particular policyholder or claim information, should be confidential according to representatives with the department.

Committee Substitute for Senate Bill 1458 would address these concerns by exempting specified 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 of the receiver, or guaranty association that would not be discoverable, but for the receivership;
- all medical records;
- nonmanagerial personnel and payroll records of the insolvent insurer; and
- claims information that identifies an insured or a claimant.

The bill provides for a statement of public necessity and states that the exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2006, unless reenacted by the Legislature.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 bill creates section 631.195, Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide, by general law, for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the 5th year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed in October of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if: (1) the exempted record or meeting is of a sensitive, personal nature concerning individuals; (2) the exemption is necessary for the effective and efficient administration of a governmental program; or (3) the exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions: (1) What specific records or meetings are affected by the exemption? (2) Whom does the exemption uniquely affect, as opposed to the general public? (3) What is the identifiable public purpose or goal of the exemption? (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption: (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which 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; 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

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 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 particular records as well as the records developed by the Receiver in investigating the insolvency may be public records under chapter 119, F.S., and the Florida Constitution.

III. Effect of Proposed Changes:

Section 1. Creates s. 631.195, F.S., applying to records of insurers in receivership, to provide that the following records are confidential and exempt:

- 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;

- 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;
- All medical records;
- Non-managerial personnel and payroll records of the insurer;
- Claims information that identifies an insured or a claimant.

This section is subject to the Open Government Sunset Review Act of 1995 and shall stand repealed October 2, 2006, unless reviewed and saved through reenactment by the Legislature.

Section 2. Provides for a statement of public necessity in that the Legislature finds that the specified records of the insurer subject to delinquency proceedings include sensitive personal information regarding insured persons and claimants, attorney work product or information privileged under other applicable law. Disclosure of such information would place the receiver and guaranty associations at a disadvantage in legal proceedings that are intended to maximize the value of the estate of the delinquent insurer and therefore afford insureds and creditors of the insurer greater recoveries through delinquency proceedings. Also, making undiscoverable records available to the public would prejudice claimants with legal entitlement to proceeds of the receivership estate. Further, personal information of the insurer contains sensitive personal information that should be exempt from disclosure.

Section 3. Provides for an effective date of October 1, 2001, if SB 1816 (companion bill) is adopted and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Policyholders will benefit under the provisions of this bill because underwriting, medical and claims information pertaining to policyholders are deemed confidential during the pendency of the receivership proceedings.

C. Government Sector Impact:

The Department of Insurance, acting as the receiver for insolvent insurers, will be able to keep specified records and related information as to such insurers confidential during the pendency of receivership proceedings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
