

STORAGE NAME: h0405.sgc.doc
DATE: February 20, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: HB 405 (PCB SA 01-12)
RELATING TO: Public Records Exemption for Certain Surplus Lines Insurance Records
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 12 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 provides that an exemption from the requirements of the public records or public meetings laws 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.

Further, the Open Government Sunset Review Act of 1995 sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment" of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal.

Section 626.921(8), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature. This section provides that certain information furnished to the Department of Insurance is confidential and exempt from public disclosure, if the disclosure of the information would reveal a trade secret. Trade secret is defined broadly.

Under s. 626.921, F.S., the Florida Surplus Lines Service Office in the performance of its duties acquires various surplus lines information provided in insurance policies, which includes the name and address of the insured and insurer, the type of coverage, the amount of coverage, the premium, the effective date, the fees charged, and deductibles. Currently, that information supplied to the department is exempt from public disclosure; however, the same information held by the office is not exempt.

This bill reenacts s. 626.921(8), F.S., and expands the exemption to add that certain information, which includes the name and address of the insured and insurer, the type of coverage, amount of coverage, the premium, effective date, fees charged, and deductibles, furnished to the office is also confidential and exempt from public disclosure. However, the bill narrows the exemption by providing that the exemption applies only if the information would reveal "information specific to a particular policy or policyholder," instead of revealing a "trade secret." This bill provides a public necessity statement for this exemption, as expanded by the bill.

If this exemption were repealed, competitors would have access to certain records, and that might be harmful to the insurer or agents due to the economic value of the information revealed. Also, the release of such information could be harmful to policyholders as an invasion of their privacy.

This bill does not appear to 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 [X] |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A [X] |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A [x] |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A [X] |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A [X] |

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

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

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(c), 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 must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Article I, s. 24, Florida Constitution, does not set forth any repeal or review requirements.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), 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.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, 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.

Section 119.15, F.S., sets forth a review process which requires that on October 2nd in the fifth year after enactment of a new exemption or "substantial amendment"¹ of an existing exemption, the exemption is to repeal, unless the Legislature reenacts the exemption. By June, of the year before the repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services must certify, to the President of the Senate and the Speaker of the House of Representatives, the language that will repeal and the statutory citation for each exemption scheduled for repeal. s. 119.15(3)(d), F.S.

Section 626.921(8), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2001, unless otherwise reenacted by the Legislature.

Analytical Framework

The Florida Constitution does not require the repeal, review, or reenactment of exemptions; the Open Government Sunset Review Act (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act is a Florida statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of s. 119.15, F.S., do not have to be met.² Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2001, that exemption *will* repeal unless the legislature reenacts the exemption.³

¹ 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. s. 119.15(3)(b), F.S.

² The requirements of Article 1, s. 24(c), Florida Constitution, must, however, be met with regard to any exemption created on or after July 1, 1993. See *infra* Florida Constitution.

³ Please note that the effective date of this bill is prior to the repeal date of October 2, 2001.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required, as a result of the requirements of Article 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the exempt records), then a public necessity statement is not required. Article 1, s. 24, Florida Constitution, only requires a public necessity statement when creating an exemption, and also requires that the exemption be in a separate bill.⁴

The Surplus Lines Law

The Florida Insurance Code contains the Surplus Lines Law in ss. 626.913-626.937, F.S. The declared purpose of this law is to provide access by the public to insurers and insurance coverage that is not otherwise available in this state. Requirements and procedures are established for approval of eligible surplus lines insurers and licensure of surplus lines agents by the Department of Insurance. ss. 626.918 and 626.927, F.S.

The Florida Surplus Lines Service Office

Chapter 97-196, L.O.F., created the Florida Surplus Lines Service Office, a nonprofit association, to act as a "self-regulating organization" to permit better access by consumers to approved surplus lines insurers. A board appointed by the Insurance Commissioner operates the association and the plan of operation must be approved by the Department of Insurance. All surplus lines agents are required to be members of the association as a condition of licensure. s. 626.921(2), F.S.

The Florida Surplus Lines Service Office is required to conduct the following activities: receive, record, and review all surplus lines insurance policies; maintain records of the policies reported to the service office and prepare monthly reports for the department; prepare and deliver to each surplus lines agent quarterly reports of the agent's business and collect and remit to the department the surplus lines tax; perform a reconciliation of the policies written in the non-admitted market, as provided by non-admitted insurers, with the policies reported to the office by the surplus lines agents; and submit a report to the department on the results of the reconciliation. s. 626.921(3), F.S.

Filing Requirements for Surplus Lines Agents

Surplus lines agents are required to report and file with the office such information on each surplus lines insurance policy as is required in the plan of operation adopted by the board and approved by the department. s. 626.921(2), F.S. The department requires agents to submit specific information on each policy, including the name and address of the insured and insurer, the type of coverage, amount of coverage, the premium, effective date, fees charged, deductibles, and other information. *Interim Project Report 2001-028*, Senate Committee on Banking and Insurance (September 2000). Surplus lines agents are also required by statute to submit a quarterly report to the service office that includes aggregate gross and net premiums and a listing of all policies issued. s. 626.931, F.S. The primary purpose served is to determine whether an agent has paid the appropriate surplus lines tax on each policy. In addition, this information enables the department to monitor the surplus lines business to determine whether business is being appropriately exported to the surplus lines market and provides data to measure the state of the admitted market for particular lines of coverage. *Interim Project Report*, at 4.

⁴ If various exemptions are reenacted that do not expand the exemption, then there is no requirement that the exemptions be in separate bills; provided however, that the bill containing the reenactments meets the single subject requirement.

Surplus lines agents are also required by s. 626.923, F.S., to submit to the department within 30 days of request, copies of requested policies, including applications, certificates, confirmation of insurance coverage, memoranda, and any changes or endorsements. Such information must be filed only upon request of the department, which is typically done only when the department is investigating an agent for a suspected violation, such as non-payment of the surplus lines tax, misappropriation of funds, or improper placement of business in the surplus lines market.

Section 626.921(8), F.S.

The information that surplus lines agents submit to the Department of Insurance (upon request) pursuant to s. 626.923, F.S., and the information that is available for inspection by the department under s. 626.930, F.S., as summarized above, is confidential and exempt from public disclosure, if the disclosure of the information would reveal a trade secret as defined in s. 688.002, F.S.¹ The exemption does not apply to any proceeding instituted by the department against an agent or insurer. This exemption is scheduled for repeal on October 2, 2001, unless reenacted by the Legislature. s. 626.921(8), F.S.

Prior to the creation of the Florida Surplus Lines Service Office in 1997, surplus lines agents were required to submit quarterly reports to the department. s. 626.931, F.S. (1995). The law provided an exemption for information submitted to the department pursuant to request under s. 626.923, F.S., or contained in the records subject to examination under s. 626.930, F.S., if the disclosure of the information would reveal a trade secret.

The 1997 legislation creating the Florida Surplus Lines Service Office amended the statutes to require surplus lines agents to file quarterly reports with the office, rather than with the department. s. 626.931, F.S., as amended by s. 4 of ch. 97-196, L.O.F. Also, the 1997 act amended s. 626.921, F.S., to require surplus lines agents to file with the office such information on each policy as required by plan of operation adopted by the board and approved by the department. The 1997 act did not provide a public records exemption for the information agents were required to submit to the office.

If the current public records exemption is retained for surplus lines information that reveals a trade secret submitted to the department, it would logically follow that the same information that is submitted to the office should also be exempt from public disclosure. According to the Open Government Sunset Act of 1995, if the exemption is expanded then the expanded exemption is treated as a newly created exemption, and the bill expanding the exemption must include a public necessity statement encompassing the entire exemption.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts s. 626.921(8), F.S., which provides that certain information, including the name and address of the insured and insurer, the type of coverage, amount of coverage, the premium, effective date, fees charged, and deductibles, in certain surplus lines insurance records furnished to the Department of Insurance is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution. If this exemption were repealed, competitors would have access to such records, and that might be harmful to the insurer or agents due to the economic value of the information revealed. Also, the release of such information could be harmful to policyholders as an invasion of their privacy.

¹ Trade secret is defined in s. 688.002(4), F.S., to mean information that "(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." This statute currently applies to all trade secrets, not just the information specific to a policy or policyholder.

This bill also amends s. 626.921(8), F.S., by expanding the public records exemption to include information furnished to the Florida Surplus Lines Service Office, and by narrowing the exemption to apply to information, which, if disclosed, would reveal "information specific to a particular policy or policyholder," instead of revealing a "trade secret," which is more encompassing.

This bill provides a public necessity statement for the exemption, as required by s. 24(a), Art. I of the Florida Constitution.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The 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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Jennifer D. Krell, J.D.

Staff Director:

J. Marleen Ahearn, J.D., Ph.D.

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Jennifer A. Krell, J.D.

Staff Director:

Don Rubottom