

**STORAGE NAME:** h0195.in.doc  
**DATE:** November 13, 2001

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
INSURANCE  
ANALYSIS**

**BILL #:** HB 195  
**RELATING TO:** Public Records  
**SPONSOR(S):** Representative Gannon  
**TIED BILL(S):** HB 193

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

- (1) INSURANCE
  - (2) STATE ADMINISTRATION
  - (3) COUNCIL FOR 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 granted by the Legislature.

The Department of Insurance may institute a delinquency proceeding by petitioning the court for an order appointing it Receiver and directing it to liquidate, conserve, or rehabilitate an insolvent or impaired insurer. The Receiver has a duty to maximize the value of the insurer for the benefit of claimants and to protect guaranty associations from having to pay the claims of insolvent or impaired insurers. 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 bill would exempt from disclosure specific records held by the Receiver. These records are not subject to disclosure under the public records law when held by the insurer, prior to receivership. 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 in a civil proceeding, 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These exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2007, unless reenacted by the Legislature.

This bill 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:

**Public Records and Open Government**

The Legislature enacted the first law affording access to public records in 1909.<sup>1</sup> In 1992, Florida 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(a), of the State Constitution:

*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 Law<sup>2</sup> states that, unless specifically exempted, all agency<sup>3</sup> 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.<sup>4</sup>*

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,

---

<sup>1</sup> Section 1, ch. 5942 (1909).

<sup>2</sup> Chapter 119, F.S.

<sup>3</sup> 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."

<sup>4</sup> Section 119.011(1), F.S.

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

The Legislature may grant exemptions from Article I, s. 24, of the State Constitution. Article I, s. 24(c), of the State Constitution, requires:

- the Legislature to create exemptions by general law;
- a law creating an exemption to describe the public necessity justifying the exemption; and
- an exemption be no broader than necessary to accomplish the stated purpose of the law.

The Open Government Sunset Review Act of 1995<sup>7</sup> reinforces these requirements. Under this Act, a public records exemption may be created or maintained only if it serves “an identifiable public purpose” that is “no broader than is necessary to meet the public purpose it serves.” 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 and cannot be accomplished without the exemption. . . .” and the exemption meets one of the three following specified 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.<sup>8</sup>

### **The Department of Insurance as Receiver<sup>9</sup>**

Generally, records held by the insurer are confidential proprietary business information and are not public records. The Department receives limited amounts of insurer records pursuant to statute or rule. Some of these may become public records (e.g., financial statements, rate filings). Others are

---

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

<sup>6</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (1979).

<sup>7</sup> Section 119.15, F.S.

<sup>8</sup> Article I, s. 24(c), of the State Constitution.

<sup>9</sup> A receiver is “a person appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor’s claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed or injured.” Black’s Law Dictionary, 7th Ed. 1990. In this case the debtor is the insolvent insurer and the creditor is the claimant policyholder.

exempt public records (e.g., risk based capital, and investigatory and examination records, prior to the completion of the investigation or examination.)

As a result of an insurer's insolvency or impairment, the Department as Receiver in a delinquency proceeding could come into possession of all the records. In this event, records that were confidential when held by the insurer could become public.

When solvency protections under the State Insurance Code 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; the goal of liquidation is to secure and maximize the assets of the insolvent company for the benefit of its policyholders. A delinquency proceeding under Ch. 631, F.S., is the "sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer."<sup>10</sup>

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 marshaled by the Receiver. Information that would be subject to the attorney-client privilege of confidentiality<sup>11</sup> and attorney work product<sup>12</sup> are among these records. These records and records developed by the Receiver in investigating the insolvency may qualify as "public records" under chapter 119, F.S., and the Florida Constitution.

### **Private Records and Discovery in Civil Suits**

Rule 1.280(b) of the Florida Rules of Civil Procedure defines the scope of discovery in civil matters brought before Florida courts. Under this rule, an insurer has to disclose any information relevant to a pending action. This includes information that, although inadmissible in court, is reasonably calculated to lead to the discovery of admissible evidence. However, an insurer generally is not required to disclose information that is privileged or protected against discovery (i.e., attorney work product, trial preparation materials, and the identity and work of non-testifying experts).<sup>13</sup> "Privileged" information includes information that is confidential because it was communicated in reliance upon the attorney-client relationship. "Attorney work product" includes the mental impressions, conclusions, opinions, or legal theories of an attorney concerning or anticipating litigation.

Presently, there is no specific exemption from the public records law for privileged attorney-client information or attorney work product that comes into the possession of the Receiver. While s. 119.07(l), F.S., exempts attorney work product prepared by or at the express direction of an agency attorney, attorney work product produced for or by an insurer prior to receivership is not included. Similarly, there is no exemption for sensitive personal information of customers and employees of the insolvent insurer contained in business records transferred to the Receiver. Underwriting files, personnel files, medical records, and claims records could contain sensitive personal information.

---

<sup>10</sup> S. 631.021(3), F.S. Also, insurers are generally exempt from federal bankruptcy laws.

<sup>11</sup> Under s. 90.502 of the Florida Evidence Code, the provides that communications between an attorney and a client are confidential if it is not intended to be disclosed to a third person, except those persons to whom disclosure is in furtherance of the legal services or those necessary to the transmission of the communication.

<sup>12</sup> Under the "work product rule," any notes, working papers, memoranda, or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery. Black's Law Dictionary, 7th Ed. 1990. The Florida Supreme Court codifies this in Rule 1.280(b) of the Florida Rules of Civil Procedure.

<sup>13</sup> Some protected trial preparation materials and the identity and work of non-testifying experts are discoverable upon a showing that the party requesting the discovery cannot obtain the substantial equivalent of the information without undue hardship. In the event that the requisite showing is made, the attorney work product contained therein will remain protected from discovery.

Since there is no exemption applicable to these public records, the Receiver may be required to permit the public, including parties to lawsuits brought by or against the Receiver, to copy or inspect this information.

**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 not otherwise available to others under the Florida Rules of Civil Procedure, or other applicable law, but for their status as public records in the hands of the Receiver. [Please see Comments Section] [*Stated justification: these records contain attorney work product and privileged information; the release of otherwise undiscoverable information would undermine the legitimate receivership function of maximizing 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, 2007, 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 bill would include a public necessity statement. As noted above, the public necessity justifying the exemption of these public records includes the need to protect sensitive private personal information and avoid undermining the legitimate receivership function of maximizing the value of the estate.

**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 an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

**STORAGE NAME:** h0195.in.doc

**DATE:** November 13, 2001

**PAGE:** 7

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Among other provisions, the bill would exempt from public disclosure records transferred by the insurer to the Receiver or guaranty association, which would be privileged against discovery under Rule 1.280(b) of the Florida Rules of Civil Procedure. Rule 1.280(b) allows discovery of any information that is not privileged, but prohibits discovery of attorney work product. Since attorney work product generally is not a privileged communication and the rule treats privileged communications and attorney work product as separate issues, the bill may not exempt attorney work product that is transferred from the insurer to the Receiver, or guaranty association. In fact, the statement of public necessity beginning on page 2, line 10, of the bill also treats attorney work product separately from privileged information (i.e., communications).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

Staff Director:

---

Eric Lloyd

---

Stephen T. Hogge