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DATE: December 12, 2001

**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: HB 281 (PCB SA 02-06)
RELATING TO: Public Records and Meetings Exemptions
SPONSOR(S): Committee on State Administration and Representative(s) Brummer
TIED BILL(S):
ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 11 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The Open Government Sunset Review Act of 1995 (Act) 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. The Act, in pertinent part, sets forth a review process, and 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 624.40851, F.S., provides public records and public meetings exemptions regarding certain information relating to risk-based capital held by the Department of Insurance. This section was certified by the Division of Statutory Revision for repeal on October 2, 2002, unless otherwise reenacted by the Legislature.

This bill reenacts the public records and public meetings exemptions for certain information regarding risk-based capital information. The public records exemption provides that the initial risk-based capital report, any adjusted risk-based capital report, any risk-based capital plan, any revised risk-based capital plan, working papers, and reports of examination or analysis of an insurer performed pursuant to a plan or corrective order, or regulatory action level, subsequently filed at the request of the Department of Insurance (DOI), with respect to any domestic insurer or foreign insurer, held by DOI are confidential and exempt from public disclosure. Hearings relating to DOI's actions regarding any insurer's risk-based capital report are closed to the public. Transcripts of those hearings are confidential and exempt from public disclosure. The public records and public meetings exemptions will terminate either one-year following the conclusion of any risk-based capital plan or revised risk-based capital plan, or on the date of entry of an order of seizure, rehabilitation, or liquidation. **This bill makes editorial changes, adds clarifying language, adds a cross-reference, deletes superfluous language, and removes the sentence that directs the repeal of the exemptions.**

The public records and meetings exemptions are a public necessity because public access to such information and hearings might damage the insurer if made available to its competitors and could substantially affect the solvency of an insurer. Damage to an insurer's solvency could have a substantial negative effect on the public as well as on other insurers. Additionally, risk-based capital reports and plans reveal an insurer's investment decisions. Such decisions are a trade secret that gives the insurer a competitive advantage in the private market. Untimely public access to such information could affect an insurer's ability to do business in Florida, and could affect an insurer's solvency.

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 <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 Public Meetings Laws

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.

In regard to public meetings, Article I, s. 24(b), Florida Constitution, provides that

[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records and meetings 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 1, 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.

With regard to public meetings, section 286.011, F.S., provides that

[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority or any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

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.²

Section 112.324(1), F.S., was certified by the Division of Statutory Revision and will repeal on October 2, 2002, 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 of 1995 (s. 119.15, F.S.) does. However, the Open Government Sunset Review Act of 1995 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.³ Nonetheless, because the certified exemption as found in the Florida Statutes actually contains language that repeals the exemption as of October 2nd, 2002, that exemption *will* repeal unless the legislature reenacts the exemption.⁴

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 can be in a separate bill.⁵

Section 624.4085, F.S., Risk-based capital requirements for insurers

Section 624.4085(2)(a), F.S., requires each domestic insurer⁶ to prepare and file with the National Association of Insurance Commissioners, on or before March 1 of each year, a report of its risk-based capital levels⁷ as of the end of the past calendar year. Such report must be in a form and contain the information required in the risk-based capital instructions.⁸ Each domestic insurer must file a printed copy of its risk-based capital report

with the insurance department in any other state in which the insurer is authorized to do business, if that department has notified the insurer of

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 Section 119.15(3)(d), F.S.

³ 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.

⁴ Please note that the effective date of this bill is prior to the repeal date of October 2, 2002.

⁵ 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.

⁶ Section 624.4085(1)(f), F.S., defines “domestic insurer” as “any insurer domiciled” in the State of Florida.

⁷ Section 624.4085(1)(o), F.S., defines “risk-based capital level” as “an insurer’s company action level risk-based capital, regulatory action level risk-based capital, authorized control level risk-based capital, or mandatory control level risk-based capital.”

⁸ Section 624.4085(1)(n), F.S., defines “risk-based capital instructions” as “the instructions for preparing a risk-based capital report as adopted by the National Association of Insurance Commissioners.”

its request in writing, in which case the insurer must file its risk-based capital report not later than the later of 15 days after the receipt of notice to file its risk-based capital report with that state; or March 1.⁹

The Department of Insurance (DOI) must use the risk-based capital instructions, risk-based capital reports, adjusted risk-based capital reports,¹⁰ risk-based capital plans,¹¹ and revised risk-based capital plans¹² for “monitoring the solvency of insurers and assessing the need for corrective action with respect to insurers.”¹³ DOI may not use that information

- For ratemaking;
- As evidence in any rate proceeding; or
- For calculating or deriving any elements of an appropriate premium level or rate of return for any line of insurance which an insurer or an affiliate of such insurer is authorized to write.¹⁴

If a domestic insurer files a risk-based capital report that DOI finds is inaccurate, DOI must adjust the risk-based capital report to correct the inaccuracy. DOI must then notify the insurer of the adjustment and the notice must state the reason for such adjustment. The insurer must file the adjusted risk-based capital report with the National Association of Insurance Commissioners.¹⁵

An insurer has a right to a hearing before DOI upon

- Notification to an insurer by DOI of an adjusted risk-based capital report;
- Notification to an insurer by DOI that the insurer’s risk-based capital plan or revised risk-based capital plan is unsatisfactory, and that the notification constitutes a regulatory action level event with respect to such insurer;
- Notification to any insurer by DOI that the insurer has failed to adhere to its risk-based capital plan or revised risk-based capital plan and that the failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event in accordance with its risk-based capital plan or its revised risk-based capital plan; or
- Notification to an insurer by DOI of a corrective order with respect to the insurer.¹⁶

The insurer may challenge any determination or action by DOI at such hearing. The insurer must notify DOI of its request for a hearing within five days after receipt of the notification by DOI. DOI must set a date for the hearing upon receipt of the request.¹⁷

⁹ Section 624.4085(2)(a)2., F.S.

¹⁰ Section 624.4085(1)(a), F.S., defines “adjusted risk-based capital report” as a risk-based capital report that has been adjusted by the Department of Insurance in accordance with s. 624.4085, F.S.

¹¹ Section 624.4085(1)(p), F.S., defines “risk-based capital plan” as a “comprehensive financial plan specified in paragraph (4)(b).”

¹² Section 624.4085(1)(m), F.S., defines “revised risk-based capital plan” as the revision of the risk-based capital plan which is prepared by an insurer after the Department of Insurance rejects the original plan.

¹³ Section 624.4085(2)(c), F.S.

¹⁴ *Id.*

¹⁵ Section 624.4085(2)(g), F.S.

¹⁶ Section 624.4085(7)(a), F.S.

¹⁷ Section 624.4085(7)(b), F.S.; The hearing date must be no fewer than 10 days and not more than 30 days after the date DOI receives the insurer’s request.

Section 624.40851, F.S., Confidentiality of risk-based capital information

Section 624.40851, F.S., created pursuant to Chapter 97-293, Laws of Florida (L.O.F.), provides a public records and public meetings exemption for certain information relating to risk-based capital information. The section exempts from public disclosure the initial risk-based capital report made, furnished or filed with DOI. Additionally, any risk-based capital plan, revised risk-based capital plan, adjusted risk-based capital report, and working papers and reports of examination or analysis of an insurer performed pursuant to a plan or corrective order, or regulatory action level, subsequently filed at the request of DOI, with respect to any domestic insurer¹⁸ or foreign insurer,¹⁹ and transcripts of closed hearings are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.²⁰

In addition, the section provides a public meetings exemption for proceedings and hearings conducted pursuant to "section 1 of SB 620, section 1 of HB 1943, or section 1 of SB 898"²¹ relating to DOI's actions regarding any "insurer's risk-based capital plan, revised risk-based capital plan, risk-based capital report or adjusted risk-based capital report" are exempt from the provisions of s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.²² All portions of such hearings or proceedings must be recorded by a court reporter. DOI must open such hearings or proceedings or

provide a copy of the transcript of such hearings or proceedings, or disclose the contents of notices, correspondence, reports, records, or other information to a department, agency, or instrumentality of this or another state or of the United States if the department determines the disclosure is necessary or proper for the enforcement of the laws of the United States or of this or another state.²³

These exemptions do not apply to proceedings, hearings, notices, correspondence, reports, records, or other information obtained upon the court appointment of a receiver for the insurer.²⁴

These exemptions will terminate "[o]ne year following the conclusion of any risk-based capital plan or revised risk-based capital plan; or on the date of entry of an order of seizure, rehabilitation, or liquidation pursuant to chapter 631."²⁵

Open Government Sunset Review Questionnaire

The House of Representatives Committee on State Administration sent DOI an Open Government Sunset Review Questionnaire in June 2001 regarding the public records and public meetings exemptions found in s. 624.40851, F.S.

¹⁸ A "domestic insurer" is defined as "one formed under the laws of this state." Section 624.06(1), F.S.

¹⁹ A "foreign insurer" is defined as "one formed under the laws of any state, district, territory, or commonwealth of the United States other than this state." Section 624.06(2), F.S.

²⁰ Section 624.40851(1), F.S.

²¹ Senate Bills 620 and 898 and House Bill 1943 did not become law during the 1997 legislative session. Senate Bill 840 containing similar provisions did become law. Senate Bill 840 is now s. 624.4085, F.S. Therefore, it refers to hearings and proceedings conducted pursuant to s. 624.4085(7)(a), F.S.

²² Section 624.40851(2), F.S.

²³ *Id.*

²⁴ Section 624.40851(3), F.S.

²⁵ Section 624.40851(4), F.S.

DOI has recommended reenactment of the public records and public meetings exemptions. DOI recommends the reenactment of such exemptions because

[t]he information filed is necessary to monitor the capital adequacy of individual insurers. The insurers consider much of the information confidential and they would be reluctant to make this type of filing if the information was available to their competitors.²⁶

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts the public records and public meetings exemptions for certain information regarding risk-based capital information. The public records exemption provides that the

- Initial risk-based capital report,
- Any adjusted risk-based capital report,
- Any risk-based capital plan,
- Any revised risk-based capital plan,
- Working papers, and
- Reports of examination or analysis

of an insurer performed pursuant to a plan or corrective order, or regulatory action level, subsequently filed at the request of DOI, with respect to any domestic insurer or foreign insurer, held by DOI are confidential and exempt from public disclosure.

Hearings conducted pursuant to *s. 624.4085, F.S.*, relating to DOI's actions regarding any insurer's risk-based capital report are closed to the public. Such hearings must be recorded by a court reporter, and transcripts of such hearings are confidential and exempt from public disclosure. The original language stated that hearings conducted pursuant to "section 1 of SB 620, section 1 of HB 1943, or section 1 of SB 898" are closed to the public. Senate Bills 620 and 898 and House Bill 1943 did not become law during the 1997 legislative session. Senate Bill 840 containing similar provisions did become law. Senate Bill 840 is now *s. 624.4085, F.S.* Therefore, this bill changes the reference to *s. 624.4085, F.S.*

DOI must

- Open such hearings,
- Provide a copy of the transcript of such hearings, or
- Provide a copy of certain risk-based capital information otherwise made confidential and exempt

to a department, agency, or instrumentality of this or another state or of the United States if DOI determines the disclosure is necessary or proper for the enforcement of the laws of the "United States or of this or another state."

The public records and public meetings exemptions will terminate either one-year following the conclusion of any risk-based capital plan or revised risk-based capital plan, or on the date of entry of an order of seizure, rehabilitation, or liquidation pursuant to chapter 631, F.S. This means that the initial risk-based capital report, any adjusted risk-based capital report, any risk-based capital plan, any revised risk-based capital plan, and working papers and reports of examination or

²⁶ House Committee on State Administration Open Government Sunset Review Questionnaire, Response by Michelle Newell, Director of Insurer Services for the Department of Insurance, June 27, 2001, at 5.

analysis of an insurer become available to the public either one-year following the conclusion of any risk-based capital plan or revised risk-based capital plan, or on the date of entry of an order of seizure, rehabilitation, or liquidation. Additionally, hearings also become open to the public either one-year following the conclusion of any risk-based capital plan or revised risk-based capital plan, or on the date of entry of an order of seizure, rehabilitation, or liquidation.

This bill removes duplicative language from the exemption by eliminating subsection (3) of s. 624.40851, F.S. This subsection provides that exempt information becomes available to the public upon the appointment of a receiver for the insurer by a court of competent jurisdiction. However, the appointment of a receiver for the insurer is taken into consideration in paragraph (b) of subsection (4), which provides that records become public and meetings are open upon entry of an “order of seizure, rehabilitation, or liquidation.”

The public records and meetings exemptions found in s. 624.40851, F.S., are a public necessity because public access to such information and hearings might damage the insurer if made available to its competitors and could substantially affect the solvency²⁷ of an insurer. Damage to an insurer’s solvency could have a substantial negative effect on the public as well as on other insurers. Additionally, risk-based capital reports and plans reveal an insurer’s investment decisions. Such decisions are a trade secret that gives the insurer a competitive advantage in the private market. Untimely public access to such information could affect an insurer’s ability to do business in Florida, and could affect an insurer’s solvency.²⁸ An insurer whose information becomes available one-year following the conclusion of any risk-based capital plan or revised risk-based capital plan should not be severely affected because such information is considered outdated.

This bill makes editorial changes, adds clarifying language, adds a cross-reference, and removes the sentence that directs the repeal of the exemptions.

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.

²⁷ Black’s Law Dictionary (6th ed.) defines “solvency” as the “ability to pay debts as they mature and become due. Ability to pay debts in the usual and ordinary course of business.” (1990, at 1394)

²⁸ Chapter 97-293, L.O.F., section 2.

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:

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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On October 11, 2001, the Committee on State Administration adopted one amendment to PCB SA 02-06. The amendment made an editorial change and removed superfluous language. The proposed committee bill was reported favorably with one amendment.

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VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

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