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 430

SPONSOR: Banking and Insurance Committee and Senator Klein

SUBJECT: Public Records: Insurer Delinquency Proceedings

DATE: January 9, 2002 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, of the 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, 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 (Department), 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 departmental representatives.

Committee Substitute for Senate Bill 430 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 a guaranty association, of, or with respect to, the insurer that would be privileged or protected against discovery in the hands of the insurer under the Florida Rules of Civil Procedure, but for the appointment of the Receiver;
- all medical records;
- nonmanagerial personnel and payroll records; and

- information in claims files that identifies an insured or a claimant.

These exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2007, unless reenacted by the Legislature.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 creates an undesignated section in the 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

Generally, records held by an insurer are confidential proprietary business information and are not public records. The Department receives limited types of insurer records pursuant to statute or rule. Some of these may become public records (e.g., financial statements, rate filings). Others are 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 insurer's records. In this event, records that were confidential when held by the insurer could become public.

When solvency protections under the Florida 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."

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 and attorney work product 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). "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.

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.

III. Effect of Proposed Changes:

Section 1. Creates an undesignated section in the law to provide that the following specified records of an insurer subject to delinquency proceedings pursuant to Ch. 631, F.S., made or received by the Department of Insurance, acting as Receiver, or by a guaranty association, are exempt from s. 119.07(1), F.S., and S. 24(a), Article I of the State Constitution:

- 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 or protected against discovery, but for the receivership;
- All medical records;
- Nonmanagerial personnel and payroll records of the insurer; and
- Information in claims files that identifies an insured or a claimant.

This provision is subject to the Open Government Sunset Review Act of 1995 and shall stand repealed October 2, 2007, unless reviewed and saved through reenactment by the Legislature.

Provides for a statement of public necessity in that the Legislature finds that the specified records of the insurer subject to delinquency proceedings include claims files and medical files which contain 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 which 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, the Legislature finds that making undiscoverable records available to the public would prejudice claimants with legal entitlement to proceeds of the receivership estate because it would undermine the receivership function of maximizing the value of the estate for the benefit of claimants. Furthermore, personal and payroll information of nonmanagerial personnel of the insurer contain sensitive personal information that should be exempt from disclosure.

Section 2. Provides for an effective date of October 1, 2002, if Committee Substitute for Senate Bill 432 or similar legislation is adopted in the same legislative session 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 information in claims files that identifies insureds or claimants 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.