

# 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 284

SPONSOR: Governmental Oversight & Productivity Committee and Banking and Insurance Committee

SUBJECT: Open Government Sunset Review of Public Records Exemption for Investigatory Records Relating to Workers' Compensation Employer Compliance

DATE: April 1, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Committee on Banking and Insurance during the interim. The exemption will repeal on October 2, 2003, unless the Legislature abrogates the repeal.

Based upon the criteria specified in the Open Government Sunset Review Act, the bill reenacts an exemption for certain investigatory records of the Division of Workers' Compensation of the Department of Insurance relating to workers' compensation employer compliance.<sup>1</sup> The bill also authorizes the department to share such investigatory records with administrative and law enforcement agencies, if such agencies maintain the confidentiality of such records, as specified by s. 440.108, F.S.

The bill amends section 440.108, Florida Statutes.

## II. Present Situation:

### Access to Public Records and Meetings

Florida has a long history of providing public access to the records of governmental and other public entities. This tradition began in 1909 with the enactment of a law that guaranteed access

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<sup>1</sup> Effective July 1, 2002, the Department of Labor and Employment Security was abolished and the majority of the functions and programs that were within the Division of Workers' Compensation of this department were transferred to the Department of Insurance. [ch. 2002-194, L.O.F.] Effective January 7, 2003, the Division of Workers' Compensation was transferred to the Department of Financial Services. [ch. 2002-404, L.O.F.]

to the records of public agencies.<sup>2</sup> The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.<sup>3</sup> In November 1992, the public approved a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

(a) 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, districts, and each constitutional officer, board, commission, or entity created pursuant to law or this Constitution.

The State Constitution, the Public Records Law,<sup>4</sup> and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Section 119.07(1)(a), F.S., requires:

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 any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency<sup>5</sup> records are to be available for public inspection. The term "public record" is broadly 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>6</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

<sup>2</sup> Section 1, ch. 5942, 1909; RGS 424; CGL 490

<sup>3</sup> Chapter 67-125, L.O.F.

<sup>4</sup> Chapter 119, F.S.

<sup>5</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>6</sup> Section 119.011(1), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associations, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>9</sup>

### **Open Government Sunset Review of Public Records Exemptions**

Exemptions to open government requirements are subjected to a review and repeal process 5 years after their initial enactment.<sup>10</sup> An exemption also may be subjected to this automatic review and repeal process if it has been “substantially amended.” An exemption has been substantially amended under the act if it “. . . expands the scope of the exemption to include more records or information or to include meetings as well as records.”<sup>11</sup> The Open Government Sunset Review Act of 1995<sup>12</sup> establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, 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 and statutory citation of each exemption scheduled for repeal the following year.<sup>13</sup> If the division does not include an exemption on the certified list that should have been included that exemption “. . . is not subject to legislative review and repeal under this section.”<sup>14</sup> If the division later determines that an exemption should have been certified, it “. . . shall include the exemption in the following year’s certification after that determination.”<sup>15</sup> As part of the review process, the Legislature is to consider:

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?<sup>16</sup>

Under s. 119.15(4)(b), F.S., an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and 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

<sup>9</sup> Art. I, s. 24(c) of the State Constitution.

<sup>10</sup> An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

<sup>11</sup> Section 119.15(3)(b), F.S.

<sup>12</sup> Section 119.15, F.S.

<sup>13</sup> Section 119.15(3)(d), F.S.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Section 119.15(4)(a), F.S.

exemption. The three specified criteria, one of which must be met by the exemption, are if 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 would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; 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 that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>17</sup>

### **Investigatory Records Relating to Workers' Compensation Employer Compliance and the Confidentiality of Such Investigatory Records**

Pursuant to s. 440.015, F.S., the Division of Workers' Compensation, within the Department of Insurance,<sup>18</sup> is charged with administering the Workers' Compensation Law in a manner that facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. The Bureau of Compliance and Enforcement within the division is charged with the responsibility of ensuring that employers subject to the Workers' Compensation Law, maintain coverage for their employees and maintain certain records relating to proof of coverage or exemption from coverage. Employers are required to provide workers' compensation coverage unless they obtain an exemption from coverage from the Division of Workers' Compensation.<sup>19</sup> According to a study released by Construction Education Concepts entitled, *A Study On the Magnitude of Loss of Workers' Compensation Premiums in 1997 Due to Employer Fraud and Exemptions in the Construction Industry* (2001), an estimated \$1.2 - \$2.8 billion in workers' compensation premiums is lost on an annual basis due to employer premium fraud and exemptions in the construction industry.

The Legislature in recent years has provided the Division of Workers' Compensation with additional enforcement and compliance tools to fight workers' compensation fraud and effectuate compliance with chapter 440, F.S. In 1997, a report issued by the Fourteenth Statewide Grand Jury entitled, *Report on Workers' Compensation Fraud*, prompted the Legislature to address workers' compensation fraud and noncompliance in 1998. This legislation provided greater enforcement and compliance tools for the Division of Workers' Compensation to enforce the coverage and exemption requirements of chapter 440, F.S.<sup>20</sup>

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<sup>17</sup> Section 119.15(4)(b), F.S.

<sup>18</sup> Effective July 1, 2002, the Department of Labor and Employment Security was abolished and the majority of the functions and programs of the Division of Workers' Compensation were transferred from the Department of Labor and Employment Security to the Department of Insurance. Effective January 7, 2003, the functions are transferred to the Department of Financial Services. [ch. 2002-404, L.O.F.]

<sup>19</sup> Section 440.38, F.S.

<sup>20</sup> Chapter 98-174, L.O.F.

In conjunction with this 1998 legislation, the Legislature also enacted a public records exemption for certain investigatory records of the Division of Workers' Compensation which are obtained from employers pursuant to the division's compliance activities under s. 440.108, F.S., and any records necessary to complete the investigation.<sup>21</sup> Such records are confidential and exempt from the public records' requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until the investigation is completed or ceases to be active. Section 440.108, F.S., further provides:

An investigation is considered to be active while such investigation is being conducted by the division with a reasonable, good faith belief that it may lead to the filing of administrative, civil, or criminal proceedings. However, s. 440.108, F.S., also provides that certain records remain confidential after an investigation is completed or ceases to be active. This includes any record that:

1. jeopardizes the integrity of another active investigation;
2. reveals a trade secret, as defined by s. 688.002, F.S.;
3. reveals business or financial information;
4. defames or causes unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or
5. reveals investigative techniques or procedures.

The Bureau of Compliance provided the following statistics regarding activities of the bureau for the prior fiscal year, 2001-02:

- 34,268 cases opened;
- 29,932 cases closed;
- 1,582 referrals to the Division of Insurance Fraud of the Department of Insurance;
- 109 referrals to other agencies (Department of Business and Professional Regulation and local government permitting offices); and
- \$20,759,527 estimated workers' compensation premiums generated as a result of compliance efforts.

In recent years, the division has released complete case files to the Division of Insurance Fraud and the Internal Revenue Service. According to the division, "there was no controversy regarding the release of this information, although the Office of General Counsel was consulted prior to the release of the information to the IRS." Although s. 440.108, F.S., does not authorize the division to release confidential and exempt records to any third party, the division contends that s. 440.108, F.S., as written, does not prevent voluntary disclosure to another governmental entity that has requested the exempt information.

During the scope of an investigation, the bureau obtains certain records and information relevant to the case, including employer financial and tax returns, and other records relating to an employer's business practices. The investigatory file would also include a narrative of the investigation, the names of persons who report an alleged violation, an employer or employee who provides information relative to the investigation, and the identities of the investigators.

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<sup>21</sup> Chapter 98-407, L.O.F.

When asked whether the information contained in the investigatory records could be obtained by alternative means, the division indicated that most of the information obtained during investigations is personal or business related and is held confidential by those sources and can only be obtained by another authorized agency. The disclosure of the financial and tax information of employers could place an employer at a competitive disadvantage with competitors.

Currently, if an investigator of the Bureau of Compliance of the Division of Workers' Compensation receives a request for copies of any record of the division, the investigator is required to document the request, noting the name of the requestor, date of the request, and information requested. Unless the record requested is considered confidential, the record will be provided in accordance with the public records' law. According to procedures of the division, "all investigation records of the Division of Workers' Compensation and any records necessary to complete an investigation [are] considered confidential and exempt until a case file is ultimately closed."

If an investigatory file is completed or ceases to be active, certain information is provided and certain information is redacted, pursuant to a public records request. According to the division, the names of the persons who report violations are redacted in order to protect the identities of persons, since these persons may be vulnerable to retribution. The division cited the following examples of other redacted information:

- unemployment insurance information obtained through the unemployment insurance database;
- social security numbers;
- federal employer identification numbers;
- claimant names;
- date of accident;
- employer tax returns;
- specific dollar information on payroll records; and
- premium calculation from applications for workers' compensation coverage.

As part of the exemption review process, as provided in s. 119.15(4)(a), F.S., staff determined the persons and records affected by the exemption, the public purpose of the exemption, and whether the information could be readily obtained by alternative means. The current exemption provides the division with an effective investigatory tool to assist in the performance of its compliance and enforcements duties relating to chapter 440, F.S., coverage requirements. The exemption is necessary to protect the integrity of ongoing investigations, the identity and safety of persons reporting alleged violations to the division, business or financial information of employers, and the good name or reputation of individuals. If the names of persons providing such information to the division were made public, such persons could be vulnerable to retribution. The disclosure of the financial and tax records of an employer could place an employer at a competitive disadvantage with competitors. Employers would be hesitant to provide such information willingly, if the information was not exempt.

The current exemption does not expressly authorize the release of investigatory records that are confidential and exempt to law enforcement and administrative agencies. The release of such records to other agencies would assist those agencies in the furtherance of their administrative or criminal investigations of a business entity. The public purpose of the exemption would be maintained, if such agencies were required to maintain the confidentiality of such investigatory records.

### **III. Effect of Proposed Changes:**

**Section 1.** Reenacts and amends s. 440.108, F.S., to authorize the Department of Insurance to share confidential and exempt investigatory records relating to workers' compensation employer compliance with administrative and law enforcement agencies. These agencies would be required to maintain the confidentiality of such records, as provided in the section.

**Section 2.** Provides that the act would take effect October 1, 2003.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

The Division of Statutory Revision identified s. 440.185(11), F.S., as an exemption that was subject to review under the Open Government Sunset Review Act during the 2002-2003 legislative interim. The exemption found in the section will repeal October 2, 2003, unless the Legislature abrogates the repeal.

Under s. 119.15(3)(b), F.S., 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. Where an exemption is substantially amended, the Open Government Sunset Review Act requires another review and repeal date because, in effect, an existing exemption that has been "substantially amended" is a new exemption. Existing exemptions that are not substantially amended are not subject to this requirement. This bill does not substantially amend the current exemption and, therefore, it is unnecessary to insert another review and repeal date.

### **V. Economic Impact and Fiscal Note:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

The exemption is necessary to protect the identity and safety of persons reporting alleged violations to the division, business or financial information of employers, and the good

name or reputation of individuals. If the names of persons providing such information to the division were made public, such persons could be vulnerable to retribution. The disclosure of the financial and tax records of an employer could place an employer at a competitive disadvantage with competitors. Employers would be hesitant to provide such information willingly, if the information was not exempt.

**C. Government Sector Impact:**

The current exemption does not expressly authorize the release of investigatory records that are confidential and exempt to law enforcement and administrative agencies. However, the release of such records to other agencies would assist those agencies in the furtherance of their administrative or criminal investigations of a business entity.

The current exemption provides the division with an effective investigatory tool to assist in the performance of its compliance and enforcements duties relating to ch. 440, F.S., coverage requirements. The exemption is necessary to protect the integrity of ongoing investigations.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Effective January 7, 2003, the Division of Workers' Compensation was transferred to the Department of Financial Services, as part of the 2002 act that transferred all of the functions of the Department of Insurance and the Department of Banking and Finance to the Department of Financial Services and the Financial Services Commission (ch. 2002-404, L.O.F.). Senate Bill 1712 by Banking and Insurance makes conforming changes to the Florida Statutes to be consistent with the 2002 act, which includes defining the term *department* as used in chapter 440, F.S., as the Department of Financial Services. If enacted, that definition would apply to the term *department* as used in s. 440.20, F.S., and the provisions of Senate Bill 284.

Effective January 7, 2003, the Division of Workers' Compensation was transferred to the Department of Financial Services. [Ch. 2002-404, L.O.F.]

**VIII. Amendments:**

None.