

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 1442

SPONSOR: Governmental Oversight and Productivity and Banking and Insurance Committee and Senator Atwater

SUBJECT: Public Records and Meetings Exemption/Self-Insurers

DATE: April 21, 2005

REVISED: _____

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

I. Summary:

The Legislature created the Florida Self-Insurers Guaranty Association, Incorporated (association), as a nonprofit entity, effective January 1, 1994. Generally, most self-insured employers are required to join the association and meet certain financial requirements to self-insure for purposes of workers' compensation coverage requirements. In the event a self-insured employer becomes insolvent, the association assumes responsibility for the administration and payment of the employer's workers' compensation claims.

The committee substitute creates a public record exemption for certain claims files and minutes of portions of meetings of the association until termination of all litigation and settlement of all claims arising out of the same accident. Once the litigation is resolved regarding all claims related to an accident, the medical records contained in the claims files and other information relating to the medical condition of a claimant would continue to be exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution once the litigation was resolved.

The bill provides statements of public necessity and provides for future review and repeal of the exemptions.

Article I, s. 24(c), State Constitution, requires a two-thirds vote of the members for passage of a newly created public records or public meetings exemption.

This bill creates section 440.3851 of the Florida Statutes.

II. Present Situation:

Public Records; Exemptions

Section 24(a), Art. I of the State Constitution states,

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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

Section 24(c), Art. I of the State Constitution permits the Legislature to create exemptions from a public records law. A bill creating an exemption must contain a statement of public necessity that justifies the exemption and the exemption must be no broader than necessary to accomplish its purpose. Additionally, a bill that creates an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides for the repeal and prior legislative review of any public records or public meetings exemptions that are created or substantially amended in 1996 and subsequently. The law states that an exemption may be created or expanded only if 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;
- 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
- 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.

Section 119.05(3), F.S., provides that in the 5th year after enactment of a new exemption or substantial amendment of an existing exemption that exemption shall repeal on October 2 of the 5th year, unless the Legislature acts to reenact the exemption.

Florida Self-Insurers Guaranty Association

The Legislature created the Florida Self-Insurers Guaranty Association, Incorporated (association) effective January 1, 1994.¹ All self-insured employers, except for public utilities and governmental entities, are required to join the association and meet certain financial requirements as a condition of their authority to self-insure.² The association exercises its powers

¹ Section 440.385, F.S.

² Section 440.385(1)(a), F.S.

and duties through a board of directors.³ The board consists of nine members that are appointed by the Department of Financial Services based upon recommendations of the members of the association. In the event a self-insured employer becomes insolvent, the association assumes responsibility for administering workers' compensation claims of the self-insured employer and paying an employer's claims.

The association is obligated for payment of compensation under ch. 440, F.S., to insolvent members' employees resulting from work-related accidents. The association is deemed the insolvent employer for purposes of ch. 440, F.S., to the extent of its obligation on the covered claims. Presently, the association does not have a public records exemption for information contained in the claims' files or an exemption for portions of association meetings that discuss the adjudication or settlement of a claim. As a result, information contained in a claim's file, including medical information of the claimant, estimated reserves, and strategies related to settling a claim are currently not exempt from public records. Since the association does not have an exemption for portions of public meetings related to the adjudication and settlement of a claim, the board evaluates claims via correspondence with individual board members. The responses to these claims evaluations are then forwarded to the executive director who has the authority to settle claims. In the absence of an exemption for portions of meetings discussing such claims, the board does not meet collectively to discuss strategies regarding the settlement of claims.

Pursuant to s. 119.07(6)(l), F.S., a public record which was prepared by an agency attorney or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, is exempt until the conclusion of the litigation or adversarial administrative proceedings. The exemption in s. 119.07(6)(l), F.S., is not waived by the release of that record to another public employee or officer of the same agency or any person consulted by the agency attorney.

When an assertion is made under this section, the agency must identify the potential parties to any criminal, civil or administrative proceedings. If a court finds that a document or other record was withheld improperly, the party seeking access must be awarded reasonable attorney's fees and costs in addition to any other remedy ordered.

Pursuant to s. 286.011(8), F.S., any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided certain conditions are met:

- The entity's attorney must advise the entity at a public meeting that he or she desires advice concerning the litigation.
- The subject matter of the meeting must be confined to settlement negotiations or strategy sessions related to litigation expenditures.

³ Section 440.385(1)(a), F.S.

- The entire session must be recorded by a certified court reporter. The reporter must record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session may be off the record. The court reporter's notes must be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- The entity must give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session must commence at an open meeting at which the persons chairing the meeting must announce the commandment and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting must be reopened, and the person chairing the meeting must announce the termination of the session.
- The transcript must be made part of the public record upon conclusion of the litigation.

III. Effect of Proposed Changes:

Section 1 provides that the following records held by the Florida Self-Insurers Guaranty Association (association) are confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution exempt:

- Claims files of the association until the termination of all litigation and settlement of all claims arising out of the same workers' compensation accident;
- Medical records that are part of a claims file and other information related to the medical condition or medical status of a claimant; and
- Minutes of exempt portions of meetings of the board of directors or any subcommittee of the board, as provided in subsection (3), until termination of all litigation and settlement of all claims with regard to that accident.

The bill allows the release of such records to another agency in the performance of that agency's official duties and responsibilities. The governmental agency receiving such record must maintain the confidentiality and exempt status of the claim file it receives.

The bill provides for future review and repeal of the exemptions on October 2, 2010.

Section 2 provides legislative findings that are necessary to make such claim files and related meetings of the board of directors or any subcommittee of the board confidential and exempt to prevent the disclosure of detailed information concerning a claim, including medical records and other information related to the medical condition of a claimant.

Section 3 provides that the bill becomes effective upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill creates a public records exemption for the Florida Self-Insurers' Guaranty Association claim files and minutes of exempt meetings until the termination of litigation and settlement of all claims relating to the same accident. The public records exemption for the claims files and minutes of closed meetings, except for medical records and other information related to a medical condition, would cease upon termination of all litigation and settlement of all claims related to an accident.

Article I, s. 24(c), State Constitution, requires a two-thirds vote of the members for passage of a newly created public records or public meetings exemption.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This public records exemption would protect sensitive health-related information of a claimant from being disclosed.

C. Government Sector Impact:

This public records exemption would assist the Florida Self-Insurers Guaranty Association during the litigation of a claim since the release of such information could jeopardize or compromise ongoing or pending litigation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Although the bill creates a public record exemption for certain claims files until termination of all litigation and settlement of all claims arising out of the same accident, some claims are never settled and are paid over the life of the claimant. "Settlement" for workers compensation claims refers to a lump sum payment. Therefore, if payments are made over the life of the claimant instead of in lump sum, the exemption from public records and open meetings for those claims would not terminate until the death of the claimant.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
