

# 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.)

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Prepared By: Banking and Insurance Committee

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BILL: CS/SB 1976

INTRODUCER: Banking and Insurance Committee and Senator Garcia

SUBJECT: Public Records/Florida Workers' Compensation Joint Underwriting Association

DATE: April 21, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	JU	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The bill makes confidential and exempt the following records and portions of meetings held by the Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market:

- Underwriting files, except that a policyholder or an applicant shall have access to his or her own underwriting files;
- Claims files of the JUA until the termination of all litigation and settlement of all claims arising out of the accident;
- Medical records that are part of a claims file and other information related to the medical condition or medical status of a claimant;
- Records obtained or generated by an auditor until the audit is completed, or if the audit is part of an investigation, until the investigation is closed or ceases to be active;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;
- Information relating to the medical condition or medical status of an employee and the medical status of their dependents;
- Matters reasonably encompassed in privileged attorney-client communications;
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until an investigation is closed or ceases to be active;

- Information secured from the Department of Revenue regarding payroll information and client lists of employee leasing companies; and
- Minutes of exempt portions of meetings of the board of directors or any subcommittee of the board at which confidential and exempt records are discussed, until termination of all litigation and settlement of all claims with regard to that 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.

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

Pursuant to s.24(c), Art. I, of the State Constitution, a two-thirds vote of the members is required for the passage of a newly created public records or public meetings exemption.

This bill creates the following sections of the Florida Statutes: 627.3121.

## II. Present Situation:

### Public Records

Florida has a long history of providing public access to government records. In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>1</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>2</sup> 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. . . .

Unless specifically exempted, all agency records are 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>3</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>4</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>5</sup>

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<sup>1</sup> Article I, s. 24 of the State Constitution.

<sup>2</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>3</sup> Section 119.011(11), F.S.

<sup>4</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>5</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

Only the Legislature is authorized to create exemptions to open government requirements.<sup>6</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>7</sup> A bill enacting an exemption<sup>8</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>9</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>10</sup>

The Public Records Act<sup>11</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>12</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>13</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>14</sup> If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>15</sup> Further, the confidentiality of that record must be preserved by the statutorily-named entity that is authorized to receive it.<sup>16</sup>

If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>17</sup> For example, active criminal investigative information is exempt pursuant to s. 119.071(2)(c)1., F.S.<sup>18</sup> Nevertheless, a law enforcement agency may release the description of an alleged perpetrator of a crime to the public. That portion of the exempt criminal investigative information would lose its status as exempt upon release to the public. If, however, a law enforcement agency were to provide exempt information

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<sup>6</sup> Article I, s. 24(c) of the State Constitution.

<sup>7</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>8</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

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

<sup>10</sup> *Ibid.*

<sup>11</sup> Chapter 119, F.S.

<sup>12</sup> Section 119.07(1)(b), F.S.

<sup>13</sup> Section 119.07(1)(c) and (d), F.S.

<sup>14</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>15</sup> *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

<sup>16</sup> *Ragsdale v. State*, 725 So.2d 203 (Fla. 1998).

<sup>17</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>18</sup> Criminal investigative information is considered “active” as long as it is related to an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. In addition, it is considered “active” while it is directly related to pending prosecutions or appeals.

to another law enforcement agency, that would not be released to the public and the information would retain its exempt status in the hands of the receiving entity.<sup>19</sup>

### **The Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>20</sup> (act) provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to 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.

The act states that 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 exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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>21</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

### **Florida Workers' Compensation Joint Underwriting Association (JUA)**

In 1993, the Legislature created the JUA as a nonprofit, self-funding entity, governed by a nine-member board, to act as an insurer of last resort for employers unable to secure workers'

<sup>19</sup> *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla 4<sup>th</sup> DCA 1994).

<sup>20</sup> Section 119.15, F.S.

<sup>21</sup> Section 119.15(4) (b), F.S.

compensation insurance in the voluntary market.<sup>22</sup> The board of this residual market is comprised of three members appointed by the Financial Services Commission; two members representing the top 20 domestic insurers writing workers' compensation; two members representing the top 20 foreign insurers writing workers' compensation; 1 person appointed by the largest property and casualty insurance agents' association; and the Consumer Advocate for the Department of Financial Services.

### **Applicability of the Public Records Law to Residual Markets**

Historically, the public records law has been held to apply to private entities, including residual markets or joint underwriting associations, created by law or by public agencies, unless specifically exempted by law. Section 119.01, F.S., requires that records made or received in connection with the transaction of official business by an agency must be open for inspection in the absence of a statute exempting the record or making it confidential. The law defines the term, "agency," to include any authority, board, commission, or other separate unit of government, *created or established by law* and any other public or private agency, person, partnership, corporation, or business entity, acting on behalf of any public agency.<sup>23</sup> Section 286.011, F.S., relating to public meetings and records provides that all meetings of any board of any state agency or authority at which official acts are to be taken are open to the public, unless exempted.

The Office of the Attorney General has opined that other joint underwriting associations, such as the former Florida Windstorm Underwriting Association and the Residential Property and Casualty Joint Underwriting Association, are subject to public records laws. The Attorney General's Office has opined that residual markets are "agencies" as defined in chapter 119, F.S., and are accordingly, subject to the provisions of the Government-in-the-Sunshine Law, unless specifically exempted from the provisions.<sup>24</sup>

Consistent with the public record laws, s. 627.311(5)(b), F.S., provides that the minutes, audits, and procedures of the JUA board are subject to ch. 119, F.S. In recent years, representatives of the JUA have contended that the JUA is not statutorily subject to the "Government-in-the-Sunshine" provisions; however, the JUA "has agreed to conduct its meetings in the spirit of those requirements pursuant to regulatory requests."<sup>25</sup> Recently, the Office of Insurance Regulation directed the JUA to amend its plan of operation to provide for meetings noticed in accordance with the Sunshine Laws and to comply promptly with all public record requests unless the information is exempt from the public record laws.<sup>26</sup>

Citizens Property Insurance Corporation, the Florida Automobile Joint Underwriting Association, and the Florida Medical Malpractice Joint Underwriting Association, which operate as residual markets, have public record exemptions created in law. These exemptions include portions of meetings and claims and underwriting records related to ongoing litigation. This type of exemption assists residual markets during the litigation of a claim, since the release of such

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<sup>22</sup> Section 627.311(5), F.S.

<sup>23</sup> Section 119.011(2), F.S.

<sup>24</sup> AGO 94-32 and AGO 95-32.

<sup>25</sup> Florida Workers' Compensation Joint Underwriting Association, Inc. Minutes of the Board of Governors Meeting, June 22, 2005.

<sup>26</sup> Letter from Kevin M. McCarty, Commission of the OIR to Laura Torrence, Executive Director of the JUA, October 12, 2005.

information could jeopardize or compromise ongoing or pending litigation. Presently, the JUA does not have a statutory exemption from the Public Records Act.

### III. Effect of Proposed Changes:

**Section 1** creates s. 627.3121, F.S., to make the following records and portions of meetings held by the Florida Workers' Compensation Joint Underwriting Association confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution exempt:

- Underwriting files, except that a policyholder or an applicant shall have access to his or her own underwriting files;
- Claims files of the JUA until the termination of all litigation and settlement of all claims arising out of the accident;
- Medical records that are part of a claims file and other information related to the medical condition or medical status of a claimant;
- Records obtained or generated by an internal auditor until the audit is completed, or if the audit is part of an investigation, until the investigation is closed or ceases to be active;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;
- Information relating to the medical condition or medical status of an employee and the medical status of their dependents;
- Records relative to the participation of an employee in an employee assistance program;
- Matters reasonably encompassed in privileged attorney-client communications;
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until the investigation is closed or ceases to be active;
- Information secured from the Department of Revenue regarding payroll information and client lists of employee leasing companies authorized under ss. 440.381 and 468.529, F.S.;
- Minutes of exempt portions of meetings of the board of directors or any subcommittee of the board at which confidential and exempt records are discussed until termination of all litigation and settlement of all claims with regard to that claim.

The bill authorizes the release of underwriting files and claims files to a carrier who is considering underwriting a risk insured by the JUA, an agent seeking to place such a risk with such a carrier, or another entity seeking to arrange voluntary market coverage for the JUA risks, provided such person agrees to maintain the confidentiality of such files. The bill also 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 exemption is subject to the Open Government Sunset Review Act and will expire October 2, 2011, unless the Legislature reviews the exemption and saves it from repeal.

**Section 2** provides legislative findings that are necessary to make such records 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 personal and sensitive information related to the medical condition of a claimant or an employee of the JUA, and other records delineated in Section 1 of the bill.

**Section 3** provides this act shall take effect upon becoming a law, only if SB 2118 or similar legislation is enacted during the 2006 Regular Session or an extension thereof and becomes a law. Committee Substitute for Senate Bill 2118 amends laws governing the Florida Workers Compensation Joint Underwriting Association.

#### **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 Workers' Compensation Joint Underwriting Association claim files and other delineated records 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 specified records 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 or a JUA employee or an employee's dependent from being disclosed.

C. Government Sector Impact:

This public records exemption would assist the Florida Workers' Compensation Joint Underwriting 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:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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