The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL:	SPB 7042
INTRODUCER:	For consideration by Banking and Insurance Committee
SUBJECT:	Open Government Sunset Review (Credit Scoring Methodologies)
DATE:	February 4, 2008 REVISED: 02/12/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill reenacts the public records exemption in s. 626.97411, F.S., relating to insurer credit scoring methodologies. This legislation is based on the recommendations from Senate Interim Project Report 2008-204 (Open Government Sunset Review of Section 626.97411, F.S., Credit Scoring Methodologies). In 2003 the Legislature enacted legislation that regulated and limited the use of credit information by insurers (s. 626.9741, F.S.) which required that insurers file their credit scoring models with the Office of Insurance Regulation as part of a rate filing that used such models. A separate law (s. 626.97411, F.S.) was also enacted in 2003 that created a public records exemption for credit scoring methodologies that are statutorily defined as "trade secrets." Auto and property insurers utilize such methodologies as an underwriting tool in determining whether to issue a policy to an applicant or the rates to be charged.

The Legislature found that creating the exemption was necessary because releasing credit scoring methodologies and related information could harm the business of an insurance company, as it contains proprietary confidential business information that has economic value derived from not being disclosed to competitors. This public records exemption is scheduled for repeal on October 2, 2008, without legislative action to save it.

This bill amends and reenacts the following section of the Florida Statutes: 626.97411.

II. Present Situation:

Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892. In 1992, Florida adopted an amendment to the State

Constitution that raised the statutory right of access to public records to a constitutional level.[1] Article I, s. 24 of the State Constitution, provides:

> (a) 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. . .

The Public Records Law[2] 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.

Unless specifically exempted, all agency[3] 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.[4]

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.[5] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[6] Only the Legislature is authorized to create exemptions to open government requirements.[7] 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.[8] A bill enacting an exemption[9] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10] There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.[11] If

[1] Article I, s. 24 of the State Constitution.
[2] Chapter 119, F.S.
[3] 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… ."
[4] Section 119.011(11), F.S.
[5] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[6] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).
[9] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[10] Article I, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62.

a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)[13] 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 Office of Legislative Services 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[14] 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.[15]

Use of Credit Information by Insurers

Beginning in the 1990's, auto insurers and property insurers have increasingly used credit scores and related credit history information as an underwriting tool in determining whether to issue a policy to an applicant or the rates to be charged. Actuarial studies have indicated that persons with low credit scores have higher claims experience and, therefore, are worse insurance risks. A recent report to Congress by the Federal Trade Commission concludes, "Credit-based insurance scores are effective predictors of risk under automobile insurance policies. They are predictive of the number of claims consumers file and the total cost of those claims."[16] In response to concerns about this practice and a report from a task force appointed by Chief Financial Officer Tom Gallagher, the Florida Legislature in 2003 enacted legislation that regulated and limited the use of credit information by insurers.[17] This legislation has remained unchanged since that time, while rulemaking has remained tied up in litigation.

The law (s. 626.9741, F.S.) applies to personal lines motor vehicle insurers and personal lines residential property insurers that make an "adverse decision" based on credit information of the policyholder or applicant. An "adverse decision" includes a refusal to issue or renew a policy,

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[12] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

[13] Section 119.15, F.S.

[14] 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. (Section 119.15(4)(b), F.S.)

[15] As part of the review process, the Legislature considers the following factors: 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 and if yes, how; is the record or meeting protected by another exemption; and, are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge.

[16] *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* (July 2007), available at: http://www.ftc.gov. The FTC will be issuing a subsequent report on the impact of credit-based insurance scores on homeowners insurance, expected in early 2008.

[17] Chapter 2003-207, L.O.F. (Senate Bill 40-A)

issuance of a policy with exclusions or restrictions, increasing the rates or premium, and other specified adverse underwriting results. In general, the law provides that a rate filing that uses credit reports or credit scores must comply with the requirements of the applicable rating law (s. 627.062, F.S., or s. 627.0651, F.S.) to ensure that rates are not excessive, inadequate, or unfairly discriminatory. Insurers must notify an applicant or insured that a credit report is being requested for underwriting or rating purposes and insurers may not request a credit report based upon the race, color, religion, marital status, age, gender, income, national origin, or place of residence of the applicant or insured. If an insurer makes an adverse decision based upon a credit report, the insurer or designated third party must provide a copy of the credit report to the applicant or insured. The insurer must include the four primary reasons, or fewer if applicable, of the adverse decision and must provide an appeal process for persons whose credit report or credit score is unduly influenced by the death of a spouse or temporary loss of employment. An insurer may not make an adverse decision solely because of credit information.[18]

Public Records Exemption under s. 626.97411, F.S.

A separate bill was also enacted in 2003 creating a public records exemption for credit scoring methodologies and related information that are trade secrets as defined in s. 688.002, F.S., and that are filed by insurers with the Office of Insurance Regulation (OIR or Office) pursuant to a rate filing.[19] The public necessity statement accompanying the exemption found that credit scoring methodologies should be confidential and that release of such information could harm the business of an insurance company, as it contains proprietary confidential business information that has economic value derived from not being disclosed to competitors. The exemption under review is scheduled for repeal on October 2, 2008, unless reviewed by the Legislature and saved from repeal pursuant to the Open Government Sunset Review Act.

Credit Scoring Methodologies

Insurers have been allowed to use credit scoring as authorized by statute and implemented by OIR. Insurers typically develop an "insurance score" for a consumer based on their credit score and other credit history information. Some insurers contract with a credit scoring organization, typically either Fair, Issac, and Co. or ChoicePoint, to develop the insurance score. In some cases the insurance score is tailored for an insurer based on its own underwriting criteria. Many larger insurers, like State Farm and Allstate, develop their own credit scoring methodologies.

The typical information used in a credit-based insurance scoring model gives the consumer low marks or a "riskier" score if the consumer has a high number of late payments or delinquencies, debt collections (generally, non-medical), legal judgments or bankruptcies, and new credit cards or credit applications. It also leads to a riskier score if the consumer has a high ratio of outstanding balances to available credit and a greater number or usage of credit cards issued by department stores, oil companies, and travel and entertainment businesses. A less riskier score is typically generated by having lower numbers for such factors and also by the greater the age of the oldest credit account and the greater the average age of all accounts. Also, a greater proportion of credit from major banks or for home mortgages (compared to department stores, etc.) usually leads to a less risky score.[20]

[18] The Financial Services Commission was given authority to adopt rules to administer the provisions of the law. After the law was passed, the OIR initiated rulemaking but no rule has been adopted due to continuous litigation.
[19] Chapter 2003-408, L.O.F. (Committee Substitute for Senate Bill 42-A); s. 626.97411, F.S.
[20] *Credit-Based Insurance Scores: Impacts on Consumer of Automobile Insurance*, Table 1.

The OIR requires an insurer to file its credit scoring methodology with the Office, based on the statutory requirement that a rate filing that uses credit reports must comply with the requirements of the insurance rating laws. This is the actual "formula" that is used for producing the insurance score. This effectively requires an insurer that does not develop its own model to obtain such information from the third party vendor that developed the model. The insurer or organization will typically consider such information proprietary and will not allow its release to competitors. However, according to a report by the Financial Trade Commission, at least one vendor (ChoicePoint) has made its insurance credit scoring model available to the public.[21]

Trade Secret Provisions

The public records exemption is limited to credit scoring methodologies and related data and information that are trade secrets as defined in s. 688.002, F.S. Under this provision, a trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A general public records exemption for all trade secrets is provided by s. 815.045, F.S., as interpreted by the Florida First District Court of Appeal. In *Sepro Corp. v. Fla. Dept. of Environmental Protection*,[22] the court determined that s. 815.045, F.S., provides a public records exemption for *all trade secrets* as defined in s. 812.081(1)(c), F.S.[23] The provision in s. 815.045, F.S., references the definition of "trade secret" in s. 812.081, F.S., which is different than the definition referenced in s. 626.97411, F.S. The definition in s. 812.081(1)(c), F..S., is somewhat broader, by defining a trade secret as providing a business an "advantage" over those who do not know it, rather than requiring that it derive "economic value" from not being generally known by other persons.

The OIR has implemented a process for handling an insurer's credit scoring data or other information filed with the Office that an insurer claims is a trade secret. Insurance companies submit all documents related to a rate or form filing to the OIR through an electronic file transfer program on the internet. This program allows those documents to be viewed online to the general public via the Office's online I-File system. If an insurer claims the information is a trade secret, it must submit the information under a special link and file a cover page explaining why it should remain a trade secret. That information is segregated and is not viewable by the public.

[21] *Id.* p. 13.
[22] 893 So.2d 781 (Fla. 1st DCA, 2003); rev. denied.
[23] Under s. 812.081(1)(c), F.S., a "trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. A trade secret includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be 1) Secret; 2) Of value; 3) For use or in use by the business; and 4) Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

If a public records request is made for the specific information claimed as a trade secret, the OIR reviews the information for the purpose of determining on a preliminary basis whether the claim is valid. If the OIR determines that the claim appears to be valid, the requestor is notified that the information sought is exempt from the public record request as a trade secret.

Alternatively, if the OIR determines on a preliminary basis that the claim of trade secret is invalid, the OIR notifies the insurer of the request for the purpose of ascertaining whether the company still claims that the information is a trade secret, and if it does, the OIR advises the company that it has 10 business days in which to obtain a temporary injunction enjoining the OIR from releasing the information. By this procedure, the question regarding the legitimacy of the claim of trade secret is placed before the court for its resolution on an expedited basis. The OIR states that public records requests have been made for credit scoring information, resulting in notice to the affected insurer, but that the parties resolved the matter between themselves which did not require disclosure of the information.

The OIR has recommended that the exemption under review be repealed because this information should be made transparent and accessible to the public. However, this information may still be protected from public records disclosure under the general exemption for trade secrets in s. 815.045, F.S. In some states, the credit scoring data filed by insurers is not protected from public disclosure. In those states, insurers either use a third-party model that is publicly available or use a "less robust" model that has fewer or simpler data points, but which the insurer believes to be less accurate than its proprietary model in matching risk to price.

III. Effect of Proposed Changes:

Section 1. Reenacts s. 626.97411, F.S., to retain the current exemption for credit scoring methodologies and related information that are trade secrets as defined in s. 688.002, F.S., and that are filed with the Office of Insurance Regulation pursuant to a rate filing or other filing required by law.

Section 2. Provides that s. 2 of ch. 2003-408, Laws of Florida, is repealed. This provision is the Open Government Sunset Review section.

Section 3. Provides that the act shall take effect on October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 119.15(6)(b), F.S., provides that

". . . an exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves."

This bill is the result of an open government sunset review of s. 626.97411, F.S. See, Interim Project Report 2008-204 by the Committee on Banking and Insurance. In that committee staff report, it was recommended that the exemption should be retained.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This exemption would protect insurer credit score methodologies and related information that are considered trade secrets as defined in s. 688.002, F.S., and that are filed with the OIR pursuant to a rate filing or other related filing. Auto and property insurers utilize such methodologies as an underwriting tool in determining whether to issue a policy to an applicant or the rates to be charged.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.