

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 Judiciary Committee

BILL: SB 2158

INTRODUCER: Senator Haridopolos

SUBJECT: Public Records Exemption/Claims Files and Medical Records

DATE: March 31, 2009

REVISED: 04/02/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Woodham	Burgess	BI	Fav/1 amendment
2.	Maclure	Maclure	JU	Fav/1 amendment
3.			GO	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input checked="" type="checkbox"/> | Technical amendments were recommended |
| | <input checked="" type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill creates a public records exemption for certain information held by the Florida Insurance Guaranty Association, which services insurance claims of insurers that have become insolvent. Among the records afforded confidential and exempt status by the bill, with prescribed limitations, are:

- Claim files;
- Medical records that are part of a claims file and other medical information relating to the claimant;
- Information relating to matters covered by privileged attorney-client communications.

The protected records may be released to a state agency in the performance of that's agency's official duties, provided that the receiving agency maintains the confidential and exempt status of the information. The public records exemption would expire in October 2014.

This bill creates section 631.582, Florida Statutes.

II. Present Situation:

Florida Public Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment, article I, section 24, to the State Constitution that raised the statutory right of access to public records to a constitutional level.

The Public Records Act² specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency³ records are available for public inspection.⁴ Section 119.011(12), F.S., defines *public records* very broadly to include “all documents, . . . tapes, photographs, films, sounds recordings, . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

Only the Legislature is authorized to create exemptions to open government requirements. Exemptions must be created by general law, and the law must specifically state the public necessity justifying the exemption.⁵ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁶ A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act⁸ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The exemption is repealed on October 2 of that fifth year unless the Legislature reenacts it. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.⁹ 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.¹⁰ An exemption meets the statutory criteria if it:

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² Chapter 119, F.S.

³ Section 119.011(2), F.S., defines *agency* as “any state, county, . . . or municipal officer, department, . . . or other separate unit of government created or established by law . . . and any other public or private agency, person, . . . acting on behalf of any public agency.”

⁴ See *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁵ FLA. CONST. art. I, s. 24(c).

⁶ *Id.*

⁷ *Id.*

⁸ Section 119.15, F.S.

⁹ Section 119.15(6)(b), F.S.

¹⁰ *Id.*

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 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.¹¹

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹²

Florida Insurance Guaranty Association¹³

The Florida Insurance Guaranty Association (FIGA or association) is a not-for-profit corporation created by the Legislature in 1970 in order to service insurance claims, whether for or against the policyholder, of property and casualty insurers that have become insolvent and ordered liquidated.¹⁴ The association's membership is composed of all Florida licensed direct writers of property or casualty insurance.

The statutory authority governing FIGA applies to all kinds of direct insurance except the various types specifically excluded under s. 631.52, F.S. Examples of the excluded types of insurance are workers' compensation, surplus lines, fidelity or surety bonds, and life, annuity, health, or disability insurance. A covered claim is "an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy."¹⁵

In assuming the obligation of certain existing covered claims, the association covers only the amount of each covered claim which is greater than \$100 and less than \$300,000, except that in the case of homeowner's insurance it shall cover an additional \$200,000 for that part of a covered claim relating to damage to the structure and contents. In the case of condominium associations or homeowners' associations that have a duty to provide coverage on residential units, FIGA's obligation is an amount under \$100,000 multiplied by the number of units.¹⁶

The association obtains funds to pay claims of insolvent insurance companies, in part, from the liquidation of assets of these companies, done by the Division of Rehabilitation and Liquidation

¹¹ *Id.*

¹² Section 119.15(6)(a), F.S.

¹³ Part II of ch. 631, F.S., govern FIGA.

¹⁴ See s. 631.55(1), F.S. See also Florida Insurance Guaranty Association, *About Us*, <http://www.figafacts.com/about.asp> (last visited Mar. 22, 2009).

¹⁵ Section 631.54(3), F.S.

¹⁶ Section 631.57(1), F.S.

in the Department of Financial Services. The FIGA also obtains funds from the liquidation of assets of insolvent insurers domiciled in other states but having claims in Florida.

In addition, after insolvency occurs, FIGA can issue two types of assessments against property and casualty insurance companies to raise funds to pay claims – regular and emergency¹⁷ assessments. The assessments are calculated and levied on a per-account basis on the:

- Automobile liability account;
- Automobile physical damage account; and
- All other account, which is comprised of all other lines of insurance covered by FIGA.¹⁸

The association assesses solvent insurance companies directly for both assessments, and the insurance company is allowed by law to pass the assessment on to its policyholders. The maximum assessment in any one year is 2 percent of each affected insurer's net direct written premiums on property and casualty policies in the state for the prior year.¹⁹

III. Effect of Proposed Changes:

The bill provides that the following records held by the Florida Insurance Guaranty Association are confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution:

- Claims files, until the termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt as otherwise provided by law.
- Medical records that are part of a claims file and other information related to the medical condition or medical status of a claimant.
- Records pertaining to matters reasonably encompassed in privileged attorney-client communications.

The bill does not prescribe what matters are “reasonably encompassed in privileged attorney-client communications.” Under the Florida Evidence Code, a client has a privilege of refusing to disclose the content of confidential communications stemming from the lawyer-client relationship. A communication between a lawyer and a client is “confidential” if it is not intended for disclosure to third persons other than when it is in furtherance of the provision of legal services or reasonably necessary for the transmission of the communication.²⁰

The bill allows the release of records covered by the exemption to any state agency in the performance of that agency's official duties and responsibilities. The agency receiving the information, however, must maintain the confidential and exempt status of the records.

¹⁷ Emergency assessments can only be issued to pay claims of insurers rendered insolvent due to a hurricane. *See* s. 631.57(3)(e), F.S.

¹⁸ Section 631.55(2), F.S.

¹⁹ Section 631.57(3), F.S. *See also* Florida Insurance Guaranty Association (FIGA), *Assessments*, <http://www.figafacts.com/assessments.asp> (last visited Mar. 30, 2009); FIGA, *2007 Annual Report*, available at <http://www.figafacts.com/userfiles/file/FIGA%20Annual%20Report%20Final%20corrected%202007.pdf> (last visited April 1, 2009).

²⁰ Section 90.502(1)(c) and (2), F.S.

The bill provides for future review and repeal of the public records exemption on October 1, 2014. The bill also includes a statement of public necessity for the public records exemption. In part, the statement notes that:

Claims files contain detailed information about the claim, personal information about the policyholder or claimant, information detailing the evaluation of the legitimacy of the claim, and a valuation of the award, if any, that should be made. . . . The Legislature finds that policyholders of a private market insurer have an expectation that sensitive personal information pertaining to them will be kept confidential and that this privacy should not be abrogated due to the fact that the insurer is later rendered insolvent.

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates a public records exemption. It appears to comply with the requirements of article I, section 24(c) in that it includes a statement of public necessity and contains only an exemption from the public records requirements. Under this constitutional provision, this new public records exemption must pass by a two-thirds vote of the membership of each house.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption protects personal information of individuals whose claims are being processed by FIGA by exempting the claims file from disclosure. To the extent claims files contain personal financial information of claimants, the exemption may protect those claimants from financial injury that could occur from the release of the information.

C. Government Sector Impact:

The bill benefits the Florida Insurance Guaranty Association because the release of the information covered by the exemption could compromise and complicate the negotiation and litigation of claims with which the association is involved.

VI. Technical Deficiencies:

The bill provides that the new public records exemption expires on October 1, 2014. However, under the Open Government Sunset Review Act, s. 119.15(3), F.S., a new exemption expires on October 2 of the fifth year after enactment. Thus, the operative date in the bill should be October 2, 2014.

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:

Barcode 302402 by Banking and Insurance on March 25 2009:

Expands the period during which claims files may be kept confidential under the public records exemption by adding until “final closing” of all claims arising out of the same incident (in addition to the termination of all litigation and settlement).

Barcode 648426 by Judiciary on April 1, 2009:

Changes the date for future repeal of the public records exemption to October 2, 2014, (from October 1, 2014) in order to be consistent with the prescribed date for repeal of new exemptions under the Open Government Sunset Review Act. This amendment addresses the issue raised in the “Technical Deficiencies” section of this bill analysis.