

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 961 Pub. Rec./Florida Insurance Guaranty Association
SPONSOR(S): Governmental Affairs Policy Committee and Wood
TIED BILLS: **IDEN./SIM. BILLS:** SB 2158

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	20 Y, 0 N	Callaway	Cooper
2)	Governmental Affairs Policy Committee	9 Y, 0 N, As CS	Williamson	Williamson
3)	General Government Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Florida operates several insurance guaranty funds to ensure policyholders are protected with respect to insurance premiums paid and settlement of outstanding claims, up to limits provided by law. A guaranty association generally is a not-for-profit corporation created by law directed to protect policyholders from financial losses and delays in claim payment and settlement due to the insolvency of an insurance carrier. A guaranty association accomplishes its mission by assuming responsibility for settling claims and refunding unearned premiums to policyholders. Insurers are required by law to participate in guaranty associations as a condition for transacting business in Florida.

When a property and casualty insurance company becomes insolvent, the Florida Insurance Guaranty Association (FIGA) is required by law to take over the claims of the insurer and pay the claims of the company's policyholders. This ensures policyholders that have paid premiums for insurance are not left without valid claims being paid. FIGA is responsible for claims on residential and commercial property insurance, automobile insurance, and liability insurance, among others.

The bill creates public records exemptions for FIGA. All Florida insurance guaranty associations except FIGA have some public records exemptions for information kept by the associations. The exemptions created in the bill are patterned on exemptions in current law for another insurance guaranty association and for state-created insurance entities providing insurance to Floridians who cannot obtain insurance from a private insurance company.

The bill makes FIGA claims files confidential and exempt from public records requirements until termination of all litigation, settlement, and final closing of all claims arising out of the same incident. However, claims files or portions thereof remain confidential and exempt after termination of litigation and settlement of claims if another statute permits the exemption. The bill also makes medical records and information related to the medical condition or medical status of a claimant held by FIGA confidential and exempt from public disclosure. FIGA records relating to attorney-client privileged communications are made confidential and exempt. The bill authorizes FIGA to release claims files, medical records and information, and attorney-client privileged communications to a state agency pursuant to a written request. The agency must maintain the confidential and exempt status of the records received.

The bill provides for future review and repeal of the FIGA exemptions on October 2, 2014, pursuant to the Open Government Sunset Review Act. It also provides a statement of public necessity.

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

The bill is effective on July 1, 2009.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background on Florida's Public Records Laws

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ More comprehensive legislation was adopted in 1967 with the enactment of ch. 119, F.S.

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution provides that:

Every person³ 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 Act⁴ specifies conditions under which access must be provided to agency⁵ records. 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.⁶

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

² Article I, s. 24 of the State Constitution.

³ 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.

⁴ Chapter 119, F.S.

⁵ The word "agency" is defined in s. 119.011(2), 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."

⁶ Section 119.011(12), F.S.

The Florida Supreme Court has interpreted this definition to encompass all materials prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge.⁷ Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.⁸

Only the Legislature is authorized to create exemptions.⁹ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.¹⁰

The Open Government Sunset Review Act¹¹ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of exemptions. By June 1, 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.

Under the Open Government Sunset Review Act, 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. 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. The three statutory criteria are:

1. 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;
2. If 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
3. If the exemption 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.¹²

Florida Insurance Guaranty Association

Florida operates several insurance guaranty funds to ensure policyholders are protected with respect to insurance premiums paid and settlement of outstanding claims, up to limits provided by law.¹³ A guaranty association generally is a not-for-profit corporation created by law directed to protect policyholders from financial losses and delays in claim payment and settlement due to the insolvency of an insurance carrier. A guaranty association accomplishes its mission by assuming responsibility for settling claims and refunding unearned premiums¹⁴ to policyholders. Insurers are required by law to participate in guaranty associations as a condition for transacting business in Florida.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

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

⁹ Article I, s. 24(c) of the State Constitution.

¹⁰ *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).

¹¹ Section 119.15, F.S.

¹² Section 119.15(6)(b), F.S.

¹³ In Florida, there are five guaranty associations. The Florida Life and Health Insurance Guaranty Association generally is responsible for claims settlement and premium refunds for health and life insurers who are insolvent. The Florida Health Maintenance Organization Consumer Assistance Plan offers assistance to members of an insolvent Health Maintenance Organization (HMO) and the Florida Workers' Compensation Insurance Guaranty Association is directed by law to protect policyholders of insolvent workers' compensation insurers. The Florida Self-Insurers Guaranty Association protects policyholders of insolvent individual self-insured employers for workers' compensation claims. The Florida Insurance Guaranty Association is responsible for paying claims for insolvent insurers for most remaining lines of insurance, including residential and commercial property, automobile insurance, and liability insurance, among others.

¹⁴ The term "unearned premium" refers to that portion of a premium that is paid in advance, typically for six months or one year, and which is still owed on the unexpired portion of the policy.

When a property and casualty insurance company becomes insolvent, the Florida Insurance Guaranty Association (FIGA) is required by law to take over the claims of the insurer and pay the claims of the company's policyholders. This ensures policyholders that have paid premiums for insurance are not left without valid claims being paid. FIGA is responsible for claims on residential and commercial property insurance, automobile insurance, and liability insurance, among others. It is a nonprofit corporation.

Provisions relating to FIGA, which was created in 1970, are contained in part II of chapter 631, F.S. FIGA operates under a board of directors. By law, the board is comprised of at least five, and no more than nine, members with members serving a four-year term.

If a property and casualty insurance company has been declared insolvent, covered claims will be paid by FIGA. The maximum amount FIGA will cover is \$300,000 with special limits applying to (1) damages to structure and contents on homeowners' claims and (2) on condominium and homeowners' association claims. For damages to structure and contents on homeowners' claims the FIGA cap is an additional \$200,000, for a total of \$500,000. For condominium and homeowners' association claims the cap will be the lesser of policy limits or \$100,000 multiplied by the number of units in the association. All claims are subject to a \$100 FIGA deductible in addition to any deductible identified in the insurance policy.

FIGA obtains funds to pay claims of insolvent insurance companies primarily from the liquidation of assets of these companies done by the Division of Rehabilitation and Liquidation in the Department of Financial Services. 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 emergency¹⁵ assessments. FIGA 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.

FIGA assesses solvent insurance companies directly for both assessments and the insurance company is allowed by law (s. 631.57(3)(a), F.S.) to pass the assessment on to their policyholders.

Effect of Bill

The bill creates public records exemptions for FIGA. All Florida insurance guaranty associations except FIGA have some public records exemptions for information kept by the associations.¹⁶

The exemptions created in the bill are patterned on exemptions in current law for the Florida Self-Insurers Guaranty Association (FSIGA),¹⁷ Citizens Property Insurance Corporation (Citizens),¹⁸ the Florida Workers' Compensation Joint Underwriting Association (FWCJUA),¹⁹ and the Florida Automobile Joint Underwriting Association (FAJUA).²⁰

¹⁵ Emergency assessments can only be issued to pay claims of insurers rendered insolvent due to a hurricane.

¹⁶ See s. 631.724, F.S. for public records exemptions for the Florida Life and Health Insurance Guaranty Fund; s. 631.822, F.S. for exemptions for the Florida Health Maintenance Organization Consumer Assistance Plan; ss. 631.931 and 631.932, F.S., for exemptions for the Florida Workers' Compensation Insurance Guaranty Association; and s. 440.3851, F.S. for exemptions for the Florida Self-Insurers Guaranty Association.

¹⁷ FSIGA is an insurance guaranty fund established to meet the workers' compensation obligations of insolvent individual self insured employers.

¹⁸ Citizens is the insurance company created by the Legislature to issue property insurance coverage for home and business owners unable to obtain coverage in the private voluntary insurance market or who meet other eligibility requirements of Citizens set by statute.

¹⁹ The FWCJUA provides workers' compensation insurance in Florida to employers who are required by law to maintain such insurance and who are in good faith entitled to, but who are unable to purchase such insurance in the voluntary market.

²⁰ The FAJUA provides automobile insurance to qualified applicants unable to procure such insurance in the voluntary market.

The bill makes FIGA claims files confidential and exempt from the public records requirements until termination of all litigation, settlement, and final closing of all claims arising out of the same incident. However, claims files or portions thereof can remain exempt after termination of litigation and settlement of claims if another statute permits the exemption. This exemption is similar to the public record exemption in s. 440.3581, F.S., for FSIGA; in s. 627.311(4)(a)2., F.S., for the FAJUA; in s. 627.351(6)(w), F.S., for Citizens; and s. 627.3121(1)(b), F.S., for the FWCJUA.

The bill also makes medical records and information related to the medical condition or medical status of a claimant held by FIGA confidential and exempt from public disclosure. This exemption is identical to the FSIGA exemption for medical records and related information (s. 440.3851, F.S.) and is similar to the exemption for FWCJUA (s. 627.3121(1)(e), F.S.).

FIGA records relating to attorney-client privileged communications are made confidential and exempt, similar to the exemption for attorney-client privileged communications given to Citizens in s. 627.351(6)(w), F.S.

The bill authorizes FIGA to release claims files, medical records and information, and attorney-client privileged communications to a state agency pursuant to a written request. The receiving agency must maintain the confidential and exempt status of the records released. Citizens and the FAJUA are authorized by law to release claims files to other governmental agencies. FSIGA is authorized to release claims files and medical records to other governmental agencies. FWCJUA is authorized to release any confidential and exempt records to another agency.

The bill provides for future review and repeal of the FIGA exemptions on October 2, 2014, pursuant to the Open Government Sunset Review Act. It also provides a statement of public necessity.

B. SECTION DIRECTORY:

Section 1: creates s. 631.582, F.S. to create public records exemptions for the Florida Insurance Guaranty Association.

Section 2: provides a statement of public necessity.

Section 3: provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could create a fiscal impact on FIGA because FIGA staff would have to be trained with regards to the categories of information made confidential and exempt from public disclosure versus records that are available for public inspection and copying. FIGA could also incur costs associated with redacting confidential and exempt information prior to releasing a record.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public record or public meeting exemption. The bill expands the current exemption under review; thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemption under review; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2009, the Governmental Affairs Policy Committee adopted two amendments and reported HB 961 favorably with Committee Substitute.

The bill provided for expiration of the public record exemption for claims files upon termination of all litigation and settlement of all claims arising out of the same incident. Amendment 1 provides that such files are available for public disclosure upon termination of all litigation, settlement, *and final closing* of all claims arising out of the same incident.

The bill provided for expiration of the public record exemption on October 1, 2014; however, the Open Government Sunset Review Act provides for repeal of newly created exemptions on October 2 of the fifth year after enactment.²¹ Amendment 2 changes the repeal date from October 1 to October 2, 2014.

²¹ Section 119.15(3), F.S.