

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 Governmental Oversight and Accountability Committee

BILL: PCS/SB 1658

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Florida Commission on Hurricane Loss Projection Methodology

DATE: April 11, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Burgess	Burgess	BI	Favorable
2.	Naf	Wilson	GO	Pre-meeting
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill is the result of an Open Government Sunset Review by the Senate Banking and Insurance Committee.

Current law provides a public-records exemption for a trade secret used in designing and constructing a hurricane loss model that is provided by a private company to the Florida Commission on Hurricane Loss Projection Methodology (commission), Office of Insurance Regulation (OIR), or an appointed consumer advocate. Current law also provides a public-meetings exemption for that portion of a meeting of the commission or a rate proceeding on an insurer's rate filing at which confidential and exempt trade secrets are discussed.

These exemptions are subject to review under the Open Government Sunset Review Act and will repeal on October 2, 2010, unless reenacted by the Legislature. This bill reenacts the exemptions.

This bill also requires a recording to be made of any closed portion of a meeting. The bill expands the existing exemptions to protect recordings of closed meetings. As such, the bill extends the repeal date from October 2, 2010 to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.

Because this bill expands an existing exemption, it requires a two-thirds vote of each house of the Legislature for passage.

The bill provides that the public-records exemption applies to a “trade secret” as defined in the Uniform Trade Secrets Act.

This bill substantially amends the following section of the Florida Statutes: s. 627.0628(3)(f).

II. Present Situation:

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, 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:

(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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁴ 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.

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

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

³ Chapter 119, F.S.

⁴ 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 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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state 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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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.¹² If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹³

Public Meetings

The “Sunshine Law” was first enacted in 1967.¹⁴ As codified in s. 286.011, F.S., the provision states:

- (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 1, ch. 67-356, L.O.F.

be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

- (2) The minutes of a meeting of any such board or commission or any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

In effect, the Sunshine Law requires:

1. Meetings of public boards or commissions to be open to the public;
2. Reasonable notice for meetings; and
3. Minutes to be taken.

In 1992, the electorate approved an amendment to the State Constitution that raised the statutory requirement of open meetings to a constitutional mandate. Article I, s. 24(b) of the State Constitution provides:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article II, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Collegial bodies within the state, including state and local bodies, are subject to open-meeting requirements, whether the members are appointed or elected.¹⁵ Further, advisory boards without the authority to take action or to bind a decision-making entity, must comply with open-meeting requirements.¹⁶ Fact-finding committees that function solely to find facts and to report them, however, have an exception under open meetings requirements.¹⁷

Given the increasing reliance of government upon legislatively-created corporations, as well as private service-providers, to perform governmental services, the applicability of open meetings requirements to these entities may arise. The judiciary has found that the Sunshine Law is to be construed liberally in order to give the full effect of its purpose.¹⁸ The Sunshine Law has been held to apply to private entities created by law or a public agency. It also applies to private

¹⁵ *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).

¹⁶ *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Accord, Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988); *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 869 (Fla. 3d DCA 1994); *Lyon v. Lake County*, 765 So.2d 785 (Fla. 5th DCA 2000).

¹⁷ *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985).

¹⁸ *Wood v. Marston*, 442 So.2d 934 (Fla. 1983); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

entities that provide services to governmental agencies on behalf of those agencies in the performance of their public duties. Generally, a private organization is not subject to the Sunshine Law unless it has been delegated the authority to perform a governmental function.¹⁹

Open Government Sunset Review Act

The Open Government Sunset Review Act²⁰ provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. 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.²¹ 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.²² An exemption meets the statutory criteria if it:

- 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 the safety of such individuals; 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 which 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.²³

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 so, 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 Commission on Hurricane Loss Projection Methodology

In 1995, the Florida Legislature created the Florida Commission on Hurricane Loss Projection Methodology (commission), under s. 627.0628, F.S., which describes the legislative intent “to

¹⁹ See, e.g., Inf. Op. to Fasano, June 7, 1996, where the Attorney General opined that the Sunshine Law does not apply to meetings of a homeowners’ association board.

²⁰ Section 119.15, F.S.

²¹ Section 119.15(6)(b), F.S.

²² *Id.*

²³ *Id.*

encourage the use of the most sophisticated actuarial methods to assure that consumers are charged lawful rates for residential property insurance coverage.” The commission is administratively housed within the State Board of Administration, but independently exercises its powers and duties as specified in the statute. Section 627.0628(3)(a), F.S., specifies that “[t]he commission shall consider any actuarial methods, principles, standards, models, or output ranges that have the potential for improving the accuracy of or reliability of the hurricane loss projections used in residential property insurance rate filings.”

A number of vendors produce highly complex computer models that purport to reflect an average annual expected loss from hurricanes and other perils. Models of this nature are driven by an array of internal assumptions, within a variety of scientific disciplines (e.g., meteorology, structural engineering, actuarial science, statistics, computer science). Although some basic assumptions may be common to more than one model, many of the detailed internal assumptions have been developed only after considerable research by each vendor, which closely guards that information as a trade secret. If all internal information of a model were published, that model could be replicated, and the vendor that produced the model would lose the entirety of its value.

Exemptions Under Review

Initially, s. 627.0628, F.S., did not contain an exemption from public records or public meetings. Accordingly, the commission undertook a process to evaluate the participating computer models, which contained proprietary information, without the ability to exempt either records or meetings from full public disclosure. The commission first established detailed standards that a model was required to meet in order to obtain approval. For the portion of the model that was nonproprietary, the commission members questioned the vendor in open meetings; for the portion that was proprietary, the commission hired a “professional team” of experts which went on-site to determine whether the model met the applicable standards, and reported its findings to the commission in an open hearing.

At the time, a number of officials voiced concern that a portion of the computer model’s internal programming was not subject to the direct scrutiny of the members of the commission, and the process was criticized by some as being a “black box” that the public was unable to view.

In 2005, the Legislature enacted s. 627.0628(3)(f), composed of three subparagraphs which effected the following respective provisions:

- Section 627.0628(3)(f)1., F.S., which provides that trade secrets used in designing and constructing a hurricane loss model and submitted by a private company to the commission, the Office of Insurance Regulation, or the consumer advocate²⁴ are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.
- Section 627.0628(3)(f)2., F.S., which provides that a portion of a meeting of the FCHLPM or of a rate proceeding at which trade secrets used in designing and constructing a hurricane

²⁴ The consumer advocate is appointed pursuant to s. 627.0613, F.S., which provides that the Chief Financial Officer must appoint a consumer advocate who must represent the general public of the state before the Department of Financial Services and before the Office of Insurance Regulation.

loss model are discussed is exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution.

- Section 627.0628(3)(f)3., F.S., which provides that the paragraph is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2010, unless the exemptions are reviewed and saved from repeal through reenactment by the Legislature.

III. Effect of Proposed Changes:

The bill repeals s. 627.0628(3)(f)3., F.S., and thereby saves from repeal the public-records exemption and the public-meetings exemption created in s. 627.0628(3)(f)1., F.S., and s. 627.0628(3)(f)2., F.S., respectively.

This bill also requires a recording to be made of any closed portion of a meeting. The bill expands the existing exemptions to make such recordings exempt from public-records requirements. As such, the bill extends the repeal date from October 2, 2010 to October 2, 2015. It also provides a public necessity statement as required by the State Constitution.

The bill provides that the public-records exemption applies to a “trade secret” as defined in the Uniform Trade Secrets Act. This makes the public-records exemption for trade secrets consistent with other similar exemptions.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill reenacts and expands existing public-records and public-meetings exemptions.

Vote Requirement

Section 24(c), art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly-created public-records or public-meetings exemption. This bill expands an existing exemption; therefore, a two-thirds vote is required for passage.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement in a bill creating a new public-records or public-meetings exemption. This bill expands an existing exemption; therefore, it contains a public necessity statement.

Subject Requirement

Section 24(c), art. I of the State Constitution provides that a public-records or public-meetings exemption must be created in legislation separate from any substantive provisions. This bill appears to comply with that requirement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The continuation of the exemptions will allow private vendors that produce models that project expected losses from hurricanes to participate in the processes of the commission without concern that its model will be replicated and, therefore, result in a financial loss to the private vendor.

C. Government Sector Impact:

The continuation of the exemptions will allow members of the commission, the OIR, and the consumer advocate to continue to have access to all information underlying the models that project hurricane losses.

The commission could incur costs associated with recording closed portions of meetings; however, those costs are expected to be minimal.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Proposed Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)**PCS by Governmental Oversight and Accountability on April 14, 2010:**

The proposed committee substitute differs from the bill in that it:

- Provides that the public-records exemption applies to a “trade secret” as defined in the Uniform Trade Secrets Act;

- Requires a recording to be made of all closed portions of the meetings;
- Expands the existing exemptions to make such recordings exempt from public-records requirements;
- Extends the Open Government Sunset Review repeal date from October 2, 2010 to October 2, 2015; and
- Includes a public necessity statement.

B. Amendments:

None.